C37

Article 37. Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty

C37.P1 **State Parties shall ensure that:**

C37.P2 **(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;**

C37.P3 **(b) No child shall be deprived of his or her**

C37.P5 **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;**

C37.P4 **(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;**

(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.

C37.S1

I. Introduction

C37.S2

A. The Need for a Child-centred Interpretation

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Article 37 is concerned with three issues that have long been the concern of human rights instruments and bodies at the international, regional and domestic level: namely, the prohibition against torture and other forms of ill-treatment; the death penalty; and deprivation of liberty. Indeed, much of the text of article 37 is drawn directly from its normative cousins, articles 6(5), 7, 9, and 10 of the International Covenant on Civil and Political Rights ('ICCPR').[1] However, the drafters of the Convention on the Rights of the Child ('CRC', 'the Convention') consciously avoided the direct importation of these provisions into the Convention.[2] On the contrary, the final text of article 37 reflects a development in the protection afforded to children relative to the ICCPR on at least three fronts. First, it prohibits 'life imprisonment without the possibility of release' for offences committed by a child. Second, it *expressly* demands that the 'detention or imprisonment of a child … shall be used as a measure of last resort and the shortest appropriate period of time',[3] and third, it provides children with an *explicit* right to maintain contact with their family when deprived of their liberty.

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These additions to the lexicon of human rights serve as a reminder of the need to ensure that the interpretation of article 37 is not simply subsumed within the considerable volume of case law, commentary,[4] and work of mechanisms such as the Human

C37.N1 [1] ICCPR (adopted 16 December 1966, entered into force 23 March 1876) 999 UNTS 171.

C37.N2 [2] E/CN.4/1989/48 paras 546–48, 561–62; OHCHR, *Legislative History on the Convention on the Rights of the Child* (OHCHR 2007), vol II ('*Legislative History*') 767, 769.

C37.N3 [3] See also African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49, arts 16, 17(2)(a).

C37.N4 [4] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005)('Nowak, *CCPR Commentary*'); Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP 2008)('Nowak and McArthur, *CAT Commentary*'); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) ch 9; Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, OUP 2009) ch 8;David Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) ch 6, 8; Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Hart 2014) 31–52, 61–97; Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009).

Rights Committee ('HR Committee'),[5] the Special Rapporteur on Torture ('Special Rapporteur'),[6] and the Working Group on Arbitrary Detention. This commentary has been generated in relation to the rights that are the subject of protection under other international, regional, and domestic instruments. Assuredly, the insights from these other jurisdictions and commentators make the task of interpreting article 37 easier. However, there is still a need to ensure that article 37 is interpreted through a lens that accommodates and reflects the experiences of children rather than adults.[7] Moreover, the principle of internal system coherence[8] demands that article 37 is understood within the context of other Convention provisions that may be relevant to its implementation. Thus, for example, article 39 provides children with a right to rehabilitation where they have experienced any form of torture or other forms of ill-treatment; article 19 complements article 37 to the extent that it protects children against all forms of violence, abuse and ill-treatment; and, of course, article 40 offers a complex and sophisticated model for the treatment of children who find themselves within a state's criminal justice system where they may face the prospect of detention and the risk of harmful treatment.

C37.P39 Importantly, the capacity to generate a child-centric understanding of the rights protected under article 37 is enhanced by the significant commentary of the Committee on the Rights of the Child ('CRC Committee', 'the Committee') with respect to this provision. Rare is the occasion when the Committee does not address issues under article 37 in its concluding observations for states and several of its General Comments offer insights regarding the scope of this provision.[9] Also pertinent when seeking to map out the meaning of article 37 are the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'),[10] and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules').[11] These standards may be supplemented by reference to general UN standards, including the UN Standard Minimum

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[5] eg: HR Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (16 December 2014) CCPR/C/GC/35 ('HRC GC 35'), replacing HR Committee, 'CCPR General Comment No 8: Article 9 (Right to Liberty and Security of Persons)' (30 June 1982) ('HRC GC 8'); HR Committee, 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (30 September 1992) ('HRC GC 20'); HR Committee, 'General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (13 March 1993) ('HRC GC 21'), replacing HR Committee, 'General Comment No 9: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (30 July 1982).

[6] See website of the Special Rapporteur http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx.

[7] For commentaries that are specific to children see eg: William A Schabas and Helmut Sax, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff 2006); Alistair MacDonald, *The Rights of the Child: Law and Practice* (Jordan 2011) ch 26; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 619–44. See also: Special Rapporteur, 'Report of the Special Rapporteur' (5 March 2015) A/HRC/28/68; UN Global Study on the Situation of Children Deprived of Liberty (the independent expert Manfred Nowak is to be submit a final report to the UN General Assembly in September 2019) http://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx .

[8] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 37–39.

[9] See especially: CRC Committee, 'General Comment No 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) CRC/C/GC/10 ('CRC GC 10') especially paras 78–89.

[10] UNGA A/RES/40/33 (29 November 1985).

[11] UNGA A/RES/45/113 (14 December 1990). Rules developed for children are the UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines', UNGA A/RES/45/112 (14 December 1990)), which focus on crime prevention.

Rules for the Treatment of Prisoners ('Mandela Rules'),[12] and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.[13]

C37.P40 However, two caveats qualify the use of UN standards when interpreting article 37. First, although the CRC Committee, the HR Committee, and the Special Rapporteur endorse them,[14] they are not legally binding,[15] nor are they widely implemented at the domestic level; thus, it is inappropriate to claim that they represent customary international norms. Second, the scope of, and definitions contained in the UN standards vary. For instance, the Beijing Rules define a juvenile by reference to the domestic legal system,[16] whereas the Havana Rules define a juvenile as any person under eighteen.[17] This is not to say that they are irrelevant. On the contrary, their content should be used to complement, infuse, and inform the Convention's normative framework.[18]

C37.S3 ## B. Key Issues

C37.P41 Article 37 is replete with interpretative challenges that have long occupied the minds of judicial officers, treaty bodies, academics, and advocates. This chapter addresses each of these issues with a view to contributing to a child-centric understanding of the rights under article 37. Ten broad conclusions are offered.

C37.P42 First, the obligation to protect children against torture, cruel, inhuman, and degrading treatment is absolute and such treatment can never be justified. Second, it extends to the actions of state and non-state actors, which means its relevance extends beyond juvenile detention centres and police cells to other settings including the home, classroom, and school yard. Third, although states enjoy a level of discretion in determining the measures required to protect children against ill-treatment, at a minimum, states have an obligation to: prohibit such treatment by legislative measures; take special measures to prevent

C37.N12 [12] The rules were first adopted at the 1st UN Congress on Prevention of Crime and the Treatment of Offenders, Geneva, 30 August 1955. The revised rules are known as the 'Mandela Rules' (ECOSOC, E/CN.15/2015/L.6/Rev.1 (21 May 2015)). The rules recognize that children and juveniles should be given special consideration as a result of their vulnerable position in the justice system (preambular para 8), but do not make specific recommendations regarding children in penal institutions. However, the rules make provision for children of prisoners (Rules 7, 28, 29, 45, 48, 60). Rule 27.1 of the Beijing Rules states that the Minimum Rules for the Treatment of Prisoners shall be applicable as far as relevant to the treatment of juvenile offenders in institutions.

C37.N13 [13] UNGA A/RES/43/173 (9 December 1988).

C37.N14 [14] See eg: Committee on the Rights of the Child ('CRC Committee'), 'Report of the Committee on the Rights of the Child' (8 May 2000) A/55/41, 'Recommendation, The Administration of Juvenile Justice', preamble; CRC GC 10 (n 9) para 4; HRC GC 21 (n 5) para 13. See: *Mukong v Cameroon* Comm No 458/91 (21 July 1994) (HR Committee) para 9. (holding that the norms contained in the older *Standard Minimum Rules for the Treatment of Prisoners* are incorporated into the guarantee of humane treatment under ICCPR art 10(1)); Special Rapporteur, A/HRC/28/68 (n 7) para 84(c) (recommending that states adhere to the Standard Minimum Rules in legislating).

C37.N15 [15] Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (Asser Press 2012) 32–33.

C37.N16 [16] Rule 2.2(a): 'A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.'

C37.N17 [17] Rule 11(a): 'A juvenile is every person under the age of 18.'

C37.N18 [18] John Tobin, 'Time to Remove the Shackles: The Legality of Restraints on Children Deprived of their Liberty under International Law' (2001) 9 International Journal of Children's Rights 213, 220; Ann Skelton, 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice' [1996] Acta Juridica 180, 181.

torture and ill-treatment; provide training for appropriate personnel regarding the obligations under article 37; undertake effective investigations into allegations of ill-treatment; prosecute and punish offenders; and provide compensation and rehabilitation for children who are victims of such harm.

C37.P43 Fourth, the CRC Committee has not sought to define or distinguish torture from cruel, inhuman, or degrading treatment. This is consistent with the approach adopted by the HR Committee. However, a definition for each of these terms has the advantage of providing guidance as to what types of behaviour are prohibited and ensuring that the special stigma associated with torture is retained. Thus, torture should be considered the intentional infliction of severe pain and suffering, whether physical or mental, on a child by a person who has the control or custody of a child. In contrast, the other forms of ill-treatment prohibited under article 37(a) need not involve intentional infliction of harm but must still reach a certain threshold of pain and suffering. The assessment of this minimum level of harm is relative and depends on the circumstances of the case, including: the duration of the treatment; the effects on the child; and other factors such as the age, gender, and health of the child.

C37.P44 Fifth, the prohibition against the death penalty is concerned with the age at which a person commits the offence, rather than the age at which the person is sentenced for the offence. Thus, states cannot execute persons over the age of 18 for offences which they committed when under the age of 18. Sixth, the CRC Committee has taken the view that the prohibition against life imprisonment without the possibility of release requires states to abolish all forms of life imprisonment for offences committed by children.

C37.P45 Seventh, the prohibition against unlawful and arbitrary deprivation of liberty extends to any form of detention from which a child is not permitted to leave at will including, arguably, school detention. Deprivation of a child's liberty will be justified, however, where it is undertaken pursuant to a valid law for a legitimate aim and the form and length of the detention is proportionate. The assessment of proportionality will require evidence that the deprivation was necessary to achieve the aim (the rational connection test) and that there was no other reasonably available alternative (the minimal impairment test). These tests are confirmed by the express requirement under article 37(b) that the detention of a child shall be in conformity with the law and shall be used as measure of last resort for the shortest appropriate period of time.

C37.P46 Eighth, the requirement to treat a child deprived of his or her liberty with respect for his or her dignity requires positive protective measures on behalf of a state which cannot be dependent on the resources available to a state. This robust obligation is justified on the basis that if a state wishes to exercise its capacity to detain a child, it must do so in a manner that is consistent with the child's dignity.

C37.P47 Ninth, the right of a child deprived of his or her liberty to have prompt access to legal or other assistance creates a burden on a state to ensure that a child have access to effective assistance from a suitably qualified and independent person within twenty-four hours of being deprived of his or her liberty. This is not a fixed rule; however, a state would have to demonstrate that it had reasonable grounds for failing to ensure such access. Finally, a state must ensure that a child has an effective right to challenge the deprivation of his or her liberty, preferably before a court, but in the absence of a court, an equivalent body which is competent, independent, and impartial.

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II. Analysis of Article 37

C37.S5

A. A State's General Obligation under Article 37

C37.P48 The drafting history offers no insight into the meaning of the phrase, 'States Parties shall ensure that', which was adopted without debate,[19] and the CRC Committee has not addressed this term. The ordinary meaning of the words 'shall' and 'ensure' indicate that it is a mandatory obligation.[20] This obligation must also be read in light of article 2 of the Convention which provides that states must '*respect and ensure* the rights set forth in the present Convention to each child within their jurisdiction' (emphasis added),[21] which extends to article 37.

C37.P49 For the purpose of this chapter, it is sufficient to note that in the context of the ICCPR, '[t]he obligation to *respect* means that States parties must refrain from restricting the exercise of these rights where such [restriction] is not expressly allowed'.[22] This duty has been characterized as 'passive or negative',[23] meaning that in the context of article 37, states are obliged to refrain from measures which would violate a child's rights under article 37. In contrast, the obligation to *ensure* 'is a positive duty'.[24] Nowak further explains that:

C37.P50 > [t]he obligation to ensure consists of the obligation to *protect* individuals against interference by third parties (horizontal effect) and the obligation to *fulfil*, which in turn incorporates an obligation to *facilitate* the enjoyment of human rights and an obligation to *provide* services.[25]

C37.P51 Thus, by virtue of article 2(1), states are not only to refrain from taking any action which might violate a child's rights under article 37 but must also take positive steps to protect children against a violation of these rights by third parties and to facilitate the effective enjoyment of these rights by children.

C37.P52 With respect to article 37, this tripartite typology of obligations translates into a requirement that states:

C37.P53 • Take all reasonable measures to ensure that its agents do not violate children's rights under article 37 (*the obligation to respect*);

C37.P54 • Take all reasonable measures to ensure that non-state actors do not violate children's right under article 37 (*the obligation to protect*); and

C37.P55 • Take all reasonable measures to fulfil and promote children's rights under article 37 (*the obligation to fulfil*).[26]

C37.P56 The practical implications of these obligations are explored and highlighted in the commentary to the various rights listed under article 37, subparagraphs (a) to (d). At a general level, it is also relevant to note that article 4 of the Convention imposes an obligation on states to take all appropriate legislative, social, administrative, educational, and other measures to ensure the implementation of the rights under the Convention, which includes article 37.

C37.N19 [19] E/CN.4/1989/48 paras 538–39; *Legislative History* (n 2) 766–67.
C37.N20 [20] See chapter 2 of this Commentary.
C37.N21 [21] See chapter 2 of this Commentary.
C37.N22 [22] Nowak, *CCPR Commentary* (n 4) 37.
C37.N23 [23] See chapter 2 in this Commentary.
C37.N24 [24] Nowak, *CCPR Commentary* (n 4) 37.
C37.N25 [25] ibid 38.
C37.N26 [26] ibid 18ff.

C37.S6 ## B. The Question of Resources

C37.P57 The breadth of a state's obligations with respect to the rights under article 37 gives rise to a question as to whether resources will ever be a relevant consideration in determining whether a state has fulfilled its obligations to respect, protect, and fulfil these rights. The orthodox view is that the rights established under article 37 are classic civil and political rights,[27] and are thus subject to immediate implementation.[28] This position is generally not contested with respect to the obligation to prohibit torture and other forms of ill-treatment under article 37(a), which is widely recognized as not being subject to progressive realization.[29] However, it becomes problematic with respect to other elements of a state's obligations under article 37, such as the obligation to ensure a minimum standard of conditions of detention, or the obligation to ensure children maintain contact with their parents when detained. In these cases, the principles set out in Chapter 4 which address the issue of resource allocation in the context of civil and political rights become relevant. That is, consideration should be given to: the consequences of an interference with a child's right; the likelihood of the interference occurring; the nature of the interference; and the level of resources required to protect a child against the interference.

C37.P58 In any case, the Economic, Social and Cultural Rights Committee ('ESCR Committee') has explained that article 2 of the ICESCR, which requires States Parties to 'take steps' towards progressive realization of the rights recognized under the Covenant, imposes 'minimum core obligations'[30] as well as 'an obligation to move as expeditiously and effectively as possible' towards full realization.[31] Thus, even if some elements of a state's obligations under article 37 were considered to be subject only to progressive realization, states are still under an obligation to immediately take conscious steps to achieve that goal.[32] The ESCR Committee considers this obligation can be met by devising appropriate strategies and indicators to improve the situation.[33]

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[27] The CRC Committee's Reporting Guidelines list the rights under art 37(a) under the heading 'Civil rights and freedoms': CRC Committee, 'Treaty-specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties' (23 November 2010) CRC/C/58/Rev.2.

[28] Under art 4 of the Convention, economic social and cultural rights are subject to progressive realization whereas civil and political rights are subject to immediate implementation. In General Comment No. 5, the CRC Committee noted that while the second sentence of art 4 CRC suggests a distinction between civil and political rights and economic, social, and cultural rights, 'there is no simple or authoritative division of human rights in general or of Convention rights into two categories': CRC Committee, 'General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child' (27 November 2003) CRC/GC/2003/5 ('CRC GC 5') para 6.

[29] See eg: Committee against Torture ('CAT Committee'), 'Implementation of Article 2 by States Parties' (24 January 2008) CAT/GC/2 ('CAT GC 2') para 5, 8; Special Rapporteur on Torture (Theo van Boven), 'General Recommendations of the Special Rapporteur on Torture' in Special Rapporteur (Theo van Boven), 'Report of the Special Rapporteur' (17 December 2002) E/CN.4/2003/68, especially paras 26(a), 26(g); *Kalashnikov v Russia* (2002) 36 EHRR 87 paras 94, 101–02. See also 'Vienna Declaration and Programme of Action' (World Conference on Human Rights, Vienna, 25 June 1993) para 57. See Chapter 4 in this Commentary for a discussion of the problematic nature of the orthodoxy concerning the allocation of resources and the implementation of civil and political rights.

[30] ESCR Committee, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)' (14 December 1990) ('ESCR GC 3') para 10. For a further discussion see chapter 4 of this Commentary.

[31] ESCR GC 3 (n 30) para 9.

[32] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156 166.

[33] ESCR Committee, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)' (11 August 2000) paras 57–58.

C37.P59 For its part, the CRC Committee has not addressed this dilemma directly. Rather, it has simply urged states to allocate 'adequate' or 'sufficient' 'human, technical and financial resources' to the juvenile justice system.[34] This approach accords with that of the HR Committee. For example, in *Mukong v Cameroon*,[35] the State Party claimed a lack of resources caused its appalling prison conditions. The HR Committee insisted on 'certain minimum standards regarding conditions of detention,' despite budgetary constraints:

C37.P60 > These include, in accordance with Rules 10, 12, 19 and 20 of the UN Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength.[36]

C37.P61 The European Court of Human Rights ('ECtHR') has adopted a similar approach. In *Poltoratskiy v Ukraine*, it held that economic conditions cannot 'explain or excuse' detention conditions that breach article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').[37] In *Dybeku v Albania*, the ECtHR held further that States Parties have an obligation to take into account the specific vulnerabilities of detainees and cannot claim inadequate resources for failing to ensure that their detention does not reach the threshold of severity for Article 3 ECHR to apply.[38] Thus, the approaches of the HR Committee and the ECtHR indicate little tolerance for a state seeking to rely on a lack of resources in order to defend a failure to provide humane conditions of detention.

C37.S7 ## C. Paragraph 37(a): The Prohibition against Torture and Other Ill-treatment

C37.S8 ### *1. A Jus Cogens Norm*

C37.P62 A significant number of treaties and resolutions prohibit states from using torture and other ill-treatment,[39] including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'),[40] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('ECPT'),[41] the Inter-American Convention to Prevent and Punish Torture ('IACT'),[42] the ICCPR,[43] the EHCR,[44] the American Convention on Human Rights ('ACHR'),[45] the

C37.N34 [34] CO Jamaica, CRC/C/JAM/CO/3-4 para 65; CO Turkmenistan, CRC/C/TKM/CO/2-4 para 57; CO Colombia, CRC/C/COL/4-5 para 67; CO Italy, CRC/C/ITA/CO/3-4 para 78; CO Luxembourg, CRC/C/LUX/CO/3-4 para 51; CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 para 77; CO Romania, CRC/C/15/Add.199 para 63; CO Lithuania, CRC/C/15/Add.146 para 56. See also Schabas and Sax (n 7) 69: 'The crucial underlying aspect of the obligation to fulfil concerns the question of the establishment and maintenance of the necessary infrastructure and resources, interestingly an issue almost never touched upon by the Committee in the State reporting process in relation to deprivation of liberty'.

C37.N35 [35] *Mukong v Cameroon* (n 14).

C37.N36 [36] ibid para 9.3.

C37.N37 [37] App No 38812/97 (29 April 2003) para 148.

C37.N38 [38] App No 41153/06 (18 December 2007) paras 50–52.

C37.N39 [39] For an overview of these treaties and resolutions see: Rodley and Pollard (n 4) 46–63.

C37.N40 [40] CAT (adopted 10 November 1984, entered into force 26 June 1987) 1465 UNTS 85. See in particular: arts 2(1), 16(1). For a comprehensive overview of CAT see: Nowak and McArthur, CAT Commentary (n 4); J Hermann Burgers and Hans Danelius, *The UN Convention against Torture—A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (Martinus Nijhoff 1988).

C37.N41 [41] ECPT (adopted 26 November 1987, entered into force 1 February 1989) CETS 126.

C37.N42 [42] IACT (adopted 9 December 1985, entered into force 28 February 1987) 67 OASTS ('OAS CAT'). See especially art 6.

C37.N43 [43] ICCPR (adopted 16 December 1966, entered into force 23 March 1876) 999 UNTS 171 art 7.

C37.N44 [44] EHCR (adopted 4 November 1950, entered into force 3 June 1952) 213 UNTS 221 art 3.

C37.N45 [45] ACHR (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 182 art 5(2)

African Charter on Human and Peoples' Rights ('ACHPR'),[46] and the African Charter on the Rights and Welfare of the Child ('ACRWC').[47]

C37.P63 It is also the subject of a specific UN resolution—the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[48]—and is contained in general UN human rights resolutions, including the Universal Declaration of Human Rights ('UDHR'),[49] the Havana Rules,[50] the Mandela Rules[51] and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.[52] Torture and other ill-treatment are also prohibited under the four Geneva Conventions,[53] and the Rome Statute of the International Criminal Court.[54]

C37.P64 Article 37(a) of the Convention continues international law's commitment to the prohibition against torture and other forms of ill-treatment. The drafting history indicates that some of the proposed formulations of the article detailed specific types of prohibited treatment, such as solitary confinement and corporal punishment.[55] The final text does not, however, contain any such references. Although the drafting history offers no insight into why this construction was adopted,[56] the final text of article 37 aligns generally with most other international instruments, which tend not to list specific forms of treatment that violate the prohibition.[57]

C37.S9 ### *2. The Application of the Prohibition to the Actions of Private Persons*

C37.P65 Traditionally, prohibitions against torture and other ill-treatment have focused on the treatment of private persons by state actors, including public officials or other persons acting in an official capacity, as in the CAT.[58] However, 'torture' is not defined in article 37, and in practice, the CRC Committee has adopted the view that the prohibition extends beyond the actions of public officials.[59] Thus, for example, the CRC Committee regularly condemns corporal punishment under article 37(a), irrespective of whether it is used in the juvenile justice system, schools, institutions, or the family, by a public or private person.[60]

C37.N99

[46] ACHPR (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 227 art 5.

[47] ACRWC (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 art 16(1).

[48] UNGA Res 3452 (XXX) (9 December 1975).

[49] UNGA Res 217A UN Doc A/RES/217A (III) art 5.

[50] Havanah Rules (n 11) Rule 67.

[51] Mandela Rules (n 12) Rule 1.

[52] Body of Principles (n 13) Principle 6.

[53] Geneva Convention I (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention II (adopted 12 August 1949, entered into force 21 October 1950)75 UNTS 85; Geneva Convention III (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. Common art 3 of the Conventions prohibits acts which include 'violence to life and person, in particular … mutilation, cruel treatment and torture', as well as 'outrages upon personal dignity, in particular, humiliating and degrading treatment': see Rodley and Pollard (n 4) 46–62.

[54] Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, arts 7(1)(f), 7(2)(e).

[55] See eg: E/CN.4/1985/WG.1/WP.1, 12–14, clauses 2, 3; 53–54, clauses 19A(5), 19C(3), 19C(4) (proposals of NGO Ad Hoc Group); *Legislative History* (n 2) 743–44; 741.

[56] See generally: E/CN.4/1986/39 paras 88–123; *Legislative History* (n 2) 745–52; E/CN.4/1989/48 paras 533–63; *Legislative History* (n 2) 762–70.

[57] cf ICCPR (n 1) art 7 prohibiting medical experimentation.

[58] See CAT (n 40) art 1(1).

[59] See eg CO Pakistan, CRC/C/PAK/CO/3-4 paras 45–46.

[60] CRC Committee, 'General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment' (2 March 2007) CRC/C/GC/8 ('CRC GC 8').

C37.P66 This approach is consistent with the second limb of the tripartite typology outlined above, namely, that the obligation to protect a child's right to be free from torture and other ill-treatment extends to measures to protect against violations by non-state actors. It is also consistent with the HR Committee's approach to protection against torture and other ill-treatment, which is intended to afford everyone legal and other necessary protection against the acts prohibited by article 7, '*whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*'.[61] Similarly, the ECtHR recognizes that children are entitled to protection against serious breaches of personal integrity, including ill-treatment administered by private individuals.[62] Moreover, the International Criminal Tribunal for the former Yugoslavia ('ICTY')[63] and the Rome Statute[64] both adopt a definition of torture that includes actors other than public officials.

C37.S10 ### 3. *The Absolute Nature of the Prohibition*

C37.P67 The Convention's prohibition on torture or other ill-treatment is non-derogable, which is consistent with other instruments.[65] The ECtHR has declared that the ECHR 'prohibits in absolute terms torture, inhuman or degrading treatment or punishment, irrespective of the victim's conduct'.[66] As such, no utilitarian arguments can be used to justify the use of torture or other ill-treatment.[67] Therefore, the exigencies of combating crime, including terrorism, do not justify limiting the protection of individuals' physical integrity.[68]

C37.S11 ### 4. *States' Obligations under the Prohibition against Torture and Other Ill-treatment*

C37.P68 Although a state has a negative obligation to refrain from treatment which violates the prohibition against torture and other ill-treatment, it also has a positive obligation to take all appropriate measures consistent with articles 2 and 4 of the Convention to ensure that children enjoy effective protection from such treatment.[69] A state enjoys discretion as to what measures it adopts for this purpose, subject to the caveat that the measures must be effective and consistent with the other provisions of the Convention. Moreover, at a minimum, it is generally accepted that a state has an obligation to take measures to:

C37.P69 • Prohibit torture and other ill-treatment;

C37.P70 • Take special measures to prevent torture and ill-treatment;

C37.N61 [61] HRC GC 20 (n 5) para 2 (emphasis added).

C37.N62 [62] *A v UK* (1998) 27 EHRR 611 para 22. See also: *HLR v France* (1998) 26 EHRR 29 para 40 (holding that the prohibition against torture 'may also apply where the danger emanates from persons or groups of persons who are not public officials'); *Costello Roberts v United Kingdom* (1993) 19 EHRR 112 paras 26–28 (holding that the obligation to secure the right to be protected against punishment in violation of the prohibition extended to the administration of corporal punishment in private schools.

C37.N63 [63] See eg: *Prosecutor v Kunarac et al* (Trial Judgment) Case No IT-96-23-T & IT-96-23/1-T (22 February 2001) para 1332; *Prosecutor v Kvočka* (Appeal Chamber Judgment) Case No IT-98-30/1-A (28 February 2005) para 284 (holding that the public official requirement was not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of CAT).

C37.N64 [64] Rome Statute of the ICC (n 54) art 7(2)(e).

C37.N65 [65] See eg: CAT (n 40) art 2; ICCPR (n 1) art 4(2). See also: HRC GC 20 (n 5) para 3 (holding that the ICCPR allows no limitation on prohibition against torture, even in public emergency, or where a superior or public officer orders otherwise); CAT GC 2 (n 29) para 5.

C37.N66 [66] *Ireland v UK* (1978) 2 EHRR 25 para 163. [67] Rodley and Pollard (n 4) 87.

C37.N68 [68] *Tomasi v France* (1992) 15 EHRR 1 para 115. See also: *Chalal v UK* (1996) 23 EHRR 413; *Ahmed v Austria* (1996) 24 EHRR 278; *Ireland v UK* (n 66) para 752.

C37.N69 [69] See generally: Rodley and Pollard (n 4) 145–79; Joseph and Castan (n 4) para 9.150–9.182.

C37.P71 • Raise awareness and educate about the prohibition;
C37.P72 • Investigate allegations of torture and ill-treatment;
C37.P73 • Prosecute and punish offenders; and
C37.P74 • Provide compensation and reparations for victims of torture and ill-treatment.

C37.S12 **(a) The Obligation to Prohibit Torture and Other Ill-treatment**

C37.P75 States must take legislative measures to prohibit torture and other ill-treatment.[70] This will generally be achieved by adopting appropriate criminal laws which prohibit conduct that would violate the prohibition. In its concluding observations the CRC Committee has often expressed its concern that states are failing in this obligation. For example, the Committee's concluding observations on Ghana expressed deep concern at the 'absence of a comprehensive law prohibiting the use of mental and physical torture or other cruel, inhuman or degrading treatment or punishment against children'[71] and its concluding observations for the Democratic Republic of Congo recommended the state ensure that the crime of torture is explicitly defined in its legislation, in conformity with the CAT'.[72] In its General Comment No 8, the Committee also indicated that 'eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties'.[73]

C37.P76 The obligation to protect children against violations of article 37(a) by private persons also requires states to pass laws dealing with domestic violence[74] and prohibiting corporal punishment within the family.[75] The Committee's concluding observations on Italy recommended:

C37.P77 the clear prevention and prohibition of torture and other cruel, inhuman and degrading treatment or punishment, as well as a ban on corporal punishment within the family, be reflected in national legislation.[76]

C37.P78 States must also ensure their laws clearly prohibit unjustified defences for the perpetrators of torture or ill-treatment.[77] In this respect, the Committee has emphasized that the Convention requires 'the removal of any provisions (in statute or common—case law) that allows some degree of violence against children', including ' "lawful", "reasonable", or "moderate" chastisement or correction'.[78] Moreover, in its concluding observations for

C37.N79

[70] HRC GC 20 (n 5) para 13. See also CAT (n 40) arts 2(1), 4 (contain a similar obligation to pass and enforce laws prohibiting torture and other ill-treatment).

[71] CO Ghana, CRC/C/15/Add.73 para 16. See also: CO Ukraine, CRC/C/UKR/CO/3-4 para 41; CO Montenegro, CRC/C/MNE/CO/1 para 35; CO Democratic People's Republic of North Korea, CRC/C/PRK/CO/4 para 32; CO Trinidad and Tobago, CRC/C/15/Add.82 para 17; CO Myanmar, CRC/C/15/Add.69 para 8; CO Uruguay, CRC/C/15/Add.62 para 6; CO Senegal,CRC/C/15/Add.44 para 24; CO Ukraine, CRC/C/15/Add.42 para 29; CO Italy, CRC/C/15/Add.41 para 20; CO Poland, CRC/C/15/Add.131 para 30; CO Philippines, CRC/C/15/Add.29 para 8; CO Panama, CRC/C/15/Add.68 para 22; CO Nepal, CRC/C/15/Add.57 para 24.

[72] CO Democratic Republic of Congo, CRC/C/COD/CO/2 para 38.See also: CO Chad, CRC/C/TCD/CO/2 paras 41–42; CO Uzbekistan, CRC/C/UZB/CO/3 para 38; CO Montenegro, CRC/C/MNE/CO/1 para 34; CO Philippines, CRC/C/PHL/CO/3 para 40.

[73] CRC GC 8 (n 60) para 22.

[74] See eg: HR Committee comments regarding Yemen, expressing concern about Yemen's lack of laws dealing with domestic violence: HR Committee, CO Egypt, CCPR/C/79/Add.51 para 14. See also: CO Democratic Republic of the Congo, CRC/C/COD/CO/2 para 94.

[75] CRC Committee, 'General Comment No 13 (2011): The Right of the Child to Freedom from All Forms of Violence' (18 April 2011) CRC/C/GC/13 ('CRC GC 13') para 22, 33; CRC GC 8 (n 60) paras 3, 5.

[76] CO Italy, CRC/C/15/Add.41 para 20.

[77] Joseph and Castan (n 4) para 9.160.

[78] CRC GC 8 (n 60) para 31.

the United Kingdom it remarked, '[t]he imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner'.[79] The ECtHR has adopted a similar view on reasonable chastisement.[80]

C37.S13 **(b) The Obligation to Take Special Measures to Prevent Torture and Other Ill-treatment**

C37.P79 Children are particularly vulnerable to torture and other ill-treatment.[81] The Special Rapporteur, the HR Committee, the ECtHR, and the Inter-American Court of Human Rights ('IACtHR') have all recognized that states must adopt special measures to protect the personal liberty and security of every child.[82] The HR Committee has explained that states must do more than criminalize violations of the prohibition to fulfil their obligations under article 7 ICCPR;[83] they must also implement procedures and safeguards to minimize the risk. The HR Committee's General Comment No 20 explains that in order to effectively prevent torture and ill-treatment, States Parties should:

C37.P80 • provide detailed information on safeguards for the special protection of particularly vulnerable persons;

C37.P81 • keep interrogation rules, instructions, methods, and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment under systematic review;

C37.P82 • hold detainees in places officially recognized as places of detention, and ensure that records of their names, places of detention, and the names of persons responsible for their detention are easily accessible to those concerned and for judicial proceedings;

C37.P83 • make provisions against incommunicado detention and ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment; and

C37.P84 • ensure prompt and regular access be given to doctors, lawyers, and, under appropriate supervision when required, to family members.[84]

C37.P85 Article 11 of CAT contains a similar duty, while the ECtHR requires states to undertake special measures with respect to children to ensure they are not subject to treatment which violates the prohibition and to adopt measures which operate to effectively deter such treatment.[85]

C37.N79 [79] CO United Kingdom, CRC/C/15/Add.34 para 16. During questioning of the United Kingdom, Thomas Hammarberg, a Committee member, explained that '[I]t was the Committee's experience that difficulties arise whenever a "reasonable" level of corporal punishment was permitted under a State's internal law. To draw an analogy, no one would argue that a reasonable level of wife beating should be permitted. His conclusion was that the United Kingdom position represented a vestige of the outdated view that children were in a sense their parents' chattels'. CRC Committee, 'Summary Record of the 205th Meeting' (30 January 1995) CRC/C/SR.205 para 63.

C37.N80 [80] See *A v UK* (n 62) para 23–24 (ECtHR holding that a stepfather's punishment of his step-child was sufficiently severe to violate the prohibition on torture and ill-treatment, and that UK law violated ECHR art 3 because English law provided inadequate protection). See also: Jane Fortin, *Children's Rights and the Developing Law* (2nd edn, CUP 2005) 279–82.

C37.N81 [81] On children in detention, see Special Rapporteur, A/HRC/28/68 (n 7).

C37.N82 [82] ibid para 32; HRC GC 35 (n 5) para 62; *Z and Others v UK* [2002] 34 EHRR 3 paras 74–75; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) paras 69–71.

C37.N83 [83] HRC GC 20 (n 5) para 8. [84] ibid para 11.

C37.N85 [85] *Güveç v Turkey* App No 70337/01 (20 January 2009) paras 82–98.

C37.P86 For its part the CRC Committee has outlined various measures states should take to prevent the torture and ill-treatment of children. It has recommended, for example, that States Parties facilitate children's ability to file complaints about ill-treatment in institutions, enhance rights training of staff in institutions such as schools, boarding schools, and detention centres, raise awareness amongst teachers on bullying in classes, and encourage schools to adopt action plans to address bullying behaviours.[86] It has also recommended that states: expedite legislative amendments and strengthen existing legal frameworks on the prohibition of torture; ensure that places of detention are monitored independently; security and police personnel are trained adequately to deal with children in conflict with the law; establish effective complaints and data collection systems concerning torture complaints from children deprived of their liberty; and ensure that all allegations are promptly and properly investigated and prosecuted.[87]

C37.P87 'Independent monitoring' of children in detention might entail oversight by another government department, obliging governments to self-regulate, or could refer to observation by a non-governmental entity—a step towards greater transparency and protections for children. However, the existence of an independent mechanism to monitor children in detention facilities, and medical and social care institutions, is insufficient—they must be adequately financed and staffed with qualified professionals.[88]

C37.P88 The CRC Committee's repeated recommendations for effective complaints mechanism for children deprived of their liberty complement its recommendations that states should 'introduce legislation making the reporting of child abuse mandatory'.[89] As the Special Rapporteur has noted, certainly any system helping identify children at risk aids the prevention of torture and other ill-treatment.[90]

C37.S14 **(c) The Obligation to Train and Educate**

C37.P89 The CRC Committee considers that training of officials and dissemination of information regarding the Convention is integral to states' obligations under article 4 to undertake all appropriate measures for the implementation of the rights recognized in the Convention. The Committee has recommended that training should be systematic and ongoing, and noted that the purpose of training is to increase knowledge of the Convention and to emphasize the status of the child as a rights-holder. As such, the Convention should be reflected in professional training curricula, codes of conduct and educational curricula, and amongst children themselves at all school levels.[91]

C37.P90 The Committee has called on states to train appropriate personnel regarding their obligations under articles 37, 39, and 40,[92] in law enforcement, juvenile justice, the militia, and police.[93] Importantly, 'appropriate personnel' should not be understood narrowly. The Committee has emphasized that states must develop training and capacity building

C37.N99 for 'all those involved in the implementation process', including government officials,

[86] CO Bulgaria, CRC/C/BGR/CO/2 para 29. [87] CO Nigeria, CRC/C/NGA/CO/3-4 para 39.

[88] Special Rapporteur, A/HRC/28/68 (n 7) paras 63–64.

[89] CO Turkmenistan, CRC/C/TKM/CO/204 para 31; CO Colombia, CRC/C/COL/4-5 para 67; CO Belize, CRC/C/15/Add.99 para 22. See also: CRC/C/15/Add.85 para 16; CO Vietnam, CRC/C/VNM/CO/3-4 para 44; CO Cambodia, CRC/C/KHM/CO/2 para 38; CO Bahrain, CRC/C/BHR/CO/2-3 para 43; CO Nigeria, CRC/C/NGA/CO/3-4 para 39; CO Romania, CRC/C/ROM/CO/4 para 44.

[90] See also Special Rapporteur, A/HRC/28/68 (n 7) para 66. [91] CRC GC 5 (n 28) para 53.

[92] ibid.

[93] See eg: CO Turkmenistan, CRC/C/TKM/2-4 para 31(d); CO Lithuania, CRC/C/LTU/CO/3-4 para 50; CO Liberia, CRC/C/LBR/CO/2-4 para 85; CO Algeria, CRC/C/DZA/CO/3-4 para 81; CO Kyrgyzstan, CRC/C/15/Add.127 para 34 (militia); CO Tajikistan, CRC/C/15/Add.136 para 29.

parliamentarians, and members of the judiciary, as well as 'all those working with and for children', including:

C37.P91 for example, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and armed forces, including peacekeeping forces, those working in the media and many others.[94]

C37.P92 The CRC Committee's approach is consistent with the view of the HR Committee, which declared that ICCPR article 7 requires states to train personnel and disseminate information to their populations on the prohibition against torture and other ill-treatment.[95] A similar duty exists under CAT article 10, and the Special Rapporteur has identified the 'availability of multidisciplinary and qualified staff working in children's institutions' as an 'essential safeguard' against torture and ill-treatment.[96]

C37.S15 **(d) The Obligation to Undertake an Effective Investigation**

C37.P93 It is widely accepted that the prohibition against torture and ill-treatment gives rise to an obligation to undertake a full and effective investigation of allegations of such treatment.[97] This obligation exists independently of any other right,[98] and is justified on the basis that it is necessary to ensure the *effective* enjoyment of the right to enjoy protection against torture and other ill-treatment.[99] Without an entitlement to demand an investigation by authorities of allegations of torture and ill-treatment, the prohibition under art 37(a) would be illusory and meaningless.[100]

C37.P94 It is within this context that the CRC Committee has persistently expressed its deep concern at the failure to investigate allegations of abuse. For example, it has expressed concern at the lack of investigation into complaints of torture, forms of ill-treatment, and arbitrary arrests, as well as insufficient prosecution of perpetrators,[101] and has emphasized that 'all allegations of torture or other forms of ill-treatment must be promptly

C37.N95 [94] CRC GC 5 (n 28) para 53. [95] HRC GC 20 (n 5) para 10.

C37.N96 [96] Special Rapporteur, A/HRC/28/68 (n 7) para 63.

C37.N97 [97] See: HRC GC 20 (n 5) para 14; CAT GC 2 (n 29) para 5; *Herrera Rubio v Colombia* Comm No 161/1983 (3 November 1987) (HR Committee) para 10.2; *María Cruz Achabal Puertas v Spain* Comm No 1945/2010 (27 March 2013) (HR Committee) para 8.6. The ECtHR has also held that art 3 imposes a procedural obligation to conduct thorough and effective investigations where there are claims of ill-treatment: *Assenov v Bulgaria* (1998) 28 EHRR 652 (facts involved a boy aged fourteen alleging that he had been arrested and beaten by police in the absence of an investigation; the Court held his injuries were sufficiently grave to violate the prohibition on torture and ill-treatment, regardless of whether the injuries had been inflicted by the boy's father or the police, and that the failure of the relevant authorities to carry out a thorough and effective investigation into the claim was a violation of the prohibition); *Gäfgen v Germany* (2010) 52 EHRR 1, para 117; *El Masri v the Former Yugoslav Republic of Macedonia* App No 39630/09 (13 December 2012) para 193 (finding that 'establishing the truth' of what had happened in the interests of the victim and society was another justification for investigation of claims). See also: Alistair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) International and Comparative Law Quarterly 437.

C37.N98 [98] See eg: *María Cruz Achabal Puertas v Spain* Comm No 1945/2010 (27 March 2013) (HR Committee) para 8.6; Joseph and Castan (n 4) para 9.169. Note also CAT (n 40) art 12.

C37.N99 [99] See eg: *Bekos and Koutropoulos v Greece* (2006) 43 EHRR 2 para 53; *Labita v Italy* [2000] ECHR 161 para 131; *Assenov v Bulgaria* (n 97) para 102.

C37.N100 [100] Tobin, 'Seeking to Persuade' (n 8) 44–46.

C37.N101 [101] CO Bahrain, CRC/C/BHR/CO/2 para 42. See also: CO Uruguay, CRC/C/URY/CO/3-5 para 38; CO Kyrgyzstan, CRC/C/KGZ/CO/3-4 para 29; CO Russia, CRC/C/RUS/CO/4-5 para 31; CO Nicaragua, CRC/C/NIC/CO/4 para 46; CO Argentina, CRC/C/ARG/CO/3 para 41; CO Cameroon, CRC/C/CMR/CO/2 para 35; CO Paraguay, CRC/C/PRY/CO/3 para 29; CO Tajikistan, CRC/C/TJK/CO/2 para 37; CO Pakistan, CRC/C/PAK/CO/4 para 45; CO Philippines, CRC/C/PHL/CO/3 para 40; CO France, CRC/C/FRA/CO/4 para 54.

and properly investigated and perpetrators prosecuted'.[102] Similarly, it has recommended that states review legislation to ensure prohibited treatment is an aggravating factor in crimes and penalties are commensurate with the crime.[103] Moreover, it has expressed concern about the 'insufficient judicial procedures to investigate cases of police brutality, ill-treatment or abuse of children' and recommended that the State Party 'reinforce its judicial mechanisms to deal with complaints of police brutality, ill treatment or abuse of children, and that cases of abuse of children be duly investigated'. [104]

C37.P95 Five further points are relevant to the obligation to undertake an effective investigation.[105] First, investigations must be prompt, impartial, transparent, and comprehensive.[106] Second, the HR Committee has held that 'a failure by a State to investigate allegations of violence could in and of itself give rise to a separate breach of the Covenant'.[107] Third, the obligation to investigate an allegation of torture or ill-treatment exists irrespective of whether the ill-treatment complained of was administered by a public authority or someone acting in their private capacity. This principle is a logical extension of the *obligation to protect* which requires states to take all reasonable measures to protect children from torture or ill-treatment from non-state actors. Thus, where a child establishes an arguable claim of treatment by any person public or private, in violation of the prohibition, the state is under an obligation to investigate the allegation effectively. When an allegation of torture is made, the Special Rapporteur on Torture has indicated that 'the public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings'.[108]

C37.P96 Fourth, states must ensure that the system for the investigation of allegations of torture and ill-treatment is accessible to children and child friendly. It is for this reason that the CRC Committee has called on states to establish an independent, child-sensitive, and accessible monitoring body to receive and consider the complaints of children involved with the administration of juvenile justice.[109] Children must be informed about and have easy access to such a body,[110] given that 'they often face particular difficulties in accessing these services, which deprives them of the possibility to effectively access the

C37.N105

[102] CO Bahrain, CRC/C/BHR/CO/2 para 43. [103] CO Tunisia, CRC/C/TUN/CO/3 para 39.

[104] CO Nicaragua, CRC/C/15/Add.108 para 29. See also: CO Belize, CRC/C/15/Add.99 para 22; CO Turkmenistan, CRC/C/TKM/2-4 para 31(a), 31(c).

[105] For a more detailed discussion, see Rodley and Pollard (n 4) 147–55.

[106] HRC GC 20 (n 5) para 14; HR Committee, 'General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add.13 ('HRC GC 31') para 15. See also: CO Kyrgyzstan, CRC/C/15/Add.127 para 33; *Halimi-Nedzibi v Austria Comm No* 8/1991 (26 April 1993) CAT/C/10/D/8/1991 (CAT Committee) para 13.5 (a delay of 15 months before an investigation of the allegations of torture is initiated is unreasonably long and infringes CAT (n 40) art 12). General guidance on the conduct of effective investigations can be found in UNGA, 'Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (4 December 2000) A/RES/55/89. These principles form part of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment (also known as the 'Istanbul Protocol') adopted in 1999, and were endorsed by the Commission on Human Rights in Human Rights Commission, (20 April 2000) E/CN.4/RES/2000/43.

[107] HRC GC 31(n 106) para 15. See also *Assenov v Bulgaria* (n 97) para 106.

[108] Special Rapporteur, 'Report of the Special Rapporteur' (17 December 2002) E/CN.4/2003/68 para 26(k).

[109] See eg: CO Sweden, CRC/C/SWE/CO/5 para 26; CO Uruguay, CRC/C/URY/CO/3-5 para 38; CO Vietnam, CRC/C/VNM/CO/3-4 para 44; CO Togo, CRC/C/TGO/CO/3 para 42(a); CO Cambodia, CRC/C/KHM/CO/2 para 39(c); CO Moldova, CRC/C/MDA/CO/3 para 73(j).

[110] CRC GC 10 (n 9) para 89.

justice system'.[111] For instance, children may lack the capacity to articulate complaints, be intimidated by the justice system, or be unaware of their rights.[112] This is particularly so for children in vulnerable positions.[113]

C37.P97 Finally, the CRC Committee has indicated that states' obligations to investigate under article 37(a) are not premised on a child first making a complaint. On the contrary, where a child presents with injuries for which there is no reasonable and legitimate explanation, it is incumbent upon states to investigate these injuries in order to determine whether they are the result of torture and other ill-treatment. In its concluding observations on Israel, the Committee strongly urged Israel to:

C37.P98 ensure that relevant judicial authorities are exercising due diligence in investigating and prosecuting acts that amount to torture or other forms of ill-treatment, even in the absence of a formal complaint when circumstances cast a doubt about the way confession was obtained.[114]

C37.P99 This principle applies to injuries sustained while in the care of authorities, and extends to ill-treatment sustained while in the care of private persons.[115]

C37.P100 The CAT, OAS *Convention against Torture*,[116] the UN *Declaration against Torture*,[117] and the *Istanbul Protocol*,[118] also require an investigation, where there has been no individual complaint. Moreover, the work of the Special Rapporteur on Torture,[119] and the Human Rights Council[120] support this approach.[121]

C37.S16 **(e) The Obligation to Prosecute and Punish Offenders**

C37.P101 The CRC Committee has maintained that violations of the prohibition against torture must be sanctioned and those responsible punished with commensurate penalties.[122] This view is consistent with the position adopted by other human rights bodies[123] and under

C37.N111 [111] Special Rapporteur (Manfred Nowak), 'Report of the Special Rapporteur' (5 February 2010) A/HRC/13/39/Add.5 para 171.

C37.N112 [112] Amnesty International, *Hidden Scandal, Secret Shame: Torture and Ill-treatment of Children* (Amnesty International London 2000) 23.

C37.N113 [113] UN High Commissioner for Human Rights, 'Access to Justice for Children' (16 December 2013) A/HRC/25/35 paras 13–17.

C37.N114 [114] CO Israel, CRC/C/ISR/CO/2-4 para 36(d).

C37.N115 [115] See eg *Salman v Turkey* (2002) 34 EHRR 17 para 99. See also; *Tomasi v France* (n 68); *Ribitsch v Austria* (1995) 21 EHRR 573 (Government failed to establish that bruises suffered were not the result of inhuman treatment by the police). Investigations must be capable of leading to the identification and punishment of those responsible, including private persons (*Assenov* (n 97)); *MC v Bulgaria* (2003) 40 EHRR 459. The ECtHR has held that cases involving child abuse must be investigated with particular care (*CAS and CS v Romania* App No 26692/05 (20 March 2012)).

C37.N116 [116] CAT (n 40) art 13; OAS CAT (n 42) art 8.

C37.N117 [117] UNGA 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 December 1975) A/RES/30/3452 art 9.

C37.N118 [118] *Istanbul Protocol* (n 106) para 2.

C37.N119 [119] Special Rapporteur, 'Interim Report of the Special Rapporteur' (23 September 2014) A/69/387 para 22.

C37.N120 [120] 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rehabilitation of Torture Victims' (19 March 2013) A/HRC/22/L.11/Rev.1 para 4.

C37.N121 [121] For more information see generally Rodley and Pollard (n 4) 147–50.

C37.N122 [122] CRC Committee, 'Day of General Discussion: State Violence against Children' in CRC Committee, 'Report on the Twenty-fourth Session' (17 July 2000) CRC/C/97. See also: CO Turkmenistan, CRC/C/TKM/2-4 para 31(c); CO China, CRC/C/CHN/CO/3 para 44; CO Israel, CRC/C/ISR/CO/2-3 para 36; CO Albania, CRC/C/ALB/CO/2-4 para 84.

C37.N123 [123] HRC GC 20 (n 5) para 13; the practice of the CAT Committee suggests that it expects a sentencing range from six to twenty years (Inglese cited in Rodley and Pollard (n 4) 190). For regional mechanisms, see: *Okkali v Turkey* (2006) 50 EHRR 1228 (ECtHR) (holding that there was inadequate enforcement of the law against those responsible for ill-treatment); *Gäfgen v Germany* (n 97) (ECtHR).

other human rights instruments.[124] For example, the UN and OAS *Conventions against Torture* require torture be treated as a crime 'punishable by appropriate penalties' accounting for its 'grave nature'[125] or 'by severe penalties' accounting for its 'serious nature'.[126] The UN *Declaration against Torture,*[127] the UN Special Rapporteur on Torture,[128] and the UN Human Rights Council,[129] also require the criminalization of acts of torture. The HR Committee has added that prosecution must be delivered expeditiously, and that delay cannot be justified by pointing to resource constraints.[130]

C37.P102 The CRC Committee has also stressed the need for states to avoid impunity for perpetrators.[131] This is consistent with the views expressed by the HR Committee,[132] and other human rights bodies.[133] However, this position raises a question as to whether amnesties, which may be provided as part of a truth and reconciliation commission or other transitional justice process, can be reconciled with the obligation to prosecute offenders and avoid a culture of impunity. The CRC Committee is yet to address this dilemma directly. In the case of Sierra Leone, it recognized that the majority of prohibited acts were committed in armed conflict and urged Sierra Leone to raise these acts in the truth and reconciliation process and ensure that they received an appropriate judicial response in future.[134] The Committee's concluding observations on Afghanistan, expressed 'concern that the 2007 Law on Public Amnesty and National Stability may be used to grant amnesty to perpetrators of the most serious crimes against children'.[135] In relation to the Syrian Arab Republic, the Committee's concluding observations noted with concern that two Legislative Decrees granting immunity from prosecution to security and intelligence agencies responsible for human rights violations committed on duty, 'may also impede independent investigation and serve as contributing factors of persisting detention and torture of children'.[136] The Committee urged the State Party to repeal both Legislative Decrees, to investigate cases of torture in a transparent, objective, and impartial manner and bring those responsible to justice.[137]

C37.P103 These comments illustrate a strong anxiety and concern of the CRC Committee with respect to the practice of amnesties. The HR Committee shows a similar concern, and has taken a robust position on this matter, declaring that 'Amnesties are *generally* incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future'.[138] It has also condemned laws that permit impunity in its concluding observations,[139] an approach

C37.N128

[124] CAT (n 40) art 4(2); OAS CAT (n 42) art 1. [125] CAT (n 40) art 4.
[126] OAS CAT (n 42) art 6. [127] Declaration against Torture (n 117) art 7.
[128] Special Rapporteur, E/CN.4/2003/68 (n108) para 26(a).
[129] Human Rights Council, A/HRC/22/L.11/Rev.1 (n 120) para 2.
[130] *Rajapakse v Sri Lanka* Comm No 1250/04 (5 September 2006) paras 9.4–9.5.
[131] See eg: CO Iraq, CRC/C/IRQ/2-4 para 37(a); CO Albania, CRC/C/ALB/CO/2-4 para 40; CO Tunisia, CRC/C/TUN/CO/3 para 39; CO Paraguay, CRC/C/PRY/CO/3 para 30; CO Romania, CRC/C/15/Add.199 para 35.
[132] HRC GC 20 (n 5) para 13.
[133] See eg: *Barrios Altos v Peru* Inter-American Court of Human Rights Series C No 75 (14 March 2001) paras 43–44; *La Cantuta v Peru* Inter-American Court of Human Rights Series C No 162 (29 November 2006) para 115.
[134] CO Sierra Leone, CRC/C/15/Add.116 para 45.
[135] CO Afghanistan, CRC/C/AFG/CO/1 para 29.
[136] CO Syrian Arab Republic, CRC/C/SYR/CO/3-4 para 50. [137] ibid para 52.
[138] HRC GC 20 (n 5) para 15 (emphasis added).
[139] See: HR Committee, CO El Salvador, CCPR/C/79/Add.34 para 7; CO Bolivia, CCPR/C/79/Add.73 para 15; CO Lebanon, CCPR/C/79/Add.78 para 12; CO Sudan, CCPR/C/79/Add.85 para 17; CO Cambodia, CCPR/C/79/Add.108 para 6; CO Colombia, CCPR/CO/80/COL para 8.

which has been followed by the CAT Committee[140] and the IACtHR, which declared in the *Velasquez-Rodriguez Case* that 'subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person'.[141] The Court added that '[i]f the State apparatus acts in such a way that the violation goes unpunished … the State has failed to comply with its duty to guarantee the full and free exercise of those rights to persons within its jurisdiction'.[142] This decision has been affirmed in subsequent cases.[143]

C37.P104 A question remains, however, as to whether amnesties will necessarily be incompatible with the obligation to prosecute offenders. The HR Committee's direction provides that amnesties are 'generally' incompatible, raising the prospect that amnesties may be justifiable in some circumstances. Commentators are divided on this controversial issue.[144] For its part the CRC Committee has not addressed this issue explicitly. However, if amnesties are granted in circumstances that contribute to a culture of reconciliation and justice, rather than 'an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations',[145] it is arguable that they may be justified.

C37.S17 **(f) Compensation and Rehabilitation for Victims**

C37.P105 Article 39 of the Convention imposes an obligation on States Parties to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim' of torture or other ill-treatment. However, a separate obligation arises under article 37 to ensure that all victims of torture or other ill-treatment receive compensation,[146] and the CRC Committee has routinely called upon states to ensure victims of such treatment receive 'adequate reparation'[147] or 'compensation'.[148]

C37.N140 [140] See CAT Committee Concluding Comments on Senegal and Colombia in 'Report of the Committee against Torture', (7 May 1996) A/51/44 paras 112, 80 respectively.

C37.N141 [141] *Velasquez-Rodriguez Case* (Judgment) Series C No 4 (29 July 1998) para 175.

C37.N142 [142] ibid para 176.

C37.N143 [143] See eg: *Barrios Altos v Peru* (Judgment) Series C No 75 (14 March 2001) para 41; *Gomes Lund et al (Guerrilha do Araguala) v Brazil* (Judgment) Series C No 219 (24 November 2010) para 174; *Gelman v Uruguay* (Judgment) Series C No 221 (24 February 2011) para 241.

C37.N144 [144] See eg: Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Violations of a Prior Regime' (1991) 100 Yale Law Journal 2537 (arguing that states have an obligation to prosecute those most notorious human rights violators); M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63 (arguing that states have an obligation to prosecute *jus cogens* crimes); Leila Nadya Sadat, 'Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2006) 194–201 (arguing that amnesties create a 'culture of impunity' incompatible with justice'). cf Michael Scharf, 'From the eXile Files: An Essay on Trading Justice for Peace' (2006) 63 Washington and Lee Law Review 339 (arguing that selective prosecution and use of 'exemplary trials' is acceptable as long as the criteria used reflect appropriate distinctions based upon degrees of culpability and sufficiency of evidence).

C37.N145 [145] *Rodriguez v Uruguay* Comm No 322/88 (23 July 1988) (HR Committee) para 12.4.

C37.N146 [146] Rodley and Pollard (n 4) 159. See also HRC GC 20 (n 5) para 15.

C37.N147 [147] See eg: CO Uruguay, CRC/C/URY/CO/3-5 para 38; CO Kyrgyzstan, CRC/C/KGZ/CO/3-4 para 29; CO Holy See, CRC/C/VAT/CO/2 para 38; CO Turkmenistan, CRC/C/TKM/2-4 para 31(c); CO China, CRC/C/CHN/CO/3-4 para 44(c).

C37.N148 [148] See eg: CO Israel, CRC/C/ISR/CO/2-4 para 36; CO Guinea, CRC/C/GIN/CO/2 para 47; CO Holy See, CRC/C/VAT/CO/2 para 38(b); CO Myanmar CRC/C/MMR/3-4 para 52(c); CO Syrian Arab Republic, CRC/C/SYR/CO/3-4 para 52.

C37.P106 The UN and OAS *Conventions against Torture* expressly require states to provide compensation that is 'fair and adequate'[149] and 'suitable', respectively.[150] Other human rights instruments generally provide for the right to an effective remedy, including compensation.[151] The HR Committee has explained that 'States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible'.[152] In the *Velasquez-Rodriguez Case,* the IACtHR cited a 'legal duty … to ensure the victim adequate compensation';[153] and the ECtHR has held that an effective remedy entails compensation.[154]

C37.P107 Unlike other treaties, however, the Convention does not contain an express right to a remedy for violations of its provisions. Nevertheless, the CRC Committee has found the state's duty to protect from torture and other ill-treatment under article 37(a) implies an obligation to compensate.[155] The Committee has emphasized states' obligation to provide rehabilitation and compensation to the victims of torture and other ill-treatment,[156] making similar comments in its concluding observations.[157] This approach is justified under the effectiveness principle; that is, the effective enjoyment of the right to protection against torture and ill-treatment would be undermined in the absence of any right to obtain compensation for a violation of this protection. It is also consistent with the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* which provide that the obligation to respect, ensure respect for, and implement international human rights law, includes the duty to 'provide effective remedies to victims, including reparation',[158] and that states are required under international law to make 'available adequate, effective, prompt and appropriate remedies, including reparation'.[159] Reparation for harm suffered includes: 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[160] Further, in 2007 the General Assembly declared that 'national legal systems *must* ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment … are awarded fair and adequate compensation'.[161]

C37.Nu99

[149] CAT (n 40) art 14. [150] OAS CAT (n 42) art 9.

[151] Discussed later in this chapter. See eg: ICCPR (n 1) arts 2, 14; HRC GC 31 (n 106) para 16.

[152] HRC GC 20 (n 5) para 15. [153] *Velasquez-Rodriguez Case* (n 142) para 174.

[154] See eg *Aksoy v Turkey* (1996) 23 EHRR 553 para 98.

[155] CO Uruguay, CRC/C/URY/CO/3-5 para 38; CO Iraq, CRC/C/IRQ/CO/2-4 para 37; CO Holy See, CRC/C/VAT/CO/2 para 38 (with reference to CAT Committee, CO Ireland, CAT/C/IRL/CO/1 para 21, which stated that all children have an enforceable right to compensation, recommending to State Party that full compensation be paid to girls and their families who were placed in Irish institutions, forced to work and were subjected to inhuman, cruel, and degrading treatment, and physical and sexual abuse).

[156] CRC GC 13 (n 75) para 55.

[157] See eg: CO Israel, CRC/C/ISR/CO/2-4 para 74; CO Vietnam, CRC/C/VNM/CO/3-4 para 44; CO Montenegro, CRC/C/MNE/CO/1 para 35; CO Cameroon, CRC/C/CMR/CO/2 para 36.

[158] *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (16 December 2005) A/RES/60/147 para 3(d).

[159] ibid para 2(d). [160] ibid para 18–23.

[161] 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (18 December 2007) A/RES/62/148 para 13 (emphasis added).

C37.S18 ## *5. The Meaning of Torture, Cruel, Inhuman, and Degrading Treatment*

C37.S19 ### (a) A Disjunctive or Conjunctive Approach?

C37.P108 It is unclear whether the prohibition against torture, cruel, inhuman, or degrading treatment should be interpreted disjunctively or conjunctively. The drafting history does not address this issue and nor does the work of the CRC Committee. This is consistent with the approach of the HR Committee which does not 'consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.[162] Indeed, medical research suggests that there is no fine distinction between torture and other ill-treatment.[163] Nonetheless, this approach has been criticized by scholars who have argued that its lack of clarity undermines certainty as to the boundaries of permissible behaviour, allowing states permitting torture to claim that they do not.[164] And yet, as Jeremy Waldron has demonstrated, thick evaluative concepts do still have the capacity to guide action.[165] As such, it is arguable that the vagueness of the CRC Committee and the HR Committee could operate to the benefit of individuals, acting to chill behaviour that nears the boundary line of permissible acts.

C37.P109 Alternatively, a disjunctive interpretation of article 37 has the advantage of offering a clear body of jurisprudence ascribing the prohibition's constituent phrases independent meaning, determined by separate tests for what constitutes torture, cruel, inhuman, or degrading treatment or punishment.[166] The EtCHR 'has commonly but not always' favoured this approach,[167] as have several national courts.[168]

C37.P110 Importantly, irrespective of whether a disjunctive or conjunctive approach is adopted, all forms of treatment under article 37 remain subject to an absolute prohibition and are non-derogable. Moreover, what is clear is that there must be a test to determine whether *treatment or punishment*[169] falls within the broad scope of the protection against torture and other ill-treatment. It is to this issue that we now turn.

C37.N162 [162] HRC GC 20 (n 5) para 4.

C37.N163 [163] Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, 'Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?' (2007) 64 Archives of General Psychiatry 277.

C37.N164 [164] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (OUP 1991) 371–72; Michael Lewis, 'A Dark Descent into Reality: Making the Case for an Objective Definition of Torture' (2010) 67 Washington & Lee Law Review 77. See eg: Bybee Torture Memo (Memorandum from Office of the Assistant Attorney General to Alberto Gonzales, Counsel to the President (1 August 2002)).

C37.N165 [165] Jeremy Waldron, 'Vagueness and Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 58, 80–81; Jeremy Waldron, 'Torture and Positive Law' (2005) 105 Columbia Law Review 1681, 1698–703.

C37.N166 [166] Geraldine Van Bueren has suggested that a disjunctive approach is helpful because the application of concepts such as cruelty and degradation may have their greatest potential for children: Geraldine Van Bueren, 'Opening Pandora's Box—Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment' in Geraldine Van Bueren (ed), *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman, and Degrading Treating and Punishment* (Ashgate 1998) 64.

C37.N167 [167] Harris and others (n 4) 56–57.

C37.N168 [168] *S v Williams* [1995] 3 SA 632 (South Africa, Con Crt), 639 (Langa J); *Ncube & Ors v State* [1988] LRC (Const) 442 (Zimbabwe, Supr Crt), 458; *Ex Parte AG, Namibia: In Re Corporal Punishment* [1991] 3 SA 76 (Namibia, Supr Crt), 86 (Mahomed J).

C37.N169 [169] The CRC Committee has not commented on the meaning of the terms 'treatment' and 'punishment'. However, the HR Committee has taken the view that there is no need to make any distinctions with respect to these terms under ICCPR art 7: HRC GC 20 (n 5) para 4. With respect to the ECHR, Duffy has explained that in practice the distinction between the two concepts has not given rise to any difficulties in the case law: Peter Duffy, 'Article 3 of the European Convention on Human Rights' (1983) 32 International and Comparative Law Quarterly 316, 320. See also: Harris and others (n 4) 259 (noting that the ECtHR does not distinguish between inhuman treatment and punishment, commonly finding both or a breach of art 3 generally).

C37.S20 **(b) The Need for a Child-focused Interpretation**

C37.P111 Until relatively recently children's experience of torture and other ill-treatment has tended to be overlooked.[170] This is because torture has traditionally been understood as limited to ill-treatment carried out by public officials in public settings rather than the treatment of children in private settings. However, as the Special Rapporteur on Torture notes, 'in reality, most of the victims of arbitrary detention, torture and inhuman conditions of detention are usually ordinary people who belong to the poorest and most disadvantaged sectors of society', including children.[171] Moreover, 'children are necessarily more vulnerable to the effects of torture and, because they are in the critical stages of physical and psychological development, may suffer graver consequences than similarly ill-treated adults'.[172] It is recognized that children experience pain and suffering differently, with studies suggesting that experiencing violence at a young age may result in 'greater susceptibility to lifelong social, emotional and cognitive impairments and to health-risk behaviours, such as substance abuse and early initiation of sexual behaviour'.[173]

C37.P112 Alarmingly, children held in detention are 'at risk of post-traumatic stress disorder', and have a higher prevalence of suicide, suicide attempts, self-harm, mental disorder, and developmental problems.[174] As such, children's experience rather than adults' must be considered when assessing whether a particular form of treatment reaches the threshold required for torture or other ill-treatment under article 37(a).[175] As a corollary, it also follows that treatment that does not violate the prohibition when imposed on adults may well amount to torture or ill-treatment when imposed on children.

C37.P113 A reorientation towards the experiences of children will, as a result, also bring into consideration the effect of treatment that may be particular to children because of their age. Thus, treatment which is peculiar to a child, but which has never been considered to fall within the purview of the prohibition must be scrutinized to assess whether its impact on a child reaches the threshold of treatment considered to be torture or other ill-treatment. In this context, the CRC Committee has stressed the need for a child-focused

C37.N179

[170] There are, however, an increasing number of reports that examine the treatment of children by reference to the prohibition against torture and other ill-treatment. See eg: Special Rapporteur, A/HRC/28/68 (n 7); Sonja Grover, *The Torture of Children During Armed Conflicts: The ICC's Failure to Prosecute and the Negation of Children's Human Dignity* (Springer 2014); Jose Quiroga, 'Torture in Children' (2009) 19 Torture: Journal on Rehabilitation of Torture Victims and Prevention of Torture 65; Susan Bitensky, *Corporal Punishment of Children: A Human Rights Violation* (Transnational 2006).

[171] Special Rapporteur, 'Interim Report of the Special Rapporteur' (3 August 2009) A/64/215 para 40. See generally also Nathalie Man, *Children, Torture and Power: The Torture of Children by States and Armed Opposition Groups* (Save the Children 2000) 23–28.

[172] (9 January 1996) E/CN.4/1996/35 para 10. See also: Special Rapporteur, A/HRC/28/68 (n 7) para 33; Special Rapporteur, A/64/215 ibid para 64; Nigel Rodley, 'Foreword' in Van Bueren (ed), *Childhood Abused* (n 166) ('children by virtue of their special vulnerabilities may well be victims of similar suffering by practices that would not be expected as grave if inflicted on adults'); Amnesty International, *Hidden Scandal, Secret Shame* (Amnesty International 2000) 15–16; Peter Newell, 'Developing a Children's Perspective on Torture' (1997) *OMCT Bulletin No 62 & 63* September 62; Eric Sottas, 'An NGO Perspective of the United Nation's Approach to Children and Torture' in Van Bueren (ed) *Childhood Abused* (n 166) 65.

[173] UN Independent Expert on Violence against Children, 'Report of the Independent Expert' (29 August 2006) A/61/299 para 36. See also: CRC GC 13 (n 75) para 15.

[174] Special Rappporteur, A/HRC/28/68 (n 7) para 33.

[175] See *A v UK* (n 62) (listing age as a relevant consideration when determining whether treatment can fall foul of the prohibition); *Prosecutor v Kvočka* (n 63) para 142–43 (finding that in assessing the seriousness of mistreatment, the ICTY should consider the physical or mental effect of the treatment on the particular victim, and in some cases consider subjective criteria such as age, sex, or state of health).

interpretation, urging States Parties to take into account the 'specific vulnerability'[176] of children generally and of children in vulnerable situations, including children in street situations,[177] and victims of child prostitution[178] in implementing their obligations under article 37.

C37.S21 **(c) The Definition of 'Torture'**

C37.P114 The definition of torture has been the subject of significant commentary.[179] Unsurprisingly but problematically, the CRC Committee,[180] like the HR Committee,[181] has on occasions recommend in its concluding observations that states adopt the definition of torture in CAT, article 1. This definition requires impugned conduct to: cause severe pain and suffering (whether physical or mental); be intentionally inflicted on the victim; be inflicted for a purpose; and be inflicted by a public official or other person acting in an official capacity.

C37.P115 This definition is problematic for two reasons. First, it is inconsistent with the approach of the HR Committee in its General Comment on article 7 of the ICCPR in which it resisted the adoption of a specific definition of torture,[182] and avoided any differentiation between the three levels of banned treatment under article 7.[183] Second, the CAT definition is confined to the actions of public officials, whereas the HR Committee has extended the prohibition against torture to treatment by public *and* private actors[184]—a position which has also been adopted by the CRC Committee.[185] Thus for the purposes of article 37, torture should not be confined to the actions of public officials. The text of the provision does not require this approach, the CRC Committee and HR Committee do not endorse this approach, and article 1(2) of CAT recognizes that a higher standard of protection under another international instrument can prevail.[186]

C37.P116 Significantly, the Rome Statute adopts a definition that is more closely aligned with the preferred approach of the CRC Committee and HR Committee.[187] While the focus on intentional infliction of severe pain and suffering under this definition is consistent with the CAT definition, as well as the jurisprudence of the European Commission of Human Rights ('ECmHR') and IACtHR,[188] importantly, there is no requirement that the action

C37.N176 [176] CO Turkey, CRC/C/TUR/CO/2-3 para 43.

C37.N177 [177] CO Morocco, CRC/C/MAR/CO/3-4 para 34; CO Costa Rica, CRC/C/CRI/CO/4 para 43. See also: CRC Committee, 'General Comment No 21 on Children in Street Situations' (21 June 2017) CRC/C/GC/21 para 60.

C37.N178 [178] CO Rwanda, CRC/C/RWA/CO/3-4 para 62.

C37.N179 [179] See generally: Rodley and Pollard (n 4) 85–124; Joseph and Castan (n 4) paras 9.03–9.22; Nowak and McArthur (n 4) 66–86, paras 92–131.

C37.N180 [180] CO Uzbekistan, CRC/C/UZB/CO/3-4 para 38; CO Nigeria, CRC/C/NGA/CO/3-4 para 38; CO Democratic Republic of the Congo, CRC/C/COD/2 para 38; CO Norway CRC/C/15/Add.23 para 15.

C37.N181 [181] CO Uzbekistan, CCPR/C/UZB/CO/3 para 10; CO Israel, CCPR/C/ISR/CO/3 para 11; CO Kuwait, CRC/C/KWT/CO/2 para 16.

C37.N182 [182] HRC GC 20 (n 5) para 4.

C37.N183 [183] Joseph and Castan (n 4) para 9.25. *Giri v Nepal* Comm No 1761/08 (24 March 2011) para 7.6. Cf: *El Hagog v Libya* Comm No 1755/08 (10 July 2012) para 8.6.

C37.N184 [184] HRC GC 20 (n 5) para 2.

C37.N185 [185] See eg CRC GC 8 (n 60) para 12 (extending the prohibition to corporal punishment in domestic settings).

C37.N186 [186] CAT (n 40) art 1(2). [187] Rome Statute of the ICC (n 54) art 7(2)(e).

C37.N188 [188] See eg: *Ireland v UK* (n 66) para 167 (defining torture as 'deliberate inhuman treatment causing very serious and cruel suffering'); *Greek Case* (1969) 12 YB 1 (ECtHR), 186 (treatment which deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable); *Bulacio v Argentina* (Judgment) Inter-American Court of Human Rights Series C No100 (18 September 2003) para 127.

must have been committed by a public official. The perpetrator must have 'custody' or 'control' of the victim, but this does not necessarily mean *legal custody or control* by a public authority, and could include legal control by a private person such as a parent or teacher over a child. But it could also include mere *physical custody or control* over a child without a legal basis for such custody or control.[189] Jurisprudence from the *ad hoc* international criminal tribunals has adopted the same expanded prohibition, not requiring that the pain must be inflicted by a public official.[190]

C37.P117 There is also no requirement under the Rome Statute definition that the treatment complained of, in the context of crimes against humanity, must have a certain purpose beyond the infliction of severe harm and suffering. Instead the emphasis is on the severity of the harm—an approach which focuses on the experience of the victim rather than the intention of the perpetrator. This approach addresses the concerns expressed by feminist scholars and advocates who have highlighted that the historical conception of torture, with its emphasis on public officials and specific purposes such as the extraction of information or punishment, excluded the severe pain and suffering experienced by women within the private sphere which is so often inflicted without any purpose.[191] Such concerns are equally applicable to children who remain vulnerable to experiences of severe pain and suffering in a range of contexts that may involve neither a public official nor a specific purpose whether in the home, classroom, school yard, the streets, and/or residential institutions designed for their care. Thus, the Rome Statute's definition of torture, which emphasizes the *intentional infliction* of *severe pain and suffering* by a person who has the control or custody of a child, appears consistent with a child-focused definition that is required under article 37.

C37.S22 *(i) Intentional Infliction (without Consent)*

C37.P118 The intention to which the definition of torture refers is the intention to cause severe pain and suffering, rather than the intention to commit a particular act on a child.[192] Under such an approach, purely negligent conduct is excluded from the definition of torture (although it may still amount to other forms of ill-treatment).[193] The Special Rapporteur has illustrated the distinction between intent and negligence:

C37.P119 A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does

C37.N199

[189] Note that 'custody' or 'control' is broader than 'imprisonment' or 'deprivation of liberty' under art 7(1)(e): Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 509.

[190] *Prosecutor v Kunarac et al* (n 63) para 495; *Prosecutor v Kunarac et al* (Appeal Chamber Judgment) Case No IT-96-23 & IT-96-23/1-A (12 June 2002) paras 150–51; *Prosecutor v Kvočka* (n 63) para 284.

[191] Frédéric Mégret, 'International Criminal Justice: A Critical Research Agenda' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge 2014) 36–41; Rana Lehr-Lehnhardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2002) 16 BYU Journal of Public Law 317.

[192] See eg: *Rojas Garcia v Colombia* Comm No 687/96 (3 April 2001) (HR Committee) (a police raid mistakenly conducted on the wrong house did not constitute torture as the raid lacked the requisite intention). See also: Nowak and McArthur (n 4) paras 106–07 (noting that intention is necessary under CAT); Rodley and Pollard (n 4) 123 (arguing that, in line with the influence of the Rome Statute, the element of purpose distinguishes torture from other cruel or inhuman treatment). See also: *Ireland v UK* (n 66) para 167 (ECtHR defining torture as 'deliberate' inhuman treatment causing very serious and cruel suffering, which must also be inflicted for a purpose); Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 20.

[193] Burgers and Danelius (n 40) 118.

not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with article 1, would qualify as torture.[194]

C37.P120 Thus, for a child's suffering to amount to torture it must have been deliberately and intentionally inflicted. Further, as Sarah Joseph and Melissa Castan note, as acts that would not normally cause severe pain and suffering sit outside the definition, the requisite intent 'would be missing unless the torturer was aware of the victim's special susceptibilities'.[195] In the case of children the threshold is clearly lower.

C37.P121 A question arises as to *reckless indifference*. Matthew Kramer has offered the example of a Josef Mengele style doctor who conducts hideous medical experiments on captives without anaesthetics. In failing to administer anaesthetics, this doctor is not deliberately seeking to inflict severe pain but, rather, anxious to avoid the added expense and time involved. The severe pain is neither a means nor an end to his true designs of medical experimentation. Kramer considers this an example of 'extreme recklessness' and argues that it should be considered torture.[196] However, although the doctor *is* recklessly indifferent to the pain he is causing, it is likely that a court would find that he knew, or ought to reasonably know, that his experimentation would cause severe pain and suffering *even though he did not intend it*. Indeed, the ICTY has adopted this approach in distinguishing between 'motivation' and 'intention'.[197] Whereas this doctor is not motivated by causing severe pain, it is a likely consequence of the actions he did intend, and thus satisfies the 'intention' threshold.

C37.P122 The CRC Committee against Torture also eschews consideration of motivation. In its General Comment No 2, it explained that 'elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances'.[198] Thus, while reckless indifference does not meet the standard of intentional infliction, if a person ought to know that his or her conduct is causing, or would cause, severe pain, he or she will likely be found in violation.[199]

C37.P123 This distinction is important. For when a person becomes aware, or ought to become aware, that their conduct is causing severe pain, they breach their obligations under article 37(a), even if they are not motivated by inflicting pain. This point was the basis for the Special Rapporteur finding that Australia's inadequate explanation for holding children seeking asylum in immigration detention constituted a breach of article 1 CAT.[200]

C37.S23 *(ii) Severe Pain or Suffering*

C37.P124 There is no precise formula to determine when the experience of a child will amount to '*severe pain and suffering*'. However, it is clear that a high threshold is required. In line

C37.N194 [194] Special Rapporteur, 'Report of the Special Rapporteur' (5 February 2010) A/HRC/13/39/Add.5, para 30 (note, of course, the purposive requirement under CAT art 1).

C37.N195 [195] Joseph and Castan (n 4) para 9.06ff; Rodley and Pollard (n 4) 117–22.

C37.N196 [196] Matthew Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (OUP 2014) 75.

C37.N197 [197] Tsvetana Kamenova, 'Survey of the Crime of Torture in the Jurisprudence of the ICTY' in Bev Clucas, Gerry Johnstone, and Tony Ward (eds), *Torture: Moral Absolutes and Ambiguities* (NOMOS 2009) 83 94.

C37.N198 [198] CAT GC 2 (n 29) para 9.

C37.N199 [199] See Oona Hathaway, Aileen Nowlan, and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 Virginia Journal of International Law 791, 802. cf Joseph and Castan (n 4) para 9.06.

C37.N200 [200] Human Rights Council, 'Report of the Special Rapporteur: Juan E Méndez' (6 March 2015) A/HRC/28/68/Add.1, 7; JAL 27/03/2014 Case No AUS 1/2014 paras 18–19.

with its disjunctive approach, the ECtHR, for example, insists on preserving 'the special stigma associated with torture that attaches only to deliberate inhuman treatment causing very serious and cruel suffering'.[201] At the same time it is increasingly recognized that 'certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future', owing to the 'increasingly high standard being required in the area of the protection of human rights'.[202]

C37.P125 For its part the CRC Committee has tended not to identify specific forms of treatment as torture, preferring instead to express its general concern at the existence of torture within a state.[203] By contrast, the ECtHR has held that the five interrogation techniques used in the *Northern Ireland Case*[204] were not torture but that rape,[205] suspending a naked person by their arms tied behind them,[206] and beating prisoners in custody with sticks and rifle butts were torture.[207] Although the HR Committee has determined that it will not distinguish between torture and inhuman treatment, it has held that following treatments violate the prohibition against torture and ill-treatment: 'beatings,' 'electric prod', and 'stringing up';[208] four days incommunicado detention, involving 'beatings, stringing up, asphyxiation, electric shocks and long periods of forced standing in the cold without anything to drink or eat';[209] and fifteen days of 'physical beatings, electric shocks (*picana*) and immersion in water (*submarino*)'.[210] The HR Committee adopts a

C37.N205

[201] *Ireland v UK* (n 66) paras 162, 167. Affirmed in inter alia: *Aydin v Turkey* (1997) 25 EHRR 251 para 82; *Aksoy v Turkey* (n 154) para 63. cf *Selmouni v France* (2000) 29 EHRR 403 para 96. One commentator has warned of the danger in applying the definition of torture too broadly as this may lessen the gravity of other more serious forms of evil perpetrated on children: Van Bueren (ed) *Childhood Abused* (n 166) 58. See also: Harris and others (n 4) 55. cf Rodley and Pollard (n 4) 124 (noting that the narrow definitions of torture have been invoked in contorted arguments for the lawfulness of egregious human rights abuses, eg by the USA).

[202] *Selmouni v France* (n 201) para 101. See also: *Cantoral-Benavides* v *Peru* Inter-American Court of Human Rights Series C No 69 (18 August 2000) para 99; Special Rapporteur, 'Report of the Special Rapporteur' (1 February 2013) A/HRC/22/53 para 14.

[203] See eg: CO Turkmenistan, CRC/C/TKM/CO/2-4 para 30 (welcomes amendment of 2012 Criminal Code that brings the definition of torture into line with CAT, and expresses concern about possible use of torture and ill-treatment on children for punishment or extraction of confessions); CO Iraq, CRC/C/IRQ/CO/2-4 para 36 (expressing concern about reported acts of torture); CO Morocco, CRC/C/MAR/CO3-4 para 34 (expressing concern that children are reported to suffer ill-treatment in police stations, despite the criminalization of torture in legislation). cf CO Uruguay, CRC/C/URY/CO/3-5 para 37 (expressing concern that the CAT Committee and Special Rapporteur have pointed out the State Party's use of excessive force, collective punishment in detention, locking children up for 22 hours per day, administration of anti-anxiety medication to juvenile detainees as a means of restraint); CO Israel, CRC/C/ISR/CO/2-4 para 35 (expressing concern about treatment of Palestinian children by military and police, including routine arrests in the middle of the night and being taken away from family while blindfolded, systematic physical and verbal violence, humiliation, painful restraints, hooding, death threats, sexual assaults against children or members of their family, restricted access to toilet, food and water, the use of solitary confinement). Rodley and Pollard observe that the fact that bodies do not identify specific practices as constituting torture testifies only to the inference that it is unnecessary in the context in which they work: (n 4) 95.

[204] *Ireland v UK* (n 66). The five techniques were wall standing, hooding, sleep deprivation, being subject to constant and intense noise, and deprivation of food and sleep. For a discussion of the case see: Rodley and Pollard (n 4) 100–05.

[205] See section II.C.5.(e)(iii). See also: *Aydin v Turkey* (n 201) para 83 (single act of rape can constitute torture); *Zontul v Greece* App No 12294/07 (17 January 2012) (forced penetration of male detainee's anus constituted rape); *Menesheva v Russia* (2006) 44 EHRR 1162 (ECtHR) (threat of rape constitutes torture).

[206] *Aksoy v Turkey* (n 154) para 64.

[207] *Salman v Turkey* (n 115); *Ihlan v Turkey* App No 22277/93 (ECtHR, 27 June 2000).

[208] *Azuaga Gilboa v Uruguay* Comm No 147/83 (HR Committee, 1 November 1985).

[209] *Berterretche Acosta v Uruguay* Comm No 162/83 (HR Committee, 25 October 1988).

[210] *Lafuente Penarrieta et al v Bolivia* Comm No 176/84 (HR Committee, 2 November 1987).

subjective evaluation that considers 'the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim'.[211]

C37.P126 Clearly if the treatments identified by the HR Committee or ECtHR were imposed on children they would also amount to torture. However, this jurisprudence is largely fashioned from the experiences of adults rather than children. As such, there remains a need to identify and assess whether experiences of severe harm and abuse to which children are more vulnerable by virtue of their age and circumstances would amount to torture. Such experiences could arise, for example, within the context of family violence in the home, bullying in the playground or workplace, sexual abuse and exploitation (whether in the context of the sale and/or trafficking of children), or the harm so many children experience when placed in detention or out of home care. Children's experiences in each of these contexts will amount to a violation of several rights under the Convention. However, the recognition that such treatment may also amount to a form of torture serves to elevate its significance and thus increase the pressure on states to take remedial action.

C37.S24 *(iii) Permissible Pain and Suffering*

C37.S25 Lawful Sanctions

C37.P127 Not all pain and suffering experienced by a child will amount to torture or other ill-treatment. The definition of torture in article 1 CAT specifically excludes 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'. Thus, 'lawful sanctions' will not amount to torture and may only be classified under CAT as cruel, inhuman, and degrading treatment or punishment. Scholars have suggested that this exception 'may swallow the rule', by enabling states to avoid the prohibition by sanctioning severe punishment.[212]

C37.P128 The first draft of CAT did not contain this loophole, but limited lawful sanctions 'to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners'.[213] This qualification was excised because the Rules are not legally binding, though curiously, a proposal to qualify 'lawful sanctions' by reference to: 'the extent consistent with international rules for the treatment of persons deprived of their liberty', was not adopted.[214] Nevertheless, this should not be interpreted to enable states to enact perverse laws, but rather only to permit sanctions that are permitted under international law.[215] The Special Rapporteur agrees with this approach.[216]

C37.N211 [211] *Vuolanne v Finland* Comm No 265/87 (HR Committee, 2 May 1989), para 9.2. See further Joseph and Castan (n 4) para 9.30. See also jurisprudence of the ICTY: *Prosecutor v Kvočka* (n 63) paras 142–43.

C37.N212 [212] See eg Gail Miller, 'Defining Torture' (Floersheimer Center for Constitutional Democracy 2005) 20.

C37.N213 [213] Commission on Human Rights, 'Letter dated 18 January 1978 from the Permanent Mission of Sweden to the UN Office at Geneva Addressed to the Division of Human Rights' (23 January 1978) E/CN.4/128, 5; Annex, art 1.1.

C37.N214 [214] Commission on Human Rights, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and other cruel, inhuman or degrading treatment or punishment' (19 December 1978) E/CN.4/1314 paras 46–57.

C37.N215 [215] Joseph and Castan (n 4) para 9.22; Abdullah Na'im, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of "Cruel Inhuman or Degrading Treatment"' in Abdullah Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) 29–32. Though note that Nowak and McArthur consider that the lawful sanctions clause under CAT art 1, has 'no scope of application and must simply be ignored' because action that is lawful under international law will not satisfy the other elements of art 1: Nowak and McArthur (n 4) 84.

C37.N216 [216] Special Rapporteur, 'Report of the Special Rapporteur' (10 January 1997) E/CN.4/1997/7 para 8.

C37.S26 Consensual Treatment or Treatment Administered to Further a Child's Best Interests

C37.P129 Torture does not extend to consensual treatment.[217] If this were the case it would lead to the possibility of absurd results. For instance, it would prohibit consensual medical treatment involving severe pain and suffering necessary to prolong, save, or improve the quality of a person's life. A more complex question arises, however, where medical treatment involving severe pain and suffering is administered without consent. The example typically used in this scenario is the unconscious mountaineer whose leg must be amputated to save his or her life, or a person with a mental illness who requires invasive but lifesaving medical treatment.

C37.P130 In such scenarios involving adults, the best interests principle or the doctrine of medical necessity[218] are used to justify the intentional infliction of severe pain and suffering. The same principles apply with respect to the situation of children who lack the capacity to consent to medical treatment in circumstances where medical professionals determine that an intervention is necessary to secure the child's best interests and his or her rights to life and health. In such circumstances, parents and/or the child's legal guardian can consent to such treatment on behalf of the child.[219]

C37.P131 However, care must be taken to ensure that the treatment in question is in reality necessary to secure a child's best interests and his or her rights to life and health. In this respect, there has historically been a tendency to assume that the sterilization of a young girl (or woman) with an intellectual disability will be in her best interests, despite the severe physical and mental pain and suffering associated with this procedure. There is now a growing awareness among human rights bodies that this procedure is often administered without justification and can constitute a form of torture.[220]

C37.S27 **(d) The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment**[221]

C37.P132 As noted above, the HR Committee has determined that it is not necessary 'to establish sharp distinctions between the different kinds of punishment or treatment'[222] prohibited under article 7 of the ICCPR and that 'the distinctions depend on the nature, purpose and severity of the treatment applied'.[223] However, the work of the HR Committee offers no insight into how the nature, purpose, and severity of treatment should be assessed when distinguishing between the different types of treatment. The work of the CRC Committee is no more helpful. As a consequence, guidance must be drawn from domestic courts, and the ECtHR, which have considered these terms more carefully.

C37.N228

[217] Rodley and Pollard (n 4) 80.

[218] For a discussion of case law on the issue, see ibid 410–11. See also *Herczegfalvy* v *Austria* App No 10533/83 (ECtHR, 24 September 1992) para 83. cf Special Rapporteur (Juan E Méndez), 'Report of the Special Rapporteur' (1 February 2013) A/HRC/22/53 paras 31–35 (criticizing the doctrine of medical necessity outlined in *Herczegfalvy v Austria* as being an obstacle to protection from arbitrary abuses in health-care settings where the person concerned is deprived of legal capacity, particularly where intrusive, irreversible or non-consensual treatments are performed on patients from marginalized groups for their 'best interests', and particularly where violations of the Convention on the Rights of Persons with Disabilities are sought to be justified using it).

[219] CRC Committee, 'General Comment No 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health' (17 April 2013) CRC/C/GC/15 para 31.

[220] See eg: Special Rapporteur, A/HRC/22/53 (n 202) para 32; Special Rapporteur (Manfred Nowak), 'Report of the Special Rapporteur' (15 January 2008) A/HRC/7/3 para 38; *VC v Slovakia* App No 18968/07 (22 March 2011) (ECtHR).

[221] See generally Nowak and McArthur (n 4) 557–76 paras 43–79.

[222] HRC GC 20 (n 5) para 4. [223] ibid.

C37.S28 *(i) Cruel Treatment or Punishment*

C37.P133 The absence of the term 'cruel' in article 3 of the ECHR, and the HRC's decision to adopt a conjunctive interpretation of the prohibition means there is little international jurisprudence on the meaning of 'cruel'. The HR Committee seldom refers to the word. In *Gilboa v Uruguay*, it concluded that Mr Gilboa's subjection to beatings, an electric prod, and stringing up amounted to 'torture and to cruel and degrading treatment'[224] but failed to explain what constitutes 'cruel and degrading treatment'.

C37.P134 Commentators have suggested there is little substantive difference between cruel and inhuman treatment. Manfred Nowak, for example, refers to the terms as one concept,[225] and has argued that they collectively amount to treatment which does not satisfy one of the essential elements of torture and/or does not occasion a sufficient degree of suffering.[226] Other commentators argue that the terms 'cruel' and 'inhuman' carry different meanings,[227] aligning with the disjunctive approach of the ECtHR's sliding scale of severity. The ECmHR explained in the *Greek Case*, '[i]t is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading'.[228] Consequently 'cruel' treatment is likely to be both inhuman and degrading. For Yoram Dinstein, '[i]t is not quite clear what level of suffering inflicted merits the label "cruel", but perhaps between inhuman conduct and torture'.[229]

C37.P135 Nowak notes that 'exceptionally' the HR Committee has established cruel treatment alone, or inhuman treatment alone.[230] In *Peart and Peart v Jamaica*, the HR Committee held that assaults and death threats by prison wardens or soldiers constituted cruel treatment,[231] while in *Polay Campos v Peru*, the HR Committee found Peru's total denial of Mr Polay Campos' visitation rights following his conviction, including restrictions placed on correspondence between him and his family, constituted inhuman treatment.[232] It is not clear why the distinction was made in each case.

C37.P136 Domestic courts have generated considerable jurisprudence on the meaning of the phrase 'cruel and unusual',[233] which appeared in article 10 of the *Bill of Rights 1688* (UK) and was later adopted by a number of states. For example, section 12 of the *Canadian Charter on Rights and Freedoms*[234] provides that, 'everyone has the right not to be subjected to any cruel and unusual treatment or punishment'.[235] In *R v Smith*,[236] although the Supreme Court failed to agree on a uniform definition, the common thread of the

C37.N224 [224] *Gilboa v Uruguay* (n 208) 128. See generally McGoldrick (n 164) para 9.15.

C37.N225 [225] Nowak, *CCPR Commentary* (n 4) 163. See also Nowak and McArthur (n 4) 558.

C37.N226 [226] Nowak, *CCPR Commentary* (n 4) 163.

C37.N227 [227] See eg: Paul Sieghart, *The International Law of Human Rights* (Clarendon Press 1983) 165–67; Yoram Dinstein, 'The Right to Life, Physical Integrity and Liberty' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 114, 123–24.

C37.N228 [228] *Greek Case* YB XII (5 November 1969) 501; Pieter Van Dijk and Godfridus Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Deventer 1990) 226.

C37.N229 [229] Dinstein (n 227) 123–24. [230] Nowak, *CCPR Commentary* (n 4)165.

C37.N231 [231] App Nos 464/1991 and 482/1991 para 11.6. [232] App No 577/1994 para 8.6.

C37.N233 [233] See generally: Clayton and Tomlinson (n 4) paras 8.16–8.51.

C37.N234 [234] *Canada Act 1982* (UK) ch 11, sch B, pt I ('Canadian Charter of Rights and Freedoms').

C37.N235 [235] See eg: Michael Jackson, 'Cruel and Unusual Treatment or Punishment?' (1982) UBC Law Review 189 (outlines history of provision and its interpretation); Walter Tarnopolsky, 'Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do we Look for Guidance?' [1978] 10 Ottawa Law Review 1 (outlining a number of tests to determine whether treatment is cruel and unusual).

C37.N236 [236] *R v Smith* [1987] 1 SCR 1045.

separate judgments is that the phrase extends to punishment or treatment that is 'grossly disproportionate' or 'so excessive as to outrage standards of decency'. With respect to the first test, Lamer J explained that:

C37.P137 In assessing whether a sentence is grossly disproportionate the Court must first consider the gravity of the offence, the personal circumstances of the offender, and the particular circumstances of the case to determine what range of sentence would have been appropriate to punish, rehabilitate, deter or protect society from the particular offender.[237]

C37.P138 With respect to the meaning of this phrase as it appears in the *Eighth Amendment of the United States Constitution,* the Supreme Court of the United States has explained that it is flexible, dynamic, and covers more than physically barbarous punishments.[238] Its guiding light is 'human dignity'[239] and its meaning is subject to 'evolving standards of decency that mark the progress of a maturing society'. [240] In *Furman v Georgia*, Brennan J held that there are four principles that determine whether a particular punishment is cruel and unusual. The particular punishment must not be: degrading to human dignity; inflicted in a wholly arbitrary fashion; clearly and totally rejected throughout society; and patently unnecessary.[241]

C37.P139 Justice Brennan explained that this is a cumulative test that assesses the strength of all four factors. In *Graham v Florida*, the Court accepted that 'the concept of proportionality is central' to this analysis,[242] flowing from the 'basic precept of justice that punishment for crime should be graduated and proportioned'.[243] In line with its 'evolving standards', recent decisions have prohibited: the imposition of capital punishment for crimes committed by juveniles;[244] sentences of life without parole for juveniles for non-homicide offences;[245] and, more recently, sentences of life without parole for all juvenile offenders.[246]

C37.S29 *(ii) Inhuman Treatment or Punishment*

C37.P140 There are two features that distinguish inhuman treatment and punishment from torture. First, the intensity of suffering required to establish inhuman treatment is less than for torture.[247] According to the ECmHR:

C37.P141 Ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is relative: it depends on all the circumstances of a case including the duration of the treatment, the physical and mental effects and sometimes the sex, age and state of health of the victim.[248]

C37.P142 Significantly, from the perspective of children, this test expressly provides that the age of the victim is a relevant factor in determining whether treatment amounts to inhuman treatment. In addition, the Court has noted in more recent cases that the threshold

C37.N248

[237] ibid para 56. For a discussion of treatment or punishment which has been found to violate the prohibition against cruel and unusual treatment see: Clayton and Tomlinson (n 4) paras 8.86–8.98.

[238] *Gregg v Georgia* 428 US 153, 171 (1976). [239] *Furman v Georgia* 408 US 238, 270 (1972).

[240] *Trop v Dulles* 356 US 86, 101 (1958). [241] *Furman v Georgia* (n 239) 281.

[242] *Graham v Florida* 560 US 48 (2010), (slip op, 8).

[243] *Roper v Simmons* 543 US 551, 560 (2005); *Weems v United States* 217 US 349, 367 (1910).

[244] *Roper v Simmons* (n 243). [245] *Graham v Florida* (n 242).

[246] *Miller v Alabama* 567 US 460 (2012).

[247] *Ireland v UK* (n 66) para 167: 'In the Court's view this distinction derives principally from a difference in the intensity of the suffering inflicted'.

[248] ibid para 162. For a summary of claims that have not satisfied this threshold requirement see: Harris and others (n 4) 61, footnote 7.

between torture and inhuman treatment is not fixed, and that certain acts classified in the past as 'inhuman and degrading treatment' could be classified as torture in the future.[249]

C37.P143 Second, there is no requirement that the suffering be intended for the treatment to be inhuman.[250] In *Selcuk & Asker v Turkey*[251] the ECtHR held that the destruction of the applicants' homes by security forces amounted to inhuman treatment. As regards the motive for the actions of the security forces, the Court declared that:

C37.P144 > even if it were the case that the acts in question were carried out without any intention of punishing the applicants but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill treatment.[252]

C37.P145 Accordingly, there is no requirement that there must be an intent to cause suffering for an act or omission to amount to inhuman treatment. Mere negligence may be sufficient if the level of suffering experienced by the victim exceeds the minimum threshold.

C37.S30 *(iii) Degrading Treatment or Punishment*

C37.P146 Torture is always inhuman and degrading,[253] and treatment may be both inhuman and degrading,[254] but degrading treatment is not necessarily inhuman; the critical element is humiliation.[255] Nowak and McArthur define *degrading treatment* or punishment as 'the infliction of pain or suffering, whether physical or mental, which aims at *humiliating* the victim'.[256] Significantly, they note that even where the particular pain or suffering does not reach the threshold of 'severe', conduct 'must be considered as degrading treatment or punishment if it contains a particularly humiliating element'.[257]

C37.P147 In the *Greek Case*, the ECmHR defined degrading treatment or punishment as treatment that grossly humiliates a person before others or drives them to act against their will or conscience.[258] The *East African Asians Case* added conduct of a certain level of severity; lowering the victim in rank, position, reputation, or character in their own or other people's eyes, was inhuman.[259] In *Tyrer v UK*,[260] the ECtHR explained that for punishment to be degrading, the relevant humiliation or debasement must be more than the level of humiliation associated with being convicted and punished by a court,[261] depending on 'all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution'.[262] The CRC Committee adopts a similar approach, and has found that emptying a bucket of urine over the head of a prisoner, throwing his food and water on the floor and his mattress out of his cell,[263] beatings,[264] and repeated soaking of an inmates bedding,[265] constituted degrading treatment. The HR Committee,[266] and several national courts have also endorsed and cited the ECtHR's test.[267]

C37.N249 [249] *Selmouni v France* (n 201) para 101.
C37.N250 [250] Harris and others (n 4) 62; *Ireland v UK* (n 66) para 167.
C37.N251 [251] *Selcuk & Asker v Turkey* (1998) 26 EHRR 477. [252] ibid paras 79–80.
C37.N253 [253] *Greek Case* (n 228). [254] See eg: *Ireland v UK* (n 66); *Tomasi v France* (n 68).
C37.N255 [255] *Tyrer v United Kingdom* (1978) 2 EHRR 1; *Price v UK* (2002) 34 EHRR 53; *Pretty v UK* (2002) 35 EHRR 1.
C37.N256 [256] Nowak and McArthur (n 4) 558 para 44 (emphasis in original). [257] ibid.
C37.N258 [258] *Greek Case* (n 228). See also: *Jalloh v Germany* (2007) 44 EHRR 32.
C37.N259 [259] *East Asian Africans v United Kingdom* (1973) 3 EHRR 76 para 189. [260] *Tyrer v UK* (n 255).
C37.N261 [261] ibid para 30. [262] ibid para 30. [263] *Francis v Jamaica* No 320/1988 para 12.4.
C37.N263 [264] *Thomas v Jamaica* No 321/1988 para 9.2. [265] *Young v Jamaica* No 615/1995 para 5.2.
C37.N266 [266] See: *Vuolanne v Finland* Comm No 265/87 (7 April 1989), para 9.2; McGoldrick (n 164) para 9.21.
C37.N267 [267] Namibia: *Ex Parte: Attorney-General, In Re: Corporal Punishment by Organs of the State* (1991) 3 SA 76, 87; Zimbabwe: *Ncube & Others v State* [1987] LRC (Const) 442, 463; South Africa: *S v Williams* [1995] 3 SA 632, 643.

C37.P148 The test precludes consideration of public opinion,[268] the length of time the treatment was applied, and its effectiveness as a deterrent.[269] Publicity may be a factor in determining whether punishment is degrading, but its absence does not preclude a finding of degrading treatment or punishment.[270] It might be sufficient, but the fact that a person feels humiliated and degraded is not conclusive, particularly if other people would not feel humiliated.[271] It will suffice that the relevant treatment is intended to debase or humiliate,[272] but intention or purpose is not required.[273] Finally, action may still fall foul of the prohibition if a person does not feel humiliated or degraded, if it is nevertheless adjudged incontrovertibly degrading.[274]

C37.S31 **(e) Examples of Treatment Which May Violate the Prohibition**

C37.P149 There is a large body of international, regional, and domestic jurisprudence that can be drawn upon to assist in determining whether a particular form of treatment or punishment will be in breach of the prohibition against torture and other ill-treatment under article 37(a).[275] This jurisprudence should always be reviewed in light of two considerations. First, the majority of decisions regarding the prohibition are based on the experiences of adults as victims and lesser acts may therefore violate the prohibition when inflicted on children. Second, the Convention, like all other human rights instruments is a 'living instrument … which must be interpreted in light of present day conditions'.[276] This means that, with the passage of time, practices that were once condoned may now be condemned as being in breach of the prohibition against torture and other ill-treatment.[277]

C37.S32 *(i) Corporal Punishment*[278]

C37.P150 The practice of corporal punishment gives rise to issues under articles 3, 16, 19, and 28(2) of the Convention which are addressed in the commentary to these provisions. Of

C37.Nav9

[268] *Tyrer v UK* (n 255) para 31. [269] ibid para 31. [270] ibid para 32.
[271] ibid para 32; *Campbell & Cosans v United Kingdom* (1992) 4 EHRR 293 para 30. See: Duffy (n 169) 319.
[272] *Raninen v Finland* (1997) 26 EHRR 563 para 55.
[273] *Peers v Greece* (2001) 33 EHRR 51 para 68, 74; *Grori v Albania* App No 25336/04 (2009) para 125.
[274] *Campbell & Cosans v UK* (n 271) para 30.
[275] See generally Rodley and Pollard (n 4) ch 3, 82–144. For a comprehensive discussion of the jurisprudence of the ECHR see: Harris and others (n 4) 61–88. For the ICCPR see: Joseph and Castan (n 4) paras 9.49–9.149; McGoldrick (n 164) paras 9.1–9.31. For the ACHR: Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) paras 15.01–15.38; Julie Lantrip, 'Torture and Cruel Inhumane and Degrading Treatment in the Jurisprudence of the Inter American Court of Human Rights' (1999) 5 ISLA Journal of International and Comparative Law 551.
[276] *Tyrer v UK* (n 255) para 31. [277] See extract from *Selmouni v France* (n 201) para 101.
[278] On corporal punishment generally see: Rodley and Pollard (n 4) ch.10. With respect to the corporal punishment of children see: Michael Freeman and Bernadette Saunders, 'Can we Conquer Child Abuse if We don't Outlaw Physical Chastisement of Children?' (2014) 22 International Journal of Children's Rights 681; Bernadette Saunders, 'Ending the Physical Punishment of Children by Parents in the English-Speaking World: The Impact of Language, Tradition and Law' (2013) 21 International Journal of Children's Rights 443; Jennifer Lansford and others, 'Forms of Spanking and Children's Externalizing Behaviours' (2012) 61 Family Relations 224; Bernadette Saunders and Chris Goddard, *Physical Punishment in Childhood—the Rights of the Child* (Wiley Blackwell 2010); 'Corporal Punishment of Children' special issue on corporal punishment of children in (2010) Law and Contemporary Problems 73(2); Christopher Ellison and Matt Bradshaw, 'Religious Beliefs, Sociopolitical Ideology, and Attitudes toward Corporal Punishment' (2009) 30 Journal of Family Issues 320; Council of Europe, *Eliminating Corporal Punishment: A Human Rights Imperative for Europe's Children* (Council of Europe 2008); Elizabeth Gershoff and Susan Bitensky, 'The Case against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications for US Public Policy' (2007) 13 Psychology, Public Policy and Law 231; Susan Bitensky, *Corporal Punishment of Children: A Human Rights Violation* (Transnational 2006); Elizabeth Gershoff, 'Corporal

relevance to this chapter is the fact that the CRC Committee in its General Comment No 8 declared this practice to be 'invariably degrading'[279] and a violation of article 37(a).[280] This position has been a feature of the CRC Committee's concluding observations,[281] and is consistent with the approach adopted by the HR Committee,[282] the ESCR Committee,[283] the Committee against Torture,[284] and the Special Rapporteur on Torture.[285]

C37.P151 For its part, the CRC Committee has also adopted an extensive definition of corporal punishment which is considered to be 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light', including inter alia hitting, with the hand or another implement, hair-pulling, forced ingestion, shaking, and forcing children to stay in uncomfortable positions.[286] Additionally, the Committee considers non-physical punishment such as: belittling, humiliating, denigrating, scapegoating, threatening, scaring or ridiculing children, to be cruel and degrading.[287] Moreover, The Committee frequently recommends that states prohibit corporal punishment 'in all settings',[288] including schools and residential settings.[289] As such, its commitment to the prohibition of this practice is not confined to the judicial system and extends to the home and schools.

C37.P152 The robust and uncompromising position of the CRC Committee has not been followed by the ECtHR which has adopted a more incremental approach. It has held that *judicial corporal punishment* is necessarily degrading.[290] As regards this practice within schools and the home, however, it has focused on factors such as the context, age, and health of the child and the severity of the harm experienced by the child to determine whether it reaches the requisite threshold for degrading or inhuman treatment. It has therefore held that three strikes to the buttocks, through shorts, of a 7-year-old schoolboy

Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' (2002) 128 Psychological Bulletin 539.

C37.N279 [279] CRC GC 8 (n 60) para 11.

C37.N280 [280] Not all members of the Committee have relied on art 37 to denounce corporal punishment. eg Thomas Hammarberg has explained that 'article 19 of the Convention, and also article 28, which covered corporal punishment in schools, were the Committee's main points of reference in its discussions with Governments regarding corporal punishment': 'Summary Record of the 205th meeting' (20 January 1995) CRC/C/SR.205 para 63.

C37.N281 [281] CO Sweden, CRC/C/SWE/CO/5 para 26; CO Uruguay, CRC/C/URY/CO/3-5 para 38; CO Tanzania, CRC/C/TZA/CO/3-5 para 72–73; CO Tuvalu, CRC/C/TUV/CO/1 para 63.

C37.N282 [282] HRC GC 20 (n 5) para 5.

C37.N283 [283] ESCR Committee, 'General Comment No 13: The Right to Education' (8 December 1999) E/C.12/1999/10 para 41.

C37.N284 [284] CO Australia, CAT/C/AUS/CO/1, 22 May 2008, para 31; CO Indonesia, CAT/C/IDN/CO/2 paras 15, 17.

C37.N285 [285] Special Rapporteur, E/CN.4/2003/68 (n 108) para 26.

C37.N286 [286] CRC GC 8 (n 60) para 11.

C37.N287 [287] ibid para 11.

C37.N288 [288] ibid para 43 See also eg: CO Guatemala, CRC/C/GTM/CO/3-4 paras 53–54; CO Lao People's Democratic Republic, CRC/C/LAO/CO/2 paras 38–39.

C37.N289 [289] CO Timor Leste, CRC/C/TLS/CO/2-3 para 32; CO Lao People's Democratic Republic, CRC/C/LAO/CO/2 paras 38–39; CO Singapore, CRC/C/SGP/CO/2-3 paras 39–40; CO Guatemala, CRC/C/GTM/CO/3-4 paras 53–54; CO Kazakhstan, CRC/C/15/Add.213 paras 37–38.

C37.N290 [290] *Tyrer V UK* (n 255) para 33 (holding that although the applicant, a 15-year-old boy who was given three strikes with a birch did not suffer any severe or long lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity').

with a soft-soled shoe, causing no visible injury was not degrading punishment.[291] In contrast, a single stroke of the cane to the hand of a 16-year-old schoolgirl, leaving a weeklong mark was held to be degrading treatment.[292] So too was the bruising suffered by a 9-year-old boy at the hands of his stepfather.[293] However, the Court made it clear that 'this finding does not mean that article 3 is to be interpreted as imposing an obligation on states to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child'.[294]

C37.P153 The failure to impose an absolute prohibition on all forms of corporal punishment conflicts with the approach adopted by the CRC Committee and other international human rights bodies. However, the absolutist position lacks an explanation as to why a single slap on a child's hand or buttocks necessarily violates the prohibition. Indeed, it is arguable that a more nuanced approach to the relationship between corporal punishment and the prohibition would reflect the reality that corporal punishment *may*, but not necessarily will, amount to cruel, inhuman, or degrading punishment or even torture. This more tentative approach appears to be favoured by the Human Rights Council, which has merely stated that 'corporal punishment, including of children, *can* amount to cruel, inhuman or degrading punishment or even to torture'.[295] In which case, article 37 should not be considered to contain an absolute prohibition against all forms of corporal punishment. Instead, other articles under the Convention, such as article 3 (the best interests principle), article 19 (the protection against all forms of abuse and violence) and article 16 (the right to privacy including the protection of a child's physical integrity) may be better suited to address the less invasive forms of corporal punishment that do not reach the threshold required for torture and other ill-treatment.[296]

C37.S33 *(ii) Neglect and Abuse*

C37.P154 Article 19 imposes an obligation on states to protect children from all forms of violence, abuse, neglect, and harm when in the care of their parents or legal guardians. However, the ECtHR has held that the failure of a state to undertake appropriate measures to protect children from the consequences of neglect and abuse, while in the care of their parents or guardians, can amount to a violation of the prohibition against inhuman and degrading treatment.[297]

C37.N295

[291] *Costello-Roberts v UK* (n 62).

[292] *Warwick v United Kingdom* App No 9471/81 (18 July 1986).

[293] *A v UK* App No 25599/94 (18 September 1997) para 55 (European Commission of Human Rights).

[294] ibid. Note, only one member of the Commission was of the view that corporal punishment of children, regardless of the degree of its severity or of the injuries caused, is by its very nature inhuman and degrading treatment: see Concurring Opinion of Mr L Loucaides, 627–28.

[295] Human Rights Council, Resolution 8/8 (18 June 2008) para 7(a). The Commission on Human Rights adopted a resolution with almost precisely the same language: 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (20 April 2000) E/CN.4/RES/2000/43 para 3.

[296] See chapters 3, 16, and 19 of this Commentary. It has been argued, for example, that art 19 offers the 'clearest indictment of corporal punishment': Michael Freeman, 'Children are Unbeatable' (1999) 13 Children & Society 130, 135. See also *YG v The State* Case (2018) (1) SACR 64 (High Court of South Africa) (holding that corporal punishment is consistent with children's best interests).

[297] *Z and Others v UK* [2001] 34 EHRR 97; *E and Others v UK* (2003) 36 EHRR 31; *ES and Others v Slovakia* App No 8227/04 (15 September 2009); *M and M v Croatia* App No 10161/13 (3 September 2015).

C37.S34 *(iii) Rape and Other Forms of Sexual Abuse*

C37.P155 Although articles 19 and 34 deal with sexual abuse of children, human rights bodies have recognized the relevance of article 37(a) to sexual abuse.[298] For example, in *Aydin v Turkey*,[299] the ECtHR held the rape of a 17-year-old girl amounted to torture.[300] The Court premised its holding on the consideration that public officials can exploit the vulnerability of victims; the 'deep psychological scars' left by rape 'do not respond to the passage of time as quickly as other forms of physical and mental violence'; and forced penetration leaves the victim 'feeling debased and violated both physically and emotionally'.[301] Similarly in *Raquel Martí de Mejía v Peru*,[302] the Inter-American Commission on Human Rights ('IACmHR') held the rape of a school principal by a Peruvian military counterinsurgency unit amounted to torture. The Special Rapporteur on Torture,[303] the ICTR,[304] and the ICTY[305] have also recognized rape as a form of torture and extended the definition of rape to include vaginal, anal, and oral penetration.[306]

C37.P156 A condition precedent to the findings of the IACmHR was that the perpetrator of the rape was a public official. The ECtHR likewise emphasized in *Aydin v Turkey* that the fact that the rape was committed by a public official made the conduct 'an especially grave and abhorrent form of ill-treatment'.[307] However in *MC v Bulgaria*, the ECtHR went further, holding that the Bulgarian authorities' failure to effectively investigate two allegations of rape committed by *private individuals* against a 14-year-old girl, constituted a violation of article 3 ECHR.[308] The Court held that states have a positive obligation 'to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.[309] This approach indicates that it is not necessary that the perpetrator of a rape be a public official for this harm to be considered a form of torture.

C37.P157 Moreover, the jurisprudence of the ICTY indicates that other forms of sexual violence can amount to torture. For example, in *Furundzija*, the Appeals Chamber held that it is 'inconceivable' that sexual violence could not be considered severe enough to constitute torture.[310] The Court reiterated this decision in *Kunarac*, holding that rape and sexual

C37.N298 [298] The CRC Committee has held that art 19 should be read in conjunction with articles that relate to violence and child protection: CRC GC 13 (n 75) para 67.

C37.N299 [299] *Aydin v Turkey* (n 201). [300] ibid para 86. [301] ibid para 83.

C37.N302 [302] *Raquel Martí de Mejía v Peru* Case No 10.970, Report No 5/96 (1 March 1996).

C37.N303 [303] 'Interim Report of the Special Rapporteur' (9 August 2012) A/67/279 para 55. Former Special Rapporteurs on Torture have adopted the same position. See the following reports by the Special Rapporteurs: E/CN.4/1986/15 (19 February 1986) para 119; E/CN.4/1992/SR.21 (12 January 1995) para 35; E/CN.4/1995/34 (12 December 1995) para 19; A/HRC/7/3 (15 January 2008) para 34.

C37.N304 [304] *Prosecutor v Jean-Paul Akayesu*, Trial Chamber I, Case No ICTR–96-4-T (2 September 1998) para 597.

C37.N305 [305] *Prosecutor v Zdravko Mucić et al*, ICTY, Trial Chamber, Case No IT-96-21-T (16 November 1998) paras 494–96.

C37.N306 [306] *Prosecutor v Furundžija*, ICTY, Trial Chamber, Case No IT-95-17/1-T, (10 December 1998) 185. The ICTY has gone one step further and held that the mass rape of women and girls including a girl as young as 12 by Bosnian Serbs constituted a crime against humanity: *Prosecutor v Kunarac et al*, ICTY, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T (22 February 2001). Decision upheld on appeal: *Prosecutor v Kunarac et al*, ICTY, Appeal Chamber, Case No IT-96-23 & IT-96-23/1-A (12 June 2002).

C37.N307 [307] *Aydin v Turkey* (n 201) para 83.

C37.N308 [308] *MC v Bulgaria* (2005) 40 EHRR 20 para 187. Note that the ECtHR had earlier held that the prohibition on torture extended to the acts of private persons. See: *A v UK* (n 62), *Assenov* (n 97), *Costello-Roberts* (n 62).

C37.N309 [309] *MC v Bulgaria* (n 308) para 153. [310] *Prosecutor v Furundzija* (n 306) paras 113–14.

violence per se constitutes a level of pain and suffering sufficient to reach the threshold of torture.[311]

C37.S35 *(iv) Medical and scientific experimentation*

C37.P158 Article 37(a) does not include the prohibition against non-consensual medical and scientific experimentation which is listed under article 7 of the ICCPR. Although attempts were made to include such a provision during drafting, they were never developed largely because it was thought that this would further delay the adoption of the Convention.[312] In any event, the principle of external system coherence requires that the interpretation of article 37 should align with the interpretation of article 7 unless there is clear evidence that the drafters of the Convention intended to depart from the meaning of article 7 under the ICCPR.[313] Given the absence of any evidence to this effect, it follows that article 37 should be interpreted to protect children against medical and scientific experimentation without their consent, or where relevant, the consent of their parents or legal guardians.[314]

C37.S36 *(v) Conditions of Detention*

C37.P159 The CRC Committee has repeatedly expressed its concern about the conditions of children's detention, usually under the general heading of juvenile justice but also within the context of article 37. Its comments tend to be expressions of general concern,[315] with occasional references to specific issues such as: the use of straps or belts and seclusion in mental health settings;[316] the use of anti-anxiety medication to restrain juveniles;[317] the administration of electric shock in drug rehabilitation centres;[318] overcrowding;[319] solitary confinement;[320] hooding of the head and face in a sack, and death threats;[321] restricted access to food, water, and sanitation;[322] poor education[323] and health services;[324]

C37.N39 sanitary conditions;[325] lack of opportunities for exercise;[326] poor ventilation and access to

[311] *Prosecutor v Kunarac et al* (n 63) para 150–51.

[312] The proposed paragraph provided that:

> States Parties shall ensure that a child shall not be subject to any medical or scientific experimentation or treatment unless it is with the free and informed consent of the child or where appropriate that of the child's parents. In any case, such experimentation or treatment shall not be adverse to the child and shall be in the furtherance of child health.' E/CN.4/1989/WG.1/WP.64 para 4; *Legislative History* (n 2) 601.

[313] Tobin, 'Seeking to Persuade' (n 8) 37–39.

[314] For a discussion of the issues associated with medical experimentation involving children under the Convention see the commentary on art 36.

[315] See eg: CO Bolivia, CRC/C/15/Add.95 para 30; CO Japan, CRC/C/15/Add.90 para 27; CO Myanmar, CRC/C/15/Add.69 para 26; CO Fiji, CRC/C/15/Add.89 para 46; CO Slovakia, CRC/C/15/Add.140 para 52; CO Burundi, CRC/C/15/Add.133 para 73; CO Suriname, CRC/C/15/Add.59 para 130.

[316] See eg CO, Sweden CRC/C/SWR/CO/5 para 26(b).

[317] CO Uruguay, CRC/C/URY/3-5 para 37(b).

[318] CO Cambodia, CRC/C/KHM/CO/2-3 para 38.

[319] See eg: CO Iraq, CRC/C/IRQ/CO/2-4 para 86; CO Fiji, CRC/C/FJI/CO/2-4 para 71(d); CO Austria, CRC/C/AUT/CO/3-4 para 67(e); CO Azerbaijan, CRC/C/AZE/CO/3-4 para 67(f).

[320] See eg: CO Sweden, CRC/C/SWE/CO/5-6 para 25; CO Kyrgyzstan, CRC/C/KGZ/CO/3-4 para 28; CO Portugal, CRC/C/PRT/CO/3-4 para 65; CO Luxembourg, CRC/C/LUX/CO/3-4 para 50.

[321] See eg CO Israel, CRC/C/ISR/CO/2-4 para 35(b).

[322] See eg Israel, CRC/C/ISR/CO/2-4 para 35(b).

[323] CO Jamaica, CRC/C/JAM/CO/3-4 para 64(d); CO Venezuela, CRC/C/VEN/CO/3-5 para 74(f); CO Holy See, CRC/C/VAT/CO/2 para 37(b).

[324] CO Uzbekistan, CRC/C/UZB/CO/3-4 para 69(f); CO Albania, CRC/C/ALB/CO/2-4 para 84(e); CO Austria, CRC/C/AUT/CO/3-4 para 86.

[325] CO Albania, CRC/C/ALB/CO/2-4 para 84(d); CO Togo, CRC/C/TGO/CO/3-4 para 75(f).

[326] CO Luxembourg, CRC/C/15/Add.92 para 22.

natural light;[327] or that children are not separated from adults.[328] However, it has tended to refrain from identifying whether such conditions amount to torture or ill-treatment. In contrast, the work of other human rights bodies is more helpful.[329]

C37.P160 Under the ECHR: overcrowding; inadequate heating, toilets, sleeping arrangements, food, and recreation; restrictions on letters and visiting rights;[330] withholding food and medical treatment from detainees;[331] forced administration of emetics to physically induce a person to regurgitate a packet of cocaine;[332] threatening imminent pain for the purpose of extracting information;[333] keeping a prisoner in a security cell naked for seven days;[334] and the application of electric shocks, suspension by arms behind the detainee's back, and making the detainee wear a gas mask filled with smoke, have been held to constitute inhuman treatment.[335] The denial of medical treatment to persons in detention also violates the prohibition.[336] The HR Committee has described as inhuman conditions: overcrowded cells with water on the floor; confinement indoors; poor sanitary conditions; hard labour and lack of food;[337] incommunicado detention; being chained to a bed spring on the floor with minimal clothing; and severe rationing of food.[338]

C37.P161 The HR Committee has held that certain minimum standards regarding the conditions of detention must be observed, regardless of the State Party's level of development, and notwithstanding any economic or budgetary considerations. According to the HR Committee:

C37.P162 These include, in accordance with Rules 10, 12, 17, 19 and 20 of the UN Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength.[339]

C37.P163 The CRC Committee has endorsed this requirement, recommending that states ensure that 'detention conditions are compliant with international standards',[340] including

C37.N327 [327] CO Israel, CRC/C/ISR/CO/2-4 para 73(g).

C37.N328 [328] CO Switzerland, CRC/C/CHR/CO/2-4 para 72(d); CO Venezuela, CRC/C/VEN/CO/3-5 para 74(e); CO Sao Tome and Principe, CRC/C/STP/CO/2-4 para 61.

C37.N329 [329] See generally: Rodley and Pollard (n 4) ch 9; Clayton and Tomlinson (n 4) paras 8.106–8.109; Joseph and Castan (n 4) paras 9.131–9.135; Harris and others (n 4) 66–73; Nowak (n 4) 173–75; McGoldrick (n 164) para 9.17. The IACtHR made reference to the CRC for the first time in the case of *Villagran-Morales et al v Guatemala* (Merits) Series C No 63 (19 November 1999). The Court upheld a claim on behalf of five youths that their torture and murder by the Guatemalan National Police amounted to a violation of several provisions of the IACHR, including art 19 which provides children with the right to appropriate measures of protection. In interpreting art 19 the Court made recourse to the provisions of the CRC and declared that such an approach was necessary to give substance to art 19.

C37.N330 [330] *Greek Case* (n 228). [331] *Cyprus v Turkey* (1976) 4 EHRR 482, 541.

C37.N332 [332] *Jalloh v Germany* (n 258) para 82. [333] *Gäfgen v. Germany* (n 97).

C37.N334 [334] *Hellig v Germany* (2012) 55 EHRR 3. [335] *Shishkin v Russia* App 18280/04 (7 July 2011).

C37.N336 [336] *Hurtado v Switzerland* [1994] ECHR 280 (person forcibly arrested refused request for x-ray for six days which when given revealed a fractured rib). In respect of forcible medical treatment, the Commission has held that the state's obligation to secure the right to life of detained person overrides any claim they may have that such treatment, where necessary to prevent harm to a person's health, is a violation of the prohibition against torture and other ill-treatment: *X v Germany* (1984) 7 EHRR 152. See generally: Harris and others (n 4) 71–73; Clayton and Tomlinson (n 4) paras 8.110–8.113.

C37.N337 [337] *Massiotti v Uruguay* Comm No 25/1978 (26 July 1982) 187.

C37.N338 [338] *Wight v Madagascar* Comm No (5 January 1982) 171.

C37.N339 [339] *Mukong v Cameroon* (n 14) para 9.3.

C37.N340 [340] CO Turkmenistan, CRC/C/TKM/CO/2-4 para 57(d); CO Sao Tome and Principe, CRC/C/STP/CO/2-4 para 61. See further: CO Uzbekistan, CRC/C/UZB/3-4 para 70; CO Azerbaijan, CRC/C/AZE/CO/3-4 para 76.

the Beijing Rules, the UN Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines') and the Havana Rules.[341]

C37.P164 Further, the Special Rapporteur has warned that children deprived of their liberty—even for very short periods—are at 'a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment'.[342] The 'unique vulnerability' of children deprived of their liberty 'requires higher standards and broader safeguards for the prevention of torture and ill-treatment'.[343] Clearly 'shackling to the walls, floors or trees' as well as forced fasting on children with neurological problems would breach these standards.[344]

C37.P165 Importantly, where conditions do not violate the prohibition against torture and other ill-treatment, they may still breach the obligation under article 37(c) to treat children deprived of their liberty with humanity and respect.[345]

C37.S37 *(vi) Solitary Confinement and Incommunicado Detention*

C37.P166 The CRC Committee has repeatedly expressed its concern at the practice of solitary confinement within the context of article 37 in its concluding observations. For example, it recommended that Sweden 'remove all children from solitary confinement and revise its legislation to prohibit the use of solitary confinement in all circumstances';[346] it urged Denmark to alter its domestic legislation to prohibit solitary confinement for persons under eighteen;[347] it recommended that Luxembourg 'take immediate measures to ban solitary confinement of children';[348] and, in its concluding observations for Vietnam, it indicated that imposing solitary confinement on children as a punitive measure in drug detention centres constituted ill-treatment or torture.[349] It has also indicated that the practice of holding children in solitary confinement 'for months',[350] or as a mode of discipline,[351] is a violation of article 37. A question remains, however, as to whether solitary confinement for children will necessarily violate article 37.

C37.P167 In answering this question, it is important to distinguish between the variations and motivations for this practice and its effect on a child. It can involve subjection to complete social and sensory isolation, but it can also be confined to removal from association with other detainees for reasons of the administration of justice, security, protection, or discipline.[352] Thus, it may be possible that a child's experience of solitary confinement will not always meet the threshold required for a violation of article 37. This approach is certainly consistent with the view of the HR Committee which has explained that 'prolonged solitary confinement of the detained or imprisoned person *may* amount to acts prohibited under article 7'.[353]

C37.N348

[341] See eg: CO Saint Lucia, CRC/C/LCA/CO/2-4 para 63; CO Thailand, CRC/C/THA/CO/3-4 para 80; CO Panama, CRC/C/PAN/CO/3-4 para 77. UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")*: resolution adopted by the General Assembly, 14 December 1990, A/RES/45/112.

[342] Special Rapporteur, A/HRC/28/68 (n 7) para 16. [343] ibid para 17.

[344] Special Rapporteur, 'Report of the Special Rapporteur on Torture' (4 February 2014) A/HRC/25/60/Add.1 paras 74–77.

[345] See section II.F.1 of this chapter. [346] CO Sweden, CRC/C/SWR/CO/5 para 26(a).

[347] CO Denmark, CRC/C/DNK/CO/4 para 66.

[348] CO Luxembourg, CRC/C/LUX/CO/3-4 para 51.

[349] CO Vietnam, CRC/C/VNM//CO/3-4 para 43.

[350] CO Israel, CRC/C/ISR/CO/2-4 para 35. [351] CO Singapore, CRC/C/15/Add.220 para 44.

[352] Clayton and Tomlinson (n 4) para 8.114.

[353] HRC GC 20 (n 5) para 6 (emphasis added). See *Sendic v Uruguay* Comm No 63/1979 (28 October 1981); *Marais v Madagascar* Comm No 48/1979 (24 March 1983); *De Voituret v Uruguay* Comm No 109/1981 (22 July 1983). For the position of the ECtHR on solitary confinement see: Harris and others (n 4) 68–71.

C37.P168 In contrast, the CRC Committee appears to be less tolerant of this practice and declared in its concluding observations for Armenia, that the State Party 'take immediate measures to ban solitary confinement of children, which amounts to inhuman treatment'.[354] This approach aligns with the Special Rapporteur on Torture who is of the view that solitary confinement 'of any duration', even where designated 'protective', constitutes cruel, inhuman or degrading treatment or punishment or even torture'.[355]

C37.P169 In order to determine if solitary confinement violates the prohibition under the ECHR, the ECtHR considers the 'particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned'.[356] The Court prohibits indefinite isolation and has stressed that 'to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure'.[357] The European Committee for the Prevention of Torture has also recommended that solitary confinement be 'highly exceptional and last no longer than is necessary'.[358]

C37.P170 With respect to children, rule 67 of the Havana Rules prohibits 'closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned'. Importantly, this rule does not prohibit all forms of solitary confinement, but only those that compromise the mental or physical health of a child.

C37.P171 Incommunicado detention is a particularly severe or aggravated form of detention where an individual is denied access to family, friends, and counsel, and where nobody, apart from the authorities, knows where, or even if, the individual is being held. An individual held in incommunicado detention may not necessarily be held in solitary confinement. The Special Rapporteur on Torture has noted that torture 'is most frequently practiced during incommunicado detention' and has therefore recommended that such detention 'be made illegal and persons held incommunicado … be released without delay'.[359]

C37.P172 In contrast, the HR Committee has not been consistent in determining the length at which incommunicado detention constitutes a violation of article 7.[360] In *McCallum v South Africa*,[361] a period of one-month was held to breach the prohibition whereas in *Boimurodov v Tajikistan*,[362] forty days incommunicado detention was not considered of itself to be a violation of article 7. These cases, however, concerned adults and the work of the CRC Committee suggests that it is far less tolerant of incommunicado detention. For example, it is has urged China to 'end the use of incommunicado detention of children, including by immediately closing all secret detention facilities'.[363] It has also indicated its concern at the incommunicado detention of school children accused of painting anti-government graffiti in Syria,[364] and strongly recommended Turkey 'enforce, or when

C37.N354 [354] CO Armenia, CRC/C/ARM/CO/304 para 52 (emphasis added). See further: CO Former Yugoslav Republic of Macedonia, CRC/C/MKD/CO/2 para 39, where the CRC Committee recommended that the State Party 'review or limit *as much as possible* the use of solitary confinement' (emphasis added).

C37.N355 [355] Special Rapporteur, A/HRC/28/68 (n 7) para 44.

C37.N356 [356] *Babar Ahmad and Others v UK* [2012] ECHR 609 (citations omitted).

C37.N357 [357] ibid para 205–12.

C37.N358 [358] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '18th General Report on the CPT's Activities' (18 September 2008) 11.

C37.N359 [359] E/CN.4/1995/34 (n 303) para 926(d).

C37.N360 [360] Joseph and Castan (n 4) para 9.142.

C37.N361 [361] Comm No 1818/05 (2 November 2010).

C37.N362 [362] Comm No 1042/01 (20 October 2005).

C37.N363 [363] CO China, CRC/C/CHN/CO/3-4 para 93.

C37.N364 [364] CO Syria, CRC/C/SYR/CO/3-4 para 46.

appropriate, review existing legislation, with a view to preventing children being held incommunicado'.[365]

C37.S38 *(vii) Deportation or Extradition*

C37.P173 The Convention does not provide an express protection against deportation or extradition of children.[366] Under international human rights law, however, it is accepted that states are prohibited from extraditing or deporting a person where there are substantial grounds for believing that an individual faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the recipient country.[367] There must be a real risk of torture, inhuman, or degrading treatment, not a mere possibility.[368] Moreover, the materialization of the risk in the recipient state does not necessarily mean the deporting state will be in breach if it had deported a person. The test is whether the state knew, or ought to have known, at the time of the extradition or deportation, not what actually eventuates.[369] Importantly, where a real risk exists, the state's obligation of non-refoulement is engaged and 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'.[370]

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[365] CO Turkey, CRC/C/15/Add.152 para 40.

[366] No human rights treaty provides such a right, with the exception of the ACHR which provides under art 22(8) that:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

[367] See eg HRC GC 31 para 12. There is a significant volume of case law and commentary on the principle of non-refoulement, which is a cornerstone of the Refugee Convention (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33. Significantly the protection against non-refoulement under the Convention and other human rights instruments such as the CRC, ICCPR, and ECHR is greater relative to that offered under the Refugee Convention. This is because the protection under art 33(1) of the Refugee Convention does not apply to persons who have committed war crimes (art IF) or to persons where there are reasonable grounds for regarding them as a danger to the security of the country in which they are, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country (art 33(2)). Under the CRC and human rights treaties neither of these caveats apply. For a discussion of the principle of non-refoulement see eg: *Pillai v Canada* Comm No 1763/08 (9 May 2011) (HR Committee) (affirming that the test for refoulement is whether or not the necessary and foreseeable consequence of deportation would be a real risk of the killing or torture of the authors of the claim); *C v Australia* Comm No 900/99 (28 October 2002) (HR Committee) (holding that deportation for crimes committed in the receiving country of an author whose refugee status has already been recognized, and who would not be able to access necessary medical treatment in destination of deportation would amount to a violation of the right to life); *Alzery v Sweden* Comm No 1416/05 (10 November 2006) (HR Committee) (holding that in determining the risk of torture or other ill-treatment in the receiving State, the HR Committee must consider elements including the general human rights situation, the existence of diplomatic assurances, the content and existence of enforcement mechanisms, etc—reliance on diplomatic assurances alone is insufficient); *Choudhary v Canada* Comm No 1898/2009 (28 October 2013) (HR Committee) para 9.8; *BL v Australia* Comm No 2053/2011 (16 October 2014) (HR Committee) para 7.3; *Kindler v Canada* Comm No 470/1991 (30 July 1993) (HR Committee) paras 13.1–13.2. See also: *Al-Saadoon and Mufdhi v UK* App No 61498/08 (2 March 2010) (ECtHR) para 143; *D v UK* (1997) 24 EHRR 423(ECtHR) para 47; *Soering v UK* [1989] 11 EHRR 439 (ECtHR) paras 85–91. See also: Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201–83.

[368] *Vilvarajah v United Kingdom* (1991) 14 EHRR 248; *Pillai v Canada* (n 367) 22 (individual opinion by Helen Keller, Iulia Antoanella Motoc, Gerald L Neumann, Michael O'Flaherty, and Sir Nigel Rodley (concurring)).

[369] *Vilvarajah v UK* (n 368) para 139.

[370] *Chalal v United Kingdom* (1996) 23 EHRR 413 para 80; *Tebourski v France* Comm No 300/2006 (1 May 2007) (CAT Committee) para 8.2.

C37.S39 *(viii) Mental Suffering and Anguish*

C37.P174 A child need not experience physical suffering to be a victim of torture, cruel, inhuman, or degrading treatment or punishment. The CRC Committee has explained states must have laws prohibiting *mental and physical* torture and other ill-treatment,[371] and that all children deprived of liberty must have effective access to mental health care.[372] The ECtHR has also held that, provided it is 'sufficiently real and immediate,' the threat of torture may create suffering amounting to inhuman treatment,[373] or even torture, as 'the fear of physical torture may itself constitute mental torture'.[374] In *Ireland v UK*, the Court held that treatment arousing fear, anguish, or inferiority capable of humiliating or breaking the resistance of a person will amount to degrading treatment.[375] Although this case dealt with the treatment of terror suspects by police authorities, its underlying principle remains applicable to the treatment of children in a range of circumstances where they remain under the control of another person whether in a school or residential setting and are vulnerable to treatment that could be humiliating and threatening.

C37.P175 Critically important is the extent to which the child's feelings of distress and anxiety go beyond the limits of a state's lawful treatment. In *T v UK*, for example, the ECtHR held an 11-year-old boy's anguish and stress on facing charges of murder did not go 'beyond that which would inevitably have been engendered by attempts by the authorities to deal with the applicant following the commission of the offence'.[376] As such the mere experience of anxiety and distress by a child will not amount to a violation of article 37 if the treatment being administered is lawful.

C37.P176 International human rights law also accepts that the suffering and anguish experienced by a child need not result from treatment that is administered against them. In *Quinteros v Uruguay*,[377] the HR Committee considered that a mother's anguish caused by her daughter's disappearance and the uncertainty about her fate and whereabouts, violated the mother's right to know what had happened to her daughter and made the mother 'a victim of the violations …suffered by her daughter' under ICCPR article 7.[378] Although this decision has been criticized for its failure to articulate the extent of the mother's right,[379] its central finding has been followed consistently: the anguish and distress of family members arising from the disappearance of an individual may constitute a violation of article 7.[380] *Quinteros* thus extends the protection under the prohibition against torture and ill-treatment beyond those who directly experience ill-treatment to family members, including children, who may also experience severe pain and anguish indirectly as a result of the ill-treatment.

C37.P177 The ECtHR has adopted a similar approach, 'routinely [holding] that … mental distress caused to family members by an enforced disappearance of a "disappeared" person can amount to degrading or inhuman treatment'.[381] However, the Court requires the

C37.N371 [371] See eg: CO Cambodia, CRC/C/KHM/CO/2-3; CO Kazakhstan, CRC/C/15/Add.213 para 39; CO Trinidad and Tobago, CRC/C/15/Add.82 para 17; CO Ghana, CRC/C/15/Add.73 para 16.

C37.N372 [372] CO Albania, CRC/C/ALB/CO/2-4 para 85.

C37.N373 [373] *Campbell and Cosans v UK* (n 271) para 26.

C37.N374 [374] *Gäfgen v Germany* (n 97) para 108.

C37.N375 [375] *Ireland v UK* (n 66) para 162.

C37.N376 [376] *T v UK* (1999) 30 EHRR 437 para 78. See also *V v UK* (1999) 30 EHRR 121 para 100.

C37.N377 [377] *Quinteros v Uruguay* Comm No 107/81 (21 July 1983).

C37.N378 [378] ibid para 14. See also: *Estrella v Uruguay* Comm No 74/80 (29 March 1980).

C37.N379 [379] See McGoldrick (n 164) para 9.23.

C37.N380 [380] See eg *Giri v Nepal* Comm No 1761/08 (27 April 2011) para 7.7.

C37.N381 [381] Kirsten Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced

presence of 'special factors' that give the applicant's suffering 'a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation'.[382] The Court has explained that relevant elements include:

C37.P178 the proximity of the family tie—in that context, a certain weight will attach to the parent-child bond … the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.[383]

C37.P179 Significantly, the IACtHR adopts a slightly different methodology. Under the European approach, 'the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation which is brought to their attention'.[384] Conversely, for the IACtHR, it is the 'disappearance as such which leads to the violation'.[385]

C37.P180 In any case, the underlying principle followed by both courts anticipates that a child's experience of suffering and trauma as a result of the ill-treatment suffered by his or her parents or other family members may amount to a violation of the child's right to protection under article 37.

C37.S40 ## D. Paragraph 37(a): The Prohibition against Capital Punishment and Life Imprisonment

C37.S41 ### *1. The Prohibition against Capital Punishment*

C37.S42 #### (a) An Age Rather than Status-based Protection

C37.P181 The Convention is not unique in containing a prohibition on the death penalty for children.[386] Article 6(5) of the ICCPR provides that a 'sentence of death shall not be imposed for crimes committed by persons below eighteen years', which echoes article 4(5) of the American Charter on Human Rights,[387] ACRWC article 5(3),[388] several of the Geneva

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Disappearance?' (2006) 7 Melbourne Journal of International Law 245, 263–64, citing *Kurt v Turkey* [1998] 27 EHRR 373 para 134; *Gongadze v Ukraine* (2006) 43 EHRR 44 para 186; *Ipek v Turkey* App No 47532/09 (10 November 2015) paras 181–83; *Orhan v Turkey* App No 25656/94 (18 June 2002) para 354; *Tanis and Others v Turkey* (2008) 46 EHRR 14.

[382] *Çakici v Turkey* (2001) 31 EHRR 133 para 98. [383] ibid.

[384] ibid. See also *Varnava and others v Turkey* (2009) 50 EHRR 21 para 200.

[385] Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) 382. See *Goiburu v Paraguay* Series C No 153 (22 September 2006) para 97; *La Cantuta v Peru*, Series C No 162 (n 133) para 123.

[386] For an overview of the prohibition against the death penalty for children under international law see: Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (OUP 2015) 223–33; Robyn Linde, 'From Rapists to Superpredators: What the Practice of Capital Punishment says about Race, Rights and the American Child' (2011) 19 International Journal of Children's Rights 127, 129–33; Human Rights Watch, *The Last Holdouts* (HRW 2008); Anne James and Joanne Cecil, 'Out of Step: Juvenile Death Penalty in the United States' (2004) 11 International Journal of Children's Rights 291, 298–300; William Schabas, 'The Death Penalty for Crimes Committed by Persons Under Eighteen Years of Age' in Eugeen Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996), 603; Rodley and Pollard (n 4) 322–24.

[387] Art 4(5) provides: 'Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women'.

[388] Art 5(3) provides: 'Death sentence shall not to be pronounced for crimes committed by children'.

Conventions,[389] and rule 17.2 Beijing Rules.[390] Only article 7(1) of the Arab Charter on Human Rights is more tolerant, prohibiting the death penalty for children under eighteen, except where otherwise provided by domestic law.[391]

C37.P182 The prohibition under article 37(a) of the CRC focuses on an individual's age at the time of the offence, rather than the time of imposing the death penalty. International law may still permit the death penalty for individuals aged over eighteen,[392] but the imposition of this punishment for offences committed by an individual before they turn 18 will violate article 37(a). Moreover, it is insufficient for states to merely refrain from implementing the death penalty, despite its continued existence in their domestic legislation. The very possibility (theoretical or otherwise) of its imposition will be sufficient to violate article 37(a). For example, the CRC Committee's report on India noted that although, 'the death penalty is de facto not applied to persons under 18',[393] it recommended that 'the State party abolish by law the imposition of the death penalty on persons under 18'.[394]

C37.S43 **(b) The Prohibition on the Death Penalty as a Customary International Norm**

C37.P183 In its General Comment No 10, the CRC Committee affirmed the absolute nature of the prohibition, declaring it 'the internationally accepted standard … that the death penalty cannot be imposed for a crime committed by a person who at the time was under 18 years of age'.[395] Such is its status that the HR Committee,[396] IACmHR,[397] and commentators[398] have suggested that the prohibition of the death penalty for persons who

C37.N389 [389] See: Geneva Convention Relative to the Protection of Civilians (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 68(4); Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I') art 77(5); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 6(4). See generally William Schabas, *The Abolition of the Death Penalty under International Law* (3rd edn, CUP 2002) 211–34.

C37.N390 [390] Rule 17.2: 'Capital punishment shall not be imposed for any crime committed by juveniles'.

C37.N391 [391] (adopted 22 May 2004, entered into force 15 March 2008) (reprinted in (2005) 12 International Human Rights Reports 893). Art 7(1) states that a '[s]entence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime'.

C37.N392 [392] For a comprehensive examination of when the death penalty is permitted under international law see: Hood and Hoyle (n 386); Schabas, *The Abolition of the Death Penalty* (n 389).

C37.N393 [393] CO India, CRC/C/15/Add.115 para 79.

C37.N394 [394] ibid para 81. See also: CO Lao People's Democratic Republic, CRC/C/LAO/CO/2 para 71; CO Nigeria, CRC/C/NGA/CO/3-4 paras 90–91; CO Pakistan, CRC/C/PAK/4 para 100; CO Bangladesh, CRC/C/BGD/CO/4 paras 46–47, 92–93; CO Niger, CRC/C/NER/CO/2 paras 80–81.

C37.N395 [395] CRC Committee, 'General Comment No 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) CRC/C/GC/10 para 75.

C37.N396 [396] HR Committee, 'General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994) CCPR/C/21/Rev.1/Add.6 para 8. See also UN Sub-commission on the Promotion and the Protection of Human Rights, 'The Death Penalty in Relation to Juvenile Offenders' (17 August 2000) E/CN/Sub.2/RES/2000/17 para 6 (noting that 'international law concerning the imposition of the death penalty in relation to juveniles clearly establishes that the imposition of the death penalty on persons aged under 18 years at the time of the offence is in contravention of customary international law').

C37.N397 [397] *Domingues v United States* (Merits) Report No 62/02 Case 12.285 (22 October 2002) para 84 (concluding that 'a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime'). cf *Roach & Pinkerton v United States* Res No 3/87 Case No 9647 (22 September 1987) para 60 (holding that 'there does not now exist a norm of customary international law establishing eighteen to be the minimum age for the imposition of the death penalty' but acknowledging that a norm was 'emerging').

C37.N398 [398] See: Hood and Hoyle (n 386) 224; Schabas, *The Abolition of the Death Penalty* (n 389) 374.

commit offences under 18 is now a customary international law norm. The IACmHR[399] and the Special Rapporteur on Torture[400] have also argued that the prohibition has attained the status of a *jus cogens* norm. Indeed, subject to a few exceptions, states' practices comply with the prohibition.[401] Only nine states—China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, the United States, and Yemen—have executed children since 1990.[402] With the exception of the United States, each state ratified the Convention without making an express reservation regarding the death penalty prohibition under article 37(a).[403] As William Schabas notes, 'the norm was recognized without protest' during the adoption of other human rights instruments containing similar prohibitions.[404] Moreover, the situation in the United States has changed since the adoption of the Convention; the Supreme Court has held that the US Constitution prohibits the infliction of the death penalty for crimes committed while under the age of 18.[405] Significantly, the Court expressly referred to 'the overwhelming weight of international opinion against the juvenile death penalty' in reaching its decision.[406]

C37.S44 **(c) The Characterization of the Death Penalty as an Example of Ill-treatment**

C37.P184 International human rights bodies and domestic courts have developed a body of jurisprudence which indicates that the imposition of the death penalty *may* (and in some jurisdictions will) constitute a violation of the prohibition against torture or other ill-treatment in three contexts. First, when there is excessive judicial delay in the imposition C37.N405 of the death penalty;[407] second, when the means of execution do not minimize the harm

[399] *Domingues v United States* (n 397) para 85.

[400] Special Rapporteur, A/HRC/28/68 (n 7) para 36; Special Rapporteur, A/67/279 (n 303) para 62, citing *Domingues v United States* (n 397). See further: Connie de la Vega and Jennifer Fiore, 'The Supreme Court of the United States has been called upon to Determine the Legality of the Juvenile Death Penalty in *Michael Domingues v. State of Nevada*' (2000) 21 Whittier Law Review 215; Neil E Walker, 'The United Nations Convention on the Rights of the Child: A Basis for *Jus Cogens* Prohibition of Juvenile Capital Punishment in the United States' (2001) 19 Behavioral Sciences and the Law 143; Kha Nguyen, 'In Defence of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States' (1995) 28 George Washington Journal of International Law and Economics 401.

[401] Rodley and M (n 4) 279; Schabas, *The Abolition of the Death Penalty* (n 389) 363–64.

[402] Iran is the greatest exponent of this practice, having executed ninety-three child offenders since 1990 (Amnesty International, 'Execution of Juveniles Since 1990' (March 2018) https://www.amnesty.org/download/Documents/ACT5038322016ENGLISH.PDF.

[403] Saudi Arabia has entered a general reservation with respect to all articles as are in conflict with the provisions of Islamic law, which permits the imposition of the death penalty with respect to children. However, at no stage during the drafting of the Convention did it voice its opposition to the proposal to prohibit this practice under the Convention. Pakistan had a similar reservation, which it withdrew on 23 July 1997. The USA has not ratified the Convention.

[404] Schabas, *The Abolition of the Death Penalty* (n 389) 374.

[405] *Roper v Simmons* (n 243).

[406] ibid 24.

[407] See: *Soering v UK* (n 367) (holding that an 18-year-old's likely six to eight year exposure to death row before his actual execution, if found guilty, would violate the prohibition against torture and other ill-treatment); *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1 (Privy Council) (holding that where the execution of a person is to take place more than five years after the imposition of the sentence, there will be strong grounds for believing that the delay will amount to inhuman or degrading punishment or treatment). cf *Johnson v Jamaica* Comm No 588/94 (20 October 1998) (rejecting this argument because it conveys a message to States Parties retaining the death penalty that they should carry out a capital punishment as expeditiously as possible after it has been imposed). See also: *Barrett and Sutcliffe v Jamaica* Comm Nos 270/88, 271/88 (30 March 1992) para 8.4; *Francis v Jamaica* Comm No 606/94 (25 July 1996) para 9.1. This position has been criticized by other members of the HR Committee in their dissenting opinions on the basis that it reflects a lack of flexibility that would enable the HR Committee to determine whether on the facts of given case, prolonged detention did amount to cruel, inhuman, or degrading treatment. See eg the dissenting opinions in *Lavende v Trinidad and Tobago* Comm No 554/93(29 October1997) and *Bickaroo v Trinidad and Tobago* Comm No 555/93 (29 October 1997).

and suffering of the victim;[408] and third, the South African constitutional court has held that the imposition of the death penalty irrespective of the age of the defendant will constitute a violation of the protection against torture and ill-treatment under the South African Constitution.[409]

C37.P185 The development of this jurisprudence has generally occurred within a context where there is no explicit prohibition on the death penalty and advocates have enlisted the prohibition against torture and other ill-treatment to persuade courts that the imposition of this penalty in the circumstances of the particular case will be a violation of the prohibition. Although these decisions are worth noting, they carry less relevance for children who are seeking to exercise their rights under the Convention, as article 37(a) provides them with an explicit protection against the death penalty irrespective of the time taken to impose the penalty or the method of execution.

C37.S45 ### *2. The Right to Protection against Life Imprisonment without the Possibility of Release*

C37.S46 #### (a) A Unique Formulation

C37.P186 The prohibition against life imprisonment for children under article 37(a) is unique to the Convention. The prohibition is not absolute but is qualified by the words 'without the possibility of release'. Nevertheless, the CRC Committee has recommended states 'abolish all forms of life imprisonment committed by persons under the age of 18' since 'for all sentences imposed upon children the possibility of release should be realistic and regularly considered', with detention regularly reviewed.[410] The Special Rapporteur has echoed this recommendation and gone further, noting that both life imprisonment and sentences of 'an extreme length' are 'grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child'.[411]

C37.P187 The caveat regarding the possibility of release was likely included to temper an otherwise absolute prohibition. This is supported by the drafting history. The initial proposal for a prohibition on life imprisonment for children was opposed by the Japanese delegation due to its absolute nature.[412] The Canadian representative suggested the inclusion of the words 'without the possibility of release'.[413] Delegations remained divided as to the merit of this amendment, some calling for its deletion,[414] but a compromise was achieved, the phrase being retained.[415]

C37.N408 [408] See eg: HRC GC 20 (n 5) para 6; *Charles Chitat Ng v Canada* Comm No 469/91 (7 January 1994) para 16.4 (holding that the use of gas which took 10 minutes to kill a person did not satisfy test of minimizing harm); *Cox v Canada* Comm No 539/93 (31 October 1994) para 17.3] (holding that execution by lethal injection did not violate art 7 ICCPR); CO Islamic Republic of Iran, CCPR/C/79/Add.25 para 8 (holding that public executions, which entail an element of humiliation, violate the prohibition).

C37.N409 [409] *State v Makwanyane* [1995] 1 LRC 269; Peter Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stanford Journal of International Law 287; *Roper v Simmons* (n 243) (holding that the imposition of the death penalty on children is a violation of the prohibition against cruel and unusual punishment under the US Constitution).

C37.N410 [410] CRC GC 10 (n 9) para 77. The HR Committee has adopted the same approach. See *Blessington and Elliot v Australia* Comm No 1968/2010 (3 November 2014) para 7.7. See also: CO Jamaica, CRC/C/JAM/CO/3-4 para 65(e); CO Liberia, CRC/C/LBR/CO/2-4 para 85(a); CO Belize, CRC/C/15/Add.252 para 71(c).

C37.N411 [411] Special Rapporteur, A/HRC/28/68 (n 7) para 74.

C37.N412 [412] E/CN.4/1986/39 para 104; *Legislative History* (n 2) 750.

C37.N413 [413] E/CN.4/1986/39 para 104; *Legislative History* (n 2) 750.

C37.N414 [414] E/CN.4/1989/48 para 541; *Legislative History* (n 2) 767.

C37.N415 [415] E/CN.4/1989/48 para 543; *Legislative History* (n 2) 767.

C37.P188 The foregoing gives guidance on what is required to satisfy the requirement that release remains a possibility, namely ongoing observation of the child's development and progress and regular review of the detention to facilitate release. To give effect to this provision, an original sentence must be subject to automatic or periodic review. It is insufficient for a child to have a right of appeal leading to a life sentence being overturned. Rather, the CRC Committee's comments require all life sentences to include a mechanism granting the child release without the child initiating the process. The prospect of release must not be subject to the State Party's discretion. Notably, the Committee considers that failure to do so conflicts with the principles of juvenile justice and therefore calls on states to abolish all forms of life imprisonment for offences committed by individuals under 18.[416] The Human Rights Council and the General Assembly ('UNGA') agree. In Resolution 24/12 the Council urged states to ensure that in both legislation and practice, no child is sentenced to life imprisonment.[417] Since 2006, the UNGA has repeatedly adopted resolutions calling upon all states to abolish, in law and practice, life imprisonment without the possibility of parole for children less than 18 years of age.[418]

C37.P189 Despite the United States not ratifying the Convention, the United States Supreme Court held in 2012 that mandatory sentences of life imprisonment without the possibility of parole for juveniles are unconstitutional, constituting cruel and unusual punishment.[419] Writing for the majority, Kagan J adopted an argument similar to the CRC Committee, holding that such a sentence 'precludes consideration of [a juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences'.[420] In 2016, the Court held that this decision applies retroactively, extending the protection to approximately 2000 juvenile offenders sentenced before 2012. Writing for the court, Kennedy J explained that the 'foundation stone' for the Court's juvenile death penalty jurisprudence is proportionality.[421] It should be noted, however, that neither of these cases declared that life sentences without parole are unconstitutional, merely that *mandatory* life sentences without parole are. In contrast, both types of sentence are prohibited by art 37(a) CRC.

C37.N429

[416] CO Netherlands, CRC/C/NLD/CO/3 para 78: ('The Committee recommends that the State party … (c) Eliminate life imprisonment sentence of children'); CO Antigua and Barbuda, CRC/C/15/Add.247 para 68: ('The Committee is concerned … that a person under 18 years can be sentenced to life imprisonment for murder'); CO Netherlands, CRC/C/15/Add.227 para 59: ('Amend legislation in the Netherlands and Aruba so that life imprisonment cannot be imposed on anyone between the age of 16 and 18 and fix a maximum limit for their detention').

[417] 'Human Rights in the Administration of Justice, Including Juvenile Justice' (8 October 2013) A/HRC/RES/24/12 para 22.

[418] See eg: 'Rights of the Child' (19 December 2006) A/RES/61/146 para 31; 'Rights of the Child (18 December 2007) A/RES/62/141 para 36; 'Rights of the Child' (24 December 2008) A/RES/63/241 para 43; 'Rights of the Child (18 December 2013) A/RES/68/147 para 49; 'Rights of the Child' (18 December 2014) A/RES/69/157 [29; Rights of the Child (17 December 2017) A/RES/70/137 para 27; Rights of the Child (19 December 2016) A/RES/71/177 para 29.

[419] *Miller v Alabama* (n 246).

[420] ibid 15. See also: Anthony Thompson, 'Clemency for Our Children' (2011) 32 Cardozo Law Review 2641; Jeffrey Fagan, 'End Natural Life Sentences for Juveniles' (2007) 6 Criminology & Public Policy 735; Victor Streib, 'Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim' (1995) 26 University of Toledo Law Review 765.

[421] *Montgomery v Louisiana* 577 US ___, 14 (2016).

C37.S47 **(b) Indeterminate Sentencing and Indefinite Detention**

C37.P190 Although both life imprisonment and indeterminate sentences or indefinite detention impose a sentence of imprisonment with no definite period of time set at sentencing, they are conceptually distinct. Life imprisonment is generally imposed for retributive reasons, while indeterminate sentencing grew out of a preventative rationale.[422] This distinction was noted by the ECtHR in *Hussain v UK*,[423] which involved a 16-year old boy who was sentenced to imprisonment at Her Majesty's pleasure, an indeterminate sentence, for the murder of his younger brother.

C37.P191 It was not until *James, Wells and Lee v United Kingdom*,[424] which involved three men sentenced to indeterminate prison sentences for the protection of the public, that the Court substantively examined indeterminate sentencing. Significantly, in finding that the State Party breached article 5(1) of the ECHR prohibiting arbitrary detention, the Court did not hold that indefinite detention per se is a violation of the ECHR. Instead, the Court held that persons detained indefinitely on the grounds of public protection must be provided with adequate rehabilitation services, enabling them a 'realistic chance of making objective progress' towards parole.[425]

C37.P192 Indefinite detention may also be incompatible with the prohibition against torture and other ill-treatment. In *T v UK*,[426] an 11-year old boy was found guilty of murder and sentenced to prison at Her Majesty's Pleasure. The ECtHR observed:

C37.P193 it cannot be excluded, particularly in relation to a child as young as the applicant at the time of his conviction, that an unjustifiable and persistent failure to fix a tariff, leaving the detainee in uncertainty over many years as to his future, might also give rise to an issue under article 3 [which prohibits torture].[427]

C37.P194 The Court determined no such issue arose in light of the relatively short period (six years) during which no tariff had been in force.[428] The ECtHR's approach mirrors that of the HR Committee, which permits—in exceptional circumstances—indefinite detention.[429]

C37.P195 The CRC Committee has condemned indeterminate sentencing, although it has failed to identify which article of the Convention this practice violates.[430] For example, in concluding observations on Malawi, the Committee noted its concern 'at the practice of detention based upon the procedure of "at the pleasure of the President" ', urged the State Party to eliminate it, 'and ensure that children are protected in accordance with the Convention'.[431] The Committee made similar comments concerning Zambia.[432]

C37.P196 This does not mean that the Convention is silent regarding indeterminate sentencing or indefinite detention. The practice is arguably inconsistent with the general rights and principles of juvenile justice under article 40.[433] An indeterminate or indefinite sentence,

C37.N422 [422] On preventative detention see: Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014); Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 Criminal Law Journal 94.

C37.N423 [423] *Hussain v UK* (1996) 22 EHRR 1 para 54.

C37.N424 [424] *James, Wells and Lee v United Kingdom* (2013) 56 EHRR 12. [425] ibid para 220.

C37.N426 [426] *T v UK* (n 376). [427] ibid para 99. See also *V v UK* (n 376) para 100.

C37.N428 [428] *T v UK* (n 376) para 99. [429] HRC GC 35 (n 5) para 21.

C37.N430 [430] See eg: CO Zimbabwe, CRC/C/15/Add.55 paras 21, 33; CO United Kingdom and Northern Ireland, CRC/C/15/Add.34 para 36. See also CO Germany, CRC/C/15/Add.43 para 38, where the CRC Committee noted that the elimination of the possibility of applying indeterminate sentences to juveniles had been taken into account in the context of reforms to the juvenile justice system.

C37.N431 [431] CO Malawi, CRC/C/MWI/CO/2 paras 75–75(i).

C37.N432 [432] CO Zambia, CRC/C/15/Add.206 paras 70, 72(a).

C37.N433 [433] See chapter 40 of this Commentary on art 40.

similarly to life imprisonment, lacks the central element of proportionality, essential in a humane punishment. It is also subject to article 37(b)'s requirement that a child is deprived of his or her liberty only as a last resort and for shortest appropriate period of time,[434] and to article 37(d)'s right to regular review.[435]

C37.S48

E. Paragraph 37(b): Protection against Arbitrary or Unlawful Deprivation of Liberty

C37.S49

1. A Fundamental Human Right

C37.P197 The right to liberty is a feature of most human rights instruments. For example, it is dealt with under UDHR article 9, ICCPR article 9, ECHR article 5, ACHR article 7, and ACHPR article 6. The formulation under article 37(b) differs from these instruments in three respects. First, it does not commence with a positive assertion of the right to liberty and security. Instead the right is expressed in negative terms, providing that no child shall be deprived of liberty arbitrarily or unlawfully.[436] Second, unlike these other instruments, article 37(b) makes no reference to a child's right to security. Third, it explicitly provides that deprivation of a child's liberty must be a measure of last resort and for the shortest appropriate period of time.

C37.P198 The first two differences are curious given that article 37(b) was based on article 9 of the ICCPR,[437] which refers to the liberty and security of a person. They also raise a question as to whether the scope of paragraph 37(b) is weakened relative to the formulations used in other instruments. Some commentators have suggested the phrase 'liberty and security' should be read as a whole.[438] For its part the ECtHR has not articulated any distinction between 'security' and 'liberty', and has noted that, '[w]hat is at stake is both the protection of the physical liberty of individuals as well as their personal security',[439] suggesting the two concepts are distinct, albeit interrelated.

C37.P199 The HR Committee has taken a similar view. In *Delgado Paez v Colombia*,[440] the author complained that the Colombian government failed to protect him against threats to his life and he was forced to leave the country. The HR Committee held the state was in violation of article 9(1) because states must 'take reasonable and appropriate measures to protect' those facing known death threats, even if they are not arrested or detained.[441] This could be taken to suggest that the right to personal security is independent of any guarantee of liberty.[442] It would be wrong to suggest, however, that the absence of a right to security under article 37(b) means that states have no corresponding obligation to protect the physical integrity and security of a child. On the contrary, such an obligation arises under several provisions including: the best interests principle (art 3); the right to life, survival and development (art 5); the right to respect for privacy, which extends to

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[434] See section II.E.4 of this chapter. [435] ibid.

[436] cf ICCPR art 9(1): 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of their liberty except on such grounds and in accordance with such provisions as are established by law.'

[437] See: E/CN.4/1986/39 para 90; *Legislative History* (n 2) 746; E/CN.4/1989/48 para 546; *Legislative History* (n 2) 767.

[438] Harris and others (n 4) 103; Clayton and Tomlinson (n 4) para 10.151.

[439] *Kurt v Turkey* (1999) 29 EHRR 373 para 123.

[440] *Delgado Paez v Colombia* Comm No 195/1985 (12 July 1990). [441] ibid para 5.5.

[442] Joseph and Castan (n 4) para 11.06. Compare the situation under the ECHR: *X v Ireland* (1973) 16 YB 388 (ECmHR).

respect for physical integrity (art 16); the right to protection against all forms of violence, abuse, injury, and neglect (art 19); and the protection against torture and ill-treatment (art 37(a)). Additionally, the savings clause in article 41 upholds any provisions of international law, 'which are more conducive to the realization of the rights of the child'.

C37.S50 ## *2. Deprivation of Liberty*

C37.S51 ### (a) The Meaning of the Phrase

C37.P200 Deprivation of liberty is defined broadly under international law and is not limited to the criminal context. Rule 11(b) of the Havana Rules provides that:

C37.P201 > deprivation of liberty means any form of detention or imprisonment, as well as any other form of placement in a public or private custodial setting, from which the child is not permitted to leave at will by order of any judicial, administrative or other public authority.

C37.P202 The CRC Committee frequently urges all States Parties to fully implement the Havana rules.[443]

C37.P203 This approach is consistent with the view of the HR Committee, which explained in its first General Comment on article 9 of the ICCPR that the protection against arbitrary and unlawful deprivation of liberty 'is applicable to all deprivations of liberty whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc'.[444] The HR Committee's updated General Comment No 35 on article 9 of the ICCPR, has adopted the same broad definition.[445] Further, in its General Comment on article 10 of the ICCPR, the HR Committee reaffirmed persons deprived of their liberty included those in 'prisons, hospitals—particularly psychiatric hospitals—detention camps or correctional institutions or elsewhere'.[446] The ECtHR[447] and the HR Committee[448] have held that states have a positive obligation to protect persons from being deprived of their liberty by private actors.

C37.P204 Finally, in General Comment No 10, the CRC Committee set down the two leading principles governing deprivation of liberty:

C37.P205 > (a) 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; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.[449]

C37.S52 ### (b) The Meaning of 'Liberty'

C37.P206 For the purposes of article 37(b) 'liberty' refers to a child's *physical* liberty. This approach has been adopted by the HR Committee,[450] the ECtHR,[451] the IACmnHR,[452] and the Special Rapporteur on Torture.[453] It also finds support in rule 11(b) of the Havana Rules,

C37.N443 [443] CRC GC 10 (n 9) para 88. See also: CO Saint Lucia, CRC/C/LCA/2-4 para 63; CO Kyrgyzstan, CRC/C/KGZ/CO/3-4 para 67; CO Portugal, CRC/C/PRT/CO/3-4 para 66; CO Russia, CRC/C/RUS/CO/4-5 para 70; CO Yemen, CRC/C/YEM/CO/4 para 86.

C37.N444 [444] HRC GC 8 (n 5) para 1.

C37.N445 [445] HRC GC 35 (n 5) paras 5, 40.

C37.N446 [446] HRC GC 21 (n 5) para 1.

C37.N447 [447] *Storck v Germany* (2005) 43 EHRR 96 para 102.

C37.N448 [448] HRC GC 35 (n 5) para 8.

C37.N449 [449] CRC GC 10 (n 9) para 79.

C37.N450 [450] HRC GC 35 (n 5) para 3 ('Liberty of person concerns freedom from confinement of the body, not a general freedom of action').

C37.N451 [451] *Engel v Netherlands* (1976) 1 EHRR 706 para 58; *Creangă v Romania* (2012) 56 EHRR 361 para 84.

C37.N452 [452] Inter-American Commission on Human Rights, 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' (13 March 2008) Res 1/08.

C37.N453 [453] UNGA 'Torture and other cruel, inhuman or degrading treatment' (9 August 2013) A/68/295 para 27.

which refer to a place of detention from which the child cannot leave 'at will'.[454] As such, other conceptions of liberty associated with freedom of religion, thought, and expression, are addressed under other articles of the Convention.

C37.S53 **(c) The Meaning of 'Deprivation'**

C37.P207 There are two concepts under international law which relate to the restriction of an individual's movement: deprivation of liberty (which is the focus of article 37(b)) and restriction of movement (which is not addressed in the Convention but which is dealt with under other international instruments).[455] The ECtHR, the Special Rapporteur, and the HR Committee agree that the distinction between these concepts relates to the degree or intensity of restriction rather than matters of substance.[456] The ECtHR has identified a range of criteria for deciding whether the requisite degree of restriction exists, including the type, duration, effects, and manner of implementation of the measure in question.[457] The general rule is the greater the degree of physical restraint, the greater the likelihood this will amount to a deprivation of liberty.[458]

C37.P208 By way of illustration, the ECtHR has found that the following situations amount to a deprivation of liberty: an order to live on a remote island with reporting requirements and curfew;[459] compulsory residence in a mental hospital, including in an unlocked ward with freedom to take unaccompanied day leave;[460] detention for two hours for deportation;[461] and even shorter detention for taking a blood test.[462] Neither a curfew,[463] nor the use of handcuffs,[464] has been considered per se to amount to a deprivation of liberty.

C37.P209 For the HR Committee, deprivation of liberty 'involves more severe restriction of motion within a narrower space than mere interference with liberty of movement'.[465] In *Celepli v Sweden*,[466] it indicated that the requisite degree of restriction must meet a minimum level of severity. The victim was confined to his residence for seven years and required to report to police three times each week for a further five years. The victim argued these severe restrictions amounted to a deprivation of liberty.[467] The HR Committee considered that 'incompatible' with the ICCPR,[468] but accepted the state's argument that

C37.N469

[454] Importantly a child must be aware of his or her right to leave at 'will'. Thus, it would be insufficient for a state to claim that a child was free to leave when the authorities detaining the child did not advise the child of his or her right to leave at will. (cf ECtHR, which endorsed the position of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment that labelling incapacitated persons in social welfare establishments from which they cannot leave at will as entering the institutions voluntarily, could deprive children of essential safeguards: *DD V Lithuania* [2012] ECHR 254 para 88) Moreover, the right to leave at 'will' must be effective. Thus, for example, it would be inappropriate for a state detaining a refugee child to claim that the claim that the child was free to leave detention provided they left the jurisdiction if no other jurisdiction were prepared to accept the child and he or she faced a risk of persecution or harm if he or she were to leave.

[455] See eg: ICCPR art 12(1) ('Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence').

[456] *Guzzardi v Italy* (1980) 3 EHRR 333 para 93; Special Rapporteur, A/HRC/28/68 (n 7) para 21; HRC GC 35 (n 5) para 5.

[457] *Guzzardi v Italy* (n 456) para 92; *Creangă v Romania* (n 451) para 91.

[458] See: Harris and others (n 4) 289–96.

[459] *Guzzardi v Italy* (n 456).

[460] *Ashingdane v United Kingdom* (1985) 7 EHRR 528 para 42. cf *Neilsen v Denmark* (1988) 11 EHRR 175.

[461] *X & Y v Sweden* (1982) 5 EHRR 147 (ECommHR).

[462] *X v Austria* App No 8278/78 (1979).

[463] *Cyprus v Turkey (First and Second Applications)* (1976) 4 EHRR 482, 529.

[464] *Raninen v Finland* (n 272).

[465] HRC GC 35 (n 5) para 5.

[466] *Celepli v Sweden* Comm No 456/1991 (18 July 1994) (HR Committee).

[467] ibid para 5.3.

[468] ibid para 6.1.

the restrictions were not sufficiently severe to breach the ICCPR, since the author was free to leave the country and live elsewhere.[469]

C37.P210 In light of the decision in *Celepli*, Joseph and Castan suggest that article 9:

C37.P211 applies only to severe deprivations of liberty, such as incarceration within a certain building (eg one's home, prison, psychiatric institution, immigration detention centre), rather than restrictions on one's ability to move freely around a State or even smaller locality.[470]

C37.P212 In General Comment No 35, the HR Committee provided a non-exhaustive list of situations that may amount to a deprivation of liberty. They include:

C37.P213 police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices.[471]

C37.P214 Lesser restrictions should be considered by reference to the right to freedom of movement under ICCPR article 12, as the Convention does not contain an express right to freedom of movement for children.[472] Moreover, other provisions under the Convention would also be relevant to restrictions that are commonly imposed on children's movement. For example, the legitimacy of a court-imposed curfew would be subject to review in light of a state's obligations under article 40.[473]

C37.P215 The practice of school detention raises a question as to whether it should fall within the scope of the prohibition against arbitrary and unlawful deprivation of liberty. The CRC Committee and other human rights bodies are yet to address this issue. However, it is arguable that this practice would satisfy the test for a deprivation of liberty in that it restricts a child's movement to a confined physical space against his or her will. If this were the case, it does not follow that school detentions are prohibited under article 37(b), but rather that this practice must be administered in a way that is lawful and non-arbitrary.

C37.S54 *3. Protection against Arbitrary and Unlawful Deprivation of Liberty*

C37.P216 Article 37(b) does not prohibit all deprivations of a child's liberty; only deprivation that is considered to be unlawful and/or arbitrary. This approach is consistent with article 9

C37.N469 [469] ibid para 4.5. [470] Joseph and Castan (n 4) para 11.10. [471] HRC GC 35 (n 5) para 5.

C37.N472 [472] See eg: ICCPR art 12(1): 'Everyone lawfully within the territory of a State shall, within, that territory, have the right to liberty of movement and freedom to choose his residence; Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963, entered 2 May 1968) ETS 46 art 2(1): 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

C37.N473 [473] A curfew prescribed under legislation could be examined by reference to art 2, the principle of non-discrimination, art 3, the best interests principle, art 15, freedom of association, and possibly even art 16, the protection against arbitrary or unlawful interference with a child's right to privacy. On curfews generally, see: *Ramos v Town of Vernon* 353 F 3d 171 (2d Cir 2003); Elyse R Grossman and Kathleen S Hoke, 'Guidelines for Avoiding Pitfalls When Drafting Juvenile Curfew Laws: A Legal Analysis' (2015) 8 Saint Louis Journal of Health Law and Policy 301; Kenneth Adams, 'Abolish Juvenile Curfews' (2007) 6 Criminology & Public Policy 663; Toni Conner, 'Juvenile Curfews: Political Pandering at the Expense of a Fundamental Right' (2007) 109 West Virginia Law Review 459; Charlotte Walsh, 'Curfews: No More Hanging Around' (2002) 2 Youth Justice 70; Deirdre Norton, 'Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation' (2001) 4 NYU Journal of Legislation & Public Policy 175; Brian Privor, 'Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances' (1999) 79 Boston University Law Review 415.

of the ICCPR and requires a consideration as to the meaning of both terms.[474] Although neither term has been addressed by the CRC Committee, the work of other human rights bodies is more helpful.

C37.S55 **(a) Arbitrarily**

C37.P217 In its General Comment No 35, the HR Committee explained that:

C37.P218 The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[475]

C37.P219 This approach to the concept of arbitrariness allows for a coherent and contextually sensitive approach to the question of when an interference with a child's right to liberty will be justified.[476] It does so by aligning the test used to answer this question in the context of article 37(b) with the test used to assess whether there has been an interference with other civil and political rights under the Convention such as freedom of expression or freedom of religion. Under this test there are three broad considerations. First, is there a *valid law* which authorizes the deprivation? Second, for an interference with a right to be considered *reasonable and/or necessary* it must pursue not only a legitimate aim, but also adopt measures that are *proportionate* to achieving that aim. Third, when assessing the proportionality of these measures it will be necessary to consider (a) whether there is objective evidence that establishes a nexus between the measure and aim (the rational connection test) and (b) if so, whether there is a reasonably available alternative which would have minimized the interference with the child's right (the minimal impairment principle).[477]

C37.P220 The HR Committee's comments with respect to detention in the course of immigration proceedings provide an illustration of these principles.[478] It has explained that 'detention in the course of proceedings for the control of immigration is not per se arbitrary but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time'.[479] Thus, asylum seekers 'may be detained for a brief period in order to document their entry, record their claims and determine their identity'.[480] Any further detention, however, would require reasons 'such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security'. This requires consideration on a case by case basis rather than a mandatory rule and states must 'take into account less invasive means of achieving the same ends'.[481]

C37.N479

[474] In contrast, art 5(1) of the ECHR lists the circumstances when deprivation of liberty will be justified as follows: (a) after conviction by a competent court; (b) for non-compliance with a court order or in fulfilment of any obligation prescribed by law; (c) to bring the person before a competent court where reasonably considered necessary in order to prevent commission of an offence or fleeing; (d) in relation to a minor for his or her educational supervision or to bring him or her before a competent legal authority; (e) to prevent the spread of infectious diseases; and (f) to prevent unauthorized entry or exit of a country.

[475] HR Committee CG 35 (n 5) para 12. See also *Alphen v The Netherlands* Comm No 305/1988 (23 July 1990) para 5.8.

[476] ECOSOC, 'Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (28 September 1984) E/CN.4/1985/4 ('Siracusa Principles') Annex, Section I.A. 'General Interpretative Principles Relating to the Justification of Limitations'.

[477] See chapter 4 of this Commentary; Siracusa Principles (n 476) section I.A.10 entitled 'General Interpretative Principles Relating to the Justification of Limitations'.

[478] HRC GC 35 (n 5) para 18. [479] ibid para 18. [480] ibid para 18.

[481] ibid para 18.

C37.S56 **(b) Unlawful**

C37.P221 According to the HR Committee, unlawful deprivation of liberty refers to 'deprivation of liberty that is not imposed on such grounds and in accordance with such procedure as are established by law'.[482] This approach appears to restrict the inquiry to an investigation as to whether there was a valid law to authorize the deprivation of a person's liberty without any consideration as to whether this law is consistent with international law. However, at a later point in its General Comment the HR Committee explains that '"unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provisions of the Covenant'.[483] This is consistent with the HR Committee's work in the context of ICCPR article 17, which provides protection against unlawful interference with the right to privacy. Here the HR Committee has explained that 'interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant'.[484] Under this approach, the requirement of lawfulness consists of both a *formal requirement*, namely the existence of a valid law, and a *substantive requirement*, namely that the law must be consistent with the Covenant.

C37.P222 With respect to the meaning of 'lawful' under article 17 of the ICCPR, the HR Committee has also explained that the 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorised interference must be made only by the authority designated under the law and on a case by case basis.'[485] This is consistent with the view that for a 'norm to be characterized as a "law"' it 'must be formulated with sufficient precision to enable an individual to regulate his or her conduct and it must be made accessible to the public'.[486]

C37.P223 When this approach is applied to the meaning of unlawful under article 37(b) of the Convention, the requirement that a deprivation of a child's liberty must be lawful includes a formal dimension (namely, the existence of a valid law which is accessible) and a substantive dimension (namely, the existence of a law that is sufficiently precise *and* compatible with other provisions under the Convention).[487] This is certainly the approach adopted under the equivalent provision of the ECHR.[488] Moreover, it is the state that bears the burden of establishing that an interference with a child's liberty is provided for by a valid law.[489]

C37.S57 ## *4. Detention as a Measure of Last Resort and for the Shortest Appropriate Period of Time*

C37.S58 **(a) An Alternative Formulation of the Minimum Impairment Principle**

C37.P224 Unlike other human rights instruments, article 37(b) provides that 'the arrest, detention or imprisonment of a child shall be used as a measure of last resort and for the shortest appropriate period of time'. The CRC Committee regularly laments the failure of states

C37.N483 [482] ibid para 11. [483] ibid para 44. [484] ibid para 3. [485] ibid para 8.

C37.N486 [486] HR Committee, 'General Comment No 34 (2011): Article 19: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34 ('HRC GC 34') para 25. See also Siracusa Principles (n 476) section I.B.17; *Sunday Times v UK* (1979) 2 EHRR 245 para 49; Harris and others (n 4) 637–38, 640–41.

C37.N487 [487] See eg Castan and Joseph (n 4) para 11.11 ff.

C37.N488 [488] *Winterwerp v Netherlands* (1979) 2 EHRR 387 para 45. [489] HRC GC 34 (n 486) para 27.

to comply with this requirement,[490] the momentum for which came during the technical review when it was suggested that article 37(b) should:

C37.P225 state clearly that the detention of children is a measure of last resort, to be limited to the minimum necessary period, with full regard to the individual needs and characteristics, in accordance with Beijing Rule 19.[491]

C37.P226 However, the requirement that deprivation of liberty must be for the 'shortest possible period of time' proved contentious.[492] Some delegations demanded its deletion because it conflicted with domestic laws,[493] while others supported its inclusion because it would ensure consistency with the Beijing Rules.[494] In the end the phrase was retained but amended to read 'for the shortest appropriate period of time'.[495] It seems that the word 'appropriate' was included as some delegations argued that the rehabilitation process 'could/should last for some period'.[496]

C37.P227 There is a tendency to laud this provision as a development in the norms relating to deprivation of liberty.[497] Certainly its inclusion provides much greater clarity as to when detention of a child will be justified relative to the general principle under international law that detention must not be *unlawful or arbitrary*. At the same time, it could be seen as an alternative formulation of the minimum impairment principle which must be applied when considering whether any deprivation of liberty is arbitrary. In this respect, it is worth noting that the HR Committee in its General Comment No 35, when discussing the circumstances in which detention of an individual with a mental illness would be lawful, indicated that such detention 'must be applied only as a matter of last resort and for the shortest appropriate period of time'.[498] This is despite the fact that no such phrase appears under the ICCPR.

C37.P228 As outlined above, the general requirement that any deprivation of liberty must be lawful and non-arbitrary demands that when a state is contemplating the deprivation of a child's liberty for a legitimate aim it must examine all reasonably available alternatives in order to minimize the interference with the child's right to liberty. Moreover, if deprivation of liberty is found to be the only reasonable way to achieve the aim, the length of the detention must be no more than is necessary to achieve that aim. In practical terms this effectively translates into a requirement that the deprivation of a child's liberty must be a measure of last resort and for the shortest appropriate period of time. Under both limbs of this standard, a state bears the burden of establishing first, that it has considered all reasonably available alternatives to detention, and second, that the detention is no longer than is necessary for the purpose of achieving the legitimate aim which justified the detention.

C37.N490

[490] CO Turkmenistan, CRC/C/TKM/CO/2-4 para 57(c); CO Hungary, CRC/C/HUN/CO/3-5 para 57(c); CO Morocco, CRC/C/MAR/CO/3-4 para 75(a); CO Indonesia, CRC/C/IDN/CO/3-4 para 78(d); CO Jordan, CRC/C/JOR/CO/4-5 para 64(c).

[491] E/CN.4/1989/WG.1/CRP.1 para 38–39; *Legislative History* (n 2) 753–54. Beijing Rules (n 10) Rule 19.1: 'The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.' See also: Havana Rules (n 11) Rule 2: 'Deprivation of liberty should be a disposition of last resort and the minimum necessary period and should be limited to exceptional cases'.

[492] E/CN.4/1989/48 paras 536–537, 549; *Legislative History* (n 2) 766–67.

[493] E/CN.4/1989/48 para 549; *Legislative History* (n 2) 767.

[494] E/CN.4/1989/48 para 555; *Legislative History* (n 2) 769.

[495] E/CN.4/1989/48 para 560; *Legislative History* (n 2) 769.

[496] E/CN.4/1989/48 paras 559–60; *Legislative History* (n 2) 769.

[497] See eg Schabas and Sax (n 7) 82 para 127.

[498] HRC GC 35 (n 5) para 19.

C37.S59 **(b) The Arrest, Detention, or Imprisonment of Children**

C37.P229 Article 37(b) provides that the principle of last resort and shortest appropriate period is associated with 'the arrest, detention or imprisonment' of children. This creates an issue as to whether it should be confined only to these types of deprivation. The drafting history indicates that the representative of the USSR suggested a reference to the 'broad notion of deprivation of liberty' be replaced with the more precise 'imprisonment, arrest and detention'.[499] This proposal was supported by four other delegations, concerned that a more general reference 'could also cover education and other types of deprivation of liberty applied to minors besides detention, arrest and imprisonment'.[500] The Working Group accepted the proposal,[501] which has led some commentators to consider 'arrest, detention and imprisonment' more limited than 'deprivation of liberty'.[502]

C37.P230 Such an approach is problematic for two reasons. First, as noted above, the requirement that deprivation of liberty be a measure of last resort and for the shortest appropriate period of time is essentially an alternative formulation of the minimal impairment principle. This principle is derived from the requirement that *any* deprivation of liberty must not be arbitrary, not just the arrest, detention, or imprisonment of a child. Second, under international law the meaning of detention is essentially synonymous with deprivation of liberty. For example, the *UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment* considers 'detention' to be the condition of a detained person and a 'detained person' to be any person deprived of personal liberty, except where the detention results from conviction for an offence.[503] Thus as Nowak has noted:

C37.P231 [t]he word detention, on the other hand, refers to the state of deprivation of liberty, regardless of whether this follows from an arrest (custody, pre trial detention), a conviction (imprisonment), kidnapping or some other act.[504]

C37.P232 This approach is followed by the HR Committee. In General Comment No 35, the HR Committee explained that 'arrest' refers to 'any apprehension of a person that commences a deprivation of liberty' and need not involve a formal arrest under domestic law, while 'detention' refers to 'the deprivation of liberty that begins with the arrest and continues in time from apprehension until release'.[505]

C37.S60 **(c) 'Conformity with the Law'**

C37.P233 The inclusion of the phrase 'conformity with the law' restates the requirement in the first sentence of article 37(b) that deprivation of a child's liberty shall not be *unlawful*. As such, during drafting, it was suggested that 'in conformity with the law' was unwarranted because the first sentence 'adequately met any concerns which the phrase was intended to cover'.[506] However, the phrase was still included at the insistence of the delegation

C37.N499 [499] E/CN.4/1989/48 para 551; *Legislative History* (n 2) 768.

C37.N500 [500] E/CN.4/1989/48 para 556; *Legislative History* (n 2) 769.

C37.N501 [501] E/CN.4/1989/48 paras 557–560; *Legislative History* (n 2) 769.

C37.N502 [502] See eg Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1995) 209.

C37.N503 [503] (9 December 1988) A/RES/43/173, Annex, 'Use of terms'.

C37.N504 [504] Nowak (n 4) 221 para 21. In its now replaced 'General Comment No 8', the HR Committee points out that art 9(1) is applicable 'to all deprivations of liberty, whether in criminal cases or in other cases': HRC GC 8 (n 5) para 1.

C37.N505 [505] HRC GC 35 (n 5) para 13. See also *Spakmo* v *Norway* Comm No 631/1995 (11 November 1999) para 6.3; *Yklymova* v. *Turkmenistan* 1460/2006 (20 July 2009) paras 7.2–7.3 (de facto house arrest).

C37.N506 [506] E/CN.4/1989/48 para 553; *Legislative History* (n 2) 768–69.

proposing the words, 'arrest, detention or imprisonment', to ensure those measures were taken in conformity with the law.[507]

C37.S61 ### *5. The Concerns of the Committee*

C37.S62 #### (a) The Requirement of a Minimum Age

C37.P234 In its original *Guidelines for Periodic Reports*,[508] the CRC Committee requested states to provide information on any minimum age defined in national legislation for the deprivation of a child's liberty, 'including by arrest detention and imprisonment, inter alia, in the areas of administration of justice, asylum seeking and placement of children in welfare and health institutions'.[509] In its current *Guidelines*, the CRC Committee still requests states that define the minimum age of children below 18 years of age indicate 'how all children benefit from protection and enjoy their rights under the Convention'—including the right that detention is a measure of last resort for children 'up to the age of 18 years'.[510] This concern is also reflected in its concluding observations. For example, it recommended that Panama 'defines in its national legislation a minimum age below which children may not be deprived of their liberty'[511] and expressed concern at the absence of such a law. The Committee is equally concerned where a State Party has defined a minimum age which is below international standards.[512]

C37.P235 However, the CRC Committee's requirement for a minimum age cannot be reconciled with the reality that a child's detention at an early age may be appropriate to, for example, ensure their care and protection, or for administrative reasons in the context of refugee detention. As such, the Committee's requirement of a minimum age should be confined to deprivation of a child's liberty in the context of the criminal justice system. This distinction is clear in the Committee's concluding observations on Tuvalu, where it recommended that the State Party 'raise the age of criminal liability to an international accepted standard and explicitly establish a minimum age for deprivation of liberty in accordance with the Convention'.[513]

C37.S63 #### (b) Imprisonment

C37.P236 The CRC Committee routinely expresses its concern that the imprisonment of children may be contrary to article 37(b).[514] The Convention certainly contemplates the imprisonment of children and it was recognized during the drafting that this may be appropriate for the purposes of a child's rehabilitation.[515] However, the Convention demands that all alternatives must be explored first (arts 37(b) and 40(4)) and that any detention must be

C37.N515

[507] E/CN.4/1989/48 para 551; *Legislative History* (n 2) 768.

[508] CRC Committee, 'General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44, paragraph 1(b) of the Convention' (20 November 1996) CRC/C/58 para 24.

[509] ibid.

[510] CRC Committee, 'Treaty-specific Guidelines Regarding the Form and Content of Periodic Reports to Be Submitted by States Parties under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child' (3 March 2015) CRC/C/58/Rev.3 ('Guidelines for Periodic Reports') para 22.

[511] CO Panama, CRC/C/15/Add.68 paras 21–22. See also: CO Syrian Arab Republic, CRC/C/15/Add.70 para 19; CO United Kingdom, CRC/C/15/Add.34 para 10.

[512] CO Seychelles, CRC/C/SYC/CO/2-4; CO Cambodia, CRC/C/KHM/CO/2-3 para 76; CO Bahrain, CRC/C/BHR/CO/2-3 para 69(a); CO Egypt, CRC/C/EGY/CO/3-4 para 86.

[513] CO Tuvalu, CRC/C/TUV/CO/1 para 63.

[514] CO Mauritius, CRC/C/MUS/CO/3-5 para 69(b); CO Kyrgyzstan, CRC/C/KGZ/CO/3-4 para 66(c); CO Namibia, CRC/C/NAM/CO/2-3 para 74(f); CO Tajikistan, CRC/C/TJK/CO/2 para 73(c).

[515] E/CN.4/1989/48 para 559; *Legislative History* (n 2) 769.

consistent with the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting their reintegration into society (article 40(1)).

C37.P237 In General Comment No 10, the CRC Committee emphasized that states must, as part of a comprehensive policy for juvenile justice, 'develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed'.[516] The Committee made reference to article 40(4) in noting that any comprehensive policy 'should include care, guidance and supervision, counselling, probation, foster care, educational and training programs, and other alternatives to institutional care'.[517]

C37.P238 The Beijing Rules also provide guidance as to when deprivation of children's liberty is *appropriate*. Under Rule 17.1, the competent authority considering imprisonment must be guided by: the proportionality of imprisonment to the gravity of the offence and the needs of the juvenile and society; the possible minimum restrictions on the juvenile's personal liberty; alternative responses to imprisonment; if the offence involves violence against another person; if the child offender persistently commits serious offences; and, the well-being of the juvenile. Moreover, the commentary to rule 19 of the Beijing Rules indicates that where it is deemed appropriate to deprive a child of liberty, the requirement that deprivation be for the shortest appropriate time has implications for the deprivation's nature. For example, 'priority should be given to "open" over "closed" institutions' and 'any facility should be a correctional or educational rather than of a prison type'.[518]

C37.S64 **(c) Pre-trial Detention**

C37.P239 The CRC Committee has repeatedly expressed concern that in many countries, children languish in pre-trial detention for months or even years, constituting a grave violation of article 37(b) of the Convention.[519] For example, in its concluding observations for Cambodia it noted that approximately half of all children in prison are being held in pre-trial detention, and often beyond a two-month period.[520] In relation to Bolivia, the Committee decried the fact that 'a child may remain in custody for the excessively long period of 45 days before the legality of his or her detention is decided upon'.[521] As such, the Committee has recommended that the length of pre-trial detention be limited,[522] only used for serious crimes,[523] and its legality in individual cases reviewed regularly, 'preferably every two weeks'.[524] Such concerns are consistent with those of the HR Committee, which considers that pre-trial detention should be an exception and as short as possible.[525] Excessive pre-trial detention has further negative consequences for individual detainees. For example, it may lead to, or exacerbate, problems of overcrowding,[526] a condition that,

C37.N516 [516] CRC GC 10 (n 9) para 23. [517] ibid.

C37.N518 [518] Beijing Rules (n 10) commentary to rule 19. See also Barry Goldson and Ursula Kilkelly, 'International Human Rights Standards and Child Imprisonment: Potentialities and Limitations' (2013) 21 International Journal of Children's Rights 345, 354.

C37.N519 [519] CRC GC 10 (n 9) para 80; CO Guinea, CO CRC/C/GIN/CO/2 para 85; CO Albania, CRC/C/ALB/CO/2-4 para 84; CO Austria, CRC/C/AUT/CO/3-4 para 66; CO Algeria, CRC/C/DZA/CO/3-4 para 82.

C37.N520 [520] CO Cambodia, CRC/C/KHM/CO/2-3 para 76.

C37.N521 [521] CO Bolivia CRC/C/15/Add.1 para 11. See also: CO Afghanistan, CRC/C/AFG/CO/1 para 75; CO Burundi, CRC/C/BDI/CO/2 para 76; CO Guatemala, CRC/C/GTM/CO/3-4 para 99; CO Sri Lanka, CRC/C/LKA/CO/3-4 para 77.

C37.N522 [522] CO Nigeria, CRC/C/NGA/CO/3-4 para 91.

C37.N523 [523] CO Burkina Faso, CRC/C/BFA/CO/3-4 para 77. [524] CRC GC 10 (n 9) para 83.

C37.N525 [525] See HRC GC 35 (n 5) paras 37–38. See also HRC GC 8 (n 5) para 3.

C37.N526 [526] Special Rapporteur, A/HRC/28/68 (n 7) para 41.

in combination with others, may lead to a finding of torture or ill-treatment. Further, as the HR Committee has noted, extremely prolonged pre-trial detention 'may also jeopardize the presumption of innocence'.[527]

C37.P240 Significantly, Rule 13 of the Beijing Rules requires that:

C37.P241 (a) Detention pending trial shall only be used as a measure of last resort and for the shortest possible period of time.

C37.P242 (b) Whenever possible detention pending trial shall be replaced by alternative measures such as close supervision intensive case or placement with a family or in an educational setting or home.

C37.P243 Rule 17 of the Havana Rules also provide that:

C37.P244 [j]uveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. When preventative detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.[528]

C37.P245 It is important to recognize that pre-trial detention can be particularly damaging for juveniles relative to adults. The Special Rapporteur on the Application of International Standards Concerning the Human Rights of Detained Juveniles states:

C37.P246 [a]lthough the general principle that detention prior to trial should be exceptional applies equally to juveniles and adults, this does not imply that the same legal criteria should be used in determining whether or not a detention of a juvenile is necessary. Deprivation of liberty generally has more serious consequences on the rights of the juvenile, because it involves separation of the child from the family, which has the function of caring for and protecting the child, and because the child is more vulnerable to the types of violence, corruption and abuse which jails and other detention centres tend to foster. Consequently, the interests of the individual, which must be balanced against those of the State, are of a different order when the individual is juvenile.[529]

C37.S65 **(d) Asylum-seeking and Refugee Children**

C37.P247 State obligations under the Convention are not limited to citizens, but apply to each child within the territory and all children subject to its jurisdiction.[530] Deprivation of liberty, including for the purposes of determining refugee status, must be used in exceptional circumstances, only as a measure of last resort, and for the shortest appropriate period of time.[531] This implies that any detention must be subject to judicial review in order to determine whether individual circumstances have changed to no longer justify detention, and limited in time.[532] Further, the best interests of the child must be a

C37.N539

[527] HRC GC 35 (n 5) para 37.

[528] See also UNGA 'UN Standard Minimum Rules for Non-Custodial Measures' (14 December 1990) UNGA Res 45/110, Rule 6.

[529] Special Rapporteur, 'Application of International Standards Concerning the Human Rights of detained Juveniles: Note by the Special Rapporteur' (22 July 1991) E/CN.4/Sub.2/1991/50 11.

[530] CRC art 2; CRC Committee, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (1 September 2005) CRC/GC/2005/6 ('CRC GC 6') para 12.

[531] CRC GC 10 (n 9) para 11. See also HRC GC 35 (n 5) para 18.

[532] CO Australia, CRC/C/AUS/CO/4 paras 80–81.

primary consideration in the process of determining refugee status and asylum-seeker claims.[533]

C37.P248 The CRC Committee has frequently expressed its concern at the detention of children seeking asylum. For example, in the Committee's fifth concluding observations for Sweden, it expressed concern at reports that asylum seeker children waited for lengthy periods in detention until their claims were determined,[534] and recommended that the processing of asylum applications be expedited.[535] The Committee's concluding observations for Canada expressed similar sentiments, stating, 'deprivation of liberty, particularly of unaccompanied children, for security or other purposes should only be used as a measure of last resort in accordance with article 37(b)'.[536] States should also collect statistics on the number of children seeking asylum.[537]

C37.P249 The CRC Committee also addressed the issue of detention of migrant, refugee, and/asylum seeking children in its Recommendations from its General Discussion Day on the Rights of All Children in the Context of International Migration in 2012. It explained that:

C37.P250 The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.[538]

C37.P251 In a joint General Comment with the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the CRC Committee has expanded on this issue, demanding an absolute prohibition on the detention of children in a migration context. Indeed, the Committee has explained that: 'any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice'.[539] The Committee has adopted this strict line because:

C37.P252 offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development.[540]

C37.N533 [533] ibid para 81; CO Canada, CRC/C/CAN/CO/3-4 para 73. See Jason Pobjoy, 'The Best Interests of the Child Principle As An Independent Source of International Protection' (2015) 64 International and Comparative Law Quarterly 327; Chapter 22 of this Commentary for a detailed discussion of this issue.

C37.N534 [534] CO Sweden, CRC/C/SWE/CO/5 para 49(f). [535] ibid para 50(e).

C37.N536 [536] CO Canada, CRC/C/15/Add.37 para 24. See also: CO Mexico, CRC/C/MEX/CO/4-5 para 58 (recommending that the state take measures to end detention of asylum-seeking children); CO Poland, CRC/C/POL/CO/3-4 para 45 (recommending that all forms of detention of asylum seekers under 18 be avoided); CO Bangladesh, CRC/C/BGD/CO/5 para 71 (recommending that the state release asylum-seeking and refugee children held in detention centres, and that the state ensure that unaccompanied, separated, refugee, and asylum-seeking children are not detained because of illegal entry or stay).

C37.N537 [537] CO United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 para 71.

C37.N538 [538] CRC Committee, 'Report of the 2012 Day of General Discussion on Rights of All Children in the Context of International Migration' para 78.

C37.N539 [539] 'Joint General Comment No 3 (2017) of the Committee of the Rights of All Migrant Workers and Members of their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration (16 November 2017) CMW/C/GC/3-CRC/C/GC/22 ('CRC GC 23') paras 5, 12.

C37.N540 [540] CRC GC 23 (n 539) para 10.

C37.P253 The CRC Committee reiterated that states should adopt solutions that fulfil the best interests of the child. This requires 'non-custodial, community-based' alternative arrangements 'while their immigration status is being resolved and the children's best interests are assessed'.[541] Unaccompanied children should be accommodated 'in accordance with the Guidelines for the Alternative Care of Children'. Importantly, however, the need to keep the family together does not justify depriving accompanied children of their liberty. Rather, 'when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family'.[542] These statements are more definitive than the New York Declaration for Refugee and Migrants resolution adopted by the UN General Assembly on 19 September 2016:

C37.P254 recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.[543]

C37.P255 The approach of the Committee is also consistent with the view of the Special Rapporteur on Torture who has noted with concern that unaccompanied child migrants 'are systematically held in detention at police stations, border guard stations or migration detention centres instead of being held in reception centres, which are in practice often not numerous enough or are overcrowded'.[544] While detained, these children often 'witness or suffer harsh physical abuse' and experience 'appalling and inhuman conditions'.[545] The Special Rapporteur recommends that immigration detention should be prohibited as a method of control or deterrence for migrant children, never used as a penalty or punishment including for irregular entry or presence, and that States Parties 'take into consideration any trauma, exposure to torture, or other forms of ill-treatment that child migrants have experienced prior to being detained'.[546]

C37.P256 The ECtHR has found that even short-term detention of migrant children can violate the prohibition on torture and other ill-treatment. In *Popov v France*, a family was detained in an overcrowded and dilapidated facility with limited privacy for a period of fifteen days. Notwithstanding that the detention centre had a special wing for the accommodation of families, the fact that 'the children's particular situation was not examined,' and that the French authorities did not verify that the detention 'was a measure of last resort for which no alternative was available,' amounted to a violation of article 5(1)(f) ECHR.[547] This case illustrates the requirement of individual consideration.

C37.P257 The HR Committee also emphasizes the importance of individual consideration in determining whether detention is unjustified. In *A v Australia*,[548] the HR Committee noted that a mandatory policy of detaining individuals seeking asylum is not per se arbitrary. However:

C37.NS48

[541] ibid para 11. [542] ibid para 11.

[543] UNGA A/RES/71/1 (3 October 2016) ('New York Declaration') para 33.

[544] Special Rapporteur, A/HRC/28/68 (n 7) para 59; Special Rapporteur, 'Report of the Special Rapporteur' (4 March 2011) A/HRC/16/52/Add.4 paras 68–69.

[545] Special Rapporteur, A/HRC/28/68 (n 7) paras 60–61. [546] ibid paras 84(m)–84(p).

[547] *Popov v France* App no 39472/07 (19 January 2012) para 119. See also *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (12 October 2006).

[548] *A v Australia* Comm No 560/1993 (11 April 1997).

C37.P258 every detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[549]

C37.P259 The HR Committee has consistently held that Australia's immigration policy breaches article 9(1) ICCPR.[550] In concluding observations the HR Committee stated:

C37.P260 The Committee considers that the mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum seekers, raises questions of compliance with article 9, paragraph 1 of the Covenant, which provides that no person shall be subject to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental organisations to the detainees in order to inform them of this right.[551]

C37.P261 The Guidelines of the United Nations High Commissioner for Refugees ('UNHCR') for dealing with refugee children complement both the CRC Committee's and the HR Committee's position. The Guidelines note initially that, in principle, children 'should not be detained at all'.[552] However, if children are detained:

C37.P262 [o]verall an ethic of care—and not enforcement—needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an 'illegal alien'.[553]

C37.P263 In addition, states must make concerted efforts to have asylum-seeking and refugee children released from detention and placed in alternative accommodation, and families must be kept together at all times, including during their stay in detention and upon their release.[554]

C37.P264 Unaccompanied and separated children are especially vulnerable.[555] To ensure their obligations under the Convention are met, states must allocate appropriate resources in order to protect and promote their rights. States should guarantee the appointment of an independent legal representative and guardian.[556] Due to the potential for a serious conflict of interest, the person responsible for immigration detention and determination of refugee and visa applications should not act as legal guardian of such children.[557]

C37.S66 **(e) Children in Need of Protection**

C37.P265 The CRC Committee's concern at the deprivation of children's liberty extends to those children who are ostensibly detained for the purposes of ensuring their care and

C37.N549 [549] ibid para 9.4.

C37.N550 [550] See *C v Australia* Comm No 900/99 (13 November 2002) para 8.2; *Baban v Australia* Comm No 1014/01 (18 September 2003); *Bakhtiyari v Australia* Comm No 1069/02 (6 November 2003); *D and E v Australia* Comm No 1050/02 (25 July 2006).

C37.N551 [551] CO Australia, CCPR/ CO/69/AUS para 19.

C37.N552 [552] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* ('UNHCR 2012') 34.

C37.N553 [553] ibid 35. [554] ibid, 34–36. [555] CRC GC 6 (n 530) para 3.

C37.N556 [556] CO Australia, CRC/C/AUS/CO/4 para 81. The HR Committee agrees: see CO Russian Federation, CCPR/CO/79/RUS para 25.

C37.N557 [557] CO Australia, CRC/C/AUS/CO/4 paras 80–81. See further Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 Sydney Law Review 437; Julie Taylor, 'Guardianship of Child Asylum-Seekers' (2006) 34 Federal Law Review 185.

protection. For example, when commenting on the provision in Nigerian national legislation providing for the detention of children assessed to be 'beyond parental control', the Committee expressed concern that:

C37.P266 abandoned children or children living and/or working on the street would have such measures applied against them … [and that] such legislative measures do not appear to be compatible with the provisions of article 37(b) of the Convention.[558]

C37.P267 Regarding Nepal, the Committee explained that, '[t]he law permitting the placement of mentally disturbed children in jails should be reviewed as a matter of urgency'.[559] It also expressed concern in its report for Kenya, that 'street children are detained on the basis of their social condition',[560] and recommended in its report for Rwanda, that the State Party:

C37.P268 [p]ermanently close all unofficial places of detention … and stop the arbitrary detention of children in need of protection, such as children in street situations and child victims of prostitution, and conduct thorough investigations of acts of arbitrary detention, ill-treatment, and other abuses occurring in the centres.[561]

C37.P269 Detaining a child for the purpose of ensuring his or her safety and protection is a legitimate aim. For instance, children who suffer from serious drug problems or are exhibiting suicidal tendencies may require confinement and monitoring to ensure they do not cause harm to themselves. However, the detention of children in such circumstances will only be *appropriate* when it is necessary to protect the health and well-being of a child and no alternative protective measures are reasonably available. This determination must be made on a case-by-case basis and will require evidence from the relevant authorities to establish that detention is a measure of last resort. It is not appropriate to simply assume or assert that depriving a child of their liberty will address any protective concerns.

C37.P270 Thus, there is a need to avoid a 'child saving' or 'child rescue' approach, whereby children by virtue of their age are assumed to be vulnerable and in need of protection. Historically, and even in many contemporary settings, this protection paradigm has led to the detention of street children and/or homeless children in circumstances where the agency, capacity, and right to liberty of children has been completely overlooked.[562] The C37.N566 Convention does not tolerate such an approach. Moreover, article 25 of the Convention

[558] CO Nigeria, CRC/C/15/Add.61 para 21. See also: CO Netherlands, CRC/C/15/Add.227 para 59(d) (recommending that juvenile offenders be detained separately to children institutionalized for behavioural problems); CO Brazil, CRC/C/BRA/CO/2-4 paras 36, 83 (recommending that arbitrary detention of children participating in demonstrations cease; recommending that arbitrary detention of street children be prohibited, and that availability of shelters for children in street situations be increased); CO Slovakia, CRC/C/SVK/CO/3-5 para 54 (making recommendations regarding the treatment of unaccompanied children outside their country of origin in care); CO Great Britain, CRC/C/GBR/CO/5 paras 78–79 (noting that detention is not applied to children with psychosocial disabilities as a matter of last resort, recommending the principle that detention should be used as a measure of last resort); CO Bulgaria, CRC/C/BGR/CP/3-5 paras 60, 61 (noting the placement of children with psychosocial disabilities, health issues such as aids and drug addiction in boarding schools, and making recommendations regarding provision of services and legal protections in such educational facilities).

[559] CO Nepal, CRC/C/15/Add.57, 7 para 38.

[560] CO Kenya, CRC/C/KEN/CO/2 para 67. See further CO Libyan Arab Jamahiriya, CRC/C/15/Add.209 para 45.

[561] CO Rwanda, CRC/C/RWA/CO/3-4 para 63.

[562] Noam Schimmel, 'Freedom and Autonomy of Street Children' (2006) 14 International Journal of Children's Rights 211; Arnon Bar-On, 'Criminalizing Survival: Images and Reality of Street Children' (1997) 26 International Social Policy 63 74.

provides that states must periodically review the placement of a child for protective purposes to ensure the suitability and necessity of the placement. This obligation extends to those placements which involve deprivation of a child's liberty.

C37.S67 **(f) Mandatory Detention of Children**

C37.P271 Mandatory detention will never be compatible with the requirement that detention is a measure of last resort and for the shortest appropriate period of time. As the Special Rapporteur on Torture has noted, mandatory detention is inherently arbitrary as it allows for no differentiation or consideration of individual circumstances. It dictates a child's detention is the sole, rather than last resort, making no allowance for judicial discretion in considering alternative courses of action. It excludes consideration of the detention's appropriateness and therefore violates the prohibition on prohibition of cruel, inhuman, or degrading punishment.[563]

C37.P272 Mandatory detention regimes may also be racially discriminatory. As Ben Saul notes, 'an indirectly racially discriminatory effect' may arise where 'it can be shown that [the regime] operates to disproportionately affect a particular racial group compared to others'.[564] The CRC Committee has criticized the mandatory detention of child offenders and asylum-seekers in Australia for this reason, among others.[565] Its concluding observations for Australia noted:

C37.P273 [t]he Committee is particularly concerned at the enactment in legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures for juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.[566]

C37.P274 This practice elicited similar criticism from other treaty monitoring committees, including the HR Committee, CAT Committee,[567] and CERD Committee.[568] The HR Committee's concluding observation for Australia stated:

C37.P275 [l]egislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.[569]

C37.P276 Like the HR Committee, the CRC Committee failed to identify which Convention articles are violated by the mandatory imposition of detention on child offenders. However, this practice is clearly inconsistent with the requirement under article 37(b)

C37.N563 [563] Special Rapporteur, A/HRC/28/68 (n 7) para 74. See also Dirk van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 The Modern Law Review 541, 547. See also Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child* (Parliament of Commonwealth of Australia 2000, 17th report) para 8.26.

C37.N564 [564] Ben Saul, Submission No 2 (21 February 2012), 1 in relation to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* http://www.aph.gov.au/DocumentStore.ashx?id=20aed458-671e-4e70-bb7b-352a423c13ce accessed 16 April 2018.

C37.N565 [565] For asylum-seekers see above section II.E.5.d.

C37.N566 [566] CO Australia, CRC/C/15/Add.79 para 22. For repeated criticism see: CO Australia, CRC/C/15/Add.268 para 74; CO Australia, CRC/C/AUS/CO/4 para 82.

C37.N567 [567] CO Australia, CAT/C/XXV/Concl.3 para 6(e).

C37.N568 [568] CO Australia, CERD/C/304/Add.101 para 16.

C37.N569 [569] CO Australia, CCPR/CO/69/AUS para 17.

that deprivation of a child's liberty be a measure of last resort and for the shortest appropriate period of time.[570]

C37.S68 ## F. Paragraph 37(c): The Treatment of Children Deprived \of Their Liberty

C37.S69 ### *1. The Right to Be Treated with Humanity and Respect*

C37.S70 #### (a) A Fundamental and Universal Rule

C37.P277 All children deprived of their liberty are entitled to be treated with humanity and respect for their inherent dignity. The formulation of this right under article 37(c) is based on article 10(1) of the ICCPR which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person'.[571] Article 37(c) differs from the ICCPR with the addition of the phrase '*and in a manner which takes into account the needs of persons of his or her age*'.[572] The CRC Committee has not explored in detail the meaning of the right to be treated with humanity and respect as it appears under article 37 and has tended to simply express its concerns with the conditions experienced by children who are in detention.[573] Although, in General Comment No 10, the CRC Committee provided a non-exhaustive list of principles and rules that must be observed in all case of deprivation of liberty.[574] In contrast, the HR Committee's General Comment No 21 on article 10 has detailed the core features of this standard.[575]

AQ: - See highlighted text in note. Complete, or delete?

C37.P278 First, it applies to all situations in which a person is deprived of their liberty, not just imprisonment.[576] Second, it imposes a 'positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant'.[577] Third, it is a fundamental and

C37.N579

[570] A number of commentators have suggested that the practice of mandatory detention for child offenders is in violation of several other arts under the Convention including: art 3, the best interests of the child; art 37(a), the prohibition against torture and other ill-treatment (see eg Saul (n 564)); art 37(b), the prohibition against arbitrary deprivation of liberty; art 40(1), the requirement to reintegrate a child offender; art 40(2)(b), the right to review of a sentence; art 40(4), the obligation to ensure alternatives to detention and proportionate punishment. A federal inquiry in Australia by the Senate Legal and Constitutional References Committee in relation to the practice of mandatory sentencing considered each of these grounds. It concluded that many of the provisions of the CRC (and the ICCPR) were in fact breached by legislation providing for mandatory sentencing: Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (Commonwealth of Australia 2000).

[571] See also: ACHR art 5(2) ('All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'); Convention on the Rights of Migrant Workers (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art 17(1); Body of Principles for the Protection of All Persons under any form of Detention of Imprisonment, Principle 1 ('All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person'); Basic Principles for the Treatment of Prisoners, Principle 1 ('All prisoners shall be treated with the respect due to their inherent dignity and value as human beings').

[572] This phrase appears in art 10(3) of the ICCPR, where it is confined to treatment of juvenile offenders. In contrast, the formulation used in art 37(c) extends the principle to all children irrespective of the nature of the deprivation of liberty.

[573] See below paras xx. See also: CO Uruguay, CRC/C/15/Add.62 para 14 ('that children deprived of liberty are treated with humanity '); CO Guinea, CO CRC/C/GIN/CO/2 para 86(e) ('respected for their inherent dignity'); CO Algeria, CRC/C/DZA/CO/3-4 para 82(c) ('treated humanely and with respect for their inherent dignity'); CO Chile, CRC/C/CHL/CO/4-5 para 86(d) ('improve the infrastructure of detention centres to ensure adequate security, dignity and privacy to children'); CO Haiti, CRC/C/HTI/CO/2-3 paras 70–71.

[574] CRC GC 10 (n 9) para 89. [575] HRC GC 21 (n 5). [576] ibid para 2.

[577] ibid para 3.

universal rule. As such, the 'application of this rule, as a minimum, cannot be dependent on the material resources available in the State party'.[578] Fourth, the following instruments provide guidance with the respect to appropriate conditions of detention: the Mandela Rules, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Code of Conduct for Law Enforcement Officials, and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[579] Fifth, states must adopt appropriate legislative and administrative measures to ensure such conditions; this includes measures to monitor implementation of these standards and the provision of appropriate training to relevant personnel.[580]

C37.P279 Sixth, the general right to be treated with humanity and respect gives rise to the more specific entitlements under article 10(2) and 10(3) of the ICCPR. Article 10(2) provides that:

C37.P280 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

C37.P281 (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

C37.P282 Article 10(3) provides that:

C37.P283 The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

C37.P284 These features of the right to be treated with humanity and respect when deprived of liberty under article 10 of the ICCPR, are also addressed under specific provisions within the Convention. The right to be separated from adults is contained in article 37(c) and the principles to inform the treatment of a child who is detained within the criminal justice system are detailed in article 40(1).

C37.S71 **(b) The Need for a Child-centred Approach when Understanding Humanity and Respect**

C37.S72 *(i) Compliance with International Standards*

C37.P285 The CRC Committee has regularly urged states to comply with international standards concerning the conditions for children deprived of their liberty.[581] In this respect, the Beijing Rules and Havana Rules are especially relevant, and both have been affirmed by the Committee in its concluding observations,[582] and in its General Comment No

C37.N578 [578] ibid para 4.

C37.N579 [579] ibid para 5. See also *Mukong v Cameroon* (n 14) para 9.3. The HR Committee held that the norms contained in the *Standard Minimum Rules for the Treatment of Prisoners* are actually incorporated into the guarantee of humane treatment under art 10(1) ICCPR. See also *Potter v New Zealand* Comm No 632/95 (28 July 1997) para 6.3.

C37.N580 [580] HRC GC 21 (n 5) paras 6, 7.

C37.N581 [581] See eg: CO Jamaica, CRC/C/JAM/3-4 para 65(c); CO Colombia, CRC/C/COL/4-5 para 67(e); CO Dominican Republic, CRC/C/DOM/3-5 para 72(f); CO Venezuela, CRC/C/VEN/CO/3-5 para 75(c); CO Indonesia, CRC/C/IDN/CO/3-5 para 78(d).

C37.N582 [582] See eg: CO Azerbaijan, CRC/C/AZE/CO/3-4 para 76; CO Belarus, CRC/C/BLR/CO/3-4 para 72. CO Kuwait, CRC/C/KWT/CO/2 para 77; CO Lithuania, CRC/C/LTU/CO/3-4 para 51; CO Monaco, CRC/C/MCO/CO/2-3 para 48; CO Sao Tome and Principe, CRC/S/STP/CO/2-4 para 61; CO Romania, CRC/C/ROM/CO/4 para 92.

10 on the Administration of Juvenile Justice.[583] These instruments provide significant insight into the particular measures that must be taken by states to ensure that the treatment of children in detention is consistent with their right to be treated with respect and humanity.

C37.P286 For example, rule 28 of the Havana Rules provides:

C37.P287 The detention of juveniles should only take place under conditions that take account of their particular needs, status and special requirements according to their age, personality, sex and type of offence as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.

C37.P288 The Havana Rules continue to set out a broad set of rights which respond to children's needs in: pre-trial detention and legal assistance; maintenance of records; movement and transfer; classification and placement; physical environment and accommodation; education; vocational training and work; recreation; religion; medical care, notification of illness, injury, or death; contacts with wider community; limitations of physical restraint and the use of force, disciplinary procedures, inspection, and complaints; and return to the community.

C37.P289 The Beijing Rules also help inform an understanding of the 'needs' of children deprived of their liberty. Rule 26.2 provides:

C37.P290 Juveniles in institutions shall receive care, protection and all necessary assistance—social, educational, vocational, psychological, medical and physical —that they may require because of their age, sex and personality and in the interest of their wholesome development.

C37.P291 The obligation to take account of a child's age when determining their needs reflects the reality that children's needs will vary according to age. It means rather than treating children deprived of their liberty as a single class, states must consider each child individually and respond to their individual needs.

C37.P292 There is no express requirement under Article 37(c) for states to take into account a child's gender. This does not mean gender is not a relevant consideration. Rather, it reflects the gender-neutral approach adopted throughout the Convention. As a matter of practice, a child's gender will be relevant to a determination of their needs. This view is supported by rule 28 of the Havana Rules and rule 26.2 of the Beijing Rules, which contain express references for the need to account for gender.[584] In addition, rule 26.4 of the Beijing Rules provides:

C37.P293 Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

C37.S73 *(ii) The Nature and Circumstances of the Deprivation*

C37.P294 The needs of children deprived of their liberty will vary according to the nature and circumstances of their deprivation. In armed conflict, where international humanitarian law is applicable, children enjoy a range of specific protections under the Geneva

C37.N583

[583] CRC GC 10 (n 9) para 88.

[584] See also Rule 27.2 of the Beijing Rules, which provides:

Efforts shall be made to implement the relevant principles laid down in the Standard Minimum Rules for the Treatment of Prisoners to the largest extent possible so as to meet the varying needs of juveniles specific to their age, sex and personality.

Conventions and Additional Protocols.[585] The treatment and detention of child refugees should be guided by the *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*, adopted by members of the UNHCR Executive Council,[586] as well as various other relevant documents adopted by the UNHCR.[587] Children in pre-trial detention are identified under the relevant UN standards as a specific group a state must accommodate.[588]

C37.S74 *(iii) The Other Provisions of the Convention*

C37.P295 An understanding of the *needs of children* who are deprived of their liberty will also be informed by other considerations. These include the rights to which children are entitled under other provisions of the Convention. Indeed, conditions of detention that violate a child's rights cannot be said to be consistent with a child's needs and it worth noting that the CRC Committee has regularly recommended that states ensure, for example, that the health and education of children in detention are addressed,[589] and that measures be taken to protect them against violence.[590]

C37.P296 The views of children themselves must also be a relevant consideration in determining their needs while deprived of their liberty. Article 12 demands that states must develop mechanisms by which children can express their views on matters that affect them, and their deprivation of liberty is surely such a matter. Although such views are not determinative as to how children must be treated, they must be given due weight in accordance with the age and maturity of the child. The CRC Committee has acknowledged the relevance of article 12 to article 37(c) in its concluding observations on Canada, where it urged the State Party to 'ensure that the views of the children concerned are adequately heard and respected in all court cases'.[591]

C37.S75 *(iv) The Work of the Committee*

C37.S76 A Focus on Reintegration

C37.P297 In General Comment No 10, the CRC Committee explored the content of the obligation to treat children in a manner that accounts for the needs of persons of their age in the context of juvenile justice. In order to satisfy the obligation, treatment must promote the child's reintegration as a constructive member of society:

C37.P298 This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and

C37.N585 [585] See chapter 38 of this Commentary and n 53 and n 389 of this chapter.

C37.N586 [586] UNHCR 2012 (n 552).

C37.N587 [587] See eg: UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-seeker and Refugees, 2014–2019* (2014) http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=536b564d4; UNHCR, 'Options Paper 1: Options for Governments on Care Arrangements and Alternatives to Detention for Children and Families' (2015) http://www.refworld.org/docid/5523e8d94.html; UNHCR, 'Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention' (2015) http://www.refworld.org/docid/5523e9024.html.

C37.N588 [588] See Havana Rules (n 11) Rules 17–18; Beijing Rules (n 10) Rule 13.

C37.N589 [589] See eg: CO Jamaica, CRC/C/JAM/CO/3-4 para 65(c); CO Columbia, CRC/C/COL/4-5 para 67(e); CO Dominican Republic, CRC/C/DOM/3-5 para 72(f); CO Venezuela, CRC/C/VEN/CO/3-5 para 75(c).

C37.N590 [590] See eg CO Columbia, CRC/C/COL/4-5 para 67(f).

C37.N591 [591] CO Canada, CRC/C/15/Add.215 para 57(b).

continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children.[592]

C37.P299 The HR Committee has offered further guidance regarding article 10(3), stating that the requirement to treat a juvenile offender according to their age requires shorter working hours and contact with relatives with the aim of furthering reformation and rehabilitation.[593] In the context of article 14(4), it noted that while juveniles are to enjoy the same basic guarantees and protection accorded to adults, 'juveniles need special protection'. In particular:

C37.P300 Detention before and during the trial should be avoided to the extent possible. States should take measures to establish … a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.

C37.P301 Whenever appropriate, in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling or community service or educational programmes, should be considered … [594]

C37.P302 In General Comment No 13 (replaced by General Comment No 21), the HR Committee criticized states for not having furnished sufficient information concerning 'the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation" '.[595]

C37.P303 The CRC Committee has frequently noted its concern that States Parties fail to provide adequate recovery and social reintegration programs for children.[596] For example, its concluding observations on the Holy See recommended that the state 'take all appropriate measures to ensure the physical and psychological recovery and social reintegration' of child victims.[597] The Committee generally does not provide specific prescriptive requirements but, at times, has noted that States Parties should provide: psychologists;[598] develop and fund social reintegration programs;[599] and provide legal assistance.[600]

C37.S77 The Need to Gather Data

C37.P304 The CRC Committee has emphasized the importance of recording appropriate data with respect to children who are deprived of their liberty.[601] It has urged states to provide comprehensive data disaggregated by age, sex, offence, geographical location, and socio-economic background.[602] The Special Rapporteur has made similar recommendations,

C37.N595

[592] CRC GC 10 (n 9) para 13. [593] HRC GC 21 (n 5) para 13.

[594] HR Committee, 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (23 August 2007) CCPR/C/GC/32 paras 42–44.

[595] HR Committee, 'CCPR General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law' (13 April 1984) in HRI/GEN/1/Rev.1, 14 para 16.

[596] CO Uruguay, CRC/C/URY/CO/3-5 para 71(d); CO Iraq, CRC/C/IRQ/CO/2-4 para 86(d); CO Gambia, CRC/C/GMB/CO/2-3 para 82(g); CO Austria, CRC/C/AUT/CO/3-4 para 67(d).

[597] CO Holy See, CRC/C/VAT/CO/2 para 38(c).

[598] CO Hungary, CRC/C/HUN/CO/3-5 para 57(f).

[599] CO Morocco, CRC/C/MAR/CO/3-4 para 75(e).

[600] CO Kenya, CRC/C/KEN/CO/2 para 33(c).

[601] CRC Committee, Guidelines for Periodic Reports (n 510) para 27. See also CO Romania, CRC/C/ROM/CO/4 para 43.

[602] See CO Egypt, CRC/C/EGY/CO/3-4 para 49, 87; CO Kenya, CRC/C/KEN/CO/2 para 67.

urging states to 'collect quantitative and qualitative data on children deprived of their liberty'.[603]

C37.S78 The Need for an Appropriate Complaint System

C37.P305 In its *General Discussion on Juvenile Justice*, the Committee noted children in the juvenile justice system 'were … often denied the right to lodge complaints when they were victims of violations of their fundamental rights, including in cases of ill-treatment and sexual abuse'.[604] In General Comment No 10, the Committee reiterated its concern, emphasizing that in all cases of deprivation of liberty:

C37.P306 Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms.[605]

C37.P307 The Committee has emphasized that complaints mechanisms must be 'independent, child-sensitive and accessible'.[606] In its concluding observations for Russia it urged the State Party to:

C37.P308 Prevent incidents of ill-treatment by conducting independent monitoring and unannounced visits to places of detention and undertaking comprehensive training programmes for security and police personnel, as well as establishing an effective complaints and data collection system for complaints of torture or other forms of ill-treatment of children deprived of their liberty.[607]

C37.P309 The Havana Rules complement the Committee's requests for establishing complaints procedures and recommend that, 'efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements'.[608] The Special Rapporteur on Torture has noted that these complaint mechanisms must also be confidential.[609]

C37.S79 ## *2. The Right to Separation from Adults*

C37.S80 ### (a) A General Rule

C37.P310 The requirement that children deprived of their liberty must be separated from adults is common to the ICCPR (art 10(2)(b)), ACRWC (art 17(2)), Havana Rules (rule 29), the Beijing Rules (rule 13(2)), the Mandela Rules (rule 11(d)), and Additional Protocol I to the Geneva Conventions (art 77(4)). However, in contrast to other instruments, the requirement appearing in article 37(c) applies to *all forms* of deprivation of liberty, not merely pre-trial detention or imprisonment. In General Comment No 10, the CRC Committee noted the 'abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being and their future ability to remain free of crime and to reintegrate'.[610] It is therefore unsurprising that the CRC

C37.N603 [603] Special Rapporteur, A/HRC/28/68 (n 7) para 85(t).
C37.N604 [604] CRC Committee, 'Report on the 10th session' (18 December 1995) CRC/C/46 para 220.
C37.N605 [605] CRC GC 10 (n 9) para 89.
C37.N606 [606] CO Burkina Faso, CRC/C/BFA/CO/3-4 para 39. See also: CO Sweden, CRC/C/SWE/CO/5 para 26(c); CO Albania, CRC/C/ALB/CO/2-4 para 40; CO Montenegro, CRC/C/MNE/CO/1 para 35; CO Bangladesh, CRC/C/BGD/CO/4 para 93.
C37.N607 [607] CO Russia, CRC/C/RUS/CO/4-5 para 31(a).
C37.N608 [608] Havana Rules, rule 77. See also rules 24, 25, 75–78.
C37.N609 [609] Special Rapporteur, A/HRC/28/68 (n 7) para 85(q).
[610] CRC GC 10 (n 9) 85.

Committee frequently recommends in its concluding observations for states that juveniles below the age of 18 who are deprived of their liberty are separated from adults 'in all circumstances'.[611]

C37.S81 **(b) The Exception to the General Rule**

C37.P311 Article 37(c) does not, however, prohibit children being detained with adults in all circumstances.[612] Instead, it creates a strong presumption against this practice which is rebuttable where it would be contrary to a child's best interests to demand separation of a child from adults. Importantly, the CRC Committee and the Special Rapporteur on Torture have stated that the exception to the general rule in favour of separation based on the child's best interests should be interpreted narrowly, noting that 'best interests does not mean for the convenience of the States parties'.[613] Instances where it is presumed that separation is *not* in a child's best interests include detention with parents, guardians, or adult family members,[614] particularly children in immigration detention, refugee camps, or where a child is detained along with a parent, usually the mother, who received a custodial sentence.[615] Ultimately, consideration of 'best interests' requires a particularized decision regarding the circumstances of a specific child, rather than merely the broad application of policy.[616] The procedure for the determination of a child's best interests is discussed in detail in the commentary to article 3.[617]

C37.S82 **(c) Reservations to the General Rule**

C37.P312 Prior to the adoption of the Convention, states' compliance with the general rule requiring separation of children from adults in detention was poor.[618] Indeed a number of states have entered reservations to this requirement under article 37(c).[619] For example,

C37.N613 Australia made the following reservation:

[611] CO Austria, CRC/C/AUT/CO/3-4 para 67. See also: CO Australia, CRC/C/AUS/CO/4 para 84; CO Republic of Korea, CRC/C/KOR/CO/3-4 para 81; CO Czech Republic, CRC/C/CZE/CO/3-4 para 70.

[612] cf ICCPR art10(2)(b), which provides that '(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. The HR Committee has stated that this requirement is mandatory: HRC GC 21 (n 5) para 13. In its original General Comment on art 9, the HR Committee was even more assertive and declared that the requirement to separate juveniles from adults was an 'unconditional requirement of the Covenant' and that 'deviation from States parties obligations under paragraph 2(b) cannot be justified for any consideration whatsoever': HRC GC 8 (n 5) para 2. However, the prohibition under the ICCPR only applies to children in the criminal justice system who have been accused of an offence.

[613] CRC GC 10 (n 9) 85; Special Rapporteur, A/HRC/28/68 (n 7) para 76. See also Lacey Levitt, 'The Comparative Risk of Mistreatment for Juveniles in Detention Facilities and State Prisons' (2010) 9 International Journal of Forensic Mental Health 44.

[614] eg: Havana Rules, rule 29 ('In all detention facilities juveniles should be separated from adults unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned'). See also: Geneva Conventions Additional Protocol I (n 389) art 77(4); Mandela Rules, rule 29(1).

[615] eg in the West Bank, child Palestinian prisoners preferred to be detained with adult prisoners because they felt safer and were able to receive a basic education: Van Bueren (n 502) 221. For a discussion of this situation see: Philip Veerman & Adir Waldman, 'When Can Children and Adolescents Be Detained Separately From Adults?: The Case of Palestinian Children Deprived of Their Liberty in Israeli Military Jails and Prisons' (1996) 4 International Journal of Children's Rights 147; Detrick (n 7) para 91, fn 278.

[616] See chapter 3 of this Commentary. See also Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 International Journal of Children's Rights 483, 485.

[617] See chapter 3 of this Commentary.

[618] See: 'Deviations on National Laws from the Principle of Separation of Children in Custody from Adults' in Katarina Tomaševski (ed), *Children in Adult Prisons: An International Perspective* (St Martins Press 1986).

[619] These countries are Aruba (under the Netherlands) Australia, Canada, China, Hong Kong (under China), Japan, Malaysia, the Netherlands, the Netherlands Antilles (under the Netherlands), New Zealand, Singapore, Switzerland, and the United Kingdom: 'Convention on the Rights of the Child: Reservations' (United Nations

C37.P313 In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia therefore ratifies the Convention to the extent that it is unable to comply with the obligations imposed by article 37(c).[620]

C37.P314 The CRC Committee has expressed concern at these reservations.[621] For example, it has suggested that Australia's reservation is unnecessary 'since there appears to be no contradiction between the logic behind it and the provisions of article 37(c)'.[622] The Committee welcomes commitments from states to review and ultimately withdraw all reservations to this effect, although only the Cook Islands, Iceland, and Myanmar have done so.

C37.S83 ### *3. The Right to Maintain Contact with Family through Correspondence and Visits*

C37.S84 #### (a) The Scope of the Right

C37.P315 The formulation of a child's right to maintain contact with his or her family, under article 37(c) is unique to the Convention.[623] A similar entitlement does however appear in the Havana Rules (rule 59), Beijing Rules (rule 10(1)), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (rule 16(1)), and the Mandela Rules (rules 106 and 107). The inclusion of this right in article 37 serves to affirm the application of a child's general right to respect for privacy, family, home, and correspondence under article 16 of the Convention to those children who are deprived of their liberty *and* separated from their family. It is also consistent with article 9(3), which provides that a child who is separated from his or her parents has a right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.

C37.P316 For its part the Committee has urged states to secure this right.[624] However, in terms of mapping out the content of the right it has done little beyond recommending that '[i]n order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family'.[625] Interestingly, in its concluding observations on Kazakhstan, the Committee appeared to extend the right of contact to 'the wider community', including 'friends and other persons or representatives of reputable

Treaty Collection 2016) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#57.

C37.N620 [620] 'Convention on the Rights of the Child: Reservations' (n 619).

C37.N621 [621] CO Canada, CRC/C/15/Add.37 para 10; CO Iceland, CRC/C/15/Add.50 para 4; CO New Zealand, CRC/C/15/Add.71 para 8; CO United Kingdom, CRC/C/15/Add.34 para 7; CO Switzerland, CRC/C/CHR/CO/2-4 paras 6–7; CO Netherlands, CRC/C/NDL/CO/4 para 7; CO Great Britain, CRC/C/GBR/CO/5 paras 5–6.

C37.N622 [622] CO Australia, CRC/C/AUS/CO/4 para 9; CO Australia, CRC/15/Add.268 para 7. On the situation in Australia see: Andrew Trotter and Harry Hobbs, 'A Historical Perspective on Juvenile Justice in Queensland' (2014) 37 Criminal Law Journal 77, 84–86.

C37.N623 [623] ACRWC (n 2) art 19(2) provides that: 'Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis'. This right, however, is a general entitlement and is not specific to the context of where a child is deprived of his or her liberty.

C37.N624 [624] CO Myanmar, CRC/C/MMR/CO/3-4 para 93; CO Philippines, CRC/C/PHL/CO/3-4 para 81; CO United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 para 78.

C37.N625 [625] CRC GC 10 (n 9) para 87.

outside organisations', and suggested that the State Party could 'give opportunity [for children deprived of their liberty] to visit their home and family'.[626] The CRC Committee has not gone this far in any other concluding observations. The work of other human rights bodies offers some more insight on the nature of the right. For example, the HR Committee has held that, 'family' must 'be given a broad interpretation to include all those comprising the family as understood in the society of the [relevant] State party'.[627] For practical purposes, this would extend beyond a child's parents to include other family members such as siblings and grandparents.

C37.P317 'Correspondence' extends to all forms of non-physical communication such as mail, telephone,[628] and access to the Internet.[629] A child's right to correspondence cannot be overstated since 'to persons in detention … the right of correspondence is of the greatest importance because for such people it is, visits apart, the only method of communication with others beyond the closed institution'.[630]

C37.P318 'Visits', a term unique to article 37(c), should be interpreted to include all forms of physical communication. The HR Committee has commented, '[a]llowing visits, in particular by family members, is normally also such a measure which is required for reasons of humanity'.[631] The Special Rapporteur on Torture has further elucidated this requirement, noting that it can play a critical protective role, both in terms of physical security and mental health. The Special Rapporteur has stressed that:

C37.P319 An important safeguard against torture and other forms of ill-treatment is the support given to children in detention to maintain contact with parents and family through telephone, electronic or other correspondence, and regular visits at all times. Children should be placed in a facility that is as close as possible to the place of residence of their family. Any exceptions to this requirement should be clearly described in the law and not be left to the discretion of the competent authorities. Moreover, children should be given permission to leave detention facilities for a visit to their home and family, and for educational, vocational or other important reasons. The child's contact with the outside world is an integral part of the human right to humane treatment, and should never be denied as a disciplinary measure.[632]

C37.S85 **(b) When Can the Right Be Limited: 'Save in Exceptional Circumstances'**

C37.P320 A child's right to maintain contact with their family whilst being deprived of liberty is not absolute; it is qualified by the phrase 'save in exceptional circumstances'. With respect to the meaning of this phrase, the CRC Committee has emphasized that '[e]xceptional

C37.N628

[626] CO Kazakhstan, CRC/C/KAZ/CO/3 para 70(g).

[627] HR Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (29 July 1994) HRI/GEN/1/Rev.1, 21, para 5. See also chapter 16 of this Commentary.

[628] The ECtHR has expanded the meaning of correspondence to include telephone communications. See eg *Klass v FRG* (1978) 2 EHRR 214 para 41.

[629] The ECtHR has adopted an evolutive interpretation of 'correspondence' to take into account technological advancements: *Copland v the United Kingdom* 2007) 45 EHRR 37 para 42 (however, note that this case concerned respect for private life under ECHR art 8(1) and not the right of detainees to maintain correspondence with their family).

[630] Harris and others (n 4) 320. The ECtHR has ruled that controls on children's correspondence in juvenile detention settings may be compatible with the ECHR where such control can be justified (*Silver v UK* App No 5847/72 (25 March 1983) para 83. However, it has ruled that blanket bans on prisoners' correspondence are not justifiable (*Campbell v UK* App no 13590/88 (25 March 1992) para 45).

[631] HRC GC 9 (n 5) para 3; replaced by HRC GC 21 (n 5).

[632] Special Rapporteur, A/HRC/28/68 (n 7) para 77.

circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities'.[633] However, it has offered little guidance as to what circumstances will be considered exceptional. The drafting history indicates that one state gave the example of a domestic law permitting the state to restrict communication between a child and their parents, if a Court reasonably believed the child might escape or destroy evidence.[634] A different approach has been advocated by Geraldine Van Bueren, who argues that the restriction is intended:

C37.P321 to provide State Parties with a discretion exercisable in the best interests of the child in cases where family members continue to exert damaging influences on the child. It is clear that it is an exception, which should be exercised only in accordance with the child's best interests and not imposed as a disciplinary measure or as a means of securing the child's cooperation.[635]

C37.P322 However, the principle of internal system coherence,[636] demands that the phrase must be informed by and interpreted consistently with the test to determine when an interference with a child's *general right* to respect for privacy, correspondence, and family life under article 16 of the Convention will be justified. This article provides that such an interference will only be justified if it is lawful and non-arbitrary. The meaning of these terms are explored fully in the commentary to article 16.[637] In summary, they demand that any interference with the child's right must satisfy three requirements: first, it must be undertaken pursuant to a valid law which is clear and accessible; second, it must be for a legitimate aim; and third, the measures to achieve the aim must be proportionate.

C37.P323 When translated to the situation of a child who is deprived of his or her liberty, a valid aim for a restriction on his or her right to maintain contact with family would include not just the protection of the child's best interests as suggested by Van Bueren but also other legitimate public concerns, such as the protection of the rights of others, and/or public health and safety. However, if the measures adopted to achieve such aims are to be considered proportionate they must: (a) have a rational connection with the aims; and (b) minimally impair a child's enjoyment of his or her right to maintain contact with family. As such, the requirement of *exceptional circumstances* should be understood as an alternative formulation of the general rule that an inference with a right will only be justified where there are no other reasonably available alternative measures that could be adopted by a state to achieve its legitimate aim. Moreover, the onus remains on a state to demonstrate why, on the balance of probabilities, any interference with a child's right to maintain contact with his or her family while deprived of liberty is justified.

C37.S86 ## G. Paragraph 37(d): Children's Right to Challenge the Deprivation of Their Liberty

C37.S87 ### *1. The Right to Prompt Access to Legal and Other Appropriate Assistance*

C37.S88 #### (a) An Immediate Entitlement

C37.P324 Article 37(d) provides a child deprived of his or her liberty with the right to have prompt access to legal or other appropriate assistance. The use of the word 'shall' indicates that

C37.N633 [633] CRC GC 10 (n 9) para 87. The Special Rapporteur on Torture has made the same point: A/HRC/28/68 (n 7) para 77.

C37.N634 [634] E/CN.4/1989/48 para 723 (Japan); *Legislative History* (n 2) 774.

C37.N636 [635] Van Bueren (n 502) 219–20. [636] Tobin, 'Seeking to Persuade' (n 8) 37–40.

C37.N637 [637] See chapter 16 of this Commentary.

this right is an immediate entitlement and not subject to a state's available resources. It can be found in other instruments, albeit in varying formulations, including the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (principle 17) the Mandela Rules (rules 54(b), 88) and the Beijing Rules (rule 13.3). Although the ICCPR does not expressly guarantee access to legal assistance to challenge the lawfulness of a person's deprivation of liberty, the HR Committee has recognized that article 9(4) contains such a right.[638] This approach is justified given that a right to challenge the legality of one's detention is likely to be illusory in the absence of legal or other appropriate assistance to enable a person to exercise this right. Indeed, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems declare that 'legal aid is a fundamental human right and an essential element of a functioning criminal justice system that is based on the rule of law'.[639] The CRC Committee has urged states to amend their legislation so as to ensure the recognition of this right.[640]

C37.S89 **(b) The Meaning of Prompt Access to Assistance**

C37.P325 The Convention does not define 'prompt' and the meaning of this term was not considered during drafting.[641] Moreover, as the requirement of prompt access to assistance is unique to the Convention there is no jurisprudence or commentary in relation to other human rights treaties from which to draw upon. The word 'prompt' is not, however, entirely absent from international human rights standards concerning deprivation of liberty. Principle 7 of the UN Basic Principles on the Role of Lawyers requires prompt access to a lawyer 'and in any case, not later than forty-eight hours from the time of arrest or detention'. Further, there is an obligation under article 9(3) of the ICCPR to bring a person charged with a criminal offence *promptly* before a court for the purpose of assessing the legality of their detention. The HR Committee has explained that 'the exact meaning of "promptly" (in this context) may vary depending on the objective circumstances',[642] which suggests that the phrase need not be equated to a fixed or certain period of time.

C37.P326 Under the ECHR, a detainee must be advised of the reasons for their arrest 'promptly'[643] and also brought 'promptly'[644] before a court or other officer. In both cases, the ECtHR has held that this requirement must be assessed by reference to the facts of the particular case,[645] but that the 'degree of flexibility attaching to the notion of "promptness" is limited'.[646] Certainly this is consistent with the purpose of articles 5(2) and 5(3), which seeks to minimize the risk of executive arbitrariness.[647]

C37.P327 Although the word 'promptly' is used in a different context in article 37(d) to the ECHR and ICCPR, the jurisprudence of the ECtHR and HR Committee remains helpful in defining the scope of the phrase in the context of the Convention.

C37.N6[illegible]

[638] HRC GC 35 (n 5) para 34; Joseph and Castan (n 4) para 11.83; *Berry v Jamaica* Comm No 330/88) (7 April 1994) para 11.1.

[639] UNGA 'UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (28 March 2013) A/RES/67/187 Annex, Principle 1.

[640] CO Turkmenistan, CRC/C/TKM/CO/2-4 para 56(b); CO Dominican Republic, CRC/C/DOM/CO/3-5 para 72(c); CO Tanzania, CRC/C/TZA/CO/3-5 para 73(a); CO China, CRC/C/CHN/CO/2 para 93.

[641] E/CN.4/1989/48 para 563; *Legislative History* (n 2) 770.

[642] HRC GC No 35 (n 5) para 33. [643] ECHR art 5(2). [644] ECHR art 5(3).

[645] *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157 para 40 (ECHR art 5(2)); *Ireland v UK* (n 66) para 199 (ECHR art 5(3)).

[646] *Brogan v UK* (1989) 13 EHRR 439 para 59 (in relation to ECHR art 5(3)).

[647] Harris and others (n 4) 339.

C37.P328 For its part, the CRC Committee has simply recommended that any child who is deprived of his or her liberty has 'immediate access to lawyer', or is provided with 'adequate free and independent legal assistance immediately after their arrest'.[648] However, an interpretation of this phrase within the context of article 37(d) requires that for the provision of assistance to be considered 'prompt' it must occur so as to enable a child to effectively exercise his or her right to challenge the deprivation of his or her liberty. In this respect, the Committee has indicated that '[e]very child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty *within 24 hours*' (emphasis added). [649] This standard, which is more onerous than that which is demanded of other human rights bodies concerning adults,[650] implies that if a child is to exercise his or her right to challenge the deprivation of their liberty within twenty-four hours, they would need to have access to legal or other assistance within this time. In which case, *prompt* would mean within twenty-four hours of a child being deprived of his or her liberty.

C37.P329 There is an issue as to whether this should be considered a fixed and absolute standard. This is because it makes no allowance for the possibility that, despite taking all reasonable measures to ensure access to assistance for a child, a state may not be able to provide such access. Thus, it is arguable that the obligation to ensure prompt access creates an expectation that such access will occur well within twenty-four hours of a child being deprived of his or her liberty unless a state can demonstrate that there are reasonable grounds to justify its failure to ensure such access.

C37.S90 **(c) An Obligation to Ensure Effective Access to Assistance**

C37.P330 The *principle of effectiveness* and the *obligation to fulfil* demand that states must ensure that children who are deprived of their liberty must have access to legal or other assistance. In the absence of such an obligation, children, who are generally more vulnerable relative to adults, would be stripped of their capacity to effectively rely on legal or other assistance for the purpose of challenging the legality of their deprivation of liberty. In concluding observations the CRC Committee frequently urges states to 'provide' 'adequate free and independent legal assistance' to children arrested and deprived of their liberty.[651] The HR Committee has certainly adopted this approach and requires that states 'permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention'.[652] So too has the ECtHR. In a case involving the detention of a person with a mental illness, the Court held that the individual concerned should not be required to obtain legal representation.[653] Rather, the state was required to provide legal representation.

C37.P331 In a practical sense, this requires that children must be informed of their right to assistance and be given the opportunity to seek their own private assistance or, where they lack the resources, to be provided with legal or other appropriate assistance as facilitated by the state. Ultimately as to which model of assistance is adopted by a state, the CRC

C37.N648 [648] See eg: CO Sweden, CRC/C/SWE/5 para 58(a). See also: CO China, CRC/C/CHN/CO/3-4 para 93(b); CO Israel, CRC/C/ISR/CO/2-4 para 74(b).

C37.N649 [649] CRC GC 10 (n 9) para 83. See also: CO Iraq, CRC/C/IRQ/CO/2-4 para 87(c); CO China, CRC/C/CHN/CO/3-4 para 93(b); CO Israel, CRC/C/ISR/CO/2-4 para 74(b).

C37.N650 [650] See eg UN Basic Principles on the Role of Lawyers, Principle 7 (requiring access to a lawyer not later than 48 hours after arrest or detention).

C37.N651 [651] CO China, CRC/C/CHN/CO/3-4 para 93(b); CO Israel, CRC/C/ISR/CO/2-4 para 74(b); CO Kenya, CRC/C/KEN/CO/2 para 33(c); CO Chile, CRC/C/CHL/CO/3 para 72(d).

C37.N652 [652] HRC GC 35 (n 5) paras 35, 46. [653] *Megyeri v Germany* A 237-A (1992) 15 EHRR 584.

Committee's comments with respect to this issue within the context of article 40 indicate that 'it is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge'.[654]

C37.S91 **(d) Legal or Other Appropriate Assistance**

C37.P332 The assistance to which a child deprived of liberty is entitled is *legal or other appropriate assistance*. The early drafts of paragraph 37(d) only contemplated the provision of legal assistance to children deprived of liberty. However, the representative from the United Kingdom disliked the notion of 'legal assistance' because social workers might not be legally qualified to appear in juvenile justice proceedings.[655] Thus a reference to 'other appropriate assistance' was included to facilitate non-legal assistance.

C37.P333 The drafting history contains no further detail regarding the nature of such 'other appropriate assistance'. The CRC Committee has affirmed that it extends to assistance from a social worker,[656] translator,[657] and presumably could also include assistance from a parent or guardian,[658] and even diplomatic representation for non-citizen children or an international organization where the child is a refugee.[659] The only caveat is that the assistance provided must be 'appropriate'. The Committee has not sought to indicate the criteria by which to assess whether assistance is appropriate. As a general principle, however, in order for assistance to be considered appropriate it must provide a child with the opportunity to effectively exercise his or her right to challenge his or her deprivation of liberty. At a minimum, this would require that the person or organization providing the assistance was:

C37.P334 • independent and not subject to any conflict of interest when assisting the child; and

C37.P335 • sufficiently competent to understand the legal issues which are relevant to whether a child's liberty has been deprived unlawfully or arbitrarily.

C37.S92 *2. The Right to Challenge Deprivation of Liberty*

C37.S93 **(a) A Fundamental Entitlement**

C37.P336 Article 37(d) provides children with a right to challenge the legality of the deprivation of liberty and enshrines the principle of *habeas corpus*,[660] which is found in many human rights instruments.[661] The right to challenge deprivation of liberty applies to any form of deprivation and is not confined, for example, to criminal detention. This was made clear by the CRC Committee in its General Comment on Juvenile Justice where it explained that:

C37.P337 the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection

C37.N699

[654] CRC GC 10 (n 9) para 49.
[655] E/CN.4/1986/39 para 98; *Legislative History* (n 2) 748.
[656] CRC GC 10 (n 9) para 49.
[657] CO Kuwait, CRC/C/KWT/CO/2, 77(d).
[658] Rule 15.2 of the Beijing Rules provides that: 'The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may however be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile'.
[659] Stanislaw Frankowski and Dinah Shelton, *Preventive Detention: A Comparative and International Law Perspective* (Brill 1992) 42.
[660] HRC GC 35 (n 5) para 39.
[661] See eg: UDHR art 8; ICCPR art 9(4); ECHR art 5(4); ACHR art 7(6); Beijing Rules Rule 10.2; Body of Principles *for the Protection of All Persons under any Form of Detention or Imprisonment* Principle 32; African Charter on Human and Peoples' Rights art 7; ACRWC arts 16, 17, especially art 17(2)(c).

or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.[662]

C37.P338 This approach is consistent with the position adopted by the HR Committee which has explained that article 9(4) ICCPR, the equivalent of article 37(d), 'entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court'.[663]

C37.S94 **(b) 'The Legality of the Deprivation'**

C37.P339 The right to challenge the 'legality' of a child's deprivation of liberty is expressed under article 9(4) of the ICCPR and article 5(4) of the ECHR as a right to challenge the 'lawfulness' of detention. These terms should be considered synonymous. The HR Committee has explained that 'unlawful' detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9 paragraph 1 or with any other relevant provisions of the Covenant'.[664] Within the context of article 37(d), this translates into a requirement that detention of a child must be consistent with article 37(b) (ie: it must be lawful and non-arbitrary) as well as the other provisions of the Convention. This means that it is not sufficient that a person's detention is consistent with domestic law for it to be considered lawful.[665] Indeed such an approach would 'make a nonsense' of the right to challenge deprivation of liberty by allowing a state to simply pass domestic legislation to validate a particular category of detention.[666] It should also be noted that this right is concerned solely with the legality of the deprivation of liberty, and is independent of the right to appeal in criminal matters.[667]

C37.P340 Importantly the HR Committee has explained that 'unlawful detention includes detention that was lawful at its inception but has since become unlawful because the individual has completed serving a sentence of imprisonment or the circumstances that justify the detention have changed'.[668] As such the right is ongoing and does not cease after an initial unsuccessful challenge to the deprivation of liberty. Where the circumstances that justify detention change, there is a right to 'automatic periodic review of a judicial character' or 'the opportunity to take proceedings before a court at reasonable intervals to challenge the deprivation of his or her liberty'.[669] The intervals between such reviews will depend on the facts of each case.[670] As noted earlier,[671] in cases of pre-trial detention, the CRC Committee has held that review must be regular, 'preferably every two weeks'.[672]

C37.S95 **(c) 'Before a Court or Other Competent, Independent and Impartial Authority'**

C37.P341 A child has a right to challenge his or her deprivation of liberty before a court *or* other competent, independent, and impartial authority. This formulation differs from article

C37.N662 [662] CRC GC 10 (n 9) para 11, fn 1. See also CRC Committee, 'Report on the 10th session' (n 604) para 228.

C37.N663 [663] HRC GC 35 (n 5) para 39, 40.

C37.N664 [664] ibid para 44. With respect to the ECHR see: *Van Droogenbroeck v Belgium* A 50 (1982) 4 EHRR 443 para 48 (holding that held the individual must be afforded the opportunity to question whether the detention is consistent with applicable municipal law and with the ECHR, including its general principles; and the deprivation must not be arbitrary).

C37.N665 [665] *A v Australia* (n 548) para 9.5.

C37.N666 [666] ibid (concurring decision of Bhagwati J).

C37.N667 [667] Schabas and Sax (n 7) para 150.

C37.N668 [668] HRC GC 35 (n 5) para 43.

C37.N669 [669] *X v United Kingdom* (1981) 4 EHRR 188; *Bouamar v Belgium* (1989) 11 EHRR 1.

C37.N670 [670] One month has been held to be reasonable in the context of a person detained on remand (*Bezicheri v Italy* (1990) 12 EHRR 210, where ECtHR also stated that the nature of detention on remand requires review at 'short intervals'). A longer period will be considered acceptable in relation to a person detained for medical reasons unless there is evidence that the mental state of the person warrants a hearing with a shorter period (*M v Germany* App No 10272/82 (18 May 1984) (ECommHR)).

C37.N671 [671] See section II.E.5.(c) of this chapter.

C37.N672 [672] CRC GC 10 (n 9) para 83.

9(4) of the ICCPR which only refers to proceedings before a court.[673] The HR Committee has explained that a 'court' 'should ordinarily be a court within a judiciary'.[674] However:

C37.P342 exceptionally for some forms of detention, legislation may provide for proceedings before a specialised tribunal which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters that are judicial in nature.[675]

C37.P343 The ECtHR has further explained that a court need not be a 'court of law of the classic kind integrated within the standard judicial machinery of the country'.[676] It must, however, be a body of 'judicial character', providing 'guarantees of procedure appropriate to the deprivation of liberty in question'.[677] 'Judicial character' requires the body to be 'independent of the executive and the parties to the case',[678] and have the competency to make legally binding decisions leading to the release of detainees. The power to make recommendations for release is insufficient.[679] The HR Committee has also stressed that the object of the right to challenge one's deprivation of liberty is release from ongoing unlawful detention and that 'the reviewing court must have the power' to make this order.[680]

C37.P344 With respect to the meaning of the phrase '*or other competent, independent and impartial authority*' the CRC Committee has offered no insights. Competence, however, implies that the relevant authority and its members have the requisite skill and expertise to determine the legality of a child's deprivation of liberty and, if necessary, to make a legally binding decision to release the child. A mere capacity to make recommendations is insufficient.[681]

C37.P345 The decision-making body must also be fully independent of the executive and the parties.[682] In *Campbell v UK*, the ECtHR explained that when determining whether a body can be considered 'independent', the Court considers: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures; and whether the body presents an appearance of independence.[683] Impartiality is distinct from, but overlaps with, independence. The ECtHR considers impartiality to mean no 'prejudice or bias'.[684] It held the existence of impartiality:

C37.P346 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in that respect.[685]

C37.N689

[673] See also: UDHR art 10; 'Basic Principles on the Independence of the Judiciary' Seventh UN Congress on the Prevention of Crime and Treatment of Offenders (Milan 26 August —6 September 1985) arts 1–2.

[674] HRC GC 35 (n 5) para 45. [675] ibid.

[676] *Weeks v United Kingdom* (1988) 10 EHRR 293 para 61.

[677] *De Wilde, Ooms and Versyp v Belgium* [1971] ECHR 1 para 76.

[678] ibid para 77. For a more detailed discussion see Harris and others (n 4) 355–56.

[679] See eg *X v United Kingdom* (n 669).

[680] HRC GC 35 (n 5) para 41. See also *Shafiq* v *Australia* Comm No 1324/2004 (13 November 2006) para 7.4.

[681] See: *Benthem v Netherlands* (1986) 8 EHRR 1; *Van de Hurk v Netherlands* A 288 (1994) 18 EHRR 481 para 45.

[682] *Ringeisen v Austria* App No 2614/65 (16 July 1971) para 95.

[683] *Campbell v UK* (1985) 7 EHRR 165 para 78. [684] *Piersack v Belgium* (1983) 5 EHRR 169.

[685] *Hauschildt v Denmark* (1990) 12 EHRR 266 para 46 (emphasis added). See further Harris and others (n 4) 450–57.

C37.S96 **(d) The Right to a Prompt Decision**

C37.P347 Article 37(d) provides a child with a right to a *prompt decision* on any action concerning the legality of his or her detention. In contrast, article 9(4) of the ICCPR provides that a court must make a decision 'without delay on the lawfulness' of a person's detention. There is no explanation in the drafting history of the Convention to explain the alternative formulation adopted under article 37(d).[686] In the absence of anything to indicate that the terms were to have a different meaning, the principle of external system coherence requires that the two formulations should be considered synonymous.

C37.P348 The CRC Committee has indicated that '[t]he right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made'.[687] However, this position is problematic as it does not demand that decisions about the legality of a child's detention must be made as soon as possible where it is reasonable to do so. Thus, there is a risk that a state could argue that a delay of two weeks to make a decision was acceptable notwithstanding that on the facts of the case it would have been reasonable to do so within one to two days. In contrast, the HR Committee requires an assessment on 'on a case by a case basis' rather than against adherence to rigid timelines.[688] It has further stressed that 'the adjudication of a case should take place as expeditiously as possible' and that 'delays attributable to the petitioner do not count as judicial delay'.[689] This test is more compatible with the minimal impairment principle and the requirement that any deprivation of a child's liberty must be minimized so as far as is reasonably possible.

C37.P349 It is also consistent with the approach adopted under article 5(4) of the ECHR which requires that any challenge to the lawfulness of a person's detention is to be decided 'speedily'.[690] Speediness is to be determined in 'light of the facts of each case'.[691] Factors relevant include the diligence of the relevant authorities, and any delays brought about by the detainee's conduct or other matters beyond the authority's control.[692] The state bears the onus of explaining any delay which appears prima facie incompatible with the notion of speediness.[693] Excessive workload will not be accepted as justification for delay as the efficiency of a judicial system is the responsibility of the state.[694]

C37.N686 [686] E/CN.4/1989/48 paras 536, 563; *Legislative History* (n 2) 766, 770 (detailing only decisions on the incorporation of the phrase 'every child' and how this provision could be made to reflect the ICCPR more closely.). cf ECHR art 5(2), under which promptness must be assessed on a case by case basis (Harris and others (n 4) 336). This requirement is satisfied where the arrested person is informed of the reasons for their arrest within a few hours (*Kerr v UK* App No 40451/98 (7 December 1999); *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157 para 42).

C37.N687 [687] CRC GC 10 (n 9) para 84.

C37.N688 [688] *Torres v Finland* Comm No 291/88 (2 April 1990) para 7.3.

C37.N689 [689] HRC GC No 35 (n 5) para 47.

C37.N690 [690] It is worth noting that the ECHR does not necessarily use the phrases 'prompt' and 'speedily' synonymously. ECHR art 5(3) requires a detained person to be brought promptly before a court when charged with criminal offences for the purposes of a bail application. Art 5(4) requires that a person who has commenced proceedings to challenge the legality of the deprivation of their liberty, whatever the circumstances, must have their challenge decided 'speedily'. The Court has stated that the notion of promptly (*aussitôt*) indicates greater urgency than that of speedily (*bref delai*): *E v Norway* (1994) 17 EHRR 30 para 64. Harris et al suggest that this distinction is necessary because the matters to be determined in a bail application are less complex than those to be determined when considering the legality of a person's deprivation of liberty: Harris and others (n 4) 158. It is therefore a distinction which appears to be confined to the text of the ECHR and does not apply to para (d).

C37.N691 [691] *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71 para 55.

C37.N692 [692] eg it has been held that a State Party will not be liable for a delay caused by a detainee's disappearance (*Luberti v Italy* (1984) 6 EHRR 440) or a delay in filing an appeal (*Navarra v France* (1994) 17 EHRR 594).

C37.N693 [693] *Koendjbiharie v Netherlands* (1991) 13 EHRR 820 paras 28–30.

C37.N694 [694] *Bezicheri v Italy* (n 670) (n 25).

C37.P350 The Commentary on Rule 20 of the Beijing Rules adopts the approach of the ECHR, noting that the 'speedy conduct of formal procedures in juvenile cases is a paramount concern'.

C37.P351 In concluding observations, the CRC Committee may be moving towards this standard. The Committee urged Guinea to 'guarantee to children in conflict with the law the respect of procedural rights', including 'the principle of celerity'.[695] In other cases it has urged that trials be conducted in 'a prompt' manner,[696] or expressed concern at the lengthy duration of trials of juveniles.[697]

C37.S97 **(e) Is There an Obligation on a State to Obtain Judicial Authorization for Any Deprivation of Liberty?**

C37.P352 The Convention does not contain an equivalent of article 9(3) of the ICCPR, which provides that '[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'. The effect of this provision is to impose a burden on a state to seek judicial authorization promptly, if it is to detain a person on criminal charges. As to the meaning of promptly, the HR Committee in General Comment No 35 explained:

C37.P353 While the exact meaning of 'promptly' may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the views of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.[698]

C37.P354 The HR Committee also stressed that 'an especially strict standard of promptness such as 24 hours should apply in the case of juveniles'.[699]

C37.P355 There is, however, no such requirement with respect to any other form of deprivation of liberty under the ICCPR which can be undertaken by a state provided there is a relevant legislative basis for the deprivation. Once the deprivation occurs the right to challenge the legality of the deprivation under article 9(4) can be invoked by the individual. This right is not merely enlivened after the initial judicial hearing but applies 'in principle from the moment of arrest'.[700] However, the right is entirely dependent on the individual concerned initiating such proceedings.[701]

C37.P356 The ECHR adopts the same distinction. Under ECHR article 5(3), the onus is placed on the state to ensure that the police bring an arrested person before a judge or judicial officer promptly.[702] In contrast, article 5(4) merely provides that a person deprived of their liberty 'shall be entitled to take proceedings' to challenge the legality of that deprivation. Indeed, the ECtHR found that while the requirements and remedies under articles 5(3)

C37.N699

[695] CO Guinea, CO CRC/C/GIN/CO/2 para 86(c).
[696] CO Israel, CRC/C/ISR/CO/2-4 para 74.
[697] CO Turkey, CRC/C/TUR/CO/2-3 para 66(c).
[698] HRC GC 35 (n 5) para 33.
[699] ibid para 33.
[700] ibid para 42.
[701] *Stephens v Jamaica* Comm No 373/89 (18 October 1995) para 9.7; HRC GC 35 (n 5) para 46.
[702] The ECtHR has not set any upper time limit alongside art 5(2); what is acceptable will depend on the facts of each case: *Ireland v UK* (n 66) para 199. However, the 'degree of flexibility attaching to the notion of 'promptness' is limited: *Brogan v UK* (n 646) para 59 (holding that a delay of four days and six hours for the detention of terror suspects, was held to breach art 5(3)). See Harris and others (n 4) 136 (suggesting that 'a much shorter period of time than 4 days should be the maximum. This would be consistent with the plain meaning of the word "promptly" and with the purpose of art 5(3) which is to minimise the risk of executive arbitrariness').

and 5(4) may overlap, 'the guarantee assured by paragraph 4 is of a different order from, and additional to, that provided by paragraph 3'.[703]

C37.P357 The difference in the treatment of criminal detention relative to other forms of detention under the ICCPR and ECHR gives rises to a question as to whether the Convention provides lesser protection for children facing deprivation of liberty in criminal matters relative to these other instruments. Two points are relevant here. First, even if the other instruments offer greater protection, children still enjoy this protection as they remain beneficiaries under these instruments. Second, the CRC Committee has tended to overlook the textual differences between the Convention and these other instruments. This is evident in its General Comment No 10, where the Committee indicated that 'every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours'.[704] The Committee has also recommended that 'the States parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks'.[705] However, the Committee has not identified the normative basis under the Convention for these recommendations. They may be consistent with article 9(3) of the ICCPR and article 5(3) of the ECHR but there is no equivalent of these articles under the Convention. The Committee's position also extends the principle to all forms of deprivation of liberty, not just detention within the criminal justice system.

C37.P358 Thus, there is a question as to whether the CRC Committee has a mandate to adopt such a position. A possible justification may be found in the general requirement under article 37(a) that a child shall not be deprived of his or her liberty unlawfully or arbitrarily. It is arguable that the effective enjoyment of this right must impose an onus on a state to ensure that whenever it seeks to deprive a child of liberty, it must obtain judicial authorization for such deprivation. Generally speaking, children are more vulnerable relative to adults. As the Special Rapporteur has noted, this vulnerability is heightened when they are deprived of their liberty,[706] and there is also a greater risk that children by virtue of their age and relative immaturity may not be able to bring an action to challenge their deprivation on their own accord.[707] Thus, the *effective protection* of their right to liberty requires prompt judicial intervention to ensure that any deprivation of liberty is lawful and non-arbitrary. Moreover, it remains incongruous to confine this entitlement to detention in a criminal justice setting, as is the case under the ECHR and ICCPR, as deprivation of a child's liberty remains a deprivation of liberty whatever its purpose or wherever its occurrence.

C37.S98 **(f) Is There an Obligation on a State to Disclose Reasons for Any Deprivation of Liberty?**

C37.P359 The CRC Committee has recommended that states 'ensure that children who are detained have the reasons for their detention and their rights explained to them immediately in a manner that is understandable to them'.[708] However, the Convention does not provide children with an explicit right to be advised of the reasons for their deprivation of liberty. In contrast, article 9(2) of the ICCPR imposes an obligation on a state to inform

C37.N703 [703] *Aquilina v Malta* (2000) 29 EHRR 185 para 40; *De Jong, Baljet and Van den Brink v Netherlands* (1986) 8 EHRR 20 para 57.

C37.N704 [704] CRC GC 10 (n 9) para 83. See also HRC GC 35 (n 5) para 33.

C37.N706 [705] CRC GC 10 (n 9) para 83. [706] Special Rapporteur, A/HRC/28/68 (n 7) para 16.

C37.N708 [707] *Aquilina v Malta* (n 703) para 45. [708] CO Sweden, CRC/C/SWE/CO/5 para 58(a).

a person who is arrested of the reasons for the arrest. A similar obligation can be found under ECHR article 5(2), which requires a detainee to be advised of the reasons for arrest 'promptly'.

C37.P360 The HR Committee has explained that the requirement under article 9(2) 'applies broadly to the reasons for any deprivation of liberty'[709] and not just criminal arrest. Despite the absence of any textual basis to support this position, the HR Committee has explained that 'one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded'.[710] Thus, it could be argued that the general obligation to provide reasons to any person deprived of their liberty does not arise under article 9(2) but rather the need to ensure the effective enjoyment of the general right to challenge the legality of a person's deprivation of liberty. This justification is particularly relevant to the Convention, which contains no equivalent of article 9(2), but does include a right to challenge deprivation of liberty, the effective enjoyment of which demands that a state must provide reasons for any deprivation of liberty.

C37.P361 The HR Committee has further explained that 'the reasons must include not only the general legal basis of the arrest but also enough factual specifics to indicate the substance of the complaint'.[711] Oral notification is sufficient provided the reasons are given in a language that the person understands.[712] Moreover, the HR Committee has stressed that 'the information must be provided immediately upon arrest'. However, 'in exceptional circumstances, such immediate communication may not be possible … [because, for example] a delay may be required before an interpreter can be present'.[713] The HR Committee has indicated that with respect to children, it is not sufficient that they be notified of the reasons for their detention; notice 'should also be provided directly to their parents, guardians or legal representatives'.[714]

C37.S99 **(g) Is There an Obligation to Provide Compensation for Unlawful Deprivation of Liberty?**

C37.P362 Unlike other human rights instruments, article 37 contains no express right to compensation for unlawful detention. In contrast, ICCPR article 9(5) provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.[715] The absence of such a guarantee in article 37 should not be interpreted as precluding such a right for children unlawfully deprived of their liberty under article 37(b) of the Convention. The CRC Committee has explained that a child subjected to treatment in violation of the prohibition against torture is entitled to compensation, despite the absence of any explicit reference to such a right under article 37(a).[716] It has taken a similar view in its concluding observations for states regarding article 37(b) when a child is unlawfully or arbitrarily deprived of their liberty. For example, in its comments to Israel the CRC Committee urged the State Party to:

C37.P363 Ensure that children in detention have access to an independent complaints mechanism and that all those who were unlawfully detained and subject to torture and ill-treatment obtain redress and adequate reparation, including rehabilitation, compensation, satisfaction and guarantees of non-repetition.[717]

C37.N719

[709] HRC GC 35 (n 5) para 24. [710] ibid para 24. [711] ibid para 25.
[712] ibid para 26. [713] ibid para 27. [714] ibid para 28.
[715] As to the scope of this right, see ibid paras 49–52. [716] See section II.C.4.(f) of this chapter.
[717] CO Israel, CRC/C/ISR/CO/2-4 para 74. See also: CO Uruguay, CRC/C/URY/CO/3-5 para 38(e); CO Holy See, CRC/C/VAT/CO/2 para 38; CO Serbia, CRC/C/SRB/CO/1 para 36.

C37.P364 The justification for this approach, in the absence of an explicit provision that provides a right to compensation, is the principle of effectiveness. This principle demands that states must take all appropriate measures to ensure that the protection of a right is real and not illusory. It is accepted that a right without a remedy is not an effective right.[718] Thus, the need for a state to provide a remedy by way of compensation for unlawful deprivation of liberty is consistent with ensuring the effective protection and recognition of the right to liberty.

C37.S100

III. Evaluation: The Need to Be Mindful of Children's Experiences

C37.P365 Article 37 may lack the unique characteristics of several other articles under the Convention that deal with issues that are peculiar to children. However, it plays a vital role in ensuring that widely recognized fundamental civil and political rights that deal with torture and ill-treatment, the death penalty, deprivation of liberty, and access to justice, remain relevant to children. As this chapter has illustrated, the extensive jurisprudence and commentary on these established rights makes the task of interpreting article 37 relatively easy compared to other provisions of the Convention. Although the boundaries of what amounts to torture and ill-treatment may still be evolving, they are relatively well mapped out. So too are the tests to determine when deprivation of liberty will be justified. The danger, however, is that an over reliance on the received wisdom concerning these rights risks overlooking the need to ensure that these rights, as they appear under article 37, are understood through the prism of children's experiences rather than those of adults.

C37.P366 Thus, the real challenge with article 37 is to shift expectations, for example, about where the risks for children lie with respect to their potential to suffer treatment that amounts to torture or other forms of ill-treatment. Police cells and prison facilities certainly remain places where children, like adults, are subject to serious abuse and harm. However, the classroom, schoolyard, workplace, residential settings, and even the home, are all places where children can be subject to treatment that could reach the threshold for torture and/or cruel, inhuman, and degrading treatment. As such, there is a need for states to become actively seized of their obligation to take effective measures to prevent not only their own agents, but also private persons, including parents, school teachers, social workers, and indeed other children, from harming children in ways that would violate article 37.

C37.P367 It is also important to recall that article 37 expands the corpus of international law by demanding a prohibition on life imprisonment without the possibility of release, by requiring that the detention of a child must be a measure of last resort and for the shortest appropriate period of time, and that a child has a right to maintain family contact whilst deprived of his or her liberty. The inclusion of these provisions acts as a reminder of the need to remain vigilant when interpreting the various rights within article 37 and ensure that children's lived experiences and vulnerabilities relative to adults must always be at the forefront of any analysis concerning their rights.

C37.N718 [718] See the maxim *ubi jus ibi remedium* in *Ashby v White* (1703) 92 ER 126. See also CRC GC 5 (n 28) para 24.

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