CHAPTER 2
INTERNATIONAL HUMAN RIGHTS
LAW AND STANDARDS REGARDING
CHILDREN DEPRIVED OF THEIR LIBERTY

2.1 INTRODUCTION

The development of International Human Rights Law does not have a very long history. Although the concept of human rights dates from ancient documents like the English Magna Carta in the 13th Century and human rights documents enlightened by the great philosophers from the Age of Enlightenment, it was the atrocities of the 20th century, in particular those of the two World Wars, that made the international community willing to develop international legal standards for the protection of fundamental human rights for everyone, thereby limiting the sovereignty of individual States. The first attempt led by Woodrow Wilson was the establishment of the League of Nations in 1919 followed by inter alia the Declaration of the Rights of the Child in 1924. However, the founding of the United Nations (UN) in 1945, after World War II, marks the turning point in this regard. During the second half of the – what could be called – ‘age of torture’ a significant array of human rights declarations, charters, treaties, recommendations, rules and guidelines were developed at both the international (UN) level and the regional level. As part of this development, specific standards for specific groups of people were designed. This led inter alia to the adoption of the UN Convention on the Elimination of All Forms of Discrimination against Women in 1979, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, and the establishment of a children’s rights framework, by means of the adoption of the CRC in 1989 and UN standards like the 1990 JDLs.

This introductory chapter addresses the development of International and Regional Human Rights Law and Standards followed by the emergence of the international children’s rights framework (paras. 2.2 and 2.3). After some interim conclusions (para. 2.4), paragraph 2.5 focuses on the recognition of the position of individuals deprived of liberty, particularly children, under international law and the growing attention for their legal status. For the sake of completion paragraph 2.6 briefly addresses the general features of International Human Rights Law.

The overall objective of this chapter is to present the relevant provisions of human rights instruments concerning deprivation of liberty of children, before

1 Sieghart 1983, p. 6ff.
2 Nowak 2005, p. 158.
addressing their legal implications in detail (see Chapter 3). To this end, an overview of the most relevant provisions of International and Regional Human Rights Law and Standards for children deprived of their liberty will be presented in paragraphs 2.7 and 2.8. The chapter ends with some concluding remarks (para. 2.9).

2.2 THE DEVELOPMENT OF HUMAN RIGHTS LAW

2.2.1 At the Global Level

Despite the early presence of a certain notion of human rights, represented by domestic human rights law and the law of war (humanitarian law), it was only after the atrocities of World War II that one could really speak of the development of *International Human Rights Law*.3 Previously, there had been no general international law on human rights, ‘concerned with both the protection of the individual from the state and the creation of societal conditions by which all individuals can develop to their fullest potential’.4 Human rights were a matter of domestic law and international law was considered inter-state law regulating behaviour between states. However, after the atrocities of World War II and its large scale infringement of the inherent dignity of the individual, a growing concern for human rights developed. The recognition that the inherent dignity of the individual is of relevance for the stability of international order led to a ‘profound transformation of international relations (…) and with it a profound transformation of international law’.5

The founding of the UN in 1945 was of particular significance in this regard. Its constitutional document, the Charter of the United Nations (UN Charter)6 contains provisions relevant to International Human Rights Law, such as listing the goals of the UN, one of which is the ‘observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’ (art. 55 UN Charter). Furthermore, all Member States pledged themselves ‘to take joint and separate action’ in cooperation with the UN to achieve this purpose (art. 56 UN Charter).

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5 Rodley 1999, p. 1. Buergenthal distinguishes four stages in the normative and institutional evolution of international human rights after 1945: the first stage of the foundation of norms (between World War II and the adoption of the International Bill of Human Rights in 1966), followed by the stage of institution building. The third stage started with the end of the Cold War and is represented by *inter alia* the 1993 Vienna Declaration on Human Rights. The final and fourth stage is the stage in which attention was given to minority rights, individual criminal responsibility and collective humanitarian intervention; Buergenthal 1997.
6 Signed in San Francisco (US) on 26 June 1945 (entry into force 24 October 1945).
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At the UN level, many standards have been set since its establishment after World War II. After the 1945 UN Charter, the Universal Declaration of Human Rights (UDHR) was adopted in 1948. The UDHR can be seen as the first codification of human rights principles at the international level, while taking approximately the same point of departure as the ‘domestic’ United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789). Article 1 UDHR states that ‘(a)ll human beings are born free and equal in dignity and rights.’ This document primarily contains civil and political rights, although it embodies some economic, social and cultural rights as well.

The UDHR was followed by the International Bill of Human Rights consisting of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, providing for the establishment of the HRC, the body in charge of monitoring the implementation of the ICCPR (art. 28 ICCPR), to receive and consider individual communications (see below). The creation of the HRC under the ICCPR was the first global initiative aiming at the international protection of human rights. Where the UDHR aimed ‘only’ at the promotion of human rights, to which Rodley refers as ‘standard-setting’, the International Bill of Human Rights was not only meant to set and promote human rights standards, but also to actively stimulate their implementation and protection.

The HRC reviews country reports of States Parties on the implementation of the ICCPR (art. 40 ICCPR). Members of the HRC are elected by the States Parties and

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7 GA Res. 172 A (III), 10 December 1948.
8 The term ‘universal’ was slightly exaggerated. The vote was 48 states in favour, none against and nine states abstaining; Van Bueren 1995, p. 17.
9 It is interesting to note that the ‘large majority of States involved in drafting the UDHR were informed in their thinking by the natural rights theory’, according to Joseph, Schultz and Castan 2004, p. 7. According to Murdoch it was the Cold War tensions between the East (economic and social rights based on socialist perceptions of rights) and the West (civil and political rights based on Western liberal democracy) that marked the competition between these two concepts of human rights; Murdoch 2006, p. 17-18. From that point of view one could argue that the UDHR was very much culturally and politically influenced, in particular by Western liberal democracies.
10 GA Res. 2200A (XXI), 16 December 1966 (entry into force ICESCR 3 January 1976; entry into force ICCPR 23 March 1976). The drafting of the ICESCR and ICCPR began in 1947, even before the adoption of the UDHR. Note that the traditional divide between civil and political rights on the one hand and economic, social and cultural rights on the other led to two separate human rights conventions. In 1989 the UN General Assembly (GA) adopted the Second Optional Protocol to the ICCPR, GA Res. 44/128, 15 December 1989 (entry into force 11 July 1991), which aims at the abolition of the death penalty.
11 Rodley 1999, p. 4.
act as independent human rights experts in their personal capacity.\textsuperscript{12} The ICESCR is monitored by a similar committee, the Committee on Economic, Social and Cultural Rights (CESCR), through a similar country reporting system. The CESCR has taken over this function from the Economic and Social Council (ECOSOC); (art. 16ff ICESCR).\textsuperscript{13} Both reporting systems aim at promoting a constructive dialogue between the committees and each State Party. Both committees, like other human rights committees established later, have a secretariat provided by the Office of the High Commissioner for Human Rights in Geneva, Switzerland.

In addition, the HRC and CESCR can issue General Comments on the interpretation of ICCPR and ICESCR respectively (art. 40 (4) ICCPR; art. 21 ICESCR). The HRC has so far (on 1 June 2008) issued 32 General Comments on specific rights, themes and the more formal aspects of the ICCPR, such as the preparation of reports. Some of these comments are updates of former comments. The ICESCR has adopted eighteen General Comments. According to Joseph, Schultz & Castan the HRC General Comments ‘have proven to be a valuable jurisprudence resource’, despite the fact that the initial General Comments were not as detailed and therefore not as useful as the later ones.\textsuperscript{14}

Under the ICCPR’s (first) Optional Protocol the HRC is competent to consider individual communications regarding alleged violations of the ICCPR provisions.\textsuperscript{15} Under the ICESCR an individual complaints procedure has not been established (yet).\textsuperscript{16} A supranational supervising body like the HRC cannot be seen as a regular vehicle for appeals and its legal value is limited, in the sense that it is restricted in fact-finding and its decisions are not legally binding.\textsuperscript{17} Its significance, however,
lays more in the fact that its decisions contribute to the interpretation of the ICCPR, which as such are legally binding and provide ‘strong indicators of legal obligations’. In addition, the rulings of the HRC that a State Party has violated the complainant’s rights will have consequences the State most likely will not appreciate, such as recommendations regarding appropriate (financial) remedies and the use of the HRC’s findings under the reporting system. Moreover, the decisions form part of what is considered international scrutiny.

Since the adoption of the ICCPR and the ICESCR, the first general legally binding human rights treaties supplemented by an international monitoring and judicial legal apparatus, a wide variety of other international human rights instruments have been developed. Among others, international conventions for specific subjects or for specific groups of individuals have been adopted: the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 CRC, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the 2006 Convention on the Rights of Person with Disabilities, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. Together, with the International Bill of Human Rights, these instruments are considered the core international human rights instruments. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) belongs to this group as well.

Furthermore, a significant number of resolutions, declarations, sets of rules, guidelines and other legal standards have been adopted since then, relating to inter alia the rights of groups of people, such as indigenous peoples and minorities, women, persons with disabilities, immigrants and children, but also more specifically regarding human rights in the administration of justice and the protection of people subjected to detention or imprisonment.

Ibid., p. 25.
Although their entry into force was in 1976, one decade later (!), which could hardly be regarded as a warm welcome.
GA Res. 34/180, 18 December 1979 (entry into force 3 September 1981).
GA Res. 39/46, 10 December 1984 (entry into force 26 June 1987).
GA Res. 45/158, 18 December 1990 (entry into force 1 July 2003).
GA Res. 61/177, 20 December 2006.
It should be noted that the ICERD was adopted in 1965 (GA Res. 2106 (XX) of 21 December 1965) and entered into force on 4 January 1969, well before the entry into force of the ICCPR and ICESCR.
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A number of these standard-setting instruments are relevant to this study on the deprivation of liberty of children and will be presented (and discussed) below (see para. 2.3.3 and 2.3.5).

2.2.2 At the Regional Level

While International Human Rights Law was developing at the global (UN) level, similar developments took place in a few regions of the world, namely in Europe, North and South America and Africa. Respectively, the Council of Europe, the Organisation of American States (OAS) and the African Union (formerly the Organisation of African Unity; OAU) developed and adopted their own human rights instruments.28

In 1950, the Council of Europe29 adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).30 Steiner & Alston argue that different factors were responsible for the ‘impetus’ that led to the adoption of the ECHR, one of which was that the ECHR was a reaction to the atrocities of World War II and was based on the assumption that governmental respect for human rights would decrease the chance of war (again) between the different European governments.31

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28. Neither the Asian region, nor the Pacific region have adopted human rights instruments like the other regions have done. The Association of Southeast Asian Nations (ASEAN), established in 1967, adopted its Charter on 20 November 2007 in Singapore. The promotion and protection of human rights is considered one of the purposes of the ASEAN (art. 1 (7) and the Charter announces the establishment of the ASEAN Human Rights Body (art. 14); see for more on the ASEAN and the Charter: www.aseansec.org, last visited 1 June 2008. In the Arab region the League of Arab States adopted the Arab Charter on Human Rights on 15 September 1994 (Res. 5437, 102nd regular session). It has been heavily criticized by human rights organizations due to the fact that it fails to meet the standards of International Human Rights Law. A drastically revised text was adopted in 2004 by the Summit of Heads of Member States of the League; Rishmawi 2005, p. 361-364. The Arab Charter entered into force on 15 March 2008.

29. The Council of Europe is a political (inter-governmental) organization founded in 1949 on the principles of respect for human rights, pluralist democracy and the rule of law within Europe. The Council of Europe is not an organ of the EU, although all EU Member States are members of the Council of Europe (which actually is a prerequisite for consideration for further EU-membership); Murdoch 2006, p. 17-18. At the time of writing the Council of Europe had 47 member countries. For more information see: www.coe.int (last visited 1 June 2008).

30. Council of Europe, Rome, 4 November 1950, CETS No. 5 (entry into force 3 September 1953). At the time of writing the ECHR had fourteen protocols; the 14th has not yet entered into force. The 10th has been withdrawn by the 11th protocol (entry into force 1 November 1998).

31. Steiner & Alston 2000, p. 786-787. The second factor was that it was considered the best way to ensure that Germany would not strive for war again. ‘[R]egional integration and the institutionalization of common values’ would be ‘a force for peace’. The third factor was the wish to create ‘a common ideological framework and to consolidate [the] unity of non-communist countries’ in the face of the Communist threat’.
The European human rights system is of particular significance because it is founded on the first comprehensive human rights treaty, with the right to individual petition to the first human rights court, the European Court on Human Rights (ECtHR) based in Strasbourg, France. The ECtHR is entrusted with an individual complaints procedure under the ECHR (art. 34 ECHR); it can also receive inter-state complaints (art. 33 ECHR). It has been producing extensive jurisprudence. Consequently, the European human rights system is considered the most significant and the most judicially developed human rights system.

In 1961 the Council of Europe adopted the European Social Charter (ESC), intended to complement the ECHR regarding economic and social rights. While the ECHR has established the legally strong ECtHR, the ESC is monitored by the European Committee of Social Rights, a supervisory mechanism which can receive collective complaints and state reports and has the mandate to strive for guaranteeing respect for economic and social rights by States Parties (art. 21ff ESC).

In 1948 the OAS, the oldest regional society of states established in 1890 as the International Union of American Republics, adopted the American Declaration of the Rights and Duties of Man (American Declaration), seven months before the adoption of the UDHR. The two declarations have the same background. They served as a response to the atrocities of World War II and represented the human rights fundamentals of the OAS and UN. In addition, they both contain guarantees regarding civil, political, economic, social and cultural rights.

In 1969, after ten years of drafting, the OAS adopted a second human rights instrument, the American Convention on Human Rights (ACHR). The ACHR was modelled after its UN and European treaty predecessors, but with modifications that...
were based on regional realities. According to Rodley ‘[t]he OAS has a tradition of drafting regional analogues to major UN human rights instruments’. Since 1969 the Inter-American System of Human Rights has been constituted by two overlapping instruments, the ACHR and the American Declaration. The significance of the latter is that it is applicable to all members of the OAS, regardless of their ratification of the ACHR, and that it contains economic, social and cultural rights. The ACHR embodies civil and political rights and merely calls for a progressive development of the economic, social, educational, scientific and cultural standards set forth in the Charter of the OAS. In 1988 the OAS adopted the ‘Protocol of San Salvador’, a protocol to the ACHR, which contains economic, social and cultural rights.

With the adoption of the ACHR the Inter-American Court of Human Rights (hereinafter: Inter-American Court) was established (art. 33 and art. 52ff ACHR), based in San José, Costa Rica, which became operational in 1979 and can issue binding decisions for States Parties to the ACHR. The position of the Inter-American Commission on Human Rights (hereinafter: Inter-American Commission) is more complicated, but it is entrusted with promotion of respect for and defence of human rights in the OAS region (art. 33 jo. 41 ACHR). The Inter-American Commission, based in Washington D.C., ‘applies the [ACHR] to its contracting parties and the American Declaration to non-convention party states’. It can conduct in loco visits, issue country reports and consider individual petitions; the Inter-American Court is a judicial body, which can issue advisory opinions and decisions in adversarial cases.

The African region, united in the African Union founded as the OAU in 1964, adopted the African Charter on Human and Peoples’ Rights, also known as the

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39 Cf Harris 1998, p. 1-4 regarding differences between the European system and the Inter-American system of Human Rights; see para. 2.5; cf Steiner & Alston 2000, p. 869.
40 Rodley 1999, p. 51.
41 Unlike for Member States of the Council of Europe regarding the ECHR, it is not compulsory for OAS Member States to ratify the ACHR. Note, e.g. that the US has not ratified the ACHR, while being a member of the OAS; the American Declaration thus is applicable to the US.
42 For more on the legal status (and added value) of the American Declaration in relation to the ACHR and OAS Charter see Harris 1998, p. 4ff.
44 Its original basis can be found in the Charter of the OAS (art. 106).
46 The Inter-American Commission can request such an advisory opinion (art. 64 ACHR) or lodge complaints before the Court (art. 61 ACHR). For more on the Inter-American Human Rights System see, e.g. Harris & Livingstone 1998. Cf www.cidh.oas.org (Inter-American Commission), www.corteidh.or.cr (Inter-American Court) and www.oas.org (OAS), all last visited on 1 June 2008.
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‘Banjul Charter’ in 1981. It entered into force on 21 October 1986. The treaty embodies civil and political, economic, social and cultural rights and is concerned with the rights of individuals and peoples. The Banjul Charter established the African Commission on Human and Peoples’ Rights. The commission is based in Banjul, The Gambia and its mandate consists of three core functions, namely: promotional activities, protective activities and interpretation of the Banjul Charter (art. 45 Banjul Charter). The two most significant functions are receiving communications (from states or individuals and (inter)national organizations; art. 47ff resp. art. 55ff) and examining of States Parties’ reports, although the Banjul Charter refers ‘tersely’ to reports in article 62.

Despite the presence of the African Commission, the need for reform was felt within five years, due to the lack of ‘adequate or effective institutions with the enforcement mandate’. Consequently, the OAU adopted a Protocol on the African Court on Human and People’s Rights in 1998 which entered into force six years later in 2004. The Protocol was based on examples such as the European and Inter-American human rights courts but also on the Statute of the International Court of Justice and the preparation for the International Criminal Court. The seat of the African Court has not yet been determined (on 1 June 2008).

2.3 THE EMERGENCE OF CHILDREN’S RIGHTS IN HUMAN RIGHTS LAW

2.3.1 A First Acknowledgment

While the development of International Human Rights Law really flourished after World War II, as part of a fundamental shift from international law being inter-state law toward international law setting and implementing standards of human rights meant to protect the rights of individuals, there were some developments noticeable earlier pointing to a (cautious) international legal acknowledgement of human rights for individual groups of human beings. Children are such a group.

51 Jallow 2004, p. 6. Cf this article and the other contributions of the January-March 2004 issue of the Africa Legal Aid Quarterly for more information on the African Court on Human and People’s Rights.
52 If not stated otherwise, International Human Rights Law refers to both international (UN) law and regional law.
53 According to Todres ‘the child rights movement was part of early international efforts to recognize human rights’; Todres 1998, p. 161. Another significant group were the slaves; the Slavery Convention was adopted in 1926. The establishment of the International Labour Organization (ILO) in 1919 and the subsequent ILO Conventions can be mentioned here. Furthermore, the
Almost a quarter of a century before the UN adopted the UDHR, the League of Nations – forerunner of the UN – adopted the Declaration of the Rights of the Child in 1924, also known as the Declaration of Geneva.\textsuperscript{54} This declaration stipulates an ‘unreparable humanitarian debt’\textsuperscript{55} to the men and women of all nations by recognizing above all that ‘mankind owes to the child the best it has to give’ and more specifically by declaring and accepting ‘it as their duty that, beyond and above all considerations of race, nationality or creed’ the following provisions, referred to as rights of the child, must be accorded to the child:

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

Although, the Declaration of Geneva referred explicitly to the \textit{rights} of the child, the five principles merely contained provisions for children as persons in need of specific care or treatment. Although, it uses rather firm wording (i.e. the child ‘must’ be helped, ‘must’ be fed, ‘must’ be reclaimed, etc.), Van Bueren argues that ‘it is clear (…) that the Declaration of the Rights of the Child 1924 was never intended to create an instrument which places binding obligations upon states’.\textsuperscript{56} Indeed, it is ‘men and women of all nations’ that are placed under a ‘burden’ to live up to these principles.\textsuperscript{57}

Nevertheless, the Declaration of Geneva remains of significance for a number of reasons.\textsuperscript{58} First, the declaration was an international document that established the concept of the rights of the child internationally and secondly it did it almost a quarter of a century before International Human Rights Standards started to develop, one of the first examples of International Human Rights Law. Furthermore, the Declaration of Geneva enshrined economic and social rights for children, which can be considered evidence that the development of International

\textsuperscript{54} League of Nations, ‘Declaration of Geneva’, 26 September 1924.
\textsuperscript{55} Van Bueren 1995, p. 7.
\textsuperscript{56} Ibid., p. 7.
\textsuperscript{57} Cf Todres 1998, p. 162.
\textsuperscript{58} Van Bueren 1995, p. 8.
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Human Rights Law did not focus exclusively on civil and political rights. The Declaration of Geneva finally is important because, due to its title which explicitly speaks of the ‘rights of the child’, it provides, albeit cautiously, for a ‘link between child welfare and the rights of the child’.\textsuperscript{59}

In addition, this declaration made explicit references to specific groups of children, who should be accorded a specific approach. One of these groups is that of delinquent children, who ‘must be reclaimed’.

After World War II and the founding of the UN, preparations for a new declaration on the rights of the child began. From the beginning of the drafting process, many different countries with different cultures and different levels of development were involved.\textsuperscript{60} Despite wide support and the agreement in the Social Commission and the Economic and Social Council that a separate declaration next to the UDHR for children was needed, justified by their special needs, it took thirteen years, before the UN General Assembly adopted the (new) Declaration of the Rights of the Child.\textsuperscript{61} The accompanying resolution urged \textit{inter alia} ‘national Governments to recognize the rights set forth [in the declaration] and strive for their observance’. By doing so the international community went further than at the time of the 1924 Declaration of Geneva, which did not contain any explicit reference to a State’s obligations.\textsuperscript{62}

The 1959 Declaration of the Rights of the Child (hereinafter: Declaration of 1959) consisted of a preamble and ten principles. In its preamble the Declaration of 1959 reiterates the debt of mankind to give the child the best it has to give. Furthermore, it reaffirms the principles of the UN Charter and UDHR,\textsuperscript{63} and affirms that the child, due to his ‘physical and mental immaturity’ has special needs, such as ‘special safeguards and care, including appropriate legal protection’. The

\begin{itemize}
  \item \textsuperscript{59} Van Bueren 1995, p. 8.
  \item \textsuperscript{60} \textit{Ibid.}, p. 10; for more information on the drafting process see Van Bueren 1995, p. 10.
  \item \textsuperscript{61} GA Res. 1386 (XIV), 20 November 1959.
  \item \textsuperscript{62} In 1948 the UN General Assembly adopted a slightly adjusted and expanded Declaration of Geneva; Cantwell 1992, p. 19. The delinquent child entitled to reclaim under its predecessor was in 1948 referred to as the ‘maladjusted child’ that must be ‘reeducated’. This declaration however has not been of much significance for the development of the children’s rights framework; footnote 8 in Todres 1998, p. 162. The 1959 Declaration of the Rights of the Child, e.g. refers to the 1924 Declaration of Geneva in its preamble, but not to the 1948 Declaration.
  \item \textsuperscript{63} The UDHR makes specific reference to children in arts. 25 and 26. Art 25 UDHR provides that ‘(m)otherhood and childhood are entitled to special care and assistance’ and that ‘[a]ll children whether born in or out of wedlock shall enjoy the same social protection’. Van Bueren argues that the UDHR ‘emphasizes the rights of children to special care and assistance, and it provides this through the direct protection of the rights of the child and indirectly through the protection of motherhood’; Van Bueren 1995, p. 17-18. Art. 26 UDHR contains the right to education, including access to education and the aims of education. It also states that parents have the ‘prior right to choose the kind of education that shall be given to their children’.
\end{itemize}
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Declaration of 1959 has first and above all recognized the child as a human being entitled to the very same rights and freedoms as adults. The non-discrimination provision embodied in Principle 1 could, at that point in time, be considered fairly new\textsuperscript{64} and was broader than article 55 UN Charter.\textsuperscript{65}

Furthermore, the Declaration of 1959 was a more specific instrument in addition to the already existing general human rights instruments, at that specific moment in time.

The ten principles of the Declaration of 1959 provided entitlements with regard to a name and nationality (Principle 3), to growth and development in health, to adequate nutrition, housing, recreation and medical services (Principle 4) and to receive education (Principle 7). Furthermore, the declaration embodied provisions regarding special care and protection to the child and his mother, including pre-natal and post-natal care (Principle 4), special treatment, education and care for a physically, mentally or socially handicapped child (Principle 5), support of the child without a family (Principle 6), and protection of every child against ‘all forms of neglect, cruelty and exploitation’ (Principle 9).

Furthermore, Principle 2 stated that ‘[i]n the enactment of laws for [the realisation of the enjoyment of the child of special protection and opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom of dignity], the best interests of the child shall be the paramount consideration’. This ‘best-interests’ principle is the predecessor of article 3 CRC, adopted thirty years later, but it can be regarded as firmer than its successor.\textsuperscript{66} It is interesting to note that compared to the 1924 Declaration of Geneva, the delinquent child was no longer mentioned explicitly.

One could say that the Declaration of 1959 addressed the position of the child more broadly, more explicitly and more firmly than its predecessor of 1924. Although the declaration still was a resolution that was not legally binding as such, it had a significant moral value and it stimulated ‘the conceptual thinking of children’s

\textsuperscript{64} Todres 1998, p. 163.
\textsuperscript{65} This article’s list of prohibitive grounds of discrimination is rather brief. Forms of discrimination that are of particular relevance for the child (i.e. discrimination on the basis of birth, social origin or ‘any other status’) were not prohibited yet at that point in time; Van Bueren 1995, p. 17. The 1948 UDHR already implied a significant improvement in this regard. Cf the declaration’s preamble, which proclaims equal treatment ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ and Principle 10, which stipulates that ‘[t]he child shall be protected from practices which may foster racial, religious and any other form of discrimination’.
\textsuperscript{66} In addition, Principle 7 formulated the best interests of the child as ‘the guiding principle of those responsible for his education and guidance’. For other comments with regard to, e.g. declined proposals in the drafting process, see Van Bueren 1995, p. 10-12.
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rights’. In the Declaration of Geneva the child was still seen as an object of international law. The Declaration of 1959 acknowledged the child more as subject of international law, by providing for entitlements, albeit limited to economic and social aspects. The Declaration of 1959 did not really address the civil and political rights of children.

2.3.2 The Child in the ICCPR and ICESCR

After the adoption of the 1924 Declaration of Geneva and 1959 Declaration of the Rights of the Child, the child was also addressed in the two major international human rights treaties: the 1966 ICCPR and ICESCR.

The ICESCR applies to ‘all men and women’ and therefore implicitly to all children as well. In addition, it contains provisions that are of specific significance for children, although the child is not particularly addressed. The ICESCR in the first place recognizes the family as ‘natural and fundamental group unit of society’ and that ‘special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions’ (art. 10 (1) and (3) ICESCR). In addition, the ICESCR is concerned with everyone’s right to the ‘highest attainable standard of physical and mental health’ and provides that States Parties should take steps to achieve the full realization of this standard, which includes ‘[t]he provision (…) for the healthy development of the child’ (art. 12 (1) and (2)(a) ICESCR). Furthermore, article 13 ICESCR enshrines the right to education for everyone and states that ‘primary education shall be compulsory and available free to all’ (art. 13 (2)(a) ICESCR).

Van Bueren emphasizes that ‘a State Party is under a duty to the maximum of its available resources to implement progressively the rights enshrined in the ICESCR’ and that because the ICESCR grants children special measures of protection and assistance, ‘states are under a duty to apportion a greater proportion of their (…) resources to implement children’s economic, social and cultural rights’.

The ICCPR is the first UN treaty that has a provision specifically written for children and formulated in terms of ‘rights’. Article 24 ICCPR stipulates that

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70 According to Van Bueren the original draft did not contain a specific article for children. States in favour of such a provision argued inter alia that the ICESCR already included a similar provision and that the rights enshrined in art. 25 UDHR should be embodied in a legally binding treaty. States against such a provision argued that its adoption was not necessary due to article 2’s anti-discrimination clause, which makes the ICCPR applicable to all human beings, including children. Subsequently, these states argued that the adoption of an article meant for a specific group of individuals, would undermine the universal applicability of other articles. Van Bueren states that ‘the passage of time which has elapsed since the adoption of the Covenant has shown this fear to
every child, without discrimination, has ‘the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State’.

In conjunction with article 2 ICCPR’s general principle of non-discrimination, each child is entitled to these special measures of protection in addition to all rights of the ICCPR.

In addition, the ICCPR embodies a few provisions in which ‘juvenile persons’ are addressed specifically, such as deprivation of liberty (art. 10 ICCPR) and the administration of the criminal justice system, including fair trial (art. 14 ICCPR).

Still, the acknowledgement of the child’s rights has a protective connotation related to ‘his status as a minor’ and therefore, ICCPR, like the ICESCR, represents what has been referred to as a welfare or charity approach, child protection approach or needs-based approach, rather than a rights-based approach.

2.3.3 Towards a Separate Treaty on Children’s Rights

During the drafting process of the Declaration of 1959 a number of states indicated that they would have preferred a convention on the rights of the child, instead of a declaration. The majority of states however were opposed to this idea. This discussion continued for another twenty years. In 1978, Poland – one of the states that had been in favour of a convention since 1959 – presented a draft text of a convention on the rights of the child, aiming at its adoption in 1979, the International Year of the Child. However, this hope proved to be vain. 1979 merely ended the opposition so the drafting process could begin. It took another ten years before the CRC was adopted, in the year of the thirtieth birthday of the Declaration of 1959.

What caused this change of thinking? Why did many states withdraw their opposition against a convention specifically designed for children? Van Bueren distinguishes seven principle reasons for ‘an international change of mind’, as a result of which the acceptance of a specific convention on the rights of the child...
had grown. First, there had been a fundamental change in the states’ attitude towards children. As witnessed by national law reforms in many states, children were no longer merely seen as individuals in need of care and protection, but of rights bearers instead, which made the Declaration of 1959 increasingly less appropriate. Second, more and more states recognized that instruments which granted specific – positive – rights to a specific group of individuals, as for women and refugees, were necessary to combat and prevent discrimination against children effectively. The mere prohibition of denial of rights for children was no longer considered to be enough. Third, states recognized that a higher standard of protection than provided for in the available international instruments was needed in order to meet the specific needs of children, because of their special vulnerability and immaturity. In addition, children require certain specific rights that may be considered inappropriate for adults.

The fourth reason was that states recognized that to have an effective instrument it was necessary to draw up an international treaty, which would leave room for local customs and culture, by embodying different principles of interpretation. This challenge must be divided into the wish to create an effective legally binding instrument on the one hand, that would leave room to adapt to local and cultural needs and customs on the other. Therefore, the two concepts of the ‘best interest of the child’ and the ‘evolving capacities of the child’ were introduced as the two fundamental principles of interpretation of children’s rights.

The fifth reason was the need for uniformity in international standards. In the two decades after the Declaration of 1959 many international, regional and bilateral agreements dealing specifically issues of children’s rights were adopted, accompanied by a large diversity in approaches and points of departure. In addition, states recognized that the two declarations and the ICCPR and ICESCR were not comprehensive instruments on children’s rights and there was a growing feeling that one needed a comprehensive instrument on this issue; this was the sixth reason and accounted for the comprehensive design of the CRC. The seventh and final reason, as distinguished by Van Bueren for the ending of the opposition against a convention, was the emotional and public opinion influence created by the designation of the year 1979 as the international year of the child.

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77 Van Bueren 1995, p. 13-14. There have been many debates concerning the rights of the child in a broad sense, from many different perspectives, such as philosophical, anthropological, sociological or pedagogical/developmental perspectives. For a compilation of significant essays representing these debates see Freeman 2004a and Freeman 2004b.


79 An example is art. 20 of the revised draft CRC (later adapted in arts. 37 and 40 CRC); Detrick 1992, p. 98-99.

80 See further below. The principle of the best interests of the child as such was not new, but it was no longer understood as a principle representing the welfare approach as ‘a principle of compassion’; Van Bueren 1995, p. 45. The concept of the child’s evolving capacities was newly introduced by the CRC; Landsdown 2005, p. 3ff.
After one decade of drafting, the CRC was adopted on 20 November 1989, the 30th birthday of the Declaration of 1959. It covers all categories of human rights, civil, political, economic, social and cultural rights. This was not the initial intention, but the CRC developed momentum and the enthusiasm among states grew tremendously, resulting in (at that time) the longest UN human rights treaty in force regarding the number of substantive rights. The CRC is not only one of the longest treaties, after its adoption it only took one year before it entered into force and, by 1 June 2008, 193 countries had ratified the CRC. Only two countries have not (yet) ratified the CRC: Somalia, which lacks an officially recognized government and therefore cannot ratify, and the United States, which lacks the (political) will to ratify; hence, this UN treaty’s characterization as the most successful UN treaty or as a universal treaty.

2.3.4 The UN Convention on the Rights of the Child

The adoption of the CRC in 1989 was a significant moment for children. It represented a new standard, which provided the child with a set of legal rights to which he became entitled regardless of his status. It ended the ‘needs-based approach’ and turned it into a ‘rights-based approach’. The latter is the result of a development started in the late 1970s, which considered the child no longer only a person in need of protection, who should be provided with special measures of protection. The child is considered a rights holder instead. That the international community has taken this standard seriously, is proven by the almost universal ratification of the CRC.

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81 See for more on the drafting process Detrick 1992.
83 As of 1 June 2008, Montenegro was the last country to ratify the CRC (23 October 2006).
84 See, e.g. Doek 2003, p. 125-127. Cf Alston & Tobin 2005, p. 2. They point at the ‘paradox’ that although the CRC is very successful and it is not difficult to find ‘superlatives to describe the achievements of the CRC (...) it is equally easy to recite a litany of terrible abuses which continue to be committed against children, some of which seem to be even more chronic and less susceptible to resolution today than they were before the Convention existed’. In May 2000 two optional protocols to the CRC were adopted. The first Optional Protocol is on the sale of children, child prostitution and child pornography (GA Res. 54/263 of 25 May 2000; entry into force 18 January 2002); the second Optional Protocol is on the involvement of children in armed conflict (GA Res. 54/263 of 25 May 2000; entry into force 12 February 2002).
85 David 2004, p. 18-20; see in particular table 3.1 in which he provides an overview of the fundamental differences between these two approaches.
86 Even though it has been formulated sometimes as an entitlement; see, e.g. art. 24 ICCPR.
87 Cf Freeman 1992 with regard to the question why one should take children’s rights more seriously.
It is argued that the CRC had the following objectives. The CRC created new rights under international law, some of which were developed under the judicial systems of the regional human rights treaties, such as the right to be heard and have the child’s views taken seriously (art. 12 CRC). In addition, it was the CRC’s objectives to create binding standards on issues that until then were only covered by non-binding recommendations, such as the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules; see further below). Furthermore, the CRC aimed at imposing new obligations concerning the provision and protection of children, such as the obligation to provide for rehabilitation of the abused, neglected or exploited child (art. 39 CRC). Finally, one of the CRC objectives was to provide an ‘additional express ground by which States Parties are under a duty not to discriminate against children in their enjoyment of the Convention’s rights’.

Obviously, signing and ratifying the CRC is one thing, acting in accordance with its principles and respecting the rights of the child is another. Due to its recent adoption just eighteen years ago, its value cannot be assessed fully. However, David argues that it can be safely assumed ‘that [the CRC] has placed crucial issues that were still negated, ignored or neglected during the 1980s on the agenda of many politicians, legislators and administrators’. One of these issues is children deprived of their liberty.

David distinguishes six aspects of the CRC, which have contributed to ‘a much wider recognition of the scope of [children’s] rights’ instead of the ‘traditional welfare and charity approaches to children’s rights’. The first aspect is that of ‘accountability’. The CRC recognizes the child, defined by article 1 as ‘every human being below the age of 18 years’, as holder of rights and provides for legally binding obligations for public authorities. By doing so the CRC provides for ‘a full set of universally recognized norms and standards that can be applied in any situation and in all social-cultural environments and are agreed upon by the international community’. David considers the second aspect to be ‘normative clarity and detail’. The third aspect of the CRC, ‘empowerment, ownership and participation’, is that it recognizes the child as an actor who is ‘progressively empowered’, according to his ‘evolving capacities’, to exercise his own rights (cf art. 5 CRC). The fourth aspect is ‘remedy’. By setting standards that are legally binding, the CRC has provided for a legal instrument, which the child or his representative can use and invoke before a court. The CRC therefore provides for a
legal remedy against violations of the CRC or lack of will to implement.\textsuperscript{93} Furthermore, the CRC has established the UN Committee on the Rights of the Child (CRC Committee) which monitors the implementation of the CRC (art. 43ff CRC). The CRC Committee is a UN body with international and independent experts, which convenes three times a year in Geneva and reviews States Parties’ reports on the implementation of the CRC. By ratifying the CRC, States Parties are under the obligation to report to the Committee and therefore stand under ‘international scrutiny’, another aspect (the fifth) relevant to the recognition of the (scope of the) rights of the child. Finally, David argues that the CRC must be seen as a ‘comprehensive and holistic analytical tool’, which can serve as the basis for research from a ‘multi-sectoral angle’. Seeing the child as a dynamic person in development, the CRC has tried to recognize and bring together the most essential developmental rights of children. Instead of approaching the child from different perspectives, such as a medical, pedagogical or legal perspective, the CRC stands for a multi-disciplinary, holistic approach.

Unlike for example the HRC (or the regional judicial bodies), the CRC Committee does not have the authority to consider individual communications. This limits the power of the committee over the States Parties concerning implementation. Nevertheless, it has proven to be rather productive through, \textit{inter alia}, its General Comments, general discussion days, concluding observations to (periodic) state reports and follow up meetings.\textsuperscript{94}

The CRC Committee has identified four articles, which contain in the opinion of the Committee the ‘general principles’.\textsuperscript{95} The first general principle is non-discrimination (art. 2 CRC). It embodies the States Parties’ obligation to ‘respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind’. The second principle (art. 6 CRC) is that every child has the inherent right to life and States Parties are under the obligation to ensure the survival and development of the child, to the maximum extent possible. The CRC Committee has stated that it “expects States to interpret “development” in its broadest sense as a holistic concept [Italic – tl], embracing the child’s physical, mental, spiritual, moral, psychological and social development”. Article 12 CRC embodies the third principle, namely the child’s right to participate, which means

\begin{itemize}
  \item \textsuperscript{93} Although David rightfully points out that enforcing respect for the rights of the child should happen outside the court arena first. Legal procedures should always be used as a last resort. The effectiveness of legal remedies are furthermore dependent on the other aspects, like the national system (monistic or dualistic), and the question whether a specific provision/standard is directly applicable and can be invoked before the national court.
  \item \textsuperscript{94} Until 1 June 2008 the CRC Committee had adopted ten General Comments; see www2.ohchr.org/english/bodies/crc/comments.htm (last visited 1 June 2008).
  \item \textsuperscript{95} General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003 (GC No. 5), para. 12; see also Doek 2007. Cf Detrick 1999 regarding the separate CRC provisions.
\end{itemize}
that he has the right to express his views freely in all matters affecting him and that States Parties must assure that those views are given due weight.

The fourth principle is that of the best interests of the child as a primary consideration in all actions concerning children (art. 3 (1) CRC). According to the CRC Committee this principle ‘refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”’ and it ‘requires active measures throughout government, parliament and the judiciary’. The Committee notes that ‘[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions’.

Although the CRC focuses on the rights of children and acknowledges them ‘as being fully-fledged beneficiaries of human rights’, it is important to stress that in the first place the child is considered a member of his family. According to the preamble of the CRC, the family is regarded as ‘the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children’. Subsequently, article 18 CRC acknowledges the specific position of the parents, as those who ‘have the primary responsibility for the upbringing and development of the child’ and that ‘States Parties shall render appropriate assistance’ (para. 2) to them. It has therefore never been the CRC’s intention to recognize the child as rights holder at the expense of the parents’ position. On the contrary, the CRC is the only treaty that recognizes and empowers the family. Nevertheless, the relationship of child, family and parents is one that changes as the development of the child moves towards maturity. This is called the concept of the child’s ‘evolving capacities’, a developmental concept embodied in article 5 CRC as follows: ‘States Parties shall respect the responsibilities, rights and duties of parents (…) to provide, in a manner consistent with the evolving capacities of the child [italics], appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.’

That the child should be regarded as an individual in development does not apply only in relation to its family, but also in light of some rights as such. A good example is the right to participation. According to article 12 CRC the right of children to express their views is limited to those children who are capable of forming their own views. Subsequently, the views of children should be given ‘due weight in accordance with the age and maturity of the child’ (art. 12 (1) CRC). On
the one hand this implies that depending on the maturity of the child parents can make decisions on his behalf. On the other hand this means that the recognition of the child as rights holder as such has been made contingent on the developmental phase he is in.99

In conclusion, the children’s rights framework provides equal enjoyment of human rights for children, while taking into account the fact that a child differs from adults in the sense that he is a human being in development, which has implications for the level of protection granted to a child, the child’s participation, the exercise of the right by the child himself, and the need for a different approach, through specific provisions. The CRC contains civil, political, economic, social and cultural rights and thus is more comprehensive than other human rights treaties, such as the ICCPR or ICESCR. In addition, it elaborates more and is more specific toward the position of children (independently and as part of his family), and contains provisions that cannot be found in any other convention.100 The content of the CRC will be further addressed in paragraph 2.7.

2.3.5 Children’s Rights in Regional Human Rights Law

The human rights developments in the European, the Inter-American and African regions show many parallels with the developments on the global level. It therefore is not surprising that children have no different position in the regional general human rights treaties than in the international general treaties. Both the European and Inter-American region cannot really be considered child-oriented; despite some references, children are not specifically addressed in the human rights conventions. The African region, on the other hand, has adopted a specific children’s rights convention.

The ECHR addresses ‘everyone’ which includes children101, and it refers specifically to ‘juveniles’ or ‘minors’ occasionally, for example regarding deprivation of liberty (art. 5 (1)(d) ECHR) and regarding the right to fair trial (art. 6 (1) ECHR).102 Compared to the ICCPR the ECHR does not provide for specific entitlements for children related to their status as minors. However, the ECHR

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99 Cf e.g. Lansdown 2005.
100 Doek 2003, p. 127.
101 See, e.g. ECtHR, Judgment of 28 November 1988, Series A. No. 144 (Nielsen v. Denmark), para. 58.
102 The ECHR does not define when childhood ends; this is a matter of domestic law; Bleichrodt 2006, p. 476. The Committee of Ministers of the Council of Europe has recommended to set the age of majority at eighteen; Res. (72) 29E on the Lowering of the Age of Full Legal Capacity, 19 September 1972.
increasingly refers to the CRC framework as relevant to the interpretation of the ECHR in matters affecting children and their families.\textsuperscript{103}

The European Social Charter, complementing the ECHR and containing guarantees regarding social and economic human rights, does address the legal status of the child, by providing for the right to ‘a special protection against the physical and moral hazards to which they are exposed’ as one of the key-principles (Part I, under 7). In addition, article 7 of the European Social Charter embodies the child’s right to special protection regarding working conditions and the minimum age for work, in light of \textit{inter alia} compulsory education. Another principle is that ‘[m]others and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection’ (Part I, under 17), which has been worked out in articles 8 and 17 of the charter.\textsuperscript{104}

In 2005 the ESC Secretariat published the document ‘Children’s Rights under the European Social Charter’ in which it elaborates extensively on the implications of the European Social Charter for the rights of children.\textsuperscript{105} Although this document is not binding on the European Committee of Social Rights, according to the disclaimer, it does state that the ESC ‘is the major European treaty which secures children’s rights’.\textsuperscript{106}

In 1996 the European Convention on the Exercise of Children’s Rights was adopted. However, the added value of this treaty compared to the CRC can be questioned.\textsuperscript{107}

The American Declaration applies to ‘all persons’ and article VII of the American Declaration provides that ‘all children have the right to special protection, care and aid.’ Children also have obligations towards their parents, an approach that has been recognized by the OAU as well, but not by the UN.\textsuperscript{108} The ACHR can be seen as the counterpart of the ECHR, but Van Bueren argues that the ACHR is more child-centred and has indeed a specific article on the rights of the child.\textsuperscript{109} Article 19 ACHR provides that ‘every minor child has the right to the measures of protection required by this condition as a minor on the part of his family, society

\textsuperscript{103} Cf e.g. Kilkelly 1999 and Dohrn 2006.
\textsuperscript{104} Van Bueren 1995, p. 22.
\textsuperscript{105} ESC Secretariat 2005.
\textsuperscript{106} ESC Secretariat 2005, p. 1.
\textsuperscript{107} Council of Europe, Strasbourg, 25 January 1996, ETS No. 160 (entry into force 1 July 2000). On 1 January 2008 only 12 countries had ratified the convention, which could be a consequence of the limited added value.
\textsuperscript{108} Cf Article XXX of the American Declaration that provides that '[i]t is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it'.
\textsuperscript{109} Van Bueren 1995, p. 23. Art. 19 is a non-derogable provision (art. 27 (2) ACHR). The ACHR refers to children in arts. 4 (5), 5 (5) and 17 (4) & (5) ACHR. Dohrn argues that the Inter-American Court has been developing ‘children’s common law’ in which increasingly reference is made to other human rights instruments, in particular the CRC; Dohrn 2006, p. 749-750 (cf para. 2.8).
and the state’. Furthermore, the ACHR is the only treaty that places a special duty on States to create ‘specialized tribunals’ for children subject to criminal proceedings (art. 5 (5) ACHR), a duty that goes further than the CRC, which only prescribes that States should seek to promote the establishment of such tribunals.\footnote{110}

The OAS has adopted an additional protocol, named the ‘Protocol of San Salvador’.\footnote{111} The protocol embodies economic, social, cultural rights. Among others article 16, with the title ‘Rights of Children’ incorporates the principle of non-separation of children and their parents and the right to free and compulsory education on an elementary level.

In 2002 the Inter-American Court issued an advisory opinion on the ‘Juridical Condition and Human Rights of the Child’, in which the court sets out its vision regarding the legal position of the child in International Human Rights Law, including article 19 ACHR.\footnote{112} The legal framework of the CRC is considered of particular significance regarding the interpretation of the ACHR with regard to children. More particularly, the Inter-American Court explicitly states that article 3 CRC’s principle of the best interests of the child ‘entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives’ (para. 137 (2)). Furthermore, the Court states that children are subjects entitled to rights (para. 137 (1)) and that ‘true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments’ (para. 137 (8). This implies that States Parties ‘have the obligation to take positive steps to ensure protection of all rights of children’.\footnote{113}

The African region did not have a human rights convention until 1981, the year the Banjul Charter was adopted.\footnote{114} The Charter does not contain specific rights of

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\footnote{110}{See art. 40 (3) CRC according to which States Parties must ‘seek to promote the establishment of (...) authorities and institutions specifically applicable to children (...). This can be interpreted as including the establishment of specialized tribunals such as juvenile courts.}

\footnote{111}{Adopted at San Salvador, El Salvador on November 17, 1988.}


\footnote{113}{Although the Inter-American Court is not explicit in its advisory opinion on deprivation of liberty of children, it does address certain aspects of the juvenile justice system; see further below. Regarding alternative institutional care, the court provides that if so, ‘the State must resort to institutions with adequate staff, appropriate facilities, suitable means, and proven experience in such tasks’ (para. 137 (6)).}

\footnote{114}{In 1979 the Declaration on the Rights and Welfare of the African Child was adopted; AHG/St. 4 (XVI) Rev. 1 1979. This declaration recalls the 1959 Declaration of the Rights of the Child and calls for action on States to address the needs of the African child and to join the international developments (through UN, ILO, etc.) regarding the establishment and enforcement of international law, relevant to children, whose welfare is ‘inextricably bound up with that of its}
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children ‘relying on the [then] existing international protection of children’s rights’. Article 18 (3) of the Banjul Charter provides that ‘(t)he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions’. In other words, the Banjul Charter refers to other international human rights instruments with regard to the rights of the child and acknowledges these as part of its own legal framework. This rule implies that the protection of the child provided for by other International Human Rights Standards are applicable in this regard. This applies for example to the ICCPR, in particular to article 24 (measures of special protection). At that time, one could not expect too much from International Human Rights Law in this regard. However, the significance of this incorporation was about to increase, as the international community was heading towards the adoption of the CRC. According to Viljoen the CRC should be understood under article 18 (3)’s ‘conventions’ as well; a few years earlier Van Bueren was not (yet) so sure about this.

In 1990, the OAU adopted the first regional instrument designed for children, the African Charter on the Rights and Welfare of the Child (ACRWC). This treaty builds upon the 1979 Declaration on the Rights and Welfare of the African Child and embodies the ‘potential value of children’s contribution to society’. It contains the same fundamental principles as the CRC, namely the principle of non-discrimination (art. 3 ACRWC), the best interests of the child principle (art. 4 (1) ACRWC), the right to life, survival and development (art. 5 ACRWC) and the right to participate (art. 4 (2) ACWRC).

Viljoen pays attention to the reasons for the drafting of a separate African children’s rights charter. Roughly, there seems to have been a desire to address particular African issues and problems (e.g. the role of the family, the situation of children living under apartheid and the use of child soldiers), and a certain frustration with the UN process resulting in the adoption of the CRC (e.g. underrepresentation of Africans during the drafting process and omissions regarding specific African issues as the result of political compromises).

The ACRWC reiterates the child’s responsibility towards his family as acknowledged in the Banjul Charter as well. This is an example of what could give the ACRWC its African character, namely the inclusion of reciprocal duties.

parents and other members of its family, especially the mother’; see preamble.

Another characteristic may be the inclusion of collective or peoples’ rights; however, this is not present. Unlike the Banjul Charter, the ACRWC does not include people’s rights. Instead, children’s rights are directed towards children individually.120

Van Bueren argues regarding the child’s responsibility towards his family that ‘there is a high risk of conditionalism, particularly in relation to the responsibility of the child to strengthen social and national solidarity’ and ‘(a)part from the difficulties of creating such duties in international law, the responsibility to respect parents and elders at all time [Italic – tl] is too unquestioning and general’.121 Viljoen responds to this by stating that ‘one need not adopt a confrontational approach to the interpretation of the charter’ and ‘[t]he duty of obedience placed on the child must be viewed within the context of the [ACRWC] as a whole’.122

Gose argues that the ACRWC has a more human rights-centred approach than the CRC. The latter is often formulated towards the States Parties. The ACRWC however refers directly to the child as ‘bearer of the right’.123 According to Viljoen it sets a higher threshold and provides better protection to children in Africa than the CRC. This seems to be particularly true regarding the definition of the child, child soldiers, internally displaced persons and child marriages, but the question can be raised whether this applies for children deprived of liberty as well (see further para. 2.8). In addition, the established African Committee of Experts on the Rights and Welfare of the Child can contribute to the ACRWC’s implementation because it can consider individual communications (art. 44(1) ACRWC), in addition to country reports.124 The African Committee can also conduct any appropriate investigation (art. 45 (1) ACRWC).125 In 2008, 41 of the 53 countries had ratified the ACRWC, while 52 countries have ratified the CRC.126

Despite its potential, the African Committee has, since its inaugural meeting in May 2002, hardly received any States Parties’ reports for consideration or

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120 Viljoen 1998, p. 211.
122 Viljoen 1998, p. 211.
123 Gose 2002, p. 18; Cf Gose 2002 for comparative analysis of the CRC and the ACRWC.
124 In particular the individual communications procedures could be of significant value; see also Slot-Nielsen 2007, p. 83. Regarding the reporting procedure, it is important to note that the African Committee can only publish its report after consideration by the Assembly of Heads of State and Government (art. 45 (3) ACRWC).
individual communications.\textsuperscript{127} Although the activities conducted by the Committee thus far are not insignificant and there are hopeful signals, in particular regarding funding, one should thus be realistic regarding the practical value (thus far) of the committee’s contribution to the implementation of the African children’s rights framework.\textsuperscript{128}

\textbf{2.4 SOME CONCLUSIONS}

International Human Rights Law really started to develop, at both the international (UN) and regional level, after World War II. The second half of the 20\textsuperscript{th} century was characterized by the development of major human rights treaties, specific human rights conventions and numerous legal instruments (declarations, resolutions, guidelines, etc.) on various topics. In addition, monitoring instruments were developed and judicial bodies established which are competent to hear (individual) complaints. The European human rights system has proven to be of particular significance since its judicial body, the ECtHR, has been delivering extensive and significant jurisprudence. Other international judicial bodies, in particular the HRC, Inter-American Commission and Inter-American Court, followed later.

There were human rights developments noticeable in the first half of the 20\textsuperscript{th} century. These developments affected \textit{inter alia} children. The 1924 Declaration of Geneva acknowledged the special position of the child and since then the position of children in International Law has been evolving. It reached its full growth in terms of recognition in 1989 with the adoption of the CRC, an almost universally ratified human rights convention. On the one hand the recognition of the child under International Law preceded the development of International Human Rights Law, on the other hand the recognition of the child as a human being with independent rights (and not merely with ‘entitlements’ regarding special protection) took much longer. Nevertheless, the children’s rights framework nowadays provides equal enjoyment of human rights for children and to this extent the CRC contains human rights that can also be found in the general Human Rights treaties, the ICCPR and ICESCR. In fact, the children’s rights framework is more comprehensive than its counterparts, because it contains both civil and political rights, as well as economic, social and cultural rights. Furthermore, it is child-oriented and contains provisions that are child-specific and cannot be found in any other convention. The CRC recognizes every child as a human being in development, whose best interests should be of primary consideration in all actions and decisions, and who has the right to participate in accordance with his age and

\textsuperscript{127} Sloth-Nielsen mentions two reports and one communication; Sloth-Nielsen 2007, p. 84.
maturity. In addition, it recognizes the child as a member of his family, whose parents have the primary responsibility for his upbringing, while taking into account his evolving capacities. These fundamental characteristics make the CRC a dynamic instrument that stands for a full respect of the independent rights of the child, without ignoring those of his family.

The almost universal ratification of the CRC is a significant success. Regarding implementation one should be cautious, but it seems fair to conclude that the CRC has, as a minimum, contributed to increased (and widespread) attention to children’s rights in general (see, e.g. the UN Millennium Development Goals) and for crucial children’s rights issues in particular, including, for example, violence against children (see the 2006 UN Violence Study), child soldiers and child exploitation (see, e.g. the two Optional Protocols of the CRC and the appointment of a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and a Special Representative of the Secretary-General for Children and Armed Conflict). It is very likely that this increased attention has led, de facto, to more respect for the rights of children; some positive signs in this regard were mentioned in Chapter 1.

In addition, the CRC Committee has proven to be particularly productive, which has undoubtedly contributed to these developments. In this regard one could, however, wonder whether the CRC might have had greater impact (or might have in the future) if it had been entrusted with a judicial body competent to hear individual complaints (such as under the other international and regional human rights treaties). The absence of such a body is a lacuna, depriving children of a judicial remedy to violations of their human rights under the CRC. At the same time, due to the high ratification rate, which may be related to the absence of an individual complaints procedure, the CRC Committee has been able to conduct (constructive) dialogue with almost each country in the world.

The regional human rights developments generally show many similarities with those at the global level. However, this applies to a lesser extent regarding the child rights orientation at the regional level. In the European and Inter-American region the recognition of children’s rights is primarily prompted by the reference made to the CRC framework in the jurisprudence of the ECtHR and Inter-American Court. The added value of the European Convention on the Exercise of Children’s Rights can be questioned. The ACRWC on the other hand can be considered an interesting initiative, with potential, given the African Committee’s competence to consider individual complaints. Unfortunately, the reporting procedure and individual

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129 GA Res. 55/2, 8 September 2000.
130 See also, e.g. the ten General Comments of the CRC Committee on various children’s rights issues.
131 See www2.ohchr.org/english/bodies/crc/index.htm (last visited 1 June 2008) for more information on States Parties’ reports and the CRC Committee’s concluding observations and recommendations.
complaints procedure have not been used effectively thus far. Therefore, the future will reveal whether the ACWRC’s potential results in (progressive) respect for every African child’s human rights and fundamental freedoms.

2.5 Development of Human Rights Instruments Relevant to Deprivation of Liberty

2.5.1 Introduction

After the brief overview of the development of Human Rights Law, globally and regionally, and the emergence of children’s rights in that context, this paragraph focuses on the group of human beings that is at the centre of this study: individuals, more specifically children, deprived of their liberty.\footnote{Hereinafter they are also referred to as prisoners or detainees.}

Deprivation of liberty is not prohibited. There can be legitimate reasons to limit one’s fundamental right to liberty of the person. Imprisonment in the context of the criminal justice system, for example, has been common practice for centuries and is regarded as a legitimate form of limitation of the right to liberty.\footnote{Nowak 2005, p. 211.} Although human rights apply to all human beings, including those deprived of their liberty, detainees and prisoners are \textit{de facto} often subjected to gross violations of their rights and freedoms. Human rights violations take place everywhere, but particularly in prisons, detention centres, police stations and all kinds of other secure centres where people are incarcerated. Children are not excluded in this regard.\footnote{See also Chapter 1.} Their invisibility and particular dependency make detainees easy targets of violence and abuse. The lack of transparency at police stations, detention centres and prisons and the lack of public interest in ‘criminals’ make their position even more vulnerable.

Under International Human Rights Law, the rights of individuals deprived of liberty were initially protected by the general human rights instruments, such as the ICCPR in conjunction with the 1957 UN Standard Minimum Rules for the Treatment of Prisoners. International attention on the specific position of prisoners, detainees and others deprived of liberty started to grow in the 1970s and 1980s. Although this has not resulted in a separate convention for individuals deprived of liberty\footnote{See Bernard 1994 for a proposal in this regard.}, a number of specific legal instruments have been developed affecting their legal status; an example is the adoption of the CAT. The increase of attention for the \textit{child} deprived of his liberty took place in the same period, as part of the development of the children’s rights framework, through the adoption of the 1985 Beijing Rules, 1989 CRC and 1990 JDLs.

This paragraph will describe the development of Human Rights Law for individuals deprived of liberty, including children, at both the global and the
regional level, in the final quarter of the 20th century and first decade of the new millennium.

2.5.2 Recognition of Individuals Deprived of Their Liberty in Human Rights Law

2.5.2.1 At the Global Level

It is argued that over the years ‘the attitude of the international community toward the treatment of prisoners has evolved into a formal recognition of basic prisoners’ rights, embodied in a series of resolutions, elaborate model standards, and several conventions setting out minimum standards and prohibitions applicable to prisoners and prison conditions’. The first set of International Human Rights Standards, specifically developed for prisoners, was the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules or SMR). The initiative for rules for the treatment of prisoners was taken in 1933 by the International Penal and Penitentiary Commission. The Assembly of the League of Nations approved the first model of rules in 1934. This model was elaborated after World War II and endorsed by the UN First Congress on the Prevention of Crime and the Treatment of Offenders. The Standard Minimum Rules were adopted by the Economic and Social Council in 1957. According to Bernard ‘[t]he primary goal of establishing the Standard Minimum Rules was to encourage their enactment in national penal codes. The rules establish minimum guidelines, which may be adapted to the political, economic, social and legal circumstances of individual countries’.

Since the Standard Minimum Rules lack the status of legally binding international law it is not surprising that the worldwide implementation of the rules

137 The development of International Humanitarian Law with special attention given to prisoners of war preceded the outburst of International Human Rights Law after World War II. According to Rodley humanitarian law, developed after centuries of large wars and conflicts and meant to ‘protect people from serious abuse by their own governments’ (Rodley 1999, p. 3), had been the predecessor (the leading example) for International Human Rights Law as a whole. Prisoners of war had already been addressed carefully by, e.g. the Geneva Conventions. Rodley, in addition, argues that ‘[t]he refinement of rules of humanitarian law on the treatment of prisoners of war (…) even now in many respects goes far beyond that of rules of human rights law relating to the treatment of prisoners in peacetime’; Rodley 1999, p. 3. Cf Murdoch 2006, p. 16. Bernard argues that the Geneva Conventions ‘provide basic definitions and relevant standards that clearly evince dawning norms of customary (Italic – it) international law for all prisoners’; Bernard 1994, p. 766. Her argument is based on the premise that it would be ‘absurd’ to distinguish between prisoners of war and prisoners as a result of criminal or administrative processes in times of peace.
138 ECOSOC Res. 662 (XXIV) of 31 July 1957 (amended in 1977, ECOSOC Re. 2076 (LXII) of 13 May 1977).
has not been realized.\textsuperscript{140} The Committee on Crime Prevention and Control\textsuperscript{141} has reviewed the Standard Minimum Rules regularly, but global surveys show little result in this regard, which justifies the conclusion that one is a far cry away from universal implementation of these standards.\textsuperscript{142} However, according to Bernard ‘there is substantial implementation by some states’ and ‘(t)here is broad recognition by nearly all states that the Standard Minimum Rules are an important point of reference for definitions and guidelines in an area of emerging customary international law’.\textsuperscript{143}

Almost a decade after the Standard Minimum Rules, the International Bill of Human Rights was adopted. In particular, the ICCPR recognizes the position of the person deprived of liberty. The point of departure in this regard is article 9 ICCPR which enshrines every individual’s fundamental right to liberty of person and security. Subsequently, this article provides for legal requirements and safeguards regarding limitations of this fundamental human right, through arrest or detention. Article 10 ICCPR provides (for the first time in International Human Rights Law) that every person deprived of liberty must be treated with humanity and with respect for his or her inherent dignity. This provision is meant to complement article 7 ICCPR’s absolute prohibition of torture, cruel or inhuman or degrading treatment or punishment.\textsuperscript{144} By including article 10 in the ICCPR the international community has chosen to acknowledge explicitly, in an instrument that is legally binding, that every person deprived of liberty, in principle, must be entitled to all rights under the ICCPR.

Article 10 could be considered a fairly unique provision at the time of adoption; the ECHR and many domestic Bills of Rights did not provide for equivalents.\textsuperscript{145} The right to a minimum standard of humane treatment had been neglected for a long time in traditional human rights enumerations. Minimum rules regarding the treatment of prisoners could only be found in the aforementioned Standard Minimum Rules, a non-binding instrument. However, once article 10 was adopted, it was heavily criticized and its legal value questioned. Nowak argues that the criticism directed towards article 10 (1) ICCPR ‘is based on a restrictive

\begin{itemize}
  \item \textsuperscript{140} See para. 2.6 for more on the legal status of standards like these. For more on the specific status of the Standard Minimum Rules see para. 2.7.
  \item \textsuperscript{141} In 1991 this commission was replaced by the Commission on Crime Prevention and Criminal Justice.
  \item \textsuperscript{142} Bernard 1994, p. 773 and 780.
  \item \textsuperscript{143} \textit{Ibid.}, p. 775.
  \item \textsuperscript{144} HRC General Comment No. 21, Replaces general comment 9 concerning humane treatment of persons deprived of liberty (art. 10), 10 April 1992 (HRC GC No. 21), para. 3.
  \item \textsuperscript{145} Nowak 2005, p. 241-242. The ACHR did at that point in time also contain such a provision: art. 5 ACHR.
\end{itemize}
understanding of human rights (as mere obligations to refrain from interference) that can today be viewed as outdated.\textsuperscript{146}

Despite the adoption of the ICCPR in 1966 it took another ten years before the ICCPR (and ICESCR) entered into force. It was at that moment in time, the mid-1970s, that the international community started to care more about the position of prisoners, albeit indirectly through attention to a topic that particularly affected prisoners, namely torture and other cruel, inhuman or degrading treatment or punishment.\textsuperscript{147}

In 1975 the UN General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{148} In 1979 the UN addressed the role of law enforcement officials including police officials, concerning the institutional treatment of prisoners. In that year the UN General Assembly adopted the Code of Conduct for Law Enforcement Officials (Code of Conduct) without vote.\textsuperscript{149} The Code of Conduct provides a standard of conduct for officials ‘who exercise police powers, especially the powers of arrest and detention’.\textsuperscript{150} It calls for treatment of arrested or detained individuals with respect for their human dignity and human rights identified and protected by national and international law (art. 2). The Code\textit{ inter alia} embodies a similar prohibition of torture and cruel, inhuman or degrading treatment under all circumstances, which could already be found in the ICCPR (and in the ECHR and ACHR) and was adopted later in the CAT.\textsuperscript{151}

Subsequently, in 1982, the UN General Assembly adopted the Principles of Medical Ethics for the Protection of Prisoners or Detainees\textsuperscript{152}, prepared by the World Health Organization, in order to prevent active or passive participation or

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\textsuperscript{146} Nowak 2005, p. 242-243.
\textsuperscript{147} Rodley 1999, p. 4-5; Bernard 1994, p. 776-778.
\textsuperscript{148} GA Res. 3452 (XXX), 9 December 1975. According to Rodley this was a ‘landmark’ declaration; Rodley 1999, p. 4. It is interesting to note that the UN General Assembly at the same time adopted a separate resolution ‘Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment’ (GA Res. 3453 (XXX), 9 December 1975) in which it calls for the development of a body of principles or the protection of all persons under any form of detention or imprisonment, draft principles on freedom from arbitrary arrest and detention, both on the basis of a ‘UN Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention or Exile’ (UN Publ. Sales No. 65.XIV.2), and a draft code of conduct for law enforcement officials. See further below.
\textsuperscript{150} See commentary sub a to art. 1.
\textsuperscript{151} Bernard 1994, p. 776-778.
\textsuperscript{152} The full title is: 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.
engagement of health personnel in acts amounting to torture or other cruel, inhuman, or degrading treatment or punishment.\footnote{GA Res. 37/194, 18 December 1982; Bernard 1994, 778. Rodley mentions more relevant developments, such as the moment in 1975 that the then UN Commission on Human Rights gave up its reluctant position regarding specific human rights violations on the domestic level, by establishing a working group on the investigation of human rights in Chile and by establishing the Working Group on Enforced or Involuntary Disappearances in 1980; Rodley 1999, p. 5.}

These separate instruments of soft international law were accompanied in 1984 by the CAT. The CAT is a far-reaching initiative followed by similar regional initiatives such as the 1985 Inter-American Convention to Prevent and Punish Torture\footnote{Adopted in Cartagena de Indias, Colombia, 9 December 1985, by OAS General Assembly (15\textsuperscript{th} regular session) (entry into force 28 February 1987).} and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (hereinafter: European Convention for the Prevention of Torture).\footnote{Council of Europe, Strasbourg, 26 November 1987, ETS No. 126 (entry into force 1 February 1989).}

The CAT introduced the UN Committee Against Torture (CAT Committee) that monitors the implementation of the CAT and is \textit{inter alia} competent to consider individual communications (art. 22 CAT). In 1985 a Special Rapporteur on Torture was appointed by the then UN Commission on Human Rights and he has reported on issues related and relevant to torture. His authority stretches to all UN Member States regardless of their ratification of the UN Convention against Torture.\footnote{Bernard 1994, p. 780-781}

In 2002, the UN General Assembly adopted the Optional Protocol to the CAT,\footnote{GA Res. 57/199, 18 December 2002 (entry into force 22 June 2006).} which established the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the CAT Committee. This Subcommittee on Prevention of Torture has a mandate to \textit{inter alia} visit the places where persons are or may be deprived of their liberty (art. 4 OPCAT) and make recommendations to States Parties concerning the protection of individuals deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment (art. 11 OPCAT).

Besides the specific attention for the combat of torture or other forms of ill-treatment, of particular but not exclusive significance for prisoners, the international community felt the need to continue to work on international human rights provisions for people deprived of their liberty, such as the Standard Minimum Rules. In the mid-1970s, first initiatives were taken to draft the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), which was adopted by the UN General Assembly.
Assembly in 1988 without a vote.\textsuperscript{158} When the open-ended working group entrusted by the General Assembly’s Sixth Committee\textsuperscript{159} started drafting the Body of Principles in 1981, it had a mandate to draft an instrument for the protection of all persons under any form of detention or imprisonment.\textsuperscript{160} The Body of Principles was meant to protect anyone deprived of liberty on behalf of, or by order of, State authorities.\textsuperscript{161}

Another development of significance in this regard was that the HRC delivered its first General Comments regarding the relevant ICCPR provisions for people deprived of their liberty in 1982, namely articles 9, 10 and 7.\textsuperscript{162}

Furthermore, the UN General Assembly adopted in 1990 a resolution on the Basic Principles for the Treatment of Prisoners in which the General Assembly affirmed the basic principles to be followed with respect to prisoner treatment, that is \textit{inter alia} that all prisoners maintain their human rights as embodied in the UDHR and if applicable, the International Bill of Human Rights.\textsuperscript{163} In 1997 the ECOSOC adopted its resolution on International cooperation for the improvement of prison conditions, alarmed by prison overcrowding which may negatively affect prisoner’s human rights, calling for international cooperation and assistance in order to improve domestic prison conditions, for the introduction of alternatives, and for reduction of pre-trial detention.\textsuperscript{164}

The development of these legal standards has to a large extent been influenced by the role of non-governmental organizations (NGOs). They have played a key

\textsuperscript{158} GA Res. 43/173, 9 December 1988.
\textsuperscript{159} The Sixth Committee is a legal body; the Standard Minimum Rules, e.g. were adopted by the ECOSOC, which has no legislative power; see Rodley 1999, p. 280 en 327.
\textsuperscript{160} Treves 1990, p. 579. See also the preamble under ‘Scope of the Body of Principles’. For some more information on initiatives and drafting process \textit{cf} Rodley 1999, p. 326-327 and Treves 1990, p. 578.
\textsuperscript{161} Rodley 1999, p. 327. According to Bernard it had to reinforce ‘international support of the rights of prisoners’; Bernard 1994, p. 775. In 1991 the then Commission on Human Rights set up the Working Group on Arbitrary Detention (Res. 1991/42, 5 March 1991), which has the mandate to investigate cases of alleged arbitrary deprivation of liberty (if domestic courts have not taken a final decision in conformity with domestic law) through consideration of individual complaints (while it has no treaty basis), field missions and a yearly report to the Commission on Human Rights. In 2006 the Human Rights Council assumed its mandate (Decision 1/102, 30 June 2006) and extended it for three years in 2007 (Res. 6/4, 28 September 2007).
\textsuperscript{162} HRC General Comment No. 8, Right to liberty and security of persons (art. 9), 30 June 1982 (HRC GC No. 8); HRC General Comment No. 9, Humane treatment of persons deprived of liberty (art. 10), 30 July 1982 (HRC GC No. 9); HRC General Comment No. 7, Torture or cruel, inhuman or degrading treatment or punishment (art. 7), 30 May 1982 (HRC GC No. 7).
\textsuperscript{164} ECOSOC Res. 1997/36 of 21 July 1997. The ECOSOC specifically refers to the Kampala declaration on Prison Conditions in Africa, annexed to the resolution (see below).
role. According to Murdoch the emergence of a number of influential NGOs such as Amnesty International (founded in 1961, London) and Human Rights Watch (founded in 1976, New York), that address torture and individuals being subjected to torture or other ill-treatment through political and legal means has been crucial to the growing concern for these individuals. Later NGOs started focusing particularly on the rights of prisoners, like the Association for the Prevention of Torture, founded in 1977 in Geneva, the World Organisation against Torture (Organisation Mondiale Contre la Torture; OMCT), founded in 1986 in Geneva, and Penal Reform International, founded in 1989 in London, United Kingdom (UK).

In conclusion, after the early precedent of the Standard Minimum Rules (1957) the actual recognition of the (specific) right of individuals deprived of liberty at the global level took place in the mid-1970s and increased during the fifteen years thereafter. This development was to a large degree influenced by the growing international attention to combating and prohibiting torture and other forms of cruel, inhuman or degrading treatment or punishment. At the same time, it formed part of a more general growing attention to specific groups of human beings, including, for example, also women and children.

2.5.2.2 At the Regional Level

At the regional level similar developments took place. In the European region, deprivation of liberty of people has been addressed in legal instruments since 1950, the year of the adoption of the ECHR. Murdoch stresses that "the framers both of the [UDHR] and of the [ECHR] were in a large part motivated by the ill-treatment of people deprived of their liberty. The widespread loss of life, use of torture and inhuman treatment, imposition of enforced labour, and arbitrary use of detention occasioned by totalitarianism, before and during the Second World War, provided compelling justification for the first four substantive guarantees in the [ECHR]." This motivation can be recognized in article 2’s right to respect for life, article 3’s prohibition of torture, inhuman or degrading treatment or punishment, article

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166 Murdoch 2006, p. 19. The International Committee of the Red Cross (ICRC) has been conducting site visits since 1915 to places where prisoners of war or political prisoners were being held, in order to report on prison conditions. Since the adoption of the Geneva Conventions the ICRC has been seen as the guardian of these conventions; Rodley 1999, p. 161. Cf ICRC 2004 and Aeschlimann 2005 for more on the ICRC’s action for people deprived of their liberty.
167 Murdoch argues that “[t]he work of [NGOs] has at times been instrumental in promoting the adoption of effective monitoring mechanisms, such as the Optional Protocol to the United Nations Convention against Torture in 2002”; Murdoch 2006, p. 19.
168 Ibid., p. 20.
4’s prohibition of slavery and forced or compulsory labour and article 5’s right to liberty and security of the person.

The recognition of people deprived of liberty as rights holders – in principle entitled to all rights under the European Human Rights Law – has not been self-evident. For a long time, limitations to human rights have been considered one of the characteristics of the deprivation of liberty (which as such was governed by art. 5 ECHR). In 1975 the ECtHR ruled in *Golder v. UK*\(^\text{169}\) that States Parties must legitimize all limitations of human rights, including those imposed on persons deprived of liberty. Still it took a long time, at least until the 1990s, before cases brought before the ECtHR led systematically to rulings judging that the human rights of people deprived of liberty could be violated under the ECHR.\(^\text{170}\)

As mentioned above the Council of Europe adopted the European Convention for the Prevention of Torture in 1987, preceded by similar initiatives at the UN and OAS in 1984 and 1985, respectively. It is argued that this European Convention is ‘far more innovative and intrusive in its approach to supervision’ in comparison to the CAT.\(^\text{171}\) It has established the European Committee for the Prevention of Torture (CPT), which proved to be of significant influence (art. 1). Its primary objective is to monitor the treatment of ‘persons deprived of their liberty by a public authority’ (art. 2), by means of country visits, in order to protect them from torture and inhuman or degrading treatment. In addition, the CPT has reported on conditions of detention and imprisonment and on legal safeguards for prisoners and detainees. Furthermore, it has developed the ‘CPT standards’, which could be considered a manual of minimum standards for the treatment of prisoners.\(^\text{172}\)

Furthermore, the Committee of Ministers of the Council of Europe (Committee of Ministers) has adopted a number of resolutions and recommendations regarding deprivation of liberty of people since 1962. Although considered soft international law, these instruments are the result of political consensus regarding the specific topic and represent the current penal philosophies: a source of inspiration for domestic legislators.\(^\text{173}\) The most significant and comprehensive set of standards is the European Prison Rules (also referred to as EPR), which were adopted for the first time in 1987.\(^\text{174}\) The EPR represented the penal approaches of that period of

\(^{169}\) ECtHR, Judgment of 21 February 1975, Series A. No. 18 (*Golder v. UK*), para. 41ff; see Lawson & Scherners 1999, p. 27.

\(^{170}\) Smaers 2005, p. 3-4.

\(^{171}\) Steiner & Alston 2000, p. 795.


\(^{174}\) Rec (87) 3, 12 February 1987.
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regarding Deprivation of Liberty of Children

time and combined many of them into one document. In January 2006 a new version of the EPR was adopted.\textsuperscript{175} According to Smaers there is a clear ‘interaction’ between these three types of European human rights standards for persons deprived of liberty. In both the judgments of the ECtHR as well as the reports of the CPT, reference has been made to the resolutions and recommendations of the Committee of Ministers.\textsuperscript{176}

The CPT, which has been far less restrictive than the ECtHR, has been influencing the judgments of the ECtHR. In fact, the ECtHR adopted some of the positive obligations for States developed by the CPT. Consequently, under article 3 ECHR States Parties are no longer solely under the obligation to refrain from torturing or treating individuals in an inhuman or degrading way; they should also provide for preventive measures, such as legal safeguards and certain minimum conditions. Under the influence of the CPT the ECtHR has upgraded the level of protection under article 3 ECHR and has developed positive obligations for States Parties.\textsuperscript{177}

Thus, similar to the global human rights framework, the general human rights convention in the European region, the ECHR, has been complemented by a specific convention on torture and ill-treatment and different non-binding standards, derived from the CPT country reports and embodied in resolutions, recommendations, etc.

However, the European developments seem to have a different background. According to Murdoch: ‘[T]he plethora of initiatives at an international level has largely occurred as a consequence of the inherent difficulties in seeking to use general standards (in particular, the International Covenant on Civil and Political Rights), while in Europe, important advances (in particular, recommendations of the Committee of Ministers and the ratification of the European Convention for the Prevention of Torture) have essentially built upon the well-established system of legal protection available under the European Convention on Human Rights.’\textsuperscript{178}

In addition, the rights of people deprived of their liberty are founded on the general ECHR, rather than on a specific instrument for this group of people.

\textsuperscript{175} Rec (2006) 2E, 11 January 2006. For more background information on the revision of the EPR see, e.g. Coyle 2006. Smaers argues that the main reason for the update has been that the underlying penitentiary philosophies are no longer supported by all Member States of the Council of Europe. Penal policies and approaches have been changing since 1987. In general they have also lost some relevance, due to the fact that they leave a lot of room for different approaches and that they are not formulated as rights for prisoners and detainees; Smaers 2005, p. 14-15.

\textsuperscript{176} Smaers 2005, p. 15.

\textsuperscript{177} \textit{Ibid.}, p. 11-14; see further para. 3.5ff. See also Murdoch 2006, p. 46-51, Mowbray 2004, p. 48-52 and 65 and Morgan & Evans 2001, p. 31ff for more on the relation between the CPT and \textit{inter alia} the ECtHR.

\textsuperscript{178} Murdoch 2006, p. 20.
Murdoch provides two explanatory factors. The first factor is that ‘substantial numbers of complaints challenging violations of Convention guarantees were brought [to the ECtHR] by persons deprived of their liberty’. Therefore the judicial bodies (the ECtHR and the former European Commission) were able ‘to shape the scope and application of the provisions of the Convention, and to this end, to employ a range of concepts and strategies to ensure that the rights provided for in the Convention were effective in practice’. This has led, according to Murdoch, to an advancement of the protection of persons deprived of liberty ‘through creative interpretation of the treaty and extrapolating from the text positive duties’. Furthermore, the judicial bodies acknowledged that other relevant guarantees can be valuable for prisoners as well, such as article 8 ECHR’s respect for privacy and family life.

The second factor that Murdoch distinguishes is that ‘advances in the protection of personal integrity have also been achieved through the extension of rights of particular interest to detainees by means of additional optional protocols’. However, a system relying upon individual complaints has its own weaknesses and shortcomings. Murdoch points in this regard to the emergence of a number of ‘pro-active’ initiatives, such as non-binding standards based on country visits and recommendations. It is interesting to note that these standards and recommendations are increasingly taken into account in the jurisprudence of the ECtHR. According to Murdoch: ‘This creativity involves an interplay between Council of Europe organs and institutions in which conflict rather than consensus can at first glance appear to be the natural order, but with a more careful study a complex interrelationship is uncovered in which new standards and enforcement mechanisms are proposed and adopted through political agreement (particularly through deliberations of the Parliamentary Assembly and the Committee of Ministers) and which may ultimately have some impact upon the Court’s jurisprudence’.

The OAS has not developed any other instrument, besides the 1985 Inter-American Convention to Prevent and Punish Torture, that has implications either directly or indirectly for people deprived of their liberty, beyond the American Declaration and the ACHR. Moreover, this Convention against Torture has not established an implementation mechanism as can be found in the European system (i.e. through

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180 Ibid., p. 21 with reference to Protocols Nos. 6 and 13, abolishing the death penalty, and Protocol No. 4, Article 1, which removes inability to fulfil a contractual obligation from being a legitimate ground for deprivation of liberty; cf art. 11 ICCPR.
181 Ibid., p. 21.
182 The OAS anti-torture convention ‘hardly deals with implementation’; Rodley 1999, p. 52. The adoption of this convention fits into what according to Rodley is an OAS ‘tradition of drafting regional analogues to major UN human rights instruments’; Rodley 1999, p. 51.

183 Inter-American Court, Judgment of 29 July 1988, Series C. No. 4 (Velásquez Rodríguez).

184 African Commission Res. 19(XVII)95.

185 African Commission Res. 4(XI)92.

The African Union (nor the OAU) has not developed any specific instrument relevant (directly or indirectly) to individuals deprived of liberty. This may partly be explained by the fact that the first human rights treaty dates from 1981, much later than the other regions and UN. In addition, the enforcement, in particular through the African Commission, has not been effective (see para. 2.2). However, the Banjul Charter does contain provisions regarding deprivation of liberty of individuals, such as article 6 which prohibits unlawful and arbitrary deprivation of liberty. The African system does not enshrine detailed human rights standards, similar to the Standard Minimum Rules or European Prison Rules, although the African Commission did issue relevant resolutions, such as the ‘Resolution on Prisons in Africa’,184 in which it is considered that prisoners should be entitled to all rights under the Banjul Charter and reference is made to the UN instruments, in particular to the CAT and SMR, and the ‘Resolution on the Right to Recourse Procedure and Fair Trial’185, in which legal safeguards of the detainee are explicitly mentioned, such as the right to information on the reasons for arrest and prompt notice of charges, the right to be tried within a reasonable time or to be released, and the prompt bringing of the detained individual before a judicial authority.

In 1996 the Kampala Declaration on Prison Conditions in Africa (Kampala Declaration) was adopted during the International Kampala Seminar on prison conditions in Africa. This conference declaration contains a number of recommendations regarding the improvement of prison conditions affecting remand prisoners, prison staff, alternatives for imprisonment and the appointment of a Special Rapporteur on Prisons. Meanwhile the African Commission prepared for the establishment of the Special Rapporteur on Prisons and Conditions of Detention in Africa, which embedded the issue of prisons in the agenda of the African
Commission. \(^{186}\) The Special Rapporteur’s mandate is ‘to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and People’s Rights’ through *inter alia* investigation and reporting through country visits and promotion. \(^{187}\) Through these activities, the role of the Special Rapporteur has proven to be significant and represents an ‘institutional response at the regional level’, which can be found in the European (under the European CPT) but not in the American region. \(^{188}\)

In 1997 the Kampala Declaration was annexed to ECOSOC resolution on international cooperation for the improvement of prison conditions, which stressed its significance. \(^{189}\)

In addition, the Robben Island Guidelines were adopted by the African Commission in 2002, whose official name is ‘Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa’, \(^{190}\) followed by the ‘Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa’. \(^{191}\) The title of the latter reveals that despite the efforts made by the Special Rapporteur, the need for accelerating the process of penal reform was seriously felt.

### 2.5.3 Recognition of Children Deprived of Their Liberty in Human Rights Law

#### 2.5.3.1 At the Global Level

With reference to paragraph 2.3, it is not surprising that attention for the child deprived of liberty basically developed during the 1980s, along with the emergence of the children’s rights framework. The first initiative in this regard was the adoption of the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (also known as the Beijing Rules), *inter alia* providing standards for pre-trial detention and disposition by institutionalization. \(^{192}\) Four years later (in 1989) the legally binding CRC was adopted, which addresses the administration of

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\(^{188}\) *Ibid.*, p. 127. See for more on the Special Rapporteur the complete analysis of Viljoen. Unfortunately, few documents of the Special Rapporteur are accessible.

\(^{189}\) See earlier above; ECOSOC Res. 1997/36 of 21 July 1997. Later the Kampala Plan of Action was adopted, providing recommendations regarding the implementation of the Kampala Declaration.

\(^{190}\) African Commission Res. 61(XXXII)02.

\(^{191}\) African Commission Res. 64(XXXIV)03.

\(^{192}\) GA Res. 40/33, 29 November 1985. Note that the delinquent child was already addressed for the first time in the 1924 Declaration of Geneva. It was absent in the 1959 Declaration of the Rights of the Child.
juvenile justice in article 40 CRC; the general principles of the Beijing Rules were upgraded by their adoption in an international treaty provision. In addition, the CRC provides a specific article (art. 37) on deprivation of liberty covering aspects, such as the prohibition of unlawful or arbitrary arrest, detention or imprisonment and the prohibition of torture and other cruel, inhuman or degrading treatment. 193

The CRC represents a child-oriented approach by providing inter alia that arrest, detention or imprisonment must only be used as a measure of last resort and for the shortest appropriate period of time, that the child is entitled to legal and other assistance and that a child deprived of liberty must be treated with humanity and respect for human dignity, and in accordance with the needs of persons of his or her age. The latter means, according to article 37 (c) CRC, among others that the child is placed separately from adults and that he must be enabled to keep in touch with his family through visits and correspondence. Article 37 (c) CRC has become the leading provision for deprivation of liberty of children and it is not limited to deprivation of liberty within the criminal justice system.

Soon after the adoption of the CRC, in 1990, the UN adopted two resolutions, approving the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs) and UN Guidelines for the Prevention of Juvenile Delinquency (also known as the Riyadh Guidelines). 194 Both documents were drafted during the second half the 1980s, after the adoption of the Beijing Rules. The Riyadh Guidelines are relevant in the sense that the prevention of juvenile delinquency affects the use of deprivation of liberty in the context of the juvenile justice system. The JDLs are of great significance for the treatment of children deprived of liberty. The Rules contain detailed provisions regarding the design of institutions and the treatment of children, including legal protection of their rights and freedoms. Moreover, its definitions include deprivation of liberty outside the context of juvenile justice (rule 11 (b) JDLs; see further para. 2.7). It is argued that ‘[t]he [CRC] and the [JDLs] signify a change in direction for children deprived of their liberty’ and that ‘[t]hey seek to establish minimum entitlements for all children regardless of the reason for the deprivation of liberty’. 195 It is important that these instruments focus more on reintegration and helping the child to return into society (art. 40 (1) CRC). According to Van Bueren ‘[t]he new international legal philosophy aims to limit both the occasions and the periods of time for which liberty can be restricted’ and

193 Obviously, the latter aspect is not limited to children deprived of their liberty.
194 GA Res. 45/113, 14 December 1990 resp. GA Res. 45/112, 14 December 1990. As mentioned before these resolutions were adopted during the same meeting as the 1990 Basic Principles for the Treatment of Prisoners and the Tokyo Rules.
that ‘[t]he ambitious intention is to recreate a family-like environment eliminating stigma and practices contrary to the dignity of the child’.

The (specific) recognition of the rights of the child deprived of his liberty has had a few significant follow ups, which provide inter alia for guidance on the implementation of the relevant CRC provisions in conjunction with the international legal standards. Examples are the 1995 General Discussion Day on Juvenile Justice and the 1997 ECOSOC recommendation called ‘Guidelines for Action on Children in the Criminal Justice System’. Both present recommendations meant to contribute to the implementation of the CRC and the relevant UN standards (Beijing Rules, Riyadh Guidelines and JDLs) with regard to children in the context of the administration of juvenile justice and to the facilitation of assistance to States Parties for an effective implementation of these instruments (para. 4 (b) of the Guidelines for Action). In the outline of the 1995 General Discussion Day the CRC Committee recalls that ‘the field of the administration of juvenile justice, and in particular the standards relating to juveniles deprived of their liberty, has become the subject of increasing and very special interest on the part of different sectors of the United Nations system’. In its 1997 resolution the ECOSOC also invited the UN Secretary-General to consider establishing a coordination panel ‘on technical advice and assistance in juvenile

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196. Van Bueren 1995, p. 227. She adds that ‘[i]nternational law (…) still has to resolve the extent to which it will intervene within family life when contrary to the expressed wishes of children, the parents place them in institutions’.  
198. ECOSOC Res. 1997/30, 21 July 1997. Although their scope is much broader, the Guidelines are relevant to children deprived of their liberty as well. The ECOSOC stresses that the States Parties have the primary responsibility to implement the CRC framework, which includes both the CRC provisions and the other relevant standards, for children within the juvenile justice system. In addition, ‘[t]he basis for the use of the Guidelines for Action should be the recommendations of the Committee on the Rights of the Child’ (para. 7).  
199. Inter alia, the Guidelines in particular call for the reduction of the number of children in closed institutions by implementing art. 37 (b) CRC’s principles of last resort and shortest appropriate period of time (para. 18), prohibition of corporal punishment in justice and welfare systems (para. 18), easy access of the family to the child if in his best interests (para. 20), and establishment of independent monitoring on the conditions of confinement in light of the UN legal framework (para. 21). It also points at the negative impact of ‘inappropriate admissions and lengthy delays’ on children deprived of their liberty (para. 23) and calls in general for education and training in human rights for all individuals who have contact with or are responsible for children in the criminal justice, including those working in institutions where children are deprived of their liberty (para. 24).  
justice’, which led to the establishment of the Interagency Panel on Juvenile Justice, based in Geneva.  
Furthermore, in 2006 the UN presented the UN Study on Violence against Children conducted by the independent expert Paulo Sérgio Pinheiro: a global study on the nature, extent, causes and consequences of different forms of (physical, psychological and sexual) violence against children, which included a study on violence against children in residential institutions and detention centres (see also Chapter 1).  

Last, the CRC Committee adopted a General Comment ‘Children’s Rights in Juvenile Justice’, which contains important implications for the use of deprivation of liberty and the treatment of children based on a thorough and close examination of all relevant aspects of the administration of juvenile justice, including the general principles of the CRC.  

In conclusion, attention to the child deprived of his liberty at the global level has been growing extensively since the adoption of the CRC in 1989. The 1985 Beijing Rules served as an important prelude and soon after the adoption of the CRC the Riyadh Guidelines and JDLs were adopted. In particular, the latter is of great significance for the treatment of children deprived of liberty. One of the most interesting aspects of the JDLs is that it no longer limits the scope of application of relevant standards for deprivation of liberty to children within the juvenile justice system only. It affects all deprivation of liberty, regardless of the context (juvenile justice, child protection, mental health care, immigration, etc.; see rule 11 (b) JDLs). This is an interesting outcome, since the growing attention to the child deprived of liberty has generally developed together with the growing attention for the child in conflict with the law.  

2.5.3.2 At the Regional Level  
The ECHR acknowledged deprivation of liberty of minors (art. 5) in 1950 and the Council of Europe adopted the Resolution on the short-term treatment of young

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201 ECOSOC Res. 1997/30, 21 July 1997, para. 6. The Panel members currently are: Office of the United Nations High Commissioner for Human Rights (OHCHR); United Nations Children’s Fund (UNICEF); United Nations Department of Peacekeeping Operations (DPKO); United Nations Development Programme (UNDP); United Nations Office on Drugs and Crime (UNODC); CRC Committee; Defence for Children International (DCI); International Association of Youth and Family Judges and Magistrates (IAYFJM); International Juvenile Justice Observatory (IJJO); Penal Reform International (PRI); Save the Children UK; Terre des hommes - aide à l’enfance and World Organisation Against Torture (OMCT). See www.juvenilejusticepanel.org (last visited 1 June 2008).

202 UN Violence Study 2006. See further www.violencestudy.org (last visited 1 June 2008).

203 GC No. 10.

204 See para. 2.7 for more on the scope of art. 37 CRC and the JDLs.
offenders of less than 21 years in 1966. However, only after the emergence of the international children’s rights framework was the child recognized in some specific European legal instruments. Unfortunately, compared to the UN developments, the specific status of children deprived of their liberty has not been acknowledged to the full extent possible in the above mentioned ECHR, the European Prison Rules and the CPT standards. Moreover, if the child were addressed, the focus was more on the delinquent child than on the child deprived of liberty. For example, in 1987 the Council of Europe adopted the Recommendation on Social Reactions to Juvenile Delinquency, with explicit reference to the Beijing Rules adopted in 1985, which expresses the conviction that the imprisonment of minors should be abolished as far as possible. The ECtHR has been reluctant to recognize the deprivation of liberty of minors under article 5 ECHR, as witnessed by the Nielsen case.

However, more recently there is increased attention to the specific status of the minor deprived of his liberty. According to Murdoch ‘there is [in Europe in 2006] (...) a growing awareness of the inappropriateness of the use of incarceration of young people and a willingness to develop alternatives to custody on account of the increasing realization that deprivation of liberty will in the long-term harm family relationships and the child’s self-esteem’. This has been acknowledged for instance in two standards: the Recommendation of the Committee of Ministers (2003) to Member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, supplementing the recommendation of 1987. In addition, the CPT delivered a specific report on CPT standards regarding children deprived of their liberty in 1999. It stresses that, at the beginning of the 21st Century, it is accepted that children and deprivation of liberty ‘deserve special consideration’, which is according to Murdoch ‘a relatively recent phenomenon’.

This assumption can be supported by the fact that efforts are made to develop specific European Rules for Juvenile Offenders Subject to Sanctions or Measures,
which will include rules regarding deprivation of liberty of juvenile offenders and juveniles in pre-trial detention, and regarding the use community sanctions.\textsuperscript{213}

In addition, the Secretariat of the European Social Charter issued the document ‘Children’s Rights under the European Social Charter’ which points out the implications of article 17 ESH for the administration of juvenile justice, including deprivation of liberty.\textsuperscript{214}

In general, one should not lose sight of the fact that the European human rights system remains of particular significance, in particular because of the well developed jurisprudence of the ECtHR, which, although non-child-specific, has implications for children deprived of liberty. The relevant provisions of the above mentioned instruments will be addressed in paragraph 2.8.

Both the American and African region have not set up specific instruments either for children deprived of their liberty, or for children in conflict with the law. Nevertheless, the jurisprudence of the Inter-American Court does have some implications for deprivation of liberty of children. As mentioned also in paragraph 2.2, Dohrn argues that ‘children’s common law’ is increasingly being developed by the Inter-American Court.\textsuperscript{215} This also affects the status of children in police custody or deprived of liberty through detention or imprisonment (see further para. 2.8.3). In addition, the Inter-American Court tends to increasingly refer to the CRC framework and even incorporate these standards into the ACHR case law. The Court has explicitly stressed the relevance of the CRC framework for the Inter-American Human Rights System in its advisory opinion ‘Juridical Condition and Human Rights of the Child’, which is indirectly of some relevance for children deprived of liberty in the context of juvenile justice.

In the African region, the child deprived of his liberty has not really been addressed thus far. The ACRWC does address the position of the child deprived of liberty in the context of juvenile justice (article 17)\textsuperscript{216}, but offers less protection than the CRC in the sense that it lacks a number of specific provisions such as the right to be treated in a manner that takes into account the needs of the child and the right to maintain contact with the child’s family through correspondence and visits (art. 37 (c) CRC).\textsuperscript{217} Although, it is argued, as pointed out above, that the ACRWC offers more protection for children than the CRC framework, this conclusion cannot

\textsuperscript{213} At the time of writing this draft-recommendation of the Council of Europe has not yet been adopted; for the draft-text see CDPC (2008) 17 - Add. 1, 5 June 2008.

\textsuperscript{214} ESC Secretariat 2005.

\textsuperscript{215} Dohrn 2006, p. 749-750.

\textsuperscript{216} Viljoen argues that the Special Rapporteur on Prisons should consider the ACRWC as part of its mandate and should use it to address the position of children with ‘greater specificity’; Viljoen 2005, p. 134-135.

\textsuperscript{217} See, e.g. Gose 2002, p. 67-72. It is interesting though that art. 17 (2) (b) of the African Charter does not allow any exceptions to the requirement of separation of children from adults, while art. 37 (c) CRC does.
be drawn with regard to children deprived of liberty in particular (see further para. 2.8).

2.5.4 Conclusion

The actual recognition of the individual deprived of liberty took place in the mid-1970s and attention to its legal position increased in the following decades. In that same period the children’s rights framework emerged and the delinquent child gained attention, as well as the child deprived of liberty, resulting in specific provisions in the CRC and specific legal instruments, such as the Beijing Rules and JDLs. At the regional level similar developments took place, albeit reluctantly; the regional legal frameworks concerning children deprived of their liberty are primarily constituted by the general human rights instruments.

The most significant achievement globally was the adoption of the CRC, which contains a specific provision for children deprived of their liberty (art. 37 CRC), supplemented by the detailed JDLs. The global and regional impact of these initiatives still needs to be determined. In general, the conclusion seems justified that at the global level the CRC, JDLs and Beijing Rules have had several spin-offs and placed the delinquent child and, increasingly, the child deprived of liberty on the international (political) agenda. Article 37 CRC and the JDLs clearly represent a broader approach in the sense that they cover all forms of deprivation of liberty (i.e. also outside the context of juvenile justice).

At the regional level the specific position of the child deprived of his liberty has not really gained attention, with the European CPT’s 9th Report and the drafting of the European Rules for Juvenile Offenders Subject to Sanctions or Measures as important exceptions. However, given the increasing role the children’s rights framework plays at the regional level, as a framework of reference for the courts (ECtHR and Inter-American Court) in its case law and advisory opinions, and for non-binding initiatives, such as the CPT reports and the Council of Europe’s drafting of resolutions and recommendations, one could expect more attention to the child deprived of his liberty in the (near) future.

Finally, it is interesting to point to the large number of international and regional legal instruments regarding the administration of (juvenile) criminal justice that have been drafted, adopted, recommended, etc. since World War II. If one takes a look, for example, at the summing up of human rights instruments on the website of the Office of the UN High Commissioner for Human Rights, one will find that most instruments are categorized under ‘human rights in the administration of justice: protection of persons subjected to detention or imprisonment’. On the one

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218 Although the scope of art. 37 (b), second sentence, seems to be limited; see further para. 2.7.
219 See www.ohchr.org > international law (last visited 1 June 2008).
hand this points at a significant interest for this specific group of people by the international community. On the other hand, however, it may well emphasize the inability of the international community to effectively protect the rights and freedoms of those arrested, detained or imprisoned under the (juvenile) criminal justice system – an assumption that seems to be confirmed by the harsh reality that the rights of both adults and children deprived of liberty (under the criminal justice system) are still violated on a large scale.

2.6 SOME GENERAL ASPECTS OF INTERNATIONAL HUMAN RIGHTS LAW

2.6.1 General Principles of Human Rights Law

Before elaborating on the relevant human rights provisions separately, some general aspects of Human Rights Law will be highlighted. The ‘structure of modern international human rights law’ and its fundamental principles have been outlined *inter alia* by Sieghart. Sieghart describes the development of ‘modern international law-making process’ (as addressed above) as a development from the adoption of non-binding declarations, resolutions or other statements by intergovernmental organizations (UN General Assembly, OAS, Council of Europe, African Union), as a recognition of consent on principles or confirmation of State practice, to the adoption and ratification of more detailed and legally binding treaties like the International Bill of Human Rights and regional human rights conventions. In addition, the major treaties were followed by more specific conventions. Sieghart distinguishes three categories of treaties: global, regional and subsidiary treaties.

Looking more closely at the content of the human rights treaties, international and regional conventions have in common that they embody particular obligations for States Parties concerning human rights and fundamental freedoms of all individuals under their jurisdiction and within their territories. Furthermore, ‘[t]hey define and circumscribe the rights and freedoms concerned’ and ‘[t]hey establish institutions and procedures for the international supervision, interpretation, and application of their substantive provisions’. All international human rights treaties have in common the fact that ‘they define and create specific rights for the individuals over whom (…) States [that have agreed upon the treaties] are able to exercise power, but who are not themselves parties to the instruments’. Furthermore, human rights have two specific features. First, in general, human rights are ‘inherent’ to human beings and are therefore inalienable (see art. 1
UDHR). In addition, the duties correlating with the human rights are placed upon the States Parties and not on private actors.\textsuperscript{222}

Sieg hart recognizes three core principles of human rights: non-discrimination, rule of law and remedies against human rights violations.\textsuperscript{223}

Non-discrimination is a central concept of International Human Rights Law and is directly related to the fact that human rights are inherent to human beings, that they are inalienable and therefore do not leave room for differentiation of any kind. This does not imply that human beings cannot and should not differ from each other. According to Sieghart ‘it is the recognition that all human beings differ from each other, and that each individual is unique, which underlies the concept of the integrity and dignity of the individual person which human rights law is primarily concerned to protect’\textsuperscript{224} The non-discrimination principle serves to respect and protect everyone’s human rights equally and to guarantee equal treatment in light of the diversity between human beings and everyone’s assumed potential to develop themselves in their own way.

The ‘Rule of Law’ means that human rights must be protected by the law and that conflicts about human rights must be resolved, in accordance with these laws, by a competent, impartial and independent judicial body. According to Sieghart ‘[t]he application of the Rule of Law is of particular importance for establishing the boundaries of the different human rights’.\textsuperscript{225} With a few exceptions (e.g. the prohibition of torture), human rights are not absolute. In essence, someone’s human rights are limited by those of others, which becomes apparent when individuals make claims based on their human rights. An example is the rather ‘classical clash’ between freedom of expression and freedom of religion. Another example is the limitation of someone’s fundamental right to liberty of the person, when he is being institutionalized to protect the rights and liberties of other members of society.

As Sieghart points out, limitations of human rights ‘must be used only to establish the proper boundaries of the protected right, and not as a pretext for eroding the core of the right itself, let alone for destroying it altogether’.\textsuperscript{226}

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\begin{itemize}
\item \textsuperscript{222} Sieghart 1983, p. 17. This does not necessarily imply that States Parties are not under the obligation to protect human rights of individuals against violations of other individuals.
\item \textsuperscript{223} Ibid., p. 17-25.
\item \textsuperscript{224} Ibid., p. 18.
\item \textsuperscript{225} Ibid., p. 18.
\item \textsuperscript{226} Ibid., p. 19. He continues that in case of conflict it therefore is ‘crucially important’ that conflicts around human rights ‘should be decided by a tribunal which is independent of all the parties concerned, not subject to any external pressures, competent to establish all the relevant facts with complete impartiality, and able to apply known and established legal rules consistently to the resolution of the conflict’; the Rule of Law.
\end{itemize}
The right to remedy in case of violation of human rights is the third core principle of human rights law. International Human Rights Law is established by States and aims at the protection of the fundamental rights and freedoms of citizens against perpetrations by the State. It is therefore crucial that individuals have the right to an (effective) remedy against violation or infringements of their human rights. This remedy should be made available within the domestic system, but the major international and regional treaties have established international judicial institutions as well. As highlighted above, the ECHR includes the establishment of the ECtHR, like the ICCPR’s optional protocol established the judicial role of the HRC; the CRC lacks an institution with the mandate to receive individual complaints.

2.6.2 Sources, Reservations and Derogation

According to article 38 of the Statute of the International Court of Justice there are four sources of international law: international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and judicial writing by the most highly qualified publicists of the various nations. It goes beyond the scope of this study, to analyze all the different kinds of sources of international law, but it particularly addresses the first two: international customary law and international conventions.

International custom preceded international conventions and has, due to the then lack of international treaties, influenced international law a great deal. Wallace defines custom in international law as ‘a practice followed by those concerned because they feel legally obliged to behave in such a way’ and she argues that ‘[a] rule of international customary law derives its law hallmark through the possession of two elements: (i) a material and (ii) a psychological element’. The first element refers to the behavior and practice of states and is determined by the duration and extent of the practice, deducted from all kinds of sources, including treaties, official statements and diplomatic documents. However, State practice is not enough. The second element, often referred to as *opinio iuris*, ‘refers to the subjective belief maintained by states that a particular practice is legally required of them’ and it should be distinguished from practice that is not experienced as legally binding. State practice together with *opinio iuris* may constitute a rule of international customary law. An example of a rule that has the status of international customary law is the prohibition of torture. Although torture unfortunately has been – and still

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229 This implies that treaties too can confirm or contribute to the establishment international customary law. So can other international legal standards confirm (or contribute to) custom, even though they are not considered legally binding.
230 Ibid., p. 16. This may require action, but also refraining from action.
is—largely practised, it is argued that the prohibition of torture is a rule of international customary law. Another example may be the UDHR, although its legal status is food for thought and discussion.

Thus, the allegation of a rule representing international customary law is a delicate matter and must be assessed carefully along with the elements of State practice and *opinio iuris*. Once a rule of international customary law can be acknowledged as such, this rule is legally binding for the international community, regardless of their reluctance to commit to written international law such as treaties.

The second significant source of international law is formed by international conventions, generally and legally referred to as treaties. International human rights conventions or covenants, like the International Bill of Human Rights, ECHR, ACHR, Banjul Charter or CRC are multipartite treaties, representing international agreements. A treaty is a source of international law that becomes legally binding, when it enters into force, but only to those states that have ratified it.

In the case of multipartite treaties, States Parties can make reservations to specific parts of the treaty, which exclude or modify ‘the legal effect of certain

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231 Cf. e.g. Nowak who argues that ‘[i]ts unconditional recognition by the present community of States justifies the view that torture is prohibited by customary international law and even ranks as *ius cogens* under international law’; Nowak 2005, p. 157-158. Although Rodley argues that ‘[t]here has been little [academic] writing on the legal status of the prohibition against torture’, but that ‘it must be noted that this topic is not one upon which the teachings of publicists can per se be expected to have decisive influence’; Rodley 1999, p. 73.

232 Van Bueren describes several different approaches in this regard. First, there is ‘the minimalist approach’ that considers the UDHR strictly as a declaration from the General Assembly that is not legally binding, due to General Assembly’s lack of power under the UN Charter to make binding decisions. According to this approach the UDHR merely is a non-binding resolution. Second, ‘the middle ground’ argues that the UDHR must be seen as an interpretation of the Human Rights Provisions of the UN Charter. Third, there is ‘the high ground’ that argues that the UDHR has become a part of international customary law in the decades after its adoption in 1948. Finally, there are people who argue that the UDHR now possesses the characteristics of *ius cogens*, which means that these provisions cannot be derogated, under any circumstances. This top of the hill position, as formulated by Van Bueren, is hard to defend. The exact status of the UDHR has so far not yet been determined and that can be seen as an ‘obstacle in the protection of human rights in general and children’s rights specifically’; Van Bueren 1995, p. 18. Cf. e.g. Rodley 1999, p. 65-66.

233 See Wallace 2002, p. 19-22 for more information on treaties as a source of international law, the relation between international customary law and law made by treaty, and universality of treaties.

234 Generally, based on a treaty provision, a treaty enters into force after a certain number of states have ratified the treaty; see, e.g. art. 49 ICCPR providing that the ICCPR enters into force three months after the 35th ratification.

provisions of the treaty in their application to that State’ (art. 2 (1) (d) of the Vienna Convention). However, a reservation is not allowed if it is prohibited by the treaty, if the treaty only allows specified reservations and the reservation is not specified, or in the case of a reservation being incompatible with the object and purpose of the treaty.236

Another limitation of the general legal effect of treaty provisions is ‘derogation’. Some international treaties, in particular the general human rights treaties, embody a derogation provision which enables a State Party to derogate from some of the legally binding provisions. An example is article 4 ICCPR which allows States Parties to derogate from their obligations under the ICCPR ‘in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’.237 There is no general international rule that allows derogation. Derogation is allowed only if permitted by the specific treaty.238

However, in general, a treaty is an international agreement and States Parties are obliged to fulfil their treaty obligations, based on the principle of pacta sunt servanda. Obviously, the substance of these obligations is subject to legal interpretation, which can be based on the wording of the treaty, the intentions of the drafters and the aims and objectives of the treaty.239 The Vienna Convention has codified the general rules of interpretation of international treaties. According to article 31 (1) of the Vienna Convention ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ [Italic – tl]. In addition, the preparatory work, the travaux preparatoires, can be invoked as a ‘supplementary means of interpretation’, but only if the other permitted approaches of interpretation would leave the treaty’s meaning ‘ambiguous or obscure’ or if it would lead ‘to a result which is manifestly absurd or unreasonable’.240

As the previous paragraphs have made clear, International Human Rights Law and Standards have not developed only through the sources of international custom and international conventions, but also through many other documents, resolutions,

236 Art. 19 of the Vienna Convention. Cf e.g. art. 51 CRC providing that ‘[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted’.

237 Derogation is not unlimited. Art. 4 (2) ICCPR prohibits derogation under this provision of certain human rights, like the inherent right to life under art. 6 ICCPR and the prohibition of torture under art. 7 ICCPR. The latter could be considered an example of what is called ius cogens under international law (see above); Nowak 2005, p. 157-158. Norms that are considered to be ius cogens are ‘norms of general international law which are of peremptory force and from which, as a consequence, no derogation may be made except by another norm of equal weight’; Wallace 2002, p. 33.


239 Wallace refers to these approaches as the ‘objective’ approach, the ‘subjective’ approach and the ‘teleological’ approach, respectively; Wallace 2002, p. 239-240.

recommendations, declarations, bodies of principles, etc. These documents are not acknowledged as ‘hard’ sources of international law and are not legally binding. Nevertheless, these sources, often referred to as ‘soft international law’, can be valuable for the interpretation and implementation of ‘hard international law’. The standards they represent certainly are not irrelevant and can contribute to the substantiation of International Human Rights Law. They have been used as such by treaty bodies such as the HRC and the CRC Committee, in conjunction with the provisions of the international conventions. The HRC for example indicated that States Parties should inform the HRC in light of the implementation of article 10 (1) ICCPR to what extent they are applying relevant UN standards, such as the Standard Minimum Rules. It is argued that the HRC in its jurisprudence indicated that the norms found in these Standards are incorporated into article 10 ICCPR, which has ‘elevated’ their legal value.

The CRC Committee urged States Parties in its General Comment on Juvenile Justice (GC No. 10, para. 88) to fully implement the JDLs in light of its obligations under article 37 CRC.

Thus, standards of ‘soft international law’ are not legally binding but are of significance to substantiate hard international law and contribute to the interpretation of International Human Rights Law. In addition, they can provide for information regarding the intentions of (member) states. Resolutions, recommendations or other instruments that embody standards of soft international law have been adopted by bodies in which states’ representatives participate. Moreover, many of these instruments have proven to be adopted without a vote or unanimously. Therefore it is argued that strictly they are not legally binding, but that a certain moral value should be attributed to them.

It is important to note that the different sources of international law may very well overlap, which may also have implications for their legal effects. As mentioned, an international convention is legally binding only for the States that have ratified it. However, if a norm is considered to be international customary law, the norm is binding, regardless of states’ willingness to be bound by international law. In addition, norms embodied in standards of soft international law are not legally binding as such, but once they contain norms of international customary law they become legally binding. However, despite the great potential of international

241 Art. 38 (1) Statute of the International Court of Justice.
242 HRC GC No. 21, para. 5.
243 Joseph, Schultz & Castan 2004, p. 283; see para. 2.7.3.3.
244 In addition, the soft legal CPT standards and EPR have proven to be of significance in the legally binding jurisprudence of the ECtHR. It also is interesting to note that domestic courts may choose to attribute legal value to standards of soft international law, which hardens their status. This has been done, e.g. by the German Constitutional Court in 2006; see in this regard Dünkel 2006 and Dünkel & Van Zyl Smit 2007. Cf Dohrn 2006 regarding the case law of the Inter-American Court.
245 See, e.g. Mijnarends 1999, p. 78-81 and 87.
customary law, its establishment and determination is a dynamic process, under the constant influence of debate, and dependent on practice and opinion at a specific point in time, which results in uncertainty.

### 2.6.3 Implementation at the Domestic Level

#### 2.6.3.1 Integration in Domestic Law; Role of (Inter)National Monitoring Bodies

Implementation of international human rights is a domestic matter in the first place, as is human rights protection. States Parties are under the obligation to integrate the provisions of International Human Rights Law, enshrined in treaties and conventions that they have ratified, into the domestic legal order. The actual protection of human rights is furthermore dependent on the legal system of every State Party.\(^{246}\) In general, a rough and certainly not limited distinction can be made between States Parties with a monistic system and a dualistic system.\(^{247}\) In a monistic system International Human Rights Law forms part of the domestic legal system; there is one legal system. International Human Rights Law has direct effect and can be invoked directly before domestic courts. In the Netherlands for example, International Human Rights Law can take precedence over domestic law (art. 94 Dutch Constitution). Whether provisions of international law are ‘directly enforceable’ or ‘self-executing’ is dependent on the domestic system (see, e.g. art. 93 Dutch Constitution).

In a dualistic system International Human Rights Law must be incorporated into domestic law before the provisions can take effect in the national legal system. In these jurisdictions International Human Rights Law does not form part of the domestic legal system; consequently there are two separate systems of law. Additionally, International Human Rights Law is inferior to domestic law.\(^{248}\)

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\(^{246}\) Differences in the structure of States (e.g. between a federation or a unitary state) is also relevant for the actual human rights protection.

\(^{247}\) It is argued that as a general rule, countries with a civil law tradition have a monistic system (so have Islamic countries and European and Asian countries with ties to the former Soviet Union), while countries with a common law legal system (supplemented by Scandinavian countries and countries with a legal system based on that of the former Soviet Union) have dualistic systems; Harland 2000, p. 193. Even though Harland’s study is limited to the effect of the ICCPR in domestic legal systems, it includes a country by country analysis and provides for an interesting overview of the implementation of an international treaty in domestic jurisdictions.

\(^{248}\) Sieghart 1983, p. 40-42. Sieghart argues however that this distinction is academic on the international level and that ‘it is well settled that international law will apply to a State regardless of its domestic law, and that a State cannot in the international forum plead its own domestic law, or even its domestic constitution, as an excuse for breaches of its international obligations’. Still the distinction is relevant on the domestic level. Cf also Joseph, Schultz & Castan 2004, p. 13-16, in particular with regard to the implementation of the ICCPR.
Chapter 2

The international human rights bodies such as the HRC under the ICCPR and the CRC Committee under the CRC, provide for another significant form of human rights protection. These bodies have the task of supervising and monitoring the implementation of international human rights treaties. This takes place through a reporting procedure. States Parties are under an obligation to report to the specific body supervising the specific convention, how they implement the convention and guarantee the protections provided for. The considerations, concluding observations and recommendations concerning the country reports are published, which places States Parties under public scrutiny (see above paras. 2.2 and 2.3). In addition, these documents can provide valuable information regarding the interpretation of the treaty provisions. In this regard, the monitoring bodies can also issue General Comments on specific issues under the conventions or regarding, for example, general measures of implementation. As mentioned earlier, the HRC and the CRC Committee have extensively exercised this competence and issued, at the time of writing, 31 and ten General Comments, respectively. Furthermore, some monitoring bodies have additional competences, such as the Inter-American Commission on Human Rights that can give advice, conduct site visits and do consultations on request or the CPT that monitors the European Convention for the Prevention of Torture in light of article 3 ECHR through country visits.

Some international and regional human rights treaties have provided – either directly or through an optional protocol – for the establishment of judicial bodies that are competent to review individual communications or individual complaints regarding human rights violations by a State Party. Under the ICCPR’s first optional protocol the HRC can review individual communications, as can the ECtHR under the ECHR, the Inter-American Court under the ACHR and the African Court under the Banjul Charter’s protocol. These judicial bodies all have jurisdiction to make binding decisions regarding individual complaints. The CRC framework does not contain an individual complaint or communication procedure.

2.6.3.2 Negative and Positive Obligations

In light of the domestic implementation of International Human Rights Law it is important to address two issues briefly. The first issue is the concept of negative

\[\text{Note that an individual must exhaust all national remedies first, provided that these can be considered effective national remedies; see, e.g. art. 35 (1) ECHR and see in this regard, e.g. ECtHR, Judgment of 11 January 2007, Appl. No. 1948/04 (Saleh v. The Netherlands), in which the ECtHR ruled that although the applicant had exhausted all national remedies, in particular the appeal before the Administrative Jurisdiction Division of the Council of State, his complaint was admissible since ‘in practice a further appeal would have had virtually no prospect of success’ (para. 123). Cf e.g. Joseph, Schultz & Castan 2004, p. 13 regarding the admissibility to the HRC under the ICCPR (art. 2 First Optional Protocol to the ICCPR).}\]
and positive obligations for states deriving from international legal instruments. A ‘traditional divide’ between civil and political rights, and economic, social and cultural rights, witnessed among others by two different international human rights covenants, the ICCPR and ICESCR, is strongly related to the difference between negative and positive State obligations. Negative human rights obligations, which oblige a State to refrain from (arbitrary or unlawful) interference with human rights and freedoms, are classically linked to civil and political rights, based on the perception that the State can guarantee freedom from interference at no cost, freely. An example is the freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment. Positive obligations on the other hand require State’s action to provide for rights and these rights are therefore often regarded as ‘costly, progressive and non-justiciable’. Economic, social and cultural rights require positive State action per se, like for instance the right to education. However, civil and political rights can imply positive obligations as well. For example, article 10 (1) ICCPR’s requirement of prisoners’ treatment with humanity and with respect for their dignity, requires State action with regard to conditions of imprisonment and, for instance, training of appropriate personnel. Another example is the right to a fair trial which requires the (costly) establishment of independent tribunals. The HRC has acknowledged in its General Comment 31 that article 2 (1) ICCPR, the general ICCPR provision providing that States Parties must respect and ensure all ICCPR rights for all individuals within its territory or subject to its jurisdiction ‘is both negative and positive in nature’. From the HRC’s case law different positive obligations can be deduced, such as the obligation to investigate allegations of ICCPR violations or to train personnel appropriately.

In addition, the CRC embodies a number of provisions that use wording referring to State obligations ‘to ensure’ the safeguarding of the CRC rights and freedoms for all children within their jurisdiction. In this regard States Parties must ‘undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]’ (art. 4 CRC).

The ECtHR has also acknowledged positive obligations under a number of ECHR provisions, ‘requiring member states to … take action’. Mowbray distinguishes two kinds of positive obligations: one derived from ‘express textual requirements of the [ECHR]’ and one as an ‘implied judicial [creation]’. Mowbray’s analysis of the development of positive obligations under the ECHR by
the ECtHR reveals that on the contrary the notion of positive obligations is broad, and not limited to economic, social and cultural rights.

Given this broad notion of positive obligations at both the international and regional level, civil and political rights can require positive State action as well, which makes the ‘traditional divide’ old fashioned to a certain extent.

2.6.3.3 Horizontal Effects

The second issue affects the horizontal effect of international human rights. The State has certain negative and positive obligations based on International Human Rights Law, which implies a vertical effect from State to individual. The question can be raised whether International Human Rights Law places individuals under the obligation to live up to these rights regarding other individuals. In other words, can human rights have horizontal effect? In addition, must the State protect individuals against human rights violations from others? And what if the latter acts as a public official or is a private individual working for a public service? These questions represent complex issues, which cannot be addressed here thoroughly, but will be addressed further below, where relevant. In general, a certain horizontal effect of human rights cannot be denied, certainly when it comes to public or private officials representing the State or (delegated) State authorities. Some international human rights provisions explicitly express horizontal effects.255 Regarding other provisions the monitoring bodies have alluded to horizontal effects, like the HRC has done for instance with regard to article 7 ICCPR, which prohibits torture or cruel, inhuman or degrading treatment or punishment.256

Under the CRC the CRC Committee has expressed the view that some of the rights set forth in the CRC have horizontal effects, implying that States Parties are under the obligation to implement these rights domestically and provide for measures to safeguard these rights for any individual against violations by other individuals (private actors).257 Examples are articles 9 and 19 CRC, aiming at protection of the child against ill-treatment by for example his parents, and article 37 (a) CRC’s prohibition of torture and other forms of ill-treatment.258

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255 See, e.g. art. 19 (1) CRC, art. 2 (c) CEDAW or art. 2 (d) ICERD.
256 Joseph, Schultz & Castan 2004, p. 36-37. There has been little opportunity for the HRC to address this issue in its case law. Joseph, Schultz & Castan argue that ‘[t]he ability to enjoy most ICCPR human rights would be totally undermined if States had no duties to control human rights abuse in the private sector. Therefore, the general duty in article 2 (1) on States to ‘ensure’ ICCPR rights entails a duty to protect individuals from abuse of all ICCPR rights by others’; Ibid., p. 38.
257 Cf the 1996 CRC Committee’s General Guidelines for Periodic reports, CRC/C/58, e.g. para. 88.
258 Detrick 1999, p. 31.
2.6.4 Conclusion

This paragraph aimed to highlight the main general aspects of International Human Rights Law and Standards, without undertaking addressing them exhaustively. However, for a proper examination of the implications of the relevant International Human Rights Law and Standards concerning deprivation of liberty of children, one should take into account the general characteristics of International Law. The key principles of general International Human Rights Law, non-discrimination, rule of law and remedies against human rights violations should be considered primary factors in the determination of the implications. In addition, one should take into account the potential sources of international law, in particular international custom and international treaties, strongly supported by judicial decisions and academic writing. The division of hard and soft international law is of particular significance given the fact that many of the relevant human rights standards regarding incarceration of children form part of the latter category. Still, the relevant international monitoring and judicial bodies, have granted significant weight to the relevant standards embodied in the SMR, JDLs and European instruments, and the EPR and CPT standards, which has hardened their (moral and interpretative) value.

Finally, it is important to keep in mind that human rights protection is primarily a domestic matter and the implementation of human rights standards is strongly (and to a large extent solely) dependent on activities at the domestic level. In this regard the domestic legal system, including national remedies, is of significance and should be taken into account. States’ responsibilities should be interpreted in accordance with the divide between negative and positive obligations and potential horizontal effects, while taking into account the general principles of International Human Rights Law mentioned above, implying that each individual within a State’s jurisdiction should be granted the protection of the rule of law, supported by effective national (and international) remedies.

2.7 Relevant Provisions of International Human Rights Instruments

2.7.1 Introduction

The previous paragraphs addressed in a brief overview the emergence of International Human Rights Law, the children’s rights framework and the developments regarding the recognition of the legal position of individuals, more specifically of children, deprived of their liberty. They show that there are numerous relevant international and regional human rights treaties and other instruments that should be taken into account in the examination of the legal implications of International Human Rights Law and Standards for the issue of deprivation of liberty. Before analyzing these implications in detail and categorizing them according to subject (see Chapter 3), this section will present the relevant provisions of human rights treaties and of other international and regional
Deprivation of liberty, first of all, is a limitation of everyone’s fundamental right to liberty of the person as embodied in article 9 (1) ICCPR. Second, it does not imply that an individual deprived of his liberty is automatically deprived of his (other) human rights and fundamental freedoms. As will be highlighted more thoroughly in Chapter 3, both the principle of non-discrimination and the right of every individual deprived of his liberty to be treated with humanity and with respect for his inherent dignity as a human being (art. 2 (1) jo. art. 10 (1) ICCPR and art. 2 (2) ICESCR) imply that he remains entitled to all rights under International Human Rights Law. This is not different concerning children (art. 2 (1) CRC). On the contrary, children are – in addition – entitled to treatment that takes into account the needs of individuals of their age (art. 37 (c) CRC).

This means in the first place that all human rights provisions are in principle – that is limited only as far as justifiable under the deprivation of liberty – applicable to all individuals deprived of their liberty. It goes beyond the scope of this study to discuss all these rights in detail, but this paragraph will start with some remarks in this regard, with special attention to child-specific provisions in the ICCPR and ICESCR and, of course, the CRC (para. 2.7.2). This will be followed by a presentation of the provisions of International Human Rights Law and other standard-setting documents, which are relevant to deprivation of liberty of individuals and which can be divided into two categories: provisions that are directly applicable to individuals deprived of liberty (category 1; para. 2.7.3) and provisions that are more specifically (than other human rights provisions) relevant to individuals deprived of liberty (category 2; para. 2.7.4). This paragraph will end with a conclusion (para. 2.7.5).259

2.7.2 Provisions in Principle Applicable to Individuals Deprived of Liberty

2.7.2.1 ICCPR, ICESCR and CRC

The ICCPR and ICESCR were the first international UN treaties providing for general human rights standards applicable to all human beings, based on the inherent dignity of human beings.260 The preambles of both treaties recognize that human beings can only enjoy freedom from fear and want if everyone is able to enjoy civil, political and economic, social, and cultural rights. This represents the

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260 See the preambles of both the ICCPR and ICESCR and the preamble and art. 1 of the UDHR.
approach that human rights are indivisible and strongly interrelated. Still, two separate treaties were drafted – the ICCPR for civil and political rights and the ICESCR for economic, social and cultural rights.

Unlike its two predecessors the CRC covers both civil and political rights, as well as economic, social and cultural rights and makes no distinction. It underscores that all kinds of human rights are indivisible, of equal importance and should be reinforced mutually. The children’s rights treaty was the result of the full recognition of the child as a human being entitled to civil, political, economic, social and cultural rights, while not losing sight that he is a dynamic human being developing his capacities towards full capacity as an adult. The four articles identified as the key-principles of the CRC, article 2 (non-discrimination), article 3 (best interests of the child), article 6 (right to life, survival and development) and article 12 (right to participation), are exemplary in this regard (see para. 2.3). Consequently, the CRC is the most significant international human rights treaty for children, including those deprived of their liberty.

Instead of speaking of the different classical groups of human rights, the CRC has often been described and analyzed in terms of the ‘three P’s’: protection, provision and participation. The CRC contains rights, freedoms or obligations related to the protection of the child, provisions for the child from which he can benefit and which he needs for his development and, finally, rights to participate in society and regarding decisions or procedures that affect him. The category of Participation includes, besides article 12’s right to participate and be heard, freedom of expression (art. 13 CRC), freedom of thought, conscience and religion (art. 14 CRC), freedom of association and assembly (art. 15 CRC) and right to information (art. 17 CRC). Rights under the category of Protection include the right to respect for privacy and family life (art. 16 CRC) and the right to be protected against violence, abuse and neglect (art. 19 CRC) and, protection against any form of exploitation, including sexual exploitation and sexual abuse (arts. 32, 34 and 36 CRC) or child labour (art. 34 CRC). Finally, the rights and provisions under the category of Provisions cover inter alia the right to an adequate standard of living (art. 27 CRC), to education (arts. 28 and 29 CRC), to the highest attainable standard

261 The only distinction that can be found affects the implementation of economic, social and cultural rights. Art. 4 CRC provides that States Parties are under the obligation to implement these rights 'to the maximum extent of their available resources'; cf art. 2 (1) ICESCR. See also para. 3.13.
262 Cantwell 1992, p. 27.
264 This provision could also be categorized as especially relevant to children deprived of liberty (category 2; see below). It is strongly related to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment (art. 37 (a) CRC).
of health (art. 24 CRC) and to rest, leisure, play and to participate in recreational activities (art. 31 CRC).265

Thus, the CRC contains a broad range of entitlements for the child, often clearly formulated as positive obligations for States Parties to implement – ‘to ensure’ – these rights. This general (positive) obligation is of equal significance for children deprived of their liberty (art. 37 (c) jo. 2 CRC).

The CRC contains specific human rights that can also be found in the ICCPR and ICESCR. The ICCPR provisions are in principle relevant to all individuals deprived of their liberty, because like the CRC it does not allow denial or limitation of rights because of status (art. 2 ICCPR).266 Under the ICESCR, economic, social and cultural rights may only be limited if necessary for the purpose of promoting the general welfare in a democratic society and provided that such limitation is determined by law and is compatible with the nature of these rights (art. 4). As a consequence, people deprived of their liberty are in principle entitled to the enjoyment of economic, social and cultural rights, like any free individual, which has implications for the conditions of detention and imprisonment.

2.7.2.2 Special Protection of the Child under the ICESCR and ICCPR

Although the CRC is the child-specific human rights treaty, the ICESCR and ICCPR recognize the special position of the child, albeit in a child welfare manner, rather than a child rights manner. The ICESCR and ICCPR positioned the child as object and – cautiously – as subject of the right to special protection. Some specific observations will be made in this regard.

Article 10 (3) ICESCR mentions children, in particular, by stipulating that ‘[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions’. This provision represents the welfare or needs-based approach of that period of time, but is nevertheless of significance, because it implies that every child, including the so-called ‘illegitimate child’, but also the one deprived of his liberty, is entitled to special measures of protection.

Article 24 (1) ICCPR provides that ‘[e]very child shall have, without any discrimination (…) the right [Italic – tl] to such measures of protection as are

265 Cf Meuwese, Blaak & Kaandorp 2005, p. 9.
266 This approach is supported by art. 10 (1) ICCPR, the key provision of treatment of individuals deprived of liberty under the ICCPR; see below.
required by his status\textsuperscript{267} as a minor\textsuperscript{268}, on the part of his family, society and the State'.\textsuperscript{269} As stressed above, this provision was the first provision that entitles the child to measures of protection, adopted in a legally binding international treaty.\textsuperscript{270} First, article 24 ICCPR acknowledges that the child has rights and second, that he is entitled to measures of protection directly related to his status as a minor. Third, article 24 ICCPR obliges the family, society and the State to provide for these measures and this includes all situations in which a child finds himself. Deprivation of liberty could be such a situation.\textsuperscript{271} Finally there must not be any distinction between children in this regard, because discrimination is explicitly prohibited. Nowak argues that ‘the prohibition of discrimination does not relate to all of a child’s rights but rather only to those protective measures required by his (her) special status as a minor’.\textsuperscript{272} Thus, children with liberty or deprived of their liberty are both entitled to measures of protection, regardless of the reasons for placement.

\textsuperscript{267} According to Nowak ‘[b]y status is meant the stage of physical development and social position’; Nowak 2005, p. 546, footnote 14.

\textsuperscript{268} The ICCPR does not define the terms ‘child’ or ‘minor’. Other ICCPR provisions use other undefined terms, such as juvenile persons (art. 10 ICCPR). The only indication can be found in art. 6 (5) ICCPR, which provides that the death penalty must not be imposed for crimes committed by persons below the age of eighteen years. Under art. 10 ICCPR the HRC has taken the position that setting limits of juvenile age is a domestic matter in light of social, cultural and other conditions, but that ‘article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice’; HRC GC No. 21, para. 13. In 1989 the HRC issued GC No. 17 (HRC General Comment No. 17, Rights of the child (art. 24), 7 April 1989) on art. 24 ICCPR, in which is stated that the age ‘should not be set unreasonably low’ (para. 4). Cf art 1 CRC’s definition of the child.

\textsuperscript{269} Art. 24 furthermore embodies the right that every child ‘shall be registered immediately after birth and shall have a name’ (para 2) and the ‘right to acquire a nationality’ (para 3).

\textsuperscript{270} Cf art. 10 (3) ICESCR, art. 25 (2) UDHR, art. 19 American Declaration and the 1959 Declaration of the Rights of the Child.

\textsuperscript{271} In HRC GC No. 17 the HRC stated that this responsibility ‘is primarily incumbent on the family (…) and particularly on the parents, to create conditions to promote the harmonious development of the child’s personality and his enjoyment of the rights recognised in the Covenant’ (para. 6). If the State takes over the care for a child, by placing him in a juvenile justice institution, it takes over this responsibility as well. Cf art. 23 ICCPR and art. 10 ICESCR; see also art. 9 and 20 CRC below).

\textsuperscript{272} Nowak 2005, p. 545-546. Nowak argues that this part of art. 24 met with the most opposition by Western European and Latin American countries. There was fear that this provision ‘might give the impression that the other rights of the [ICCPR] were not fully applicable to children’. Moreover, why should children deserve special protection and not other groups as well? In addition, special protection against discrimination against children would be redundant in light of art. 2 (1) ICCPR. According to Nowak ‘[t]he main objections concentrated on the completely equal status given to the ‘illegitimate’ child, which might then endanger the stability of the family specially protected by [a]rt. 23’; Ibid., p. 545. Cf Joseph, Schultz & Castan 2004, p. 625-6256 regarding the relation between the anti-discriminatory provisions of art. 2 ICCPR and this provision (the ‘ancillary role of article 24’).
Article 24 ICCPR does not prescribe to which measures a child is entitled. States Parties have a broad discretion regarding the way they implement their positive obligation regarding the special protection of children. This does, however, not mean that the child is not entitled to ‘any independently enforceable and justiciable rights’ at all.273 On the contrary the HRC has pointed out in that ‘the rights provided for in article 24 are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all the civil rights enunciated in the Covenant’ (HRC GC No. 17, para. 2).274 In some ICCPR provisions explicit reference is made to children ‘with a view to affording minors greater protection than adults’ (HRC GC No. 17, para. 2).275 Joseph, Schultz & Castan argue that ‘it seems that article 24 acts to ‘top up’ the other civil rights offered to children by the ICCPR’s other guarantees by more explicitly requiring positive measures of protection’.276

Thus, article 24 ICCPR has consequences for the interpretation of provisions that do not explicitly refer to children. An example is the prohibition of torture, which may have a different threshold when it comes to children (e.g. concerning the degree of pain), due to article 24. Furthermore, this provision may imply that one should recognize that such heinous treatment may cause more damage to a child than to an adult.277 Another example is article 14 (3) (c) ICCPR’s minimum guarantee that everyone, facing criminal charges, shall be entitled to be tried without undue delay. Under article 24 the threshold for undue delay should be lower for children than for adults.

Deprivation of liberty as such is not prohibited under article 24 ICCPR. In Jalloh v. The Netherlands (HRC Comm. No. 794/1998) a complainant argued that his detention as an alien of three and a half months, when he was seventeen years old, breached his entitlement to special protection under article 24 ICCPR. The HRC noted ‘that the detention of a minor is not per se a violation of article 24 of the Covenant’ (para. 8.3). This depends on the circumstances of the case. In this case, where ‘there were doubts as to the [petitioner’s] identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing [the State Party claimed for

274 The HRC speaks here of civil rights only. Joseph, Schultz & Castan argue that this has been done on purpose, because a child would not be entitled to exercise political rights like the right to vote (art. 25 ICCPR); Joseph, Schultz & Castan 2004, p. 626. The CRC represents a different approach, although it does not provide for the right to vote, there are other political rights that should be equally applicable (see, e.g. art. 15 CRC). In addition, the HRC provides that art. 24 ICCPR also includes economic, social and cultural measures (para. 3).
275 An example is art. 10 (2) ICCPR, which will be addressed below.
instance that it was not certain that the petitioner was a minor\textsuperscript{278}, the Committee concludes that the [petitioner] has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor’ (para. 8.3). The Committee found no breach of article 24 ICCPR in this case.\textsuperscript{279}

2.7.2.3 Conclusion

Each child deprived of his liberty is in principle entitled to all rights under the CRC, ICCPR and ICESCR. The latter two treaties, in particular through article 10 (3) ICESCR and more strongly article 24 ICCPR grant each child special (measures of) protection in addition to his other entitlements under the treaties. This calls for a child-specific approach, including \textit{inter alia} specialized facilities, special attention for the child’s (developmental) needs, including family contact and educational programmes, and special measures of protection against the (potential) negative influences of deprivation of liberty.

The CRC has codified and improved this child-oriented approach, by explicitly providing for civil, political, economic, social and cultural entitlements for each child regardless of his status. It contains further guidance to States Parties regarding how to realize this approach by setting standards concentrated around its general principles: non-discrimination, right to life and development, right to participation, and best interests of the child. Given the CRC’s almost universal ratification, the CRC applies to almost each country in the world and thus to almost all children deprived of their liberty globally.

2.7.3 Provisions Directly Applicable to Individuals Deprived of Liberty (Category 1)

2.7.3.1 Introduction

The first category of relevant provisions consists of provisions that are directly applicable\textsuperscript{280} to deprivation of liberty of individuals, more specifically children. The

\textsuperscript{278} This is often the difficulty for children due to lack of adequate birth records and may lead to detention in order to establish the identity and age of the person.

\textsuperscript{279} Joseph, Schultz & Castan 2004, p. 626; cf Nowak 2005, p. 555 and HRC Comm. No. 1096/2002 (Bakhtiyari \textit{et al.} v. Australia), in which an Afghan family with five children were held in mandatory immigration detention for two years and eight months. This constituted a breach of art. 9 (1) ICCPR. Moreover, the HRC concluded that ‘the measures taken by the State Party had not (…) been guided by the best interest of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children’s rights to such measures of protection as required by their status as minors up that point in time’; para. 9.7.

\textsuperscript{280} ‘Directly applicable’ in this regard does not refer to the issue of direct enforceability in domestic jurisdictions; see para. 2.6.
core provision in this regard is article 37 CRC, which covers in general all forms of
deprivation of liberty. It was developed on the provisions of articles 9 and 10
ICCPR and combines elements of both provisions in one child-oriented human
rights provision exclusively designed for children deprived of liberty.

It is therefore relevant to first present articles 9 and 10 of the ICCPR because
that may contribute to a proper understanding of the background and content of
article 37 CRC, as the child-specific provision. This will be followed by
information on the Standard Minimum Rules applicable to all individuals deprived
of their liberty because they are relevant to children deprived of their liberty in
addition to child-specific standards such as the JDLs.\textsuperscript{281} Subsequently, this section
addresses the child-specific provisions of direct relevance for deprivation of liberty
of children, article 37 CRC and the JDLs.

2.7.3.2 ICCPR

A. Article 9 – Right to Liberty of the Person

Article 9 ICCPR recognizes every person’s right to liberty of person.\textsuperscript{282} Liberty of
the person is one of the oldest human rights. However, deprivation of liberty
through imprisonment has for an equally long period been accepted as one of the
legitimate means for the State to infringe an individual’s right to liberty of the
person for reason of crime control and public safety and it has certainly gained in
significance.\textsuperscript{283}

According to article 9 (1) ICCPR ‘[n]o one shall be subjected to arbitrary arrest
or detention’ and ‘[n]o one shall be deprived of his liberty except on such grounds
and in accordance with such procedures as are established by law’. In other words,
article 9’s right to liberty of the person is not absolute. Limitation of this right is
allowed but only under the condition that this limitation is neither unlawful, nor
arbitrary. This concerns the procedure as well. It places States Parties under the
obligation to define in its domestic legislation on what grounds and by which
procedure someone can be deprived of his liberty.

\textsuperscript{281} Rules 9 and 27 Beijing Rules explicitly refer to the SMR as relevant and applicable for children; \textit{cf}
GC No. 10, para. 88.

\textsuperscript{282} Article 9 also protects the right to security of the person. The significance of this right is not very
clear and has been subject to discussion. Originally – in the French revolution – it aimed at State
protection of citizens against infringements of personal rights and property from other citizens.
This is often considered to be the contemporary meaning of the right to security as well. The fact
that art. 9 ICCPR seems to be designed specifically for deprivation of an individual’s liberty raises
the question whether the right of security under article 9 must be protected only when an
individual is deprived of liberty; Nowak 2005, p. 213-214. Nowak argues that ‘[a] systematic
interpretation reveals that security of person provides the individual with legal claims that are
independent of liberty of [the] person’ and that ‘these claims are directed primarily against
interference with personal integrity by private persons’; \textit{Ibid.}, p. 214.

\textsuperscript{283} \textit{Ibid.}, p. 211.
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Subsequently, article 9 provides for procedural safeguards, such as information regarding the reasons for arrest and charges, if any (para. 2). Other safeguards are the right to be brought promptly before a judicial authority and to be tried within a reasonable time or to be released (para. 3), the right to challenge the legality of the arrest or detention (para. 4), and the enforceable right to compensation for victims of unlawful arrest or detention (para. 5). Furthermore, article 9 (3) ICCPR provides that pre-trial detention ‘shall not be the general rule’, which demonstrates that pre-trial detention should be used only after careful consideration in an individual case (the precursor to ‘last resort’).

Consequently, the right to liberty of the person may be limited by arrest or detention. Neither deprivation of liberty, nor arrest or detention are defined by the ICCPR. According to the HRC ‘paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.’ The broad interpretation also applies for the application of article 9 (4), right to challenge legality, and article 9 (5), right to compensation. Paragraphs 2 (second part) and 3 are limited to the context of criminal justice.

Thus, article 9 applies to all forms of deprivation of liberty, unless the specific provision limits the applicability to arrest or detention under the criminal justice system.

One final remark should be made at this point. Article 9 does not make any reference to children in particular. Nevertheless it is also directly applicable to the arrest and detention of children. Taking into account article 24 ICCPR, it is defensible that children are entitled to a more protective interpretation of the article 9 provisions. The right to be informed of the reasons for arrest could for example imply that a child should be informed in a child-friendly manner. In addition, a child arguably is entitled to a higher compensation under article 9 (5) ICCPR if his rights under article 9 ICCPR have been violated.

B. Article 10 – Treatment of Individuals Deprived of Liberty

Article 9 ICCPR provides for legal requirements concerning deprivation of liberty and procedural entitlements for individuals in the event that they are arrested or detained. It does not cover the treatment of individuals who are deprived of their liberty. This is where article 10 ICCPR becomes applicable, which provides that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. Article 10 ICCPR stands in the middle between articles 9 and 7. Article 7 ICCPR, which will be addressed

284 HRC GC No. 8, para. 1.
285 See also Nowak 2005, p. 219ff. See Ibid., p. 216ff for more on the drafting history of art. 9.
below, enshrines the protection of each individual against negative interference by the State with his personal human dignity and physical integrity, while article 9’s right to liberty of the person is limited to the protection against unlawful and arbitrary arrest and detention. Article 10 however embodies a positive obligation for States to guarantee treatment with humanity and respect for the dignity of the human person during deprivation of liberty, which adds extra dimensions to both article 9’s right to liberty of the person and article 7’s classic right to be protected against torture or cruel, inhuman or degrading treatment or punishment.

According to the HRC (HRC GC No. 21, para. 3): ‘Article 10, paragraph 1, imposes on States Parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their 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. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 (…), but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.’

Thus, the requirement of treatment with humanity and respect for the inherent dignity of the human person implies that each individual deprived of his liberty should in principle be entitled to all rights under the ICCPR. Nowak rightfully adds that ‘prisoners should enjoy other human rights as well, in particular those contained in the [ICESCR], such as the rights to work, food, shelter, clothing, health and education’. Article 10 (1) ICCPR places States under the obligation to guarantee such treatment to all individuals deprived of their liberty and therefore relates to both the general state of facilities where people are deprived of their liberty, as well as the minimum conditions of detention, imprisonment or other forms of custodial placement. Limitations of one’s human rights should be justified in light of article 10 (1) ICCPR’s requirement of humane treatment. As Nowak argues, article 10 ICCPR ‘ensures minimum guarantees of humane treatment that (…) reduce or define more precisely the permissibility of restrictions on [human rights]’. Such restrictions or limitations, thus require explicit justification. A mere

286 Nowak 2005, p. 250.
287 Ibid., p. 242 with further reference to HRC Comm. No. 74/1980 (Angel Estrella v. Uruguay). In this case the HRC found that limitations on prisoner’s correspondence not only breached art. 17 (the right to privacy; prohibition of unlawful interference with a person’s correspondence), but also art. 10 (1) ICCPR. Nowak also points at the innovative character of art. 10 ICCPR (and also of art. 5 ACHR, which contains a similar provision), the significance of which is prompted by the ‘experience (…) that precisely the situation of “special power relationships” within closed facilities often occasions massive violations of [these] human rights’.
reference to one’s deprivation of liberty as justification for (inherent) limitations is not legally satisfactory under article 10 (1) ICCPR.288

Article 10 ICCPR’s first paragraph has a broad scope. It is applicable to all forms of deprivation of liberty and is not limited to the context of (juvenile) criminal justice.289 Its second and third paragraphs, however, are limited to accused and convicted individuals, including juvenile persons. Article 10 (2) ICCPR calls for segregation between unconvicted and convicted individuals and for separation between accused juvenile persons and adults. In addition, it provides that the former group must be brought for adjudication ‘as speedily as possible’;290 ‘The third paragraph provides that the essential aim of the treatment of offenders within the penitentiary system must be their reformation and social rehabilitation. Regarding juvenile offenders specifically this paragraph provides that they must be ‘segregated from adults and be accorded treatment appropriate to their age and legal status’’.291

Thus, article 10 ICCPR embodies a broad call for treatment of individuals deprived of their liberty with humanity and respect for their inherent dignity. In addition, it enshrines a number of requirements regarding the housing of individuals deprived of their liberty in the context of criminal justice, in particular regarding separation of different categories of detainees and prisoners. In this regard explicit reference is made to juvenile persons.292

2.7.3.3 Standard Minimum Rules and Other Applicable Standards

A. Introduction

The HRC has stressed that States Parties should inform the HRC in light of the implementation of article 10 (1) ICCPR ‘to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of

288 Nowak 2005, p. 242. ‘In practice, wide-ranging restrictions on these rights, which often go far beyond those necessarily accompanying the deprivation of liberty, are sought to be justified with mere reference to the permissibility of deprivation of liberty of persons and so-called “inherent limitations” deriving therefrom’, according to Nowak.
289 See also HRC GC No. 21, para. 2.
290 Cf art. 9 (3) ICCPR embodying the entitlement to a trial within a reasonable time.
291 The rather absolute formulation of art. 10 (2) and (3) has met with criticism, witnessed by the large number of reservations of many – primarily – Western European states; see for more on this Ibid., p. 243.
292 ‘Juvenile person’ and ‘juvenile offender’ have not been defined. The HRC stated that ‘[a]rticle 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice’; HRC GC No. 21, para. 13.
Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) 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 (1982)’ (HRC GC No. 21, para. 5). According to Joseph, Schultz & Castan ‘the HRC [has in its case law] indicated that the norms found in the most famous of the UN codes, the Standard Minimum Rules for the Treatment of Prisoners 1957 are incorporated into the article 10 guarantee’.293 They argue strongly that ‘it can be safely assumed that the Standard Minimum Rules, and possibly norms in other UN codes, have been elevated to norms of international treaty law in article 10(1) of the Covenant’.294 In any event, the UN standards, in particular the Standard Minimum Rules for the Treatment of Prisoners, give content to the requirement of humane treatment of article 10(1). Even when considered soft international law, they are particularly relevant to the interpretation of article 10 ICCPR.

B. UN Standard Minimum Rules for the Treatment of Prisoners
The 1957 UN Standard Minimum Rules are meant to provide for rules regarding the minimum conditions of deprivation of liberty. One should think of a large variety rules covering many aspects of closed facilities, such as accommodation, personal and medical care, and contact with the outside world, but also restraint, discipline and punishment, inspection and training of personnel. They provide a large and detailed set of rules that should be used to organize the domestic prison system. It entails a detailed description of many aspects of the administration of institutions, basic conditions under which prisoners must be institutionalized, different rules regarding the further limitation of the exercise of fundamental rights and rules regarding remedies against neglecting these rules.

Despite the strong link between the rules and the requirement of article 10 ICCPR regarding the treatment of prisoners with humanity and with respect to their human dignity and their assumed elevation to norms of hard international law, the wording of the preliminary observations to the Standard Minimum Rules illustrate the reticent attitude of the drafters. The rules ‘are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of general consensus of contemporary thought and the essential elements of the most adequate


systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.\textsuperscript{295}

Second, the drafters acknowledged the ‘great variety of legal, social, economic and geographical conditions of the world’ and therefore ‘it is evident that not all of the rules are capable of application in all places at all times’ (rule 2 SMR). This approach leaves much room but the drafters have stressed that the Standard Minimum Rules ‘represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations’ (rule 2 SMR). In that regard these rules ‘serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application’ (rule 2 SMR).

This approach, although fitting in the dogma of cultural and economic relativism towards international law, has arguably been set aside by the HRC’s approach that the Standard Minimum Rules are directly linked to article 10 (1) ICCPR, which implementation may not be dependent on States Parties’ developmental status, the legal system or the geographical conditions of a State Party.\textsuperscript{296}

The Standard Minimum Rules are meant to represent the minimum conditions with regard to the treatment of prisoners. This means that ‘[i]t will always be justifiable for the central prison administration to authorise departure from the rules’ that is ‘in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole’ (rule 3). This leaves room for the prison administration to experiment with practices in due course that give better content to the objectives of these Standard Minimum Rules. However, these practices may not lead to a lower degree of treatment than provided for in the minimum standards.\textsuperscript{297}

It goes beyond the scope of this paragraph to describe and analyze the content of the Standard Minimum Rules (see Chapter 3). Some general remarks will be made at this point. Rule 4 explains the outline of the Standard Minimum Rules. Part I deals with the general management of institutions and part II provides rules for specific categories of prisoners. The first part ‘Rules of General Application’ applies to ‘all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures” or corrective measures ordered by a judge’ (rule 4 (1) SMR). This can be seen more or less as the definition of

\textsuperscript{295} Rule 1. Despite this statement, the wording of the Rules is in general fairly firm. Many rules are formulated in a direct way by using the word ‘shall’, which can be considered as language appropriate for hard international legal instruments, like treaties and conventions.


\textsuperscript{297} In this regard, one should note that it is not the incarcerated individual who is the subject of the Standard Minimum Rules, but the rules provide how the (administration of the) institution should be designed.
‘prisoners’, which is broader than sentenced persons under the criminal law system only. In part II a distinction has been made between different categories of prisoners. Section A applies to ‘Prisoners under sentence’298, section B with ‘Insane and mentally abnormal prisoners’, section C ‘Prisoners under arrest or awaiting trial’, section D ‘Civil prisoners’ and finally section E with ‘Persons arrested or detained without charge’.299

The Standard Minimum Rules do not have the intention to cover the management of institutions ‘for young persons such as Borstal institutions or correctional schools’, according to rule 5 (1). However ‘in general part I would be equally applicable in such institutions’ (rule 5 (1) SMR). Unfortunately ‘young persons’ has not been defined. Rule 5 (2) SMR introduces another category of young persons, namely: ‘young prisoners’, which ‘should include at least all young persons who come within the jurisdiction of juvenile courts’. These young prisoners should preferably not be imprisoned, but if so, they seem to be protected by part II of the Standard Minimum Rules. This is rather confusing and raises the question whether the Standard Minimum Rules (part I and II) are applicable to young persons placed in a correctional school on the basis of a juvenile court order. The answer seems to be positive, which implies that only if a young person is placed in a Borstal or correctional school on another basis than a juvenile court order (e.g. with parental consent), the applicability of the Standard Minimum Rules will in principle be limited to part I.

Although, the scope of the Standard Minimum Rules concerning children – ‘young persons’ – is not exactly clear, it is defensible that they apply to all children deprived of their liberty on the basis of a juvenile court order. Their applicability to children detained or imprisoned in the context of juvenile justice can be confirmed by referring to rule 21.1 of the Beijing Rules, providing that the Standard Minimum Rules ‘shall be applicable as far as relevant to the treatment of juvenile offenders in institutions, including those in detention pending adjudication’.300 The Commentary to this rule explains that the Standard Minimum Rules ‘have had a worldwide impact’ and that ‘they continue to be an important influence in the humane and equitable administration of correctional institutions’. According to rule 27.2 of the Beijing Rules the Standard Minimum Rules should be implemented ‘to the largest

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298 However rule 4 (2) adds that the rules contained in section A apply to prisoners under categories B, C and D as well ‘provided they do not conflict with the rules governing those categories and are for their benefit’. This means that in case of conflict the special rules take precedence over the general rules under part II, section A, and should, besides that, be in the prisoner’s interest. This characterizes the character of the special minimum rules of the different sections of part II.

299 This part was added in 1977.

300 Note that rule 21.1 provides that the Rules are applicable ‘as far as relevant’ and not ‘as far as applicable’.
possible extent so as to meet the varying needs of juveniles specific to their age, sex and personality’; an approach which was, according to the Commentary, chosen deliberately, rather than to modify the Standard Minimum Rules according to the particular characteristics of juvenile institutions.\textsuperscript{301} Moreover, the CRC Committee urges States Parties to take into account the SMR as far as it is relevant to the implementation of the JDLs (see below) concerning children deprived of their liberty in the context of juvenile justice (GC No. 10, para. 88). Thus, the SMR should be regarded as applicable and be interpreted in light of the children’s rights framework.\textsuperscript{302}

C. Other Applicable Human Rights Standards

The other international standards characterized by the HRC as relevant under article 10 ICCPR are the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as well as the 1978 Code of Conduct for Law Enforcement Officials and 1982 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. It goes beyond the scope of this study to pay attention to these instruments thoroughly. This paragraph will be limited to some general remarks regarding the Body of Principles as the most relevant instruments in the context of this study.\textsuperscript{303}

The UN General Assembly adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) in 1988 without a vote. The main objective of the Body of Principles is primarily to ‘protect the physical safety’ of individuals deprived of their liberty.\textsuperscript{304} It is argued that ‘the Body of Principles provides further evidence of a general acceptance that a person does not lose the right to be humanely treated when he or she is imprisoned’ and that they ‘expand and supplement the already widely accepted Standard Minimum Rules, reinforcing international support of the rights of prisoners’\textsuperscript{305} It particularly focuses on the protection of individuals deprived of their liberty against (threats of) ill-treatment or ill-punishment or even torture, including protection against illegal forms of deprivation of liberty, such as for example detention.

\textsuperscript{301} This point of departure was set aside later, resulting in the drafting of the JDLs; see para. 2.7.3.5.
\textsuperscript{302} Cf. rules 9 and 27 Beijing Rules. The question of what added value the Standard Minimum Rules provides compared to the JDLs will be addressed in para. 2.7.3.5.
\textsuperscript{303} For more on the Code of Conduct and the Principles of Medical Ethics see Rodley 1999, p. 355ff and p. 371ff, respectively.
\textsuperscript{304} Bernard 1994, p. 775. As mentioned before the Body of Principles’ scope covers all forms of deprivation of liberty.
\textsuperscript{305} Bernard 1994, p. 776. See also Defence for Children International 1990, p. 9.
incommunicado.\textsuperscript{306} The Body of Principles contains a few specific aspects that make it of added value compared to the Standard Minimum Rules.

First, the Body of Principles provides definitions of arrest, detention and imprisonment, as presented in Chapter 1.

Second, the Body of Principles provides for both principles regarding the treatment of arrested, detained or imprisoned individuals, as well as legal (procedural) safeguards for deprivation of liberty of individuals, relating to article 9 ICCPR. For example Principle 10 reiterates that ‘[a]nyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of any charges against him’. In addition, Principle 14 provides that ‘[a] person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive [the information mentioned in Principle 10] promptly in a language which he understands’.

Third, the Body of Principles recognizes the juvenile deprived of liberty by stipulating in Principle 5 (2) that ‘[m]easures applied under the law and designed solely to protect the right and special status of (…) children and juveniles (…) shall not be deemed to be discriminatory’. Furthermore, the arrested, detained or imprisoned juvenile who is incapable of understanding his right to notify his family or other appropriate persons of the arrest or transfer from one place of detention or imprisonment to another, shall be supported to exercise this entitlement or the competent authority shall exercise this right for him. In this regard ‘[s]pecial attention shall be given to notifying parents or guardians’ (Principle 16 (3) and (1)).

In general, the Body of Principles is not as extensive as the Standard Minimum Rules, but it provides for a number of elaborations on specific issues. As Rodley states ‘the instrument contains a detailed checklist of safeguards, compliance with which would make threats to, or assaults on, life and limb of prisoners unusual’.\textsuperscript{307} In addition, the Body of Principles is of additional value for children, in particular regarding the notification of parents in case of transfer.\textsuperscript{308}

\textsuperscript{306} Unlike the Standard Minimum Rules it does not provide for detailed rules regarding general minimum conditions of detention or imprisonment.

\textsuperscript{307} Rodley 1999, p. 326. The legal value is subject to debate. According to Bernard the Body of Principles was originally entitled the “Code”, but “[f]ear that using “Code” would lend too much weight to the document led to the substitution”; Bernard 1994, p. 775-776. Although the wording is sometimes peremptory it primarily serves as an instrument that can provide for substantive guidance for the interpretation and implementation of the relevant ICCPR provisions; Rodley 1999, p. 333.

\textsuperscript{308} For more information on the Body of Principles see Treves 1990 and Rodley 1999, p. 326ff.
2.7.3.4 Article 37 CRC

A. Introduction
This article is the core provision concerning deprivation of liberty of children, containing ‘the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty’ (GC No. 10, para. 78). In general, article 37 CRC applies to all forms of deprivation of liberty, regardless of the context (e.g. juvenile justice or child protection; cf para. 3.2).

Three of its four paragraphs, (b)-(d), explicitly focus on various aspects of the deprivation of liberty as such and will therefore be discussed here. Article 37 (a) CRC contains the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment and will be addressed in the next paragraph. It is important for children deprived of their liberty but equally for all other children. The second part of article 37 (a) CRC prohibits capital punishment and life imprisonment without parole and is of limited relevance for this study; it will be addressed in connection with article 37 (b) CRC (see under D.).

B. Article 37 (b) CRC – Legal Requirements concerning Deprivation of Liberty of Children
Article 37 (b) CRC prohibits unlawful or arbitrary deprivation of liberty. Without mentioning every child’s fundamental right to liberty (and security) of person explicitly – like its predecessor article 9 (1) ICCPR does – it provides that ‘[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily’. This part of article 37 (b) CRC was not significantly debated during the drafting process. It was drafted to protect children’s fundamental right to liberty of person regardless of the reason for deprivation of liberty. It indicates that deprivation of liberty of children as such is not prohibited, provided that it does not occur unlawfully or arbitrarily. Like article 9 (1) ICCPR, article 37 (b) CRC does not provide a list of permitted reasons for deprivation of liberty (cf art. 5 (1) ECHR, see para. 2.8.2).

Article 37 (b) CRC introduced two additional requirements concerning deprivation of liberty of children, which introduction, according to Cantwell, is one ‘among the most notable improvements and innovations which the [CRC] sets out’.

According to article 37 (b) CRC ‘[t]he arrest, detention or imprisonment of a child (...) shall be used only as a measure of last resort and for the shortest appropriate

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309 Cf the scope of art. 9 ICCPR, in particular paras. (2) and (3). For the scope of art. 37 (b) CRC see under C.
310 Schabas & Sax 2006, p. 76.
311 Cantwell 1992, p. 28-29.
The requirements of last resort and shortest appropriate period of time place States Parties under the obligation to use deprivation of liberty regarding children with the utmost restraint and only after careful consideration, that is: based upon an individual assessment regarding the appropriateness and duration of the deprivation of liberty, while giving due weight to the best interests of the child, including *inter alia* his age and maturity, and family environment (see further para. 3.4).313 These additional requirements can be considered as two child-specific elements that give content to the general requirements of lawfulness and non-arbitrariness. They have no precedent in international treaty law, but can be found, with regard to deprivation of liberty of children within the juvenile justice system, in the 1985 Beijing Rules.314 The CRC has incorporated them in a legally binding treaty provision. In light of this, it is fair to conclude that the CRC has developed these standards ‘further’.315 This conclusion is also justified in comparison to article 9 ICCPR (and similar regional human rights provisions; see para. 2.8); the CRC has introduced a child-specific approach regarding the legality of deprivation of liberty of children. As mentioned above, article 9 (3) ICCPR instructs States Parties not to use pre-trial detention as ‘a general rule’. This corresponds with the principle of last resort, but article 9 (3) does not refer to the shortest appropriate period of time. Van Bueren rightfully notes that ‘[t]he standard set by the [CRC] for children and pre-trial detention is higher’ and should therefore prevail regarding children in states that have ratified both the ICCPR and CRC (see art. 41 CRC).316 In addition, the ICCPR does not refer to the other forms of deprivation of liberty in the context of criminal justice, while article 37 (b) CRC applies to arrest and imprisonment as well. Still, article 37 (b) CRC may not offer the special legal protection to all children deprived of liberty, since its scope seems to be limited to deprivation of liberty in the context of juvenile justice. This requires further attention.

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312 Art. 37 (b), second sentence CRC also provides that the arrest, detention or imprisonment of a child ‘shall be in conformity with the law’. This is the result of the consensus reached during the drafting process and is rather redundant given the requirements of lawfulness and non-arbitrariness of the first part of art. 37 (b) CRC.

313 See also Schabas & Sax 2006, p. 81. They argue that this provision ‘calls for a comprehensive understanding of the child’s personal development, its interaction with his or her environment and others, before considering social reaction to certain behaviour of the child’. Note that, e.g. under art. 5 ECHR the use of deprivation of liberty as *ultimum remedium* has been recognized as well by the ECHR; see para. 3.4.2. However, the ECHR, like all other human rights treaties do not explicitly refer to the last resort principle.

314 See, e.g. rules 13, 17 and 19 Beijing Rules. See also Detrick 1999, p. 630-633.

315 Schabas & Sax 2006, p. 82.

C. Scope of Article 37 (b) CRC, Second Sentence
Despite the fact that article 37 (b) CRC in general focuses on all forms of deprivation of liberty, the scope of the second sentence seems to be limited to arrest, detention and imprisonment (i.e. a juvenile justice context), according to the wording. During the drafting process this part of article 37 (b), contrary to the first sentence, was the subject of a rather controversial debate. Some countries were not willing to limit their discretion regarding other forms of deprivation of liberty than those deriving from the juvenile criminal justice system. Some countries objected particularly to the limitation in time (initial proposal: ‘shortest possible period of time’) because such a principle was not incorporated in their domestic legislation. Finally, the USSR representative suggested limiting the scope of article 37 (b) CRC, second sentence by adopting the wording ‘arrest, detention or imprisonment’, rather than ‘deprivation of liberty’, which would have included deprivation of liberty outside the context of juvenile justice. This proposal eventually received the most support.

The time clause was changed towards the end of the drafting process into ‘shortest appropriate period of time’ – another compromise. Van Bueren observes that the majority of States ‘argued that to assist children to assume a constructive role in society, detention would not necessarily involve the ‘shortest possible penalty’’. Consequently, they adopted what Van Bueren refers to as the ‘weaker standard’.

Based on the drafting history, article 37 (b) CRC in general applies to all forms of deprivation of liberty, but the requirements of last resort and shortest appropriate period of time are – deliberately – limited to the context of juvenile justice. As Van Bueren concludes: ‘States Parties (…) are therefore under a duty only to impose arrest, imprisonment, and detention as a measure of last resort rather than all forms of deprivation of liberty.’ The same is true for the legal requirement of the ‘shortest appropriate period of time’.

319 Van Bueren 1995, p. 214 with reference to UN Doc. E/CN.4/1989/WG.1./L.4; although the same majority in principle agreed on Senegal’s remark that regarding arrest, detention or imprisonment states should only ‘endeavour to apply the shortest possible penalty’ (UN Doc. E/CN.4/1989/WG.1/WP.67/Rev. 1). Cf Detrick 1992, p. 477. Still, often reference is made to the use of arrest, detention or imprisonment for the ‘shortest possible period of time’, while this has different implications than ‘the shortest appropriate period of time’; see for more on this para. 3.4.
320 A position that can also be supported by the argument that the second sentence of art. 37 (b) CRC is founded on rules 13, 17 and 19 Beijing Rules.
321 Van Bueren 1995, p. 209. Van Bueren also argues that ‘implicit in this duty is a prohibition on using penal institutions as a substitute for inadequate social assistance facilities’.
322 Ibid., p. 214.
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Where the second sentence of article 37 (b) CRC represents a restrictive approach, as far as the requirements of last resort and shortest appropriate period of time are concerned, the JDLs, adopted one year after the CRC, represent a broader approach. Rule 2 JDLs provides that deprivation of liberty of a child, defined as ‘any form of detention or imprisonment or the placement (…) in a public or private custodial setting, from which [he] is not permitted to leave at will, by order of any judicial, administrative or other public authority’ should be ‘a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases’.

Schabas & Sax consider the adoption of the JDLs part of ‘the trend towards the emancipation of deprivation of liberty standards from the narrower criminal law context to a broader scope of applicability’. Article 37 (b) CRC, second sentence would represent the ‘lowest common denominator’ at that point in time (i.e. 1989), while the JDLs would represent a deliberate choice of the international community for a broad approach; the international community would have ‘overcome the traditional narrow perception of deprivation of liberty as a criminal justice issue only’. Consequently, they consider Van Bueren’s interpretation ‘restrictive’ and one that ‘would not adequately take into account the context and purpose of CRC standards in this regard’.

Schabas & Sax additionally state that ‘all the arguments in relation to the severe impact of limitations to the child’s personal liberty and his or her development are valid irrespective of the legal regime ordering such measure’ and that the objective of reintegration should be accepted for deprivation of liberty in other contexts as well (child protection, mental health etc.). They conclude that if the requirements of last resort and shortest appropriate period of time ‘are well-established for the field of juvenile justice, it would not be compatible with the object and purpose (…) of over-all CRC standards on deprivation of liberty [art. 37 (b)-(d) CRC – tl] and in light of succeeding developments of standards to exclude other forms of deprivation of liberty from its application’.

323 Rule 11 (b) JDLs; see para. 2.7.3.5.
324 Schabas & Sax 2006, p. 55.
325 Ibid., p. 84. They argue that the restrictive character of the second sentence of article 37 CRC has been the result of a compromise, which must be seen in light of that period in time, the late 1980s, during which significant initiatives of International Human Rights Standards for children, juvenile justice and deprivation of liberty were taken. Some countries were not willing to adopt new principles in the CRC, while only one year later the UN adopted the JDLs representing a broader approach (i.e. not limited to the context of juvenile justice). These developments would be jeopardized if one would maintain the ‘more restrictive standards under the CRC’, according to Schabas & Sax.
326 Ibid., p. 84.
327 Ibid., p. 85 with reference to article 31(1) of the Vienna Convention.
Schabas & Sax’s two additional arguments are certainly defensible, but the assumption that the JDLs represent a deliberate change of views of the international community deserves some further attention. Although a development of ‘emancipation of deprivation of liberty standards’ is recognizable with article 37 CRC itself as the best example, it is not self-evident that indeed the claimed crucial switch took place in 1990 when the JDLs were adopted. The drafting of the JDLs had already started before the adoption of the CRC (see para. 2.7.3.5); still its broad approach was deliberately set aside by the drafters of article 37 (b) CRC. In addition, the JDLs have not entirely set aside the restrictive context; they still have a strong juvenile justice flavour (see in particular rule 2 and rule 1). This confirms the transition Schabas & Sax have noticed, but not to the extent that it fully justifies a broad interpretation of article 37 (b) CRC, second sentence. Furthermore, the difference between article 37 (b) CRC as part of a legally binding treaty and the JDLs’ standards, as part of a non-binding UN resolution, is not irrelevant in this regard. Even if one takes into account that the JDLs were adopted without a vote, one should not exclude the fact that States Parties did not feel that compelled to bring forward the same arguments used during the drafting of the CRC, during the drafting of the JDLs, simply because the latter would not limit their domestic discretion.

Although there certainly are substantive arguments why children outside the juvenile justice context should not be denied the same protections when it comes to their (potential) deprivation of liberty, an unconditional claim that article 37 (b) CRC, second sentence must interpreted broadly, seems to be, as a minimum, (legally) challengeable.

In addition, the CRC Committee has not provided explicit clarification in this regard. Schabas & Sax observe that the CRC Committee ‘has accepted the JDLs definition of deprivation of liberty, it routinely recommends States Parties to implement the [JDLs] and it frequently refers to the principles of last resort and shortest period of time’. At the same time, however, the discussions regarding deprivation of liberty often ‘take place in the juvenile justice context’. Still, ‘the CRC Committee has expressed concern over disrespect for the principles of last resort and shortest period of time on many occasions, extending also beyond the juvenile justice context’.

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328 E.g. the ECtHR has held that the duration of the deprivation of liberty of a child can be a relevant factor for the determination whether it is lawful under art. 5 ECHR. This also affects deprivation of liberty outside the context of juvenile justice (i.e. under art. 5 (1) (d) ECHR), Van Bueren 1995, p. 214-216.

329 Note that the JDLs were adopted together with the Riyadh Guidelines on the prevention of juvenile delinquency (i.e. a juvenile justice instrument).

In its GC No. 10 the CRC Committee calls upon States Parties to implement the JDLs (para. 88), but the General Comment addresses solely deprivation of liberty solely within the juvenile justice context. Consequently, there was no need to elaborate on the scope of article 37 (b) CRC, second sentence.

On the other hand, regarding unaccompanied or separated children outside their country of origin, the CRC Committee has stated that unaccompanied or separated children ‘should not, as a general rule, be detained’ and ‘[w]here detention is exceptionally justified for other reasons [than ‘solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof’], it shall be conducted in accordance with article 37 (b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time’. The Committee adds: ‘In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.’

This arguably indicates that the CRC Committee considers article 37 (b) CRC, second sentence, applicable to detention of unaccompanied or separated children outside the juvenile justice context. Still, the CRC Committee has not (yet) provided for unambiguous guidance regarding the interpretation of the scope of article 37 (b) CRC, second sentence.

D. Article 37 (a) CRC – Inconsistency with Article 37 (b) CRC
The second part of article 37 (a) CRC prohibits severe sentences, namely capital punishment and life imprisonment. The latter sentence is prohibited unless (or is allowed provided that) there is the possibility of release. This result of a political compromise has significantly weakened the value of the prohibition of life imprisonment and has additionally led to an inconsistency in article 37 CRC. On the one hand it proclaims restraint regarding imprisonment of children (art. 37 (b) CRC); on the other it allows life imprisonment, as long as there is the possibility of release. It would have been much more consistent with article 37 (b) CRC and the objectives of juvenile justice, as enshrined in article 40 (1) CRC, if the CRC had prohibited all forms of life imprisonment for children, as recommended by the CRC Committee in GC No. 10, para. 77.

E. Article 37 (c) CRC – Quality of the Treatment of Children Deprived of Liberty
If a child is deprived of his liberty, he must 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’. This ‘right to be treated with
humanity’ is stipulated by article 37 (c) CRC and can be considered as the core-article regarding the quality of treatment of children deprived of liberty. It embodies a positive obligation for States Parties to ensure minimum guarantees for the humane treatment of detained children and is based on article 10 ICCPR.333 ‘In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests 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’, according to the second part of article 37 (c) CRC. These aspects can be considered elements of the requirement to be treated with humanity as stipulated in article 37 (c) CRC. This paragraph addresses these and other implications of article 37 (c)’s right to be treated with humanity. It is important to note that article 37 (c) CRC explicitly addresses ‘[e]very child deprived of liberty’. Therefore the requirement to be treated with humanity is not limited to arrest, detention or imprisonment under the (juvenile) criminal justice system.

F. Article 37 (d) CRC – Procedural Safeguards
Once a child is deprived of liberty, he is entitled ‘to prompt access to legal and [Italic - tl] other appropriate assistance’.334 Additionally, he has the ‘right to challenge the legality of the deprivation of his (…) liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action’. Article 37 (d) CRC stipulates these two procedural safeguards apply to all children deprived of their liberty and makes no distinction between different forms or contexts of deprivation of liberty. Despite some textual differences, most implications of article 9 (4) ICCPR apply to article 37 (d) CRC as well (see para. 3.4).335

G. Conclusion
Despite its lacunae, inconsistency due to its weakest link: the non-prohibition of life imprisonment with the possibility of release, and interpretative issue regarding the scope of paragraph (b), article 37 CRC provides for a strong and clear legal child-specific framework regarding deprivation of liberty of children. It can be divided into legal requirements regarding deprivation of liberty and provisions regarding the quality of treatment of children deprived of liberty and their (procedural and substantive) legal status. These provisions are worked out more in detail in the 1990

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334 Cf art. 40 (2) (b) (ii) CRC which provides for the right to legal or other appropriate assistance.
335 Note that art. 9 (4) ICCPR does not contain an entitlement to legal representation related to the condition a person finds himself in (i.e. deprivation of liberty); art. 14 (3) (d) ICCPR does like art. 40 CRC provide for the right to legal counsel as part of the right to fair trial. The HRC has explicitly linked legal representation to the entitlements under art. 9 (4) ICCPR; see HRC Comm. No. 330/1988 (Berry v. Jamaica); Joseph, Schultz & Castan 2004, p. 334.
JDLs. The CRC Committee urges States Parties in its General Comment No. 10 (para. 88) to implement the JDLs in conjunction with the Standard Minimum Rules (see above in para. 2.7.3.3) and to incorporate them into national laws and regulations. This UN resolution will be addressed in the following paragraph.

2.7.3.5 UN Rules for the Protection of Juveniles Deprived of Their Liberty

A. History
Until 1989 and 1990, the years of the adoption of the CRC and the JDLs respectively, the rights of children deprived of their liberty were not specifically regulated under International Human Rights Law. The position of the child deprived of liberty was to some extent recognized in the ICCPR, but the most detailed instrument, the Standard Minimum Rules, was unclear about its applicability to children (see para. 2.7.3.3). Although it can be defended that the Rules are applicable to children, they cannot be considered as child-specific and their value in this regard has been questioned.

Van Bueren criticizes the assumptions of the Standard Minimum Rules, which are in her view inappropriate for children. One is that the Standard Minimum Rules ‘assume that adult institutions are capable of housing a large number of prisoners, whilst contemporary juvenile justice theory and practice stresses the opposite: the need for small units integrated into the community and simulating family-like living arrangements’. Second, she argues that the Standard Minimum Rules provide for ‘little guidance as to how the objectives of treatment are to be provided’.337

According to Van Bueren ‘[b]ecause of this paucity of detailed international law protecting the rights of children deprived of their liberty, the British section of Amnesty International in 1981 produced draft Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty’.338 While the initial idea was to draft minimum rules meant as ‘internal guidelines’ for Amnesty International, in particular to help its researchers judge whether a case of a child in prison would fall within the mandate of the human rights organization, it became clear that in order to realize any real benefit for incarcerated children, it would be necessary for the international community adopt the draft rules as well.339

The real drafting process of the JDLs started after the adoption of resolution 21 by the 7th UN Congress on the Prevention of Crime and Treatment of Offenders in 1985, calling for Standard Minimum Rules for the Protection of Juveniles Deprived

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336 Which have become ‘more influential and more widely accepted’ in the years according to Defence for Children International; Defence for Children International 1990, p. 9.
337 Van Bueren 1995, p. 207. See also under B.
338 Ibid., p. 208.
of Their Liberty. During this congress the Beijing Rules were adopted. These rules, despite a few general remarks, do not address the conditions of deprivation of liberty of children thoroughly or systematically, since their main focus is on the administration of the juvenile justice system (see further para. 2.7.4). During the 7th Congress the possibility of expanding the scope of the draft Beijing Rules was considered, but ultimately rejected. The drafting process was already in an advanced stage when it became apparent that it would require a large expansion of the scope of the rules, which simply could not be done if the Beijing Rules were to be adopted during the 1985 conference. As a result, the Beijing Rules were adopted and the Congress adopted the resolution, mentioned above, ‘that a new instrument on the protection of children deprived of their liberty be prepared for consideration by the 8th Congress’.

The draft JDLs were further developed and prepared between 1985 and 1990. A preliminary draft was prepared in 1986 at the request of the UN Crime Prevention and Criminal Justice Branch by an NGO-group, including Amnesty International, Defence for Children International, the International Catholic Child Bureau, the International Commission of Jurists and Rädda Barnen (Save the Children, Sweden). Subsequently, it was circulated to experts, institutions and associations worldwide for feedback. In 1988 a revised version of the draft was submitted to the UN Consultant responsible for submitting the final draft of the UN Secretariat to an inter-regional preparatory meeting of experts in Vienna. Upon approval by this meeting the draft was reviewed by the UN Committee on Crime Prevention and Control in August and endorsed by the UN ECOSOC resolution 1989/69. In 1989 the draft was submitted to the governments in order to receive their comments during a series of Regional Preparatory Meetings. The observations of these meetings were reviewed by the Committee on Crime Prevention and Control in February of 1990 and the draft was prepared to be considered at the 8th Congress in Havana, Cuba, in August and September 1990. The Congress approved the draft and sent it to the UN General Assembly for adoption, which occurred on 14 December that year, without a vote. This process explains why the JDLs are also known as the Havana rules.

340 Res. 21, A/CONF.121/22/Rev.1. 341 Defence for Children International 1990, p. 3. NGOs, like Defence for Children International, Rädda Barnen and Amnesty International persuaded States to adopt this resolution in 1985; Van Buuren 1995, p. 208. more in general, these NGOs played a significant role in the establishment of the JDLs, as appreciated by the General Assembly in Res. 45/113, para. 3.

342 Defence for Children International 1990, p. 4. 343 In 1987 the draft was studied by juvenile justice and correctional practitioners in seminars organized by DCI and the UN Latin American Institute for the Prevention of Crime and Treatment of Offenders.

344 It is remarkable that the label ‘Havana Rules’ is not as widely used as the Beijing Rules and the Riyadh Guidelines both named after the cities where they were approved.
B. Relation (Draft) JDLs and Standard Minimum Rules

The necessity of a separate instrument for children deprived of liberty\textsuperscript{345} has been questioned by some observers during the drafting process. Similarly, questions have been raised whether, given the existence of the SMR ‘a brief statement of general principles concerning the special needs of juveniles would not be sufficient’.\textsuperscript{346} Defence for Children International argued that they ‘could not be significantly shortened without substantially reducing the protection which they afford to children deprived of their liberty’.\textsuperscript{347}

When the Standard Minimum Rules have been taken into account and compared to the JDLs ‘there is a superficial resemblance in the degree of detail, the length of the two texts and to some extent the subjects covered and the structure’.\textsuperscript{348}

Relevant differences ‘stem from the special psychological [and developmental] needs of juveniles’ and the draft Rules were also influenced by the ‘special needs and greater vulnerability’ of juveniles deprived of their liberty, compared to adults in the same condition. An example in this regard is the rules regarding the daily programme, with elements such as education, vocational training and work. Furthermore, the rules of the JDLs regarding classification and placement, the physical environment and accommodation, education and medical care are made ‘quite different from the [Standard Minimum Rules]’, due to the fact that, according to one of the main principles underlying the JDLs, the treatment of juveniles should take place ‘in the context of a relationship between the juvenile and the community even when institutionalization is necessary’.\textsuperscript{349}

Another important difference between the JDLs and the Standard Minimum Rules is that the JDLs are in principle applicable to all children. This is a different approach than the Standard Minimum Rules, which contains, besides rules of general application (part I), specific rules for different categories of prisoners (part II). The reason behind the JDLs approach is that the ‘principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals

\textsuperscript{345} The JDLs refer to ‘juveniles’ rather than to ‘children’. Consequently, both terms will be used in this section.

\textsuperscript{346} Defence for Children International 1990, p. 9. Defence for Children International states that ‘[i]t took the United Nations 35 years to decide there are (...) substantial differences between an adult prison and a juvenile correctional facility, and that the management of juvenile institutions is important enough to deserve a modest effort to develop an internationally acceptable set of guidelines’.

\textsuperscript{347} Ibid., p. 10. They in particular point to the significance of a comprehensive set of rules for the standard-setting process and the development of international norms, but moreover for the advice and technical assistance for national legislators and for enforcement authorities, which can use the standards as a tool for, e.g. training of correctional staff.

\textsuperscript{348} Ibid., p. 9.

\textsuperscript{349} Ibid., p. 9-10. See below for the key objectives of the JDLs.
concerned and the protection of their physical, mental and moral integrity and well-being’ (rule 28 JDLs).\footnote{Cf Defence for Children International 1990, p. 10. Defence for Children International remarks that ‘it is difficult to find aspects of the [JDLs] that have not been influenced by the special characteristics and needs of children’.
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Yet the question of whether there was a need for separate rules for children deprived of liberty was certainly legitimate. The question whether the Standard Minimum Rules still are of added value compared to the JDLs is legitimate as well. Despite the critique one can make regarding the Standard Minimum Rules, they are claimed to have proven their value in terms of wide influence and acceptance.\footnote{See Defence for Children 1990, p. 9-10; cf Bernard 1994 and Rodley 1999.}

The 1985 Beijing Rules observe that ‘[i]t is generally agreed that [the Rules] have had a worldwide impact’ and that they ‘continue to be an important influence in the humane and equitable administration of correctional institutions’.\footnote{Commentary to rule 27 Beijing Rules.}

With regard to the (substantive) provisions the JDLs are (by far) more child-oriented and given its comprehensiveness, it has replaced the Standard Minimum Rules, as the most valuable legal instrument for children deprived of their liberty. However, at some points the Rules provides for additional or more comprehensive (and/or more detailed) provisions that give better guidance to institution’s administration on the minimum conditions of detention or imprisonment. This is particularly true for the quality of treatment that should be attributed to pre-trial detainees, in light of article 10 (2) ICCPR’s requirement of segregation of unconvicted from convicted individuals and separate treatment in accordance with the status of unconvicted detainee: a requirement that cannot be found in the children’s rights framework but that can be equally applicable to children (art. 41 CRC; see further para. 3.7). Other examples of the SMR’s added value are the explicit reference (in terms of rules) to the right to have one’s privacy (and physical integrity) protected during transportation, explicit guidance on the treatment of illiterate people, and specific demands regarding accommodation.

Thus, where the JDLs follow a ‘one size fits all approach’, the Standard Minimum Rules can be of added value regarding the treatment of the specific category of pre-trial detainees. In addition, they are more comprehensive or more detailed at some points. In this regard, the CRC Committee rightly calls for the implementation of the JDLs, while taking into account the Standard Minimum Rules, as far as relevant (GC No. 10, para. 88).

The presence of the Standard Minimum Rules (and comparable European instruments, see para. 2.8), beside the JDLs points to a dynamic, detailed and more than incidental guidance of the international community towards respect for the rights of individuals deprived of liberty, more specifically children. One should
thus take into account the International Human Rights Standards altogether, rather than merely judging them separately on their own merits.

C. Objectives and Definitions
After extensive drafting, in which criminologists, judges, lawyers, administrators and staff of juvenile facilities (including psychologists, educators, medical doctors and social workers) were involved, the JDLs can be considered ‘a comprehensive set of principles and standards conceived and designed to meet the special needs of juveniles’. According to the JDLs’ accompanying resolution the General Assembly was ‘alarmed at the conditions and circumstances under which juveniles are being deprived of their liberty world wide’, ‘aware that juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights’ and were ‘concerned that many systems do not differentiate between adults and juveniles at various stages of the administration of juvenile justice and that juveniles are therefore being held in gaols and facilities with adults’.

The General Assembly affirmed that the placement of juvenile in an institution ‘should always be a disposition of last resort and for the minimum necessary period’. Despite the use of different wording, this is an explicit reference to the requirements of ‘last resort’ and the ‘shortest appropriate period of time’ enshrined in article 37 (b) CRC. Subsequently, the General Assembly ‘recognizes that, because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of their liberty’. This is an important recognition, because it underlines the implications of the child’s right to be treated with humanity, with respect for its human dignity and in a manner that takes into account the needs of persons of his or her age, as enshrined in article 37 (c) CRC.

353 Defence for Children International 1990, p. 5. The adoption of the JDLs provided the UN Secretary-General with the opportunity to appoint a Special Rapporteur on the Application of International Standards Concerning Human Rights of Detained Juveniles; Van Bueren 1995, p. 208. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has considered the matter of the administration of juvenile justice since 1985. In 1989 as Special Rapporteur was appointed on the application of the international standards concerning the human rights of detained juveniles, in particular the separation of juvenile and adult offenders in penal institutions; detention pending trial, least possible use of institutionalization and the objectives of institutional treatment; Sub-Commission Res. 1989/31. See also ECOSOC, E/15.4/1995/100, 16 December 1994 (Expert group meeting on children and juveniles in detention: application of human rights standards - Vienna, 30 October - 4 November 1994). Through this Special Rapporteur children deprived of their liberty were placed on the international (UN) agenda; *Ibid.*, p. 208. Despite this no Special Rapporteur has been appointed since the first half of the 1990s.

354 Cf rule 2 JDLs which further adds that it should ‘be limited to exceptional cases’.

355 Note that this recognition extends the positive obligation of States to live up to these requirements to the period after the child’s deprivation of liberty (i.e. aftercare; see further para. 3.12).
The purpose of the JDLs, according to rule 3, is to counteract ‘the detrimental effects of all types of detention’ and to foster the child’s ‘integration in society’ by establishing minimum norms accepted by the UN ‘for the protection juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms’. The JDLs provide guidance regarding the organization of child institutions in order to prevent violation of children’s rights.

The JDLs use a broad definition of deprivation of liberty (see also para. 2.7.3.4). Rule 11 (b) JDLs defines deprivation of liberty as: ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.’ Consequently, the JDLs cover all forms of deprivation of liberty and do not only apply to arrest, detention or imprisonment as part of the juvenile justice system. For example, child refugees placed in detention or children placed in educational facilities or Borstals under child protection law are protected by the JDLs as well. In other words, the JDLs regulate the administration of all kinds of different facilities, including youth detention centres or prisons, residential substance abuse facilities for children, closed or (semi-)open facilities for children in need of alternative care or secured detention centres for immigrants. The definition clearly includes private facilities in which children are deprived of liberty on the basis of an order of any judicial, administrative or other public authority. In addition, there is no reason to assume that children in secured adult facilities should not be awarded the same minimum guarantees (see further below).

According to Defence for Children International, the drafters of the JDLs proposed the broad definition facing the reality that ‘in some countries juvenile offenders and juveniles in situations of risk or judged in need of protection and control find themselves in nearly identical situations and are even confined in the same facilities’. A restrictive definition that would limit deprivation of liberty to the context of juvenile justice, would have ‘the anomalous effect of depriving many

356 Rule 3 JDLs refers to the status of the rules as minimum standards. The title of the JDLs lacks an explicit reference in this regard (c.f. the Beijing Rules and Standard Minimum Rules).
358 Unlike the perception that may arise from rules that (still) represent a juvenile justice approach, such as rules 1 and 2.
359 According to the drafting history, the JDLs are not meant to apply to orphanages. An earlier draft definition contained an extra paragraph that stated that ‘the rules are not designed to apply to institutions which are dedicated exclusively to the provision of a home to orphans or other needy children or young people’. The reason for this was that ‘residence in institutions of this kind should not deprive the juvenile of his or her liberty, except when the age and level of maturity of the juveniles is such that it would be dangerous for him or her to leave the home unaccompanied’. Later the drafters agreed on the deletion of this paragraph, but emphasized that these considerations should be recorded. Furthermore, the JDLs are not meant to cover the issue of children being detained together with their parents; Defence for Children International 1990, p. 15.
juveniles of the protection which the [JDLs] are intended to provide, and whose need for such protection is no less than that of juveniles offenders". 360

Given the broad definition, the decisive factor for applicability of the JDLs is the fact that a child is placed in a facility from which he is not permitted to leave at will. This also covers (semi-)open institutions and not only closed facilities. 361 Finally, it is important to note that whereas the drafters of the Standard Minimum Rules decided to extend the scope of the Rules by recognizing different categories of prisoners by creating separate sections (part II of the SMR), the drafters of the JDLs chose a general system in which the special needs of specific groups of children are addressed, as relevant. 362

Another aspect that determines the scope of the JDLs is the definition of 'juvenile'. Rule 11 (a) JDLs defines a juvenile as 'every person under the age of 18'. In the preliminary draft of the NGOs in 1987 a similar definition was proposed, because the absence of a fixed age limit could lead to a variety of different interpretations at the domestic level. In addition, eighteen was regarded as the generally accepted age, which during the process of sentencing differentiates adults from juveniles. 363 The UN Crime Prevention and Criminal Justice Branch, however, preferred to link up with the definition used in the Beijing Rules (see rule 3.1). The draft submitted in 1988 to the Interregional Meeting of Experts contained the following definition of a juvenile: ‘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.’ The Inter-regional Meeting approved this definition without debate. 364

According to this draft definition juveniles who are tried as juveniles, would have to be treated as such in detention or imprisonment as well. However, this would also mean that if a juvenile were not tried as a juvenile (but under adult criminal law), even if he officially still is a child under domestic law, he need not to be treated as a juvenile during his detention or imprisonment. As a result the JDLs would not be applicable to these children. According to Defence for Children International '[t]hese exceptions were not intended by the Interregional Meeting of Experts, but were simply the unforeseen consequence of borrowing the definition

360 Defence for Children International 1990, p. 15. Defence for Children International also pointed to the controversy regarding ‘the conceptual underpinning of the distinction between institutions for juvenile offenders and juveniles in need of treatment’; Ibid., p. 14. Cf e.g. para. 3.7.
361 Note that the JDLs favour the use of open institutions. For more on the definition of deprivation of liberty see para. 3.2.
362 Ibid., p. 14-15. Cf e.g. rules 17 and 18 or rule 53 JDLs.
363 Note again the juvenile justice context as the frame of reference.
364 Ibid., p. 12. This proposition was debated during the Regional Preparatory Meetings for Europe, resulting in the adding of the sentence ‘… and who falls under the upper age limit considered to be the major dividing line separating juveniles from adults’.
employed by the Beijing Rules. A second consequence of any close attachment of the JDLs to the Beijing Rules is that it would limit the scope of the JDLs to juvenile justice only.

Defence for Children International therefore proposed two alternative amendments, one of which aimed at the adoption of a definition that would be the same as the one used in article 1 CRC. In the end, it was felt desirable to make the draft Rules compatible with the CRC and the Committee on Crime Prevention and Control was recommended to use the following definition: ‘A juvenile is every person under the age of 18 unless, under the respective legal system, majority is attained earlier. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law.’

During the meeting of the Committee on Crime Prevention and Control in February 1990 one committee member raised the question ‘whether this definition would [preclude] countries from adopting different ages of majority for criminal and civil purposes’. However, since discussion regarding the content of the draft text was no longer possible, the chair of the meeting proposed the deletion of the words ‘unless, under the respective legal system, majority is attained earlier’ and suggested that this should be debated further at the 8th Congress in Havana later that year.

The Congress took over the proposal of the Committee’s chair and, as mentioned above, the JDLs define a juvenile as ‘every person under the age of eighteen’. Unlike the CRC definition (art. 1), the JDLs definition is absolute and not dependent on exceptions based on domestic legislation. Still, one could wonder why the JDLs use the term ‘juvenile’ rather ‘child’, as used by the CRC. Subsequently, the JDLs provided that every state should determine an age limit below which it should not be permitted to deprive a child of his or her liberty by

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366 Ibid., p. 13. Defence for Children International stressed that a broad approach (i.e. the applicability of the JDLs to all children deprived of liberty) was needed. It argued that the exclusion of juveniles tried as adults ‘would aggravate the injury to their rights’ and ‘[n]ot only would they be denied the type of trial to which they are entitled’ based on the Beijing Rules and later the CRC – it], they would also be denied the type of correctional treatment to which they are entitled’. ‘Moreover’, it argued, ‘it is doubtful whether this limitation on the applicability of the Rules for the Protection of Juveniles Deprived of Their Liberty would be compatible with existing international law’, with reference to art. 10 (3) ICCPR and art. 37 (c) CRC (see also para. 3.7).
367 Ibid., p. 13.
368 Ibid., p. 13-14.
369 Ibid., p. 14. Defence for Children International argued that its proposal, without the deletion as proposed by the chair, would be preferable, because ‘[i]t helps advance and ensure the complementarity [sic] and compatibility of international standards, without imposing unrealistic expectations on States’. It expressed the hope that the definition would be retained as proposed, which turned out to be in vain.
370 Note that rule 11 (a), second sentence, uses the word ‘child’, just after defining ‘juvenile’.
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371 One can assume that rule 11 (a) JDLs aims at establishing a specific minimum age limit, which should be set separately from the minimum age for criminal responsibility (MACR; art. 40 (3) (a) CRC). This seems to be supported by the broad scope of the JDLs, while the MACR merely regulates the scope of the juvenile justice system.


374 The population of child facilities should be as small as possible. Originally the draft JDLs embodied a provision that proclaimed that facilities larger than 200 places were unacceptable. Later this specific reference was deleted, because it was argued that ‘even the figure of 200 might encourage the construction of centres too large for individualized treatment and the integration of juveniles in residential care into the community’; Defence for Children International 1990, p. 5. Note that compliance with the first principle should be interesting for governments, because placement in an institution generally is a costly intervention. It is therefore in the (financial) interests of the government to try to integrate deprivation of liberty of children into the community.

375 Dünkel & Van Zyl Smit 2001, p. 848. Dünkel & Van Zyl Smit explain that ‘since the mid-1990s a reverse trend of institutionalization can also be observed to some extent’; Ibid., p. 849. However they argue that in general ‘the juvenile justice systems have (…) retained the policy of imprisonment and institutionalization as a last resort’.


D. Principles of the JDLs
There are four principles that can be seen as the general principles of the JDLs.

1. ‘Integration into the community’ can be considered the first underlying principle of the JDLs, which means that the use of community facilities, such as community education, should be stimulated in order ‘to foster integration and minimise stigmatization of the juveniles in their custody’. O’Donnell refers to this principle as ‘the principle of incompleteness’, which means that the JDLs do not proclaim that institutions should meet all the needs of children. Instead, it should stimulate the practice that ‘institutionalised juveniles (…) use community facilities to the greatest extent possible’ with a view to the realization of the objectives of deprivation of liberty (i.e. reintegration in society). In light of this principle, rule 30 JDLs provides that open institutions for children should be established, and that facilities should be decentralized and be of a size that enables integration into the ‘social, economic and cultural environment of the community’. This principle bears resemblance to the fact that in the 1980s and 1990s many countries extended the scope of community sanctions in order to try to reduce incarceration of children.

2. ‘Respect for the dignity of the juvenile’ is regarded as the second principle and is based on the premise that ‘building on the widely accepted tenet that self-respect is essential for the healthy development of the child’. It is under this principle that
the drafters have chosen to use ‘rights-terminology’ to emphasize that disregard of the JDLs may very well amount to violation of rights of the child as embodied in international treaties, such as the CRC, ICCPR and ICESCR.\(^{377}\) That the child deprived of liberty ought to be recognized as a rights holder has been acknowledged by rule 13 stating that ‘[j]uveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty’. Additionally, some fundamental rights are explicitly recognized in the JDLs, such as the right of the juvenile to understand the process of institutional treatment (rule 25 JDLs), which was considered as of ‘fundamental importance in the process of rehabilitation’ by the experts during the drafting process, or the right to protection against unlawful or arbitrary treatment (see e.g. rule 63ff regarding the use of restraint or force, or rule 66ff regarding the imposition of disciplinary measures).\(^{378}\)

Consequently, ‘institutions should be organized in a manner consistent with the fundamental rights and freedoms of the juvenile’ and the design of child facilities should be in accordance with the JDLs and contribute to respect for the child’s development and legal status.\(^{379}\) ‘The emphasis on the juvenile’s ability to resume a full life in the community extends to the design of the facilities, which should be designed in accordance with the juvenile’s need for privacy, sensory stimuli and for opportunities to associate with his or her peers’, according to Van Bueren.\(^{380}\)

3. ‘Family contact’ can be considered the third principle of the JDLs and refers to article 37 (c) CRC. The JDLs contain a number of provisions that point to the importance of contact between the child deprived of liberty and his family. Rule 59 considers ‘adequate communication with the outside world (…) an integral part of the right to fair and humane treatment and (…) essential for the preparation of juveniles for their return to society’. Family contact is one aspect of adequate contact with the wider community. In addition, rule 60 JDLs contains a clear instruction to institutions to facilitate ‘regular and frequent visits’ as part of the right of the child to communicate and receive visits from his family (see art. 37 (c) CRC). Although this right is not absolute, Defence for Children International argues that this rule ‘establishes a presumption in favour of such visits’.\(^{381}\)

\(^{377}\) Defence for Children International 1990, p. 6; O’Donnell 1988, p. 23. Cf art. 37 (c) CRC.
\(^{379}\) Van Bueren 1989, p. 2.
\(^{380}\) Ibid., p. 2.
\(^{381}\) Defence for Children International 1990, p. 6. An earlier version of this rule also contained a provision that was meant to ensure that the juvenile ‘can effectively enjoy this right’. However, this part was removed.
4. ‘The right to be treated fairly’ is the fourth principle and is related to the child’s right to protection against unlawful or arbitrary treatment. This stresses again that the child deprived of liberty should be recognized as a rights holder, as acknowledged by rule 13 JDLs, a ‘legal milestone’.382 In order to prevent arbitrary treatment, rule 68ff provides that rules should be established regarding the imposition of disciplinary measures and procedures. In addition, inspection and supervision, and legal remedies, such as the right to file complaints is of importance in this regard (rule 72ff JDLs).

Furthermore, children must understand the reasons for deprivation of liberty, as well as the backgrounds and objectives of the treatment during their stay in an institution. According to Defence for Children, many experts have found it necessary that ‘the juvenile is to become an active participant in the rehabilitative process’.383 In addition, he should also have access to his personal file (rule 19 JDLs).

Finally, rule 81ff JDLs sets standards regarding institutional staff, who should be properly trained and remunerated. Staff should be encouraged to uphold the basic principles of the JDLs, as a vital element of the fair treatment of children.384

E. Content of the JDLs
The JDLs contain five sections. The section I embodies the JDLs’ ‘fundamental perspectives’ and section II the scope and application of the rules, including the definitions of the terms ‘juvenile’ and ‘deprivation of liberty’, which have been addressed above. A special section, section III, has been designed for children under arrest or awaiting trial and entails special requirements regarding the treatment of this specific group of children in accordance with their status as unconvicted detainees. Section IV is applicable to all children deprived of liberty and can be considered the substantive body of the JDLs. It regulates ‘the management of juvenile facilities’ and contains rules regarding the quality of treatment of children deprived of liberty, affecting inter alia accommodation, education and medical care. It also regulates administrative aspects, such as placement and admission procedures, and measures to restore order and safety, such as the use of restraint or force, or disciplinary measures. This section furthermore provides for rules regarding information for child and his family, contact with the wider community, including his family, and rules regarding inspection, supervision

382 Defence for Children International 1990, p. 7. According to Defence for Children International [m]any experts have asserted that this evolution in international legal standards is supported by contemporary educational theory as well as experience of some modern rehabilitation programmes which indicate that the juvenile’s perception of fair treatment encourages self-respect and constitutes an essential element of effective programmes of treatment”; Ibid., p. 7.
383 Ibid., p. 8.
384 Van Bueren 1989, p. 2. Cf art. 3 (3) CRC.
and legal remedies against unlawful or arbitrary treatment. The fifth and final section (V) contains rules regarding the (training of) staff of juvenile institutions.

2.7.3.6 Conclusion

The first category of relevant provisions at the global level regarding deprivation of liberty of children consists of article 9 and 10 ICCPR in conjunction with the Standard Minimum Rules, and article 37 (b), (c) and (d) CRC in conjunction with the JDLs. These provisions are directly applicable to children (potentially) deprived of their liberty and contain legal requirements regarding the decisions leading to deprivation of liberty, procedural safeguards concerning those who are deprived of their liberty, and requirements regarding the (quality of) treatment of the children involved.

Article 37 CRC is the core provision regarding deprivation of liberty of children. It combines specific elements of its predecessors, articles 9 and 10 ICCPR, into one article and adds and refines some elements that are of particular importance for children. One of these child-specific elements is the use of arrest, detention or imprisonment as a measure of last resort and for the shortest appropriate period of time (art. 37 (b), second sentence CRC; see also the 1985 Beijing Rules). Both requirements are child-specific elements of the general prohibition of unlawful or arbitrary deprivation of liberty, present in the CRC and ICCPR (and regional human rights treaties).

In general, article 37 CRC covers all forms of deprivation of liberty. The scope of article 37 (b) CRC, second sentence – the requirements of last resort and shortest appropriate period of time – is deliberately limited to arrest, detention and imprisonment, that is: deprivation of liberty in the context of juvenile justice. There certainly are arguments to proclaim a broader interpretation. Children (potentially) deprived of liberty under other (legal) systems than the juvenile justice system, should be entitled to the same protection against unlawful and arbitrary deprivation of liberty. In addition, other forms of deprivation of liberty should also be used with great restraint and only after careful (individual and periodic) consideration regarding both the need for and duration of this limitation of children’s right to personal liberty. Nevertheless, the deliberate drafting intentions should not be set aside easily. The CRC Committee has not provided for explicit, unambiguous guidance in this regard, but it seems in favour of a broad, rather than a restrictive interpretation. This corresponds with the broad definition embodied in rule 11 (b) JDLs. Given this uncertainty, it would be advisable for the CRC Committee to clarify its position in this regard, for example in a General Comment exclusively on the broad deprivation of liberty of children.

Despite the ambiguity regarding the scope of article 37 (b), second sentence, it is clear that it covers deprivation of liberty in the context of juvenile justice. Article 9 (3) ICCPR makes reference to pre-trial detention, by providing that it should not
be used ‘as a general rule’. Clearly the last resort principle offers more protection and additionally calls for a child-specific assessment (see further para. 3.4). As a consequence article 37 CRC offers more protection than the ICCPR and should therefore prevail in states that have ratified both the ICCPR and CRC.385

The child-specific approach of article 37 CRC, compared to article 9 and 10 ICCPR, is furthermore visible for example in the right to legal and appropriate assistance to all children deprived of liberty, which goes further than the right to legal or other appropriate assistance that should be granted to children during the juvenile justice process (art. 14 ICCPR; article 40 CRC; see below), but also in article 37 (c) CRC, which embodies the right to be treated with humanity and respect for human dignity. In addition to this requirement, also recognized in article 10 (1) ICCPR as the first treaty provision in this regard, article 37 (c) CRC explicitly refers to the right to be treated in a manner that takes into account the needs of persons of his or her age. This represents a child-specific and developmental approach, including for example specialized facilities and staff (see further para. 3.5ff). It also implies, as explicitly acknowledged in article 37 (c) CRC as well, that the child should be separated from adults, unless not in his best interests, and he has the right to maintain contact with his family, save in exceptional circumstances. The separation issue can be found in article 10 ICCPR as well, albeit formulated in an absolute way, which has not received enthusiastic support particularly by Western (European) countries. The CRC provision leaves room for deviation if required by the child’s best interests (cf. art. 3 CRC). The second element, contact with the family, is one of the child-specific elements of article 37 CRC and has no equivalent in International Human Rights Law. The article 37 (c) CRC quality of treatment needs further elaboration in domestic law. Both the JDLs and Standard Minimum Rules, regarding article 10 (1) ICCPR, suggest more detail in domestic legislation. The CRC Committee urges States Parties to implement the JDLs in conjunction with the SMR and to incorporate them into national laws and regulations (GC No. 10, para. 88).

The JDLs have been drawn up specifically to provide for rules regarding deprivation of liberty of children, regardless of the context (a ‘one size fits all approach’ with some exceptions). It is the key set of legal standards safeguarding the quality of treatment as stipulated by article 37 (c) CRC, based on four principles: ‘Integration into the community’, ‘respect for the dignity of the juvenile’, ‘family contact’, and ‘the right to be treated fairly’. The SMR, although not designed for children, has retained its value concerning specific issues which are additional, more comprehensive and/or more detailed. This is particularly true

regarding the specific treatment that should be granted to pre-trial detainees, in light of the legal requirement that unconvicted and convicted persons should be segregated and treated differently (art. 10 (2) ICCPR). This requirement is recognized neither in the CRC, nor in the JDLs, but should – in light of article 41 CRC – be considered applicable to children deprived of their liberty in states that have ratified both the CRC and ICCPR.

Finally, some further remarks regarding the added value of the ICCPR beyond article 37 CRC should be made here. Although most of the provisions of article 9 and 10 ICCPR are embodied in article 37 CRC, the latter makes no explicit reference to the right to compensation in case of unlawful or arbitrary deprivation of liberty, as embodied in article 9 (5) ICCPR. Furthermore, article 37 CRC does not refer to a prompt bringing before a judge or other competent judicial authority (cf. art. 9 (3) ICCPR) or information on the reasons for arrest (cf. art. 9 (2) ICCPR). Information on charges is covered by article 40 (2) (b) (ii) CRC, rather than by article 37 CRC. However, in states that have ratified both the ICCPR and CRC, children are nevertheless entitled to these safeguards and compensation through article 41 CRC.

The ICCPR provisions provide also added value for the assessment of the implications of the provisions it shares with article 37 CRC. Due to the absence of an individual complaints procedure under the CRC, the jurisprudence of the HRC can offer significant guidance. In addition, the General Comments of the HRC can serve as framework of reference.

2.7.4 Provisions Especially Relevant to Individuals Deprived of Liberty (Category 2)

2.7.4.1 Introduction

This paragraph presents the provision of International Human Rights Law and Standards that are especially relevant to children deprived of their liberty (category 2). For all children deprived of liberty, whether within the context of juvenile justice or as the result of for example a measure of child protection or mental health care, the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment is of crucial importance. Therefore article 7 ICCPR, the CAT Convention and article 37 (a) CRC will be (briefly) discussed.

For children deprived of their liberty in the context of juvenile justice, various provisions in article 40 CRC are specifically relevant and will be highlighted
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386 As mentioned in para. 2.5.3 the Riyadh Guidelines is one of the three UN resolutions relevant to the administration of juvenile justice and deprivation of liberty. Although, the guidelines are of significance for deprivation of liberty in the sense that prevention of juvenile delinquency affects the use of deprivation of liberty in the juvenile justice context, it goes beyond the scope of this study to address it separately here.

387 There are various other forms of deprivation of liberty; see para. 3.2.

388 Furthermore, art. 7 prohibits in particular medical or scientific experimentation on a person without his free consent. Punishment implies a disciplinary nature, while treatment implies ‘an act or omission of an individual or one that can at least be attributed to her’; Nowak 2005, p. 159-160.

389 See also para. 2.7.3.2 for the relation between art. 10 and 7 ICCPR.

390 Joseph, Schultz & Castan argue that the distinctive line between the two provisions, as mentioned previously, ‘has been blurred in HRC jurisprudence’; Joseph, Schultz & Castan 2004, p. 280. Sometimes general conditions of detention have constituted a breach of article 7, despite its high threshold, and sometimes ‘special attacks of people’ have constituted violation of article 10 ICCPR; Joseph, Schultz & Castan 2004, p. 280. Joseph, Schultz & Castan argue, based on HRC Comm. No. 639/1995 (Walker and Richards v. Jamaica) that ‘article 10 also redresses personal attacks which fall short of article 7 severity.’; Joseph, Schultz & Castan 2004, p. 280. Nowak argues that the HRC jurisprudence inconsistencies are often caused by the fact that the HRC ‘is faced with the difficulty that violations of human dignity and personal integrity ultimately are able to be ascertained only on a case-by-case basis by weighing all the circumstances, including the subjective impressions of the person concerned’; Nowak 2005, p. 249-250. For more information about the HRC jurisprudence see Ibid., p. 246ff.
for human dignity than that within the meaning of art. 7.\textsuperscript{391} In other words the threshold of a violation of article 10 is lower than that of article 7.\textsuperscript{392}

Much can be said about article 7 ICCPR. Although it was not designed specifically for individuals deprived of liberty, this group of people has proven to be particularly vulnerable to abusive practices. History provides for examples of prisoners and detainees being subjected to the most (morally) reprehensible treatment. As mentioned before it was the atrocities and abusive practices against prisoners that led to a growing consciousness of the need for human rights standards specifically against this kind of heinous treatment and for this group of people in the 1970s and 1980s.

One treaty of particular importance is the 1984 CAT. While article 7 ICCPR prohibits torture, it does not provide for a definition of torture. The CAT does and its definition, although it is not legally binding under the ICCPR, is widely accepted\textsuperscript{393} and can therefore serve as point of reference in interpreting article 7 ICCPR (and art. 37 (a) CRC, addressed below). Article 1 CAT defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

Article 7 ICCPR prohibits different kinds of heinous treatment or punishment: torture and cruel, inhuman or degrading treatment or punishment. According to Nowak there is a gradual difference between the different forms, ‘from “mere” degrading treatment or punishment to that which is inhuman and cruel, up to torture as the most reprehensible form’.\textsuperscript{394} These forms have not been defined sharply, although for example European jurisprudence provides more guidance (see further para. 3.6).

\textsuperscript{391} Nowak 2005, p. 245. According to Joseph, Schultz & Castan this has been confirmed by the HRC Comm. No. 493/1992 (Griffin v. Spain). This case ‘concerned complaints about the general conditions of detention. Perhaps article 10 applies when conditions of detention are generally poor, while article 7 applies where the [petitioner] is specifically treated worse than others’: Joseph, Schultz & Castan 2004, p. 278 with further reference HRC Comm. No. 512/1992 (Pinto v. Trinidad and Tobago).
\textsuperscript{392} Nowak 2005, p. 172.
\textsuperscript{393} Joseph, Schultz & Castan 2004, p. 196.
\textsuperscript{394} Nowak 2005, p. 160.
In sum, article 7 ICCPR embodies one of the most fundamental human rights and can be considered an absolute right; no limitations are allowed and no derogation is permitted (art. 4 (2) ICCPR). It has many equivalents in other international and regional human rights treaties, like the ACHR, ECHR, CRC and particularly CAT. Although it was not designed for persons deprived of liberty, it is of great importance for this group. It has different kinds of consequences (see para. 3.6), such as implications for the treatment of persons deprived of their liberty, including the prohibition of corporal punishment, for the conditions of detention, including the use of solitary confinement and detention incommunicado, and States Parties’ obligation concerning the abolishment of heinous treatment of prisoners and detainees.

Although children are not mentioned in particular, article 24 ICCPR calls for a more protective approach regarding children.

B. Article 37 (a) CRC
Article 37 (a) CRC also prohibits torture or other cruel, inhuman or degrading treatment and punishment and is based on article 7 ICCPR. This part of article 37 CRC did not lead to much discussion in the drafting process. The drafters of the CRC used the same wording. Article 7 ICCPR also prohibits medical or scientific experimentation on people without their free consent. This prohibition was discussed during the drafting of the CRC, under drafting article 12bis regarding health care (now art. 24 CRC), but was ultimately not included in the CRC. However, this may be covered by article 41 CRC (for States Parties to the ICCPR) and/or by article 36 CRC providing that ‘States Parties shall protect the child against all forms of exploitations prejudicial to any aspects of the child’s welfare’.

The CRC provision provides little guidance regarding the potential specific child rights implications of the prohibition of torture and other forms of ill-treatment. Article 37 CRC must nevertheless be interpreted in light of the children’s rights framework, which may lead to different interpretations concerning for example the threshold of torture or specific issues like corporal punishment, solitary confinement or conditions of detention (see para. 3.6).

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395 Schabas & Sax 2006, p. 8. Contrary to the part that prohibits capital punishment and life imprisonment without the possibility of release (see para. 2.7.3.4). For more information on the drafting of art. 37 (a) CRC see Detrick 1992, p. 458ff and Schabas & Sax 2006, p.7-10.
396 There are a few differences. Besides the fact that the child is the addressee it is interesting that art. 37 (a) CRC refers to torture as a form of cruel, inhuman or degrading treatment. Unlike art. 7 ICCPR, it uses the wording: ‘torture or other [Italic – it] cruel, inhuman or degrading treatment or punishment’ which is a tiny difference which confirms the gradual differences between the different forms of prohibited treatment or punishment.
397 Detrick 1992, p. 355-358. Cantwell considers this as a lacuna; Cantwell 1992, p. 27,
2.7.4.3 Fair Trial – Administration of Juvenile Justice

A. Article 14 ICCPR
Article 14 ICCPR contains the right to a fair trial and embodies everyone’s right to be treated equally before courts and tribunals.\(^{399}\) It has implications for instance for individuals in (pre-trial) detention. According to article 14 (2) ICCPR ‘[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. This presumption of innocence, one of the key principles of a fair trial, also affects the treatment of an accused person in pre-trial detention. The segregation between pre-trial detainees and offenders sentenced to imprisonment, enshrined in article 10 (2) ICCPR, is prompted by the presumption of innocence.

Also of relevance is article 14 (3) (c) ICCPR’s minimum guarantee that everyone, who is facing criminal charges, shall be entitled ‘[t]o be tried without undue delay’. This principle is especially relevant to pre-trial detainees, because it affects the length of the pre-trial detention.

Article 14 (4) ICCPR makes special reference to juvenile persons and provides that ‘[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and desirability of promoting their rehabilitation’.\(^{400}\) This mirrors article 10 (3) concerning special detention facilities. Article 24 ICCPR ‘subsumes the article 14 (4) guarantee’.\(^{401}\)

B. Article 40 CRC – Administration of Juvenile Justice
Article 40 CRC contains standards for the administration of juvenile justice.\(^ {402}\) Deprivation of liberty as part of the juvenile justice system (arrest, detention and imprisonment) should serve the objectives this system, as provided for by article 40 (1) CRC. This provision stipulates that States Parties must ‘recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for human rights and


\(^{400}\) This was the first international treaty provision placing States Parties under the obligation to distinguish regarding the justice system between juveniles and adults; Detrick 1999, p. 679.

\(^{401}\) Joseph, Schultz & Castan 2004, p. 452. Cf. HRC General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 (HRC GC No. 32). This recently adopted General Comment pays more specific attention to the position of juveniles under art. 14 ICCPR (paras. 42ff), than its predecessor: HRC General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984 (HRC GC No. 13). It refers to provisions of art. 40 CRC. It provides that ‘[[]juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection’ (para. 42), and calls for the setting of a MACR (para. 43). The HRC does not set a specific age.

\(^{402}\) It is founded on art. 14 (and 15) ICCPR and significantly influenced by the Beijing Rules (see below); Detrick 1999, p. 681.
fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

Deprivation of liberty of children as part of the juvenile justice system must, in other words, have the child’s reintegration as the primary objective. Consequently, the child must be treated, and this includes the treatment during deprivation of liberty, in a way that takes into account the age of the child, promotes his sense of dignity and worth, and that reinforces his respect for human rights and fundamental freedoms of others. This can be considered the pedagogical character of the juvenile justice system, representing the combination of a reaction to (alleged) criminal behaviour and an attempt to provide the child with guidance for the future in order to avoid recidivism.\footnote{Cf Detrick 1999, p. 682-683. For more detailed analyses on the implications of art. 40 CRC see, e.g. Van Bueren 1995, p. 169-205, Detrick 1999, p. 674-711 and Van Bueren 2006. See also GC No. 10.}

The other requirements of article 40 CRC can be of special relevance for children deprived of their liberty as well, most of which are similar to those of article 14 ICCPR. Article 40 (2) (b) contains a number of guarantees which should be ensured as a minimum. Like article 14 ICCPR, article 40 CRC contains the presumption of innocence, relevant to the treatment of children in pre-trial detention (art. 40 (2) (b) (i) CRC). In addition, article 40 (2) (b) (iii) CRC stipulates that the child is entitled to ‘have the [criminal case] determined without delay’, which affects the length of the pre-trial detention. According to the CRC Committee ‘without delay’ is stronger than ‘without undue delay’, as stipulated by article 14 ICCPR, and requires a more speedy process (GC No. 10, para. 51).

Furthermore, if the child is arrested, the child must be ‘informed promptly and directly\footnote{According to the CRC Committee ‘prompt’ means ‘as soon as possible’ (i.e. ‘when the prosecutor or judge initially takes procedural steps against the child’ (GC No. 10, para. 47)} of the charges against him or her’. If appropriate this must happen ‘through his or her parents or legal guardians’. However, this is only a duty to inform them of the charges and does not entail a requirement of informing the parents of their child’s arrest.\footnote{Van Bueren 2006, p. 14; moreover, parents arguably are only mentioned here as an intermediary by the use of the word ‘through’. The appropriateness depends on the best interests of the child; \textit{Ibid.}, p. 15.} Along with this ‘derived’ duty to inform the parents, the duty of article 9 (4) CRC to inform the parents of an arrest by the State is made dependent on a request.\footnote{This provision is meant to prevent disappearances; \textit{Ibid.}, p. 14.} Van Bueren argues that because of the (general) duty to inform parents under article 9 (4) CRC (see para. 2.7.4.4) and the limited duty to inform under article 40 (2) (b) (ii) CRC there may be ‘a time gap’ between the operation of both provisions, which may lead to unwanted practices, like the
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disappearance of the child after arrest, which had not been the intention of the drafters of the CRC.\textsuperscript{407}

Furthermore, a child arrested is entitled to legal or other appropriate assistance (art. 40 (2)(b)(ii) CRC)\textsuperscript{408} and his privacy must be ‘fully respected at all stages of the proceedings’ (art. 40 (2) (b) (vii) CRC; art. 16 CRC). According to the CRC Committee this includes deprivation of liberty after conviction (GC No. 10, para. 64).

Article 40 (3) CRC furthers the creation of a separate and special juvenile justice system,\textsuperscript{409} ‘the establishment of laws, procedures, authorities and institutions’ should be promoted for this aim.\textsuperscript{410} This also has implications for the institutions in which children are detained or imprisoned. These should be specifically designed for children and meet their specific requirements, which includes appropriate and adequate staff.\textsuperscript{411} The same applies to the establishment of special laws and procedures.

One particular aspect of a separate justice system for children is the establishment of a minimum age of criminal responsibility (MACR). States Parties must ‘seek to promote’ the establishment of a MACR, which as a consequence serves as the minimum age for deprivation of liberty under the juvenile justice system.\textsuperscript{412} The CRC does not provide for a minimum age, but the CRC Committee has set the minimum age limit at twelve years of age as the absolute minimum (GC No. 10, para. 32; see further para. 3.3).

The second more specific aspect is the use of diversion as proclaimed by article 40 (3) (b) CRC, which may have implications for the use of arrest, detention or imprisonment as a measure of last resort (art. 37 (b) CRC).\textsuperscript{413} In addition, paragraph 4 of article 40 provides that States Parties have the positive obligation ‘to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence’\textsuperscript{414}, which must be

\begin{footnotes}
\footnote{407}{Van Bueren 2006, p. 14-15. Cf Beijing Rules that recommend immediate notification of parents and guardians (not limited to legal guardians) after a child’s arrest.}
\footnote{408}{Cf art. 37 (d) CRC but note that art. 40 CRC provides for an entitlement to either legal or other appropriate assistance, while art. 37 CRC grants both; see further para. 3.4.}
\footnote{409}{Van Bueren speaks of ‘child justice’. This may be inspired by developments in South Africa where the South African Law Commission drafted a new ‘child justice bill’ (see also chapter 1). Dohrn also argues for discarding the term juvenile justice to promote a child-specific and rights-based approach; Dohrn 2007, p. 32-33.}
\footnote{410}{Cf art. 5 (5) ACHR.}
\footnote{411}{Cf rule 10.3 Beijing Rules.}
\footnote{412}{As mentioned above rule 11 (a) JDLS calls upon States to set a minimum age for deprivation of liberty.}
\footnote{413}{Cf Van Bueren 2006, p. 27-28.}
\footnote{414}{This combination represents two important aspects of the juvenile justice approach of the CRC; the well-being of the child together with the principle of proportionality; cf art. 40 (1) CRC; see further para. 3.3.}
\end{footnotes}
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fostered by ‘[a] variety of dispositions, such as care, guidance and supervision orders; counseling, probation; foster care; education and vocational training programmes and other alternatives to institutional care’. States Parties must make a variety of alternatives to institutional care available, which can also contribute to the implementation of the last resort principle of article 37 (b) CRC.

Thus, article 40 CRC elaborates further on the foundation of the fair trial principles embodied in article 14 ICCPR and adds a number of child-specific elements for the administration of juvenile justice, some of which are of special relevance for deprivation of liberty in the context of juvenile justice.\(^{415}\) The specific principles of deprivation of liberty of children in the context of juvenile justice will be addressed in more detail in paragraph 3.3.

C. UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

Detailed rules regarding the administration of juvenile justice can be found in the 1985 Beijing Rules, which was the first child-specific instrument setting standards for the administration of juvenile justice. According to Van Bueren the Beijing Rules ‘provide, as intended, a framework within which a national juvenile justice system should operate and a model for states of a fair and human response to juveniles who may find themselves in conflict with the law.’\(^{416}\) It significantly influenced the drafting of article 40 CRC.\(^{417}\)

Some of the Beijing Rules have been incorporated into article 40 CRC and gained the status of hard legal provisions. In addition, the rules contribute to the interpretation, substantiation and implementation of the CRC provisions\(^{418}\) and also of article 10 ICCPR, since the HRC has explicitly referred to the Beijing Rules as relevant to the treatment of juveniles: ‘States should give relevant information

\(^{415}\) According to Van Bueren there is a tension between a focus on the welfare of the child and dependency upon lawyers in the traditional juvenile justice system. As a result of this, ‘[a]rticle 40 does not reiterate all the legal protections found in other treaties, particularly those found in the [ICCPR]’; Van Bueren 2006, p. 8.

\(^{416}\) Van Bueren 1995, p. 170. Furthermore, Van Bueren argues that ‘the [General Assembly] is seeking to overcome the handicap of the standards being adopted as recommendatory by advising on methods of implementation’; \textit{Ibid.}, p. 170-171. Member States are, e.g. invited to regularly inform the UN Secretary General on the implementation of the Beijing Rules (GA Res. 40/33, 29 November 1985 (96th Plenary Meeting), under 7). Today this reporting should be part of the CRC reports. Furthermore, the UN Secretary General and Member States have been requested ‘to provide the necessary resources to ensure the successful implementation of the Beijing Rules; in particular in the areas of recruitment, training and exchange of personnel, research and evaluation, and the development to new alternatives to institutionalization’ (GA Res. 40/33, 29 November 1985 (96th Plenary Meeting), under 11).

\(^{417}\) Detrick 1999, p. 681.

\(^{418}\) Together with the JDLs and Riyadh Guidelines, it forms part of the three relevant UN resolutions for the administration of juvenile justice and deprivation of liberty; \textit{cf} e.g. GC No. 10, para. 4.
about the age groups of persons treated as juveniles. In that regard, States Parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987) [sic].[^419]

The Beijing Rules consist of six parts: general principles (part one), investigation and prosecution (part two), adjudication and disposition (part three), non-institutional treatment (part four), institutional treatment (part five) and research, planning, policy formulation and evaluation (part six). In the Beijing Rules, each (set of) rule(s) is accompanied by a commentary, which provides a clarification of the specific rule(s). Many aspects of the administration of juvenile justice have (indirect) implications for deprivation of liberty of children in that system. The Beijing Rules also contain some rules with direct implications for arrest, detention or imprisonment of children. The first rule that can be mentioned here is rule 13 on ‘detention pending trial’. This rule aims at combating the ‘dangers to juveniles of “criminal contamination” while in detention pending trial’. According to the commentary to rule 13, these dangers must not be underestimated. Among others, rule 13 provides that pre-trial detention should be used only as a measure of last resort (‘[w]henever possible, detention pending trial shall be replaced by alternatives measures, such as close supervision, intensive care or placement with a family or in an educational setting or home’[^420]) and for the shortest possible period of time. As mentioned briefly earlier above, this time element conflicts with article 37 (b) CRC, which requires the use of arrest, detention or imprisonment for the shortest appropriate period of time. As a treaty provision, the latter should prevail (see further para. 3.4). Rule 19 provides that institutional placement as a disposition must ‘always be a disposition of last resort and for the minimum necessary period’, which seems more congruent with article 37 CRC.

Rule 13 furthermore provides that juveniles must be kept separately from adults, and adds that they must ‘be detained in a separate institution or in a separate part of an institution also holding adults’ (cf art. 37 (c) CRC; art. 10 (2) (b) ICCPR).

Finally, it embodies provisions regarding the conditions of deprivation of liberty. First, specific reference has been made to the Standard Minimum Rules. Juvenile pre-trial detainees must be ‘entitled to all rights and guarantees of the Standard Minimum Rules’ and subsequently they must receive ‘care, protection and all necessary assistance (…) that they may require in view of their age, sex and personality’.[^421] Furthermore, rule 18 stresses that institutionalization should be

[^419]: HRC GC No. 21, para. 13.
[^420]: Which may result in less far-reaching forms of deprivation of liberty; see para. 3.2.
[^421]: The commentary explicitly states that ‘[j]uveniles under detention pending trial are entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights, especially article 9 and 10 (2) (b) and (3)’. 

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Avoided ‘to the greatest extent possible’ and therefore ‘[a] large variety of disposition measures’ must be made available, and provides for some examples, such as probation and community service orders. As mentioned above, rule 19 provides that the institutional placement as a disposition must always be of last resort and for the minimum necessary period. In light of this, the Beijing Rules contain one part specifically designed for non-institutional treatment (part four). However, if institutional treatment should be used – part five – rules 26 and 27, respectively, provide for the objectives of institutional treatment and the applicability of the Standard Minimum Rules, ‘as far as relevant to the treatment of juvenile offenders in institutions’. \(^{422}\) The other rules of part five concentrate on conditional release and semi-institutional arrangements in order to reintegrate juveniles properly into society.

2.7.4.4 Deprivation of Liberty of Children outside the Juvenile Justice Context

Regarding deprivation of liberty of children outside the juvenile justice context, the CRC contains three provisions that are of particular relevance, namely: articles 9, 20 and 25. A few remarks regarding these provisions will be made. \(^{423}\)

A. Article 9 CRC – Separation from Parents and Parental Care

Although the primary responsibility for the upbringing and development of the child is attributed to the child’s parents or legal guardians (art. 18 CRC), and article 9 (1) CRC represents the principle that a child must not be separated from his parents against his will, \(^{424}\) the child’s best interests may nevertheless require separation. Article 9 (1) CRC provides for a legal basis to separate a child from his parents, provided that the competent authorities (e.g. a child protection board or authority) determine that it is in the child’s best interests and under the condition of judicial review. \(^{425}\) A few examples that legitimize separation are mentioned

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422 Rule 27.1 also refers to the Standard Minimum Rules as being applicable to children deprived of liberty.
423 Yet one of the general characteristics of deprivation of liberty, regardless of the context, is that the child is deprived of his family (and parents). This means that art. 9 CRC is relevant to deprivation of liberty in the context of juvenile justice; see further para. 3.2.4.
424 States Parties are under the obligation to ensure that a child shall not be separated from its parents against its will. This also has implications for children of imprisoned parents; an issue that does not fall within the scope of this study; cf Wolleswinkel 2002 and Doek 2006, p. 23-24 and 28.
425 Cf Doek 2006, p. 21ff. There are only two human rights treaties that explicitly contain provisions regarding this issue: the CRC and ACRWC; see Doek 2006, p. 17-18 for an analysis of differences between both treaties in this regard. In addition, the other conventions may have related implications. According to the HRC the child’s entitlement to measures of protection (art. 24 ICCPR) implies that a child may be separated from his parents when circumstances so require (HRC GC No. 17, para. 6). Under the ACHR a young child should not be separated, but only in exceptional circumstances, recognized judicially (art. 19 ACHR; art. 16 of the Protocol of San Salvador). Finally, article 8 ECHR protects the child’s right to respect for family life. The child’s
explicitly. The first and relevant example in this regard is ‘abuse or neglect of the child by the parent’.

Taking into account the positioning of article 9 in the CRC, it must be considered one of the general CRC provisions dealing with the child’s and his parents’ family life, and a State Party’s responsibilities in this regard. It covers all separations, including those deriving from deprivation of liberty, regardless of legal basis, provided that there is one. However, taking into account the presence of specific provisions for specific groups of children, like those within the juvenile justice system (art. 40 CRC) or immigrant children (art. 22 CRC), and the explicit requirement of the best interests of the child as the only permitted ground for separation, article 9 CRC has been designed primarily for the interventions within the private or civil law system, such as child protection measures. It is arguable that deprivation of liberty in the context of juvenile justice also falls under the scope of article 9 CRC, because it implies the child’s separation from his parents (and/or family). This point of view is supported by the fact that article 9 (4), regulating the duty of disclosure, explicitly refers to detention and imprisonment as State actions resulting in separation.

A procedural safeguard is laid down in article 9 (2) CRC, which stipulates that ‘[i]n any proceedings pursuant to [art. 9 (1)] all interested parties shall be given an opportunity to participate in the proceedings and make their views known’ (cf art. 12 CRC).

If separated, the child’s right to maintain ‘personal relations and direct contacts with both parents on a regular basis’ must be respected. The only exception allowed is limitation or denial of contact for the child’s best interests. This provision has an equivalent in article 37 (c) CRC. Article 9 adds however that the child’s right to maintain contact with his family includes contact ‘on a regular basis’. What this means is not entirely clear, however it prevents States Parties from guaranteeing this right in a ‘hollow’ way. On a regular basis should mean that the child is able to maintain contact in a constructive manner that is in his best interests, including his eventual return to society and to his family. Arguably, it also means that the child’s separation should always be considered as a temporary measure and the primary objective should be the return of the child to his parents, unless this is not considered to be in his best interests.

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426 Art. 9 (1) aims furthermore at the situation in which ‘the parents are living separately and a decision must be made as to the child’s place of residence’, e.g. in the situation of divorce and custody.
Finally, when a child is separated from its parents, due to *inter alia* detention or imprisonment ordered by the State Party’s government, article 9 (4) places States Parties under the obligation to provide the parents with essential information ‘concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child’.428 This information should be provided upon request and works vice versa, which implies that a child can instigate such a request as, if appropriate, can another member of the family. This request is not permitted to lead to ‘adverse consequences for the person(s) concerned’.430

B. Article 20 CRC – Deprivation of Family Environment and Alternative Care

If a child is (temporarily) deprived of his family environment or the child’s best interests require him to be removed from his family environment, article 20 CRC stipulates that he is entitled to ‘special protection and assistance provided by the State’.431 These terms have been elucidated in the following paragraphs of article 20. First, States Parties must ‘ensure alternative care’ for such a child, ‘in accordance with their national laws’. This alternative care may ‘if necessary’ include ‘placement in suitable institutions for the care of children’, which could mean, although this has not been mentioned explicitly, that the alternative care leads to placement in a (closed) institution (i.e. resulting in deprivation of liberty; art. 20 (3) CRC). ‘If necessary’ bears a resemblance to the last resort principle of article 37 CRC and calls for the use of alternatives. Some options are mentioned explicitly: foster placement, *Kafalah* under Islamic law and adoption. It implies that placement in suitable institutions should only be used if other more suitable (lighter) options have failed or are anticipated to do so in the particular circumstances. Thus, States Parties are under the obligation to have other options.

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427 These forms of separation are mentioned explicitly, together with exile, deportation or death, the latter includes ‘death arising from any cause while the person is in the custody of the State’.

428 This provision fits in respect to the child’s and parents’ family life; it is also meant to prevent disappearances of children; Van Bueren 2006, p. 14. Cf art. 37 (c) CRC and rule 56f JDLs regarding the notification of parents (and child vice versa) in the case of illness or death during deprivation of liberty. Other human rights treaties do not contain a similar provision; Detrick 1999, p. 179.

429 Which prevents this provision from being a hard positive obligation upon States Parties; Cf e.g. art. 40 (2) (b) (ii) CRC; Van Bueren 2006, p. 14.

430 Cf Detrick 2006 for a more detailed analysis of art. 9 CRC. Cf art. 23 jo. 24 ICCPR, regarding which the HRC has stated that ‘in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require’ (HRC GC No. 17, para. 6). If children are deprived of their family environment the State Party should provide for ‘special measures of protection in order to enable them to develop in conditions that most closely resemble those characterizing the family environment’ (HRC GC No. 17, para 6).


432 Cf Art. 46 of the Riyadh Guidelines.
available; ‘If necessary’ does certainly not refer to ‘if no alternative is available, at all’.433

Article 20 (3) CRC adds that ‘[w]hen considering solutions, due regard shall be paid to the desirability of continuity of the child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’.434 The requirement of continuity of the child’s upbringing has implications for the nature of the alternative care. The appropriateness is inter alia dependent on the possibility of continuing the child’s upbringing in the best possible way. In addition, it implies that the alternative care itself must foster the child’s upbringing. Deprivation of liberty, as a form of alternative care, should serve this goal as well, which implies for example that the child should be able to go to school, keep in touch with his family, friends and relatives, provided that this is in his best interests, and develop his talents. The institution of alternative care should be equipped with facilities and personnel which serve the objective of the continuity of the child’s upbringing.435

C. Article 25 CRC – Periodic Review

If a child is placed in alternative care, article 25 CRC stipulates that ‘States Parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances to his or her placement’.436 This provision embodies the right to periodic review of the treatment a child receives during alternative care. In addition, all other circumstances relevant to the placement should also be reviewed.

Article 25 CRC does not provide much guidance regarding its implications or its scope. Nor does it clarify which authority should be competent to conduct the review. The review arguably includes the content of the treatment provided to the child and all relevant circumstances for the judgment whether the placement should continue or whether it should be terminated or adjusted. This implies that when the

433 See, e.g. the CRC Committee’s observations regarding the Netherlands. The Committee expressed its worries about the lack of alternatives to closed institutionalization of children in need of care and recommended expansion of the alternatives and other supportive services to these children; CRC/C/15/add. 227, para. 41-42 and earlier CRC/C/15/add. 114.

434 Regarding the latter part it is interesting to note that the Dutch legislator has deleted a comparable provision from the Dutch Civil Code, stressing that the child’s religious background should be taken into account when placing him outside its family environment. One could argue that based on art. 20 (3) CRC every form of alternative care must take into account the child’s background.

435 The Dutch practice that children in need of urgent alternative care are placed in a closed institution on a temporary basis can be considered to be in conformity with art. 20 CRC. However, many of these children are waiting for a subsequent placement in a treatment centre. If the waiting time lasts too long, which does occur frequently, the continuity of the child’s upbringing may be in danger, which can violate art. 20 CRC; cf Van Unen 1998 and Bruning, Liefgaard & Volf 2004a, p. 208.

review takes place the child or his representative, his family or the provider of alternative care can submit all relevant circumstances to the competent authorities. Sources of information can be various as well (treatment plans, school reports, etc.). The wording ‘periodic’ seems to imply that the review should take place in a certain (fixed) time frame, although there is no guidance regarding the frequency. It does, however, not deprive the child (or his family) to submit a request for review if he finds reason to do so.

In this regard it is interesting to take a look at the relationship of article 25 and article 37 (d) CRC, which is applicable to all children deprived of their liberty (i.e. not limited to the juvenile justice context) and provides for the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority (see para. 2.7.3.4). Are these provisions redundant or complementary? They seem redundant in the sense that they both contain entitlements regarding the actual placement (i.e. deprivation of liberty). Still the differences are worth mentioning and contribute to the belief that the provisions can be complementary.

First, article 25 CRC’s periodic review includes a review of the content of the treatment programme, while article 37 (d)’s right to challenge legality merely affects the legality of the deprivation of liberty. Another difference of significance affects the issue, mentioned above, of periodic review *ipso jure* or upon request; article 25 CRC seems to imply both, while article 37 (d) implies that the child must ‘challenge’ (i.e. petition) the legality of his deprivation of liberty. A third difference stressing that both provisions are complementary, is that article 37 (d) CRC covers all forms of deprivation of liberty, while article 25 CRC seems to be limited to placements (and subsequent treatment) as forms of alternative care (art. 20 CRC), particularly when one takes into account the positioning of article 25 (i.e. close to art. 20 CRC).

The final and fourth difference affects the authority competent to conduct the review. Article 37 (d) CRC makes explicit reference to a judge or other competent, independent and impartial authority. Article 25 CRC does explicitly provide for a similar high standard of competence, independency and impartiality, which could be explained by the fact that article 37 (d) CRC exclusively focuses on deprivation of liberty, which justifies high demands in this regard, while treatment or placement under article 25 CRC not necessarily implies deprivation of liberty. Still, article 25 CRC could have provided for more clarity. A certain impartiality and independence, either directly or through an appeal procedure after a first review done by the authority responsible for the treatment or placement itself, would be favourable.

437 Which does not rule out that the child is offered occasions during which he can exercise his right (e.g. during court hearings in the pre-trial phase of the justice process).

438 One could wonder whether art. 25 CRC covers other placements and treatment, e.g. in the context of juvenile justice, as well. The answer to this question is not easy; cf e.g. para. 3.4.
2.7.5 Conclusion

This paragraph has outlined the relevant provisions of International Human Rights Law and Standards and highlighted their main characteristics and backgrounds. The overall point of departure is that children may be deprived of their liberty, but they remain in principle entitled to all rights under the International Human Rights Framework. Since children are concerned, the CRC framework contains the provisions that are of primary relevance, containing a holistic recognition of the child entitlements as a human being in development. The CRC has been built upon the foundation of the ICCPR and ICESCR, which both contain a notion that children deserve special attention, but lacks a child rights approach.

Two categories of relevant provisions can be distinguished. The first category contains specific provisions that have been designed specifically for deprivation of liberty of children and enshrine legal requirements for the decision leading to deprivation of liberty and (general and detailed) requirements for the (quality of) treatment of children deprived of their liberty. The core provision in this regard is article 37 CRC, more specifically paragraph (b), (c) and (d), which are founded on articles 9 and 10 ICCPR. These hard binding provisions of Human Rights Law are supplemented by two sets of International Human Rights Standards: the JDLs and Standard Minimum Rules, respectively (for more specific concluding remarks see para. 2.7.3.6).

The second category consists of (specific) provisions with implications for all forms of deprivation of liberty of children, although they are not (exclusively) designed for this issue. This category includes the prohibition of torture and other forms of ill-treatment (art. 37 (a) CRC; art. 7 ICCPR), which is especially relevant to the protection of the physical integrity and dignity of children deprived of their liberty. Also included are human rights provisions containing the right to fair trial (art. 14 ICCPR; art. 40 CRC). These principles have implications for the use of deprivation of liberty as part of the justice system. For example, the presumption of innocence recognized in both provisions has implications for the treatment of children in pre-trial detention (and also forms the foundation of the separation of unconvicted and convicted detainees; art. 10 (2) ICCPR). There are no relevant provisions of article 14 ICCPR that cannot be found in article 40 CRC. In addition, the child-specific provision elaborates further on the foundation of fair trial principles and adds specific elements for the administration of juvenile justice, some of which are of particular relevance for deprivation of liberty in the context of juvenile justice (e.g. the MACR, objectives of juvenile justice and specific position of the child’s family). Article 40 CRC should be used in conjunction with the comprehensive Beijing Rules. With further guidance provided by the CRC Committee (GC No. 10), the CRC framework represents a comprehensive, juvenile justice approach,
based on the principles of fair trial, with implications for deprivation of liberty of children under the juvenile justice system.

Finally, there are three CRC provisions with implications primarily for deprivation of liberty outside the context of juvenile justice, as a form of alternative care (arts. 9, 20 and 25 CRC). Nevertheless, articles 9 and 25 can have implications for the juvenile justice system, such as the duty to provide both child and parents with information on each other’s whereabouts, when a child is separated from his parents due to arrest, detention or imprisonment (art. 9 (4) CRC). In addition, the right to periodic review of the child’s placement and/or treatment could have implications if the child’s treatment has been ordered as a disposition under penal law (art. 25 CRC). Furthermore, article 20 (3) CRC’s requirement of continuity of the child’s upbringing, although not specifically applicable to the juvenile justice system, represents a notion that is particularly relevant to the realization of the objectives of that system (art. 40 (1) CRC).

The development of International Human Rights Law is a dynamic process which becomes particularly apparent if one observes the development of the relevant provisions described above and their interdependence. The CRC framework has clearly developed the ICCPR (and ICESCR) provisions further and has made International Human Rights Law more appropriate for children, more specifically for children deprived of their liberty.

**2.8 RELEVANT PROVISIONS OF REGIONAL HUMAN RIGHTS INSTRUMENTS**

*2.8.1 Introduction*

This paragraph will further examine the relevant provisions of regional human rights instruments. Although the main focus of this study is on the implications of International (UN) Human Rights Law and Standards, the regional legal framework is of relevance, because its development shows many similarities with the international legal framework regarding time lines, main principles and content. The (substantive) differences between the regional instruments, separately and in comparison to the international instruments, are not that significant; on the contrary there are many similarities. The value of the regional human rights framework is that it can provide information and guidelines regarding the interpretation and implications of shared principles and provisions. This is particularly true for the European and Inter-American systems of human rights in which the European and Inter-American Human Rights Courts and Commissions have been responsible for
the development of significant jurisprudence.\textsuperscript{439} In addition, in the European region a few relevant non-treaty instruments have been developed, which are of significance for the implementation of human rights for individuals deprived of their liberty: the CPT standards and European Prison Rules.

At the same time it is important to stress that most of the regional human rights instruments are not designed for children specifically. This does not make them insignificant, but points out that they cannot compete in this regard with the instruments of the CRC framework.

Like International Human Rights Law and Standards, the point of departure regarding individuals deprived of their liberty in each region is that they remain in principle entitled to all human rights and fundamental freedoms (see para. 2.5.2.2). Consequently, all general human rights provisions of the regional treaties are in principle applicable. In addition, there are provisions that can be categorized as directly applicable (category 1) or especially relevant (category 2) for individuals, including children, deprived of their liberty (see para. 2.7). This paragraph (briefly) examines the relevant provisions belonging to both categories separately per region, starting with the European region, followed successively by the Inter-American and African regions.

2.8.2 European Human Rights Provisions

2.8.2.1 Article 5 ECHR

The key provision of the ECHR regarding deprivation of liberty of individuals, including children (‘minors’), is article 5. This ‘category 1 provision’ embodies the fundamental right to liberty of person and provides for an exhaustive list of permitted legal grounds for limitation, resulting in deprivation of liberty. \textit{Inter alia}, the grounds for deprivation of liberty are: imprisonment after a court conviction (para. (1)(a)), pre-trial detention (para. (1)(c)) and detention of minors for educational purposes (para. (1)(d)).\textsuperscript{440} No other international or regional human rights instruments contain a similar exhaustive list. They generally prohibit unlawful or arbitrary deprivation of liberty, which leaves it to the States Parties’ discretion to provide for legal bases for deprivation of liberty in domestic statutory

\textsuperscript{439} In addition, the European and Inter-American conventions (and American declaration) are older than the ICESCR and ICCPR. Regional instruments are also closer to legal systems at the domestic level than international instruments, which can be of significance for their domestic ‘acceptance’. Moreover, both the ECHR and Inter-American Court tend to use the children’s rights framework; see, e.g. Kilkelly 1999 and Dohrn 2006.

\textsuperscript{440} Art. 5 ECHR also recognizes forms of deprivation of liberty related to (mental) health issues (para. (1)(e)) or immigration issues (para. (1)(f)).
law. In addition, the ECtHR has developed jurisprudence regarding the question what constitutes deprivation of liberty. The definition of deprivation of liberty is relevant to the further protection of individuals deprived of their liberty under article 5 ECHR. Paragraphs 2ff provide for legal safeguards such as prompt information to anyone who is arrested about the reasons for arrest and charges against him, if any, or the right to challenge the legality of the deprivation of liberty. Other procedural rights are the rights to be brought before a magistrate promptly and to be tried within a reasonable time or to be released. Article 5 (5) ECHR, finally, embodies the right to compensation if his rights under article 5 ECHR are violated.

Contrary to the ICCPR (art. 10) and CRC (art. 37 (c)) the ECHR omits any explicit reference to the right of everyone deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person. Nevertheless, both the CPT and Council of Europe have addressed the treatment of individuals deprived of liberty and conditions of deprivation of liberty in the CPT standards and European Prison Rules respectively (see further below). In addition, the ECtHR has developed positive obligations in this regard under article 3 ECHR (see below).

In addition, the only explicit reference to children in this regard can be found in article 5 (1) (d) ECHR, which permits deprivation of liberty for educational purposes and if necessary in order to bring the child before the competent authority. These are additional grounds for deprivation of liberty regarding minors, since they are not excluded from being deprived of liberty legally under both article 5 (1) (a) and (1) (c) – imprisonment and pre-trial detention respectively – as part of the (juvenile) criminal justice system.

Three other relevant provisions are articles 3, 6 and 8 ECHR. All could be categorized under the second category of provisions of special relevance for deprivation of liberty of individuals, including children.

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441 Cf e.g. art. 37 (b) CRC and art. 9 ICCPR. See also art. 7 ECHR embodying the principle that no one shall be punished (and, e.g. sentenced to imprisonment) for a fact which did not constitute a criminal offence by (inter)national law at the time it was committed (nullum crimen and nulla poena sine lege).
2.8.2.2 Article 3 ECHR and CPT Standards

Article 3 ECHR prohibits torture and inhuman or degrading treatment or punishment.\textsuperscript{444} The ECtHR’s jurisprudence has resulted in information and guidance on the definitions of torture on the one hand and inhuman or degrading treatment or punishment on the other.\textsuperscript{445} In addition, a number of positive obligations have been acknowledged by the ECtHR, including obligations regarding the conditions of detention, since poor conditions can lead to violation of article 3 ECHR, and safeguarding the (physical) protection of vulnerable persons, such as (young) children against ill-treatment by others.\textsuperscript{446}

Like the UN and OAS, the Council of Europe adopted a separate anti-torture convention in the mid-1980s. The 1987 European Convention for the Prevention of Torture elaborates more on the (implications) of the prohibition of torture and inhuman or degrading treatment or punishment. It established the CPT (art. 1), which has become influential.\textsuperscript{447}

As mentioned in paragraph 2.5.2.2, the CPT’s primary objective is to monitor the treatment of individuals deprived of their liberty, by means of country visits, in order to protect them from torture and inhuman or degrading treatment under the European Convention against Torture. The CPT is not a court, but a monitoring body. It has no jurisdiction over states. It basically identifies inhumane, degrading situations or situations that may end up becoming forms of torture and provides recommendations for change. However, since its first operations, the scope of the CPT’s activities was not only related to torture. It has been reporting on conditions of detention and imprisonment and on legal safeguards for prisoners and detainees. Based on these reports and the related the CPT’s General Reports, it has developed the ‘CPT standards’, which could be considered a manual of minimum standards for the treatment of prisoners (and would fall in category 2). The CPT standards, composed of extracts from the CPT’s General reports, include standards regarding police custody (part I), imprisonment (part II), health care services in prisons (part III), training of law enforcement personnel (part VIII), and standards for particular categories of prisoners, including juveniles deprived of their liberty (part VI). The standards regarding children include safeguards against ill-treatment, rules

\textsuperscript{444} Contrary to, e.g. the ICCPR, CAT and CRC, art. 3 ECHR does not explicitly prohibit cruel treatment or punishment. Van Bueren finds the prohibition of cruel treatment or punishment of particular importance for children; Van Bueren 1995, p. 224; cf para. 3.6.


\textsuperscript{446} Mowbray 2004, p. 48-52 resp. 43-47. Note that the art. 3 ECHR’s prohibition is not limited to individuals (incl. children) deprived of their liberty.

\textsuperscript{447} As mentioned in para. 2.5.2.2 it is argued that the CPT has proven to be far less restrictive than the ECtHR and, in addition, has been influencing the judgments of the ECtHR, which resulted in the recognition of positive obligations under art. 3 ECHR, e.g. regarding prison conditions.
regarding detention centers for juveniles (material conditions, regime activities, staffing issues, contact with the outside world, discipline, complaint and inspection procedures and medical issues).

One of the benefits of the CPT is that its standards are directly founded on the CPT’s reporting system and as a consequence are much more dynamic than for example the JDLs, which have not been updated since their adoption in 1990. This may contribute to these standards’ sense of reality, while the JDLs to some extent seem to represent a utopian dream. On the other hand, the CPT Standards are not as comprehensive as the JDLs and not child-specific. In this regard, it is interesting to note that the CPT stresses in para. 21 of its 9th General Report that ‘any standards which it may be developing in this area should be seen as being complementary to those set out in a panoply of other international instruments, including the [CRC, Beijing Rules, JDLs and Riyadh Guidelines]’.

2.8.2.3 Article 6 ECHR

Article 6 ECHR embodies the fundamental right to ‘fair trial’, which has indirect implications for deprivation of liberty of individuals, including children. Consequently it can be considered as a category 2 provision, like article 14 ICCPR and article 40 CRC. It basically contains the same relevant provisions, although it is not child-specific like the CRC provision. It contains for example the right to be tried within a reasonable time (art. 6 (1) ECHR), which can affect the length of pre-trial detention, and the presumption of innocence (art. 6 (2) ECHR), which should affect the treatment in pre-trial detention. Furthermore, article 6 ECHR embodies a number of legal safeguards that can also be found in the other provisions and must be granted to anyone who finds himself charged with an offence and is tried accordingly, such as the right to legal representation, to information on the charges (see also art. 5 ECHR) and to an interpreter. Furthermore, everyone accused of having infringed the penal law must be granted sufficient time and facilities to prepare his defence; this has implications for the conditions of detention, which should at least include time and facilities to consult defence counsel (confidentially). Despite the lack of child-specificity, article 6 ECHR can be of value for deprivation of liberty of children in the context of juvenile justice, in particular given the significant amount of jurisprudence of the ECtHR regarding this provision.

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448 For more on the relation between the CPT standards (and CPT work in general) and other active human rights organs and standards see Morgan & Evans 2001, p. 31-33.

449 It goes beyond the scope of this study to address this jurisprudence in detail; see, e.g. Van Dijk & Viering 2006.
2.8.2.4 Article 8 ECHR

The third and final ECHR provision is article 8, containing the fundamental right to respect for one’s privacy (including the right to correspondence\(^{450}\)) and family life (a category 2 provision). According to article 8’s second paragraph, the State must refrain from infringing these rights, unless interference is grounded on statutory law and required in ‘a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. Based on the ECtHR’s jurisprudence, article 8 ECHR does not only imply a negative obligation, but also a number of positive obligations. Some of these affect children in public care, which may have implications for deprivation of liberty of children, albeit limited primarily to deprivation of liberty as a form of alternative care.\(^{451}\)

2.8.2.5 European Prison Rules

Furthermore, the European Prison Rules (also referred to as EPR) adopted by the Committee of Ministers of the Council of Europe in 1987 and revised in 2006, provide detailed rules regarding the treatment of individuals deprived of their liberty (category 1).\(^{452}\) These recommendations represent the contemporary penal approaches. The EPR include rules regarding inter alia conditions of imprisonment (part II), health (part III), good order (part IV), management and staff (part V), inspection and monitoring (part VI), untried prisoners (part VII) and rules regarding sentenced prisoners (part. VIII). With its 108 rules, the EPR can be regarded as comprehensive.

The EPR are primarily applicable to individuals (prisoners) remanded in custody or sentenced to imprisonment and placed in prisons, that is the appropriate institution for these categories of prisoners (arts. 10.1 and 10.2) – a criminal justice context. In addition, it covers the categories of prisoners who are not placed in prisons and other individuals who are deprived of liberty in prisons for other reasons (art. 10.3).\(^{453}\)

The position of children in the EPR requires further attention, because the EPR are not utterly clear in this regard. Rule 11.1 provides that ‘[c]hildren under the age

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\(^{450}\) See, e.g. again ECtHR, Judgment of 21 February 1975, Series A. No. 18 (Golder v. UK); see para. 2.5.2.2.

\(^{451}\) Cf Mowbray 2004, p. 127-187, in particular p. 155ff. Cf arts. 16 and 9 CRC. The ECtHR has developed extensive jurisprudence regarding art. 8 ECHR; see, e.g. Heringa & Zwaak 2006.

\(^{452}\) The CPT takes the EPR as a point of reference as well.

\(^{453}\) According to the commentary to rule 10 one should think, e.g. of immigration detainees placed in prisons or of pre-trial detainees or prisoners (temporarily) housed in a police station or participating in activities outside the prison. This is a rather complex way of determining the rules’ scope.
of 18 years should not be detained in a prison for adults, but in an establishment specifically designed for the purpose’. In addition, rules 11.2 and rule 35.1 provide that if children are placed together with adults in prison for adults exceptionally, they should be granted a special approach that takes into account their status and needs. This includes access to social, psychological and educational services, religious care and recreational programmes or equivalents available to children in the community. Every child who is subject to compulsory education must have access to such education and children must be provided with additional assistance upon and after release. It is, however, not clear whether the EPR are applicable only to children deprived of their liberty placed in prisons for adults or also to children placed in any other institution. According to the commentary to rule 35, prisons are primarily seen ‘as institutions for the detention of adults’ and the EPR ‘as a whole are designed to deal primarily with the manner of detention of adults in prison’. ‘Nevertheless,’ the commentary continues, ‘the rules incorporate within their scope children who are detained on remand or following a sentence in any institution.’ As a consequence, they apply to children in prison, in the ‘undesirable’ situation, but also to children ‘in other institutions’. Regarding the latter situation, the commentary explicitly points out that the EPR ‘although geared to adults, may offer useful general indications for minimum standards that should apply equally to children in other institutions as well’. In addition, the commentary refers to the more specific recommendations of the Council of Europe, Recommendations R (87) 20 and Rec. (2003) 23,\(^\) which provide for principles acknowledging the exceptional vulnerability of children in prison.\(^\) Children should be particularly protected against any form of threat, violence or sexual abuse and be provided with adequate education and schooling, support and guidance in their emotional development and appropriate sport and leisure activities. They should also be supported to maintain contact with their families. The EPR commentary furthermore refers to specialist UN standards, such as the Beijing Rules and JDLs. This explicit reference indicates that the standards set in the UN instruments are seen as complementary sources for the protection of children deprived of their liberty in the European region.


\(^{455}\) The commentary does not refer to Recommendation Rec (2003) 20, which complements recommendation R (87) 20. It pays particular attention to the child deprived of liberty in the context of juvenile justice and calls for a child-specific approach, which takes into account the relevant international human rights instruments, including the ECHR, CRC, Beijing Rules and JDLs (see preamble and para. 22). In addition, it contains specific standards, which can also be found in other standards. Particularly interesting is the setting of two time limits: 1. police custody should not last longer than 48 hours (para. 15) and 1. pre-trial detention should be used as a last resort and should not be longer than 6 months before the trial starts (para. 16); cf GC No. 10, para. 83. Furthermore, it is interesting to note that this recommendation expresses the need for separate European Prison Rules for juveniles and for one on community sanctions, which are, at the time of writing, being drafted together.
Consequently, in this study the EPR will be used as additional framework of reference. Its particular significance is primarily prompted by the fact that it represents contemporary penal approaches in Europe regarding treatment of individuals deprived of liberty, especially after its 2006 revision.456

2.8.2.6 Draft European Rules for Juvenile Offenders Subject to Sanctions or Measures

In June 2008 the European Committee on Crime Problems (CDCP)457 adopted the Draft Recommendation on the European Rules for Juvenile Offenders Subject to Sanctions or Measures. It is to be expected that this recommendation will be adopted by the Committee of Ministers of the Council of Europe in the (near) future. A few remarks regarding this recent development will be made here.458

The draft European Rules for Juvenile Offenders will provide the European region with the most recent set of standards regarding sanctioning of juvenile offenders (i.e. any person under the age of 18 years who is alleged to have or who has committed an offence; rule 21.1). It aims to provide for detailed rules regarding the imposition and implementation of sanctions for juveniles under the (juvenile) justice system, in particular regarding community sanctions and measures on the one hand (rule 23ff) and deprivation of liberty on the other (rule 49ff). The draft rules have been designed as an instrument that “parallels the European Rules on Community Sanctions and Measures (ERSCM)459 and the European Prison Rules (EPR) in respect of adults”.460 It has been drafted while taking into account the ECHR, European Convention for the Prevention of Torture and the CRC. In addition, the relevant recommendations of the Council of Europe and the relevant UN standards, including the Beijing Rules and JDLs were taken into consideration; this is particularly visible in the definition of deprivation of liberty provided by the draft in rule 21.5 which shows comparison with rule 11 (b) of the JDLs.

Compared to the JDLs it is interesting to note that the draft rules aims to regulate community sanctions and measures, in essence alternatives for deprivation of liberty. It therefore has a broad(er) scope of application. This leaves unaffected that

456 It is argued that the EPR (and other instruments of the Council of Europe) have been inspiring for domestic legislator; Smaers 2005, p. 15. The value of this source of inspiration should not be overestimated; see, e.g. De Jonge 2007, p. 292 regarding the position of the Dutch Minister of Justice towards the EPR.
457 The CDCP is entrusted the responsibility for overseeing and coordinating activities of the Council of Europe in the field of crime prevention and crime control.
458 Given the fact that the draft text was published after the completion of the manuscript of this book, the remarks are limited to a few general observations.
460 Draft Commentary to the European Rules for Juvenile Offenders Subject to Sanctions or Measures (Draft Commentary), CDCP (2008) 16, 5 June 2008, p. 2
the draft rules are limited to children in conflict with the law, while the JDLs cover all forms of deprivation of liberty, also outside the context of juvenile justice. Nevertheless, the draft rules take into account that children deprived of their liberty in the context of juvenile justice can be placed in other than penal facilities, such as welfare or mental health institutions. It has been the explicit objective of the drafters to provide for rules regarding the enforcement of deprivation of liberty of juvenile offenders in these institutions as well. The content of the draft rules shows furthermore much resemblance with the European Prison Rules, as far as the rules regarding deprivation of liberty are concerned.

The rules’ overall approach is to assert that deprivation of liberty shall be implemented only for the purpose for which it is imposed (rule 49.1). For children who are convicted to imprisonment, for example, this implies that the deprivation of liberty should aim at their education and social reintegration. In addition, draft rule 49.1 provides that deprivation of liberty must be implemented ‘in a manner that does not aggravate the suffering inherent in it’, which in essence comes down to the recognition that the rights of each child may only restricted as far as ‘necessary to guarantee the safety and security of the detained juveniles, other persons in the institutions and staff’. This point of departure has also been recognized by the CRC (see further para. 3.5). According to draft rule 5 the imposition and implementation of deprivation of liberty must be based on the best interests of the child (cf art. 3 CRC), in conjunction with the principle of proportionality and the ‘principle of individualisation’, meaning that a child’s age, physical and mental well-being, development, capacities and personal circumstances should also be taken into account.

The draft rules furthermore consider a variety of meaningful activities as part of the daily programme based on an ‘individual overall plan’, gradual transfer to less restrictive regimes, preparation for (early) release and reintegration into society essential parts of the overall approach regarding deprivation of liberty (see rule 50.1ff). In addition, aftercare services and special assistance in light of the ‘continuity of care’ is regarded particularly important (rule 51). Moreover, the rules acknowledge that children deprived of their liberty are ‘highly vulnerable’; they must receive protection of their physical and mental integrity, and their well-being must be fostered by the authorities. In light of this, ‘[p]articular care shall be taken to the needs of juveniles who have experienced physical, mental or sexual abuse’ (rules 52.1 and 52.2).

In order to foster the implementation of deprivation of liberty in accordance with these points of departure, the draft European Rules for Juvenile Offenders provide detailed rules regarding inter alia the design of juvenile institutions, administrative aspects of placement of children, conditions of deprivation of liberty

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461 Draft Commentary, p. 2
462 Draft Commentary, p. 19.
(including health care, nutrition and regime activities), contact with the outside world, good order (including searching, use of force or restraint, separation, discipline and punishment), preparation for release, complaints procedures, inspection and monitoring, and quality of staff. It is particularly interesting that the draft rules pay special attention to foreign nationals, ethnic and linguistic minorities and juvenile with disabilities. Furthermore, the child’s parents are explicitly recognized in the rules, *inter alia* regarding legal advice and assistance, and complaints procedures.

2.8.2.7 Article 17 ESC

Where the ECHR lacks a child-orientation, article 17 ESC seems to have implications for the administration of juvenile justice, including deprivation of liberty, at least according to the ESC Secretariat’s document ‘Children’s Rights under the European Social Charter’. The European Social Charter, in particular article 17, requires that criminal procedures should be adapted to the age of children and young persons, that remand in custody and prison sentences should be used only in exceptional circumstances and only for serious offences. Furthermore, the duration of sentence must be short and be determined by a court, like pre-trial detention which should not be of an excessive duration. Finally, children (minors) should be separated from adults, both in pre-trial detention as well as during their sentence. It is furthermore, interesting to note that article 17 ESC requires that the minimum age for criminal responsibility ‘must not be too low’.

2.8.2.8 Conclusion

European human rights provisions regarding treatment of people deprived of liberty are generally founded upon article 5, requiring lawful deprivation of liberty and providing for procedural safeguards, and 3 ECHR, prohibiting torture and inhuman or degrading treatment or punishment. Although the ECHR lacks an explicit legal


464 ESC Secretariat 2005, p. 5. In addition, art. 17 ESC has implications for children in public (i.e. alternative) care, including children in institutions. According to the ESC Secretariat ‘[i]nstitutional care should be organized in small units and should be as close to a family setting as possible’. The child’s fundamental rights, such as privacy and integrity and the right to meet with close relatives must be guaranteed. Furthermore, the child placed in institutions (and his parents) must be provided with the possibility to file complaints about the institutional care and treatment. Finally, the institutions must be well supervised; ESC Secretariat 2005, p. 8. Although these implications seem to be limited to institutional placement as a form of alternative care, under the JDLs they are applicable to all forms of deprivation of liberty.

465 ESC Secretariat 2005, p. 5 with reference to the European Committee of Social Rights’ conclusions regarding Malta, Turkey and the UK.
provision regarding the treatment of people deprived of liberty, similar to article 10 ICCPR or article 37 (c) CRC, their position is recognized by the ECtHR under article 3 ECHR and comprehensively addressed in the CPT standards and EPR. Both soft legal instruments provide for detailed guidance regarding the treatment of individuals deprived of their liberty. In this regard they seem rather similar to the UN instruments, such as the Standard Minimum Rules, but there are two interesting differences. First the CPT standards are based on the reporting system of the CPT and are therefore more dynamic than the international instruments. The EPR is not based on a reporting system such as the CPT, but it is subject to revision; the EPR’s most recent version dates from January 2006 and as a consequence represents contemporary penal approaches. Second, the standards set in both soft legal instruments are increasingly referred to by the ECtHR, which increases their relevance.

Nevertheless, both standard-setting instruments cannot be regarded as child-specific, although the CPT has addressed the child specifically in its 9th General Report. The EPR are not designed for children, although the minimum standards should apply equally to them. It therefore is of significance that explicit reference is made to the Beijing Rules and JDLs, as the special standard setting instruments for children. In addition, European Rules for Juvenile Offenders Subject to Sanctions or Measures are to be expected in the (near) future and a child rights approach under article 17 ESC is proclaimed.

Altogether, it is fair to conclude that the European human rights system currently embodies standards of significance for individuals deprived of liberty, although not specifically for, but including children. The Committee of Ministers of the Council of Europe may soon adopt the recommendation on the European Rules for Juvenile Offenders, which would be significant step forwards in the recognition of the rights of children in institutions in the context of juvenile justice within the European region.

2.8.3 Inter-American Human Rights Provisions

2.8.3.1 Differences between Inter-American and European Human Rights Systems

There are a number of important differences between the Inter-American System and the European system of human rights. First, the Inter-American System of Human Rights is more complex than the European System. As mentioned in paragraph 2.2.2, the Inter-American System is based on two instruments, the 1948 American Declaration and 1969 ACHR. Both instruments are overlapping and, moreover there are two supervisory institutions, the Inter-American Commission and the Inter-American Court. While Member States of the Council of Europe must

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ratify the ECHR, it is not compulsory for the OAS Member States to ratify the ACHR. There are States, for example the United States, that are not party to the ACHR and do not fall under the jurisdiction of the Inter-American Court, but that can be monitored by the Inter-American Commission under the American Declaration and the Charter of the OAS. 467

Another difference between both regional systems is the political context. According to Harris the history of much of the American states has included ‘military dictatorships, (…) violent repression of political opposition and of terrorism and intimidated judiciaries for a while being the order of the day in a number of countries’, while ‘the European system has (…) generally regulated democracies with independent judiciaries and governments that observe the rule of law’. 468 As a result, the human rights issues within the Inter-American system concern gross violations of human rights, including enforced disappearances, arbitrary detention and torture. The European system, however, has also had the opportunity to address more particular issues, like the fundamental freedoms of expression or the right to a fair trial. 469

Regarding the enforcement of the decisions of the different treaty bodies it is important to stress that the decisions of both the Inter-American Court and the European Court are legally binding. However, the lion share of the case law within the Inter-American human rights system is dealt with by the Inter-American Commission, the decisions of which are not legally binding. In addition, the Inter-American human rights system does not have a similar body like the Committee of Ministers of the Council of Europe that supervises the enforcement of the ECtHR’s decisions. 470

Another significant difference between the Inter-American and European human rights system is that the latter is much older (the ECHR entered into force in 1953) and the jurisprudence of the ECtHR (and former European Commission) has been developing since the (late) 1950s. In comparison the jurisprudence of the Inter-American Court still is young (ACHR entered into force in 1979) and has had less time to mature. Consequently, the interpretation of many of the provisions remains to be carried out. 471

467 Harris argues that the Inter-American Commission and Court generally refer to and follow their own earlier decisions, but that the Commission follows the court’s jurisprudence; Harris 1998, p. 13.
468 Ibid., p. 2.
469 Ibid., p. 2. Although more recently ‘ordinary human rights cases’ have been addressed by the Inter-American Commission. For specific and less fundamental differences cf Ibid., p. 2-4.
470 Ibid., p. 3. Harris further remarks that, although the Inter-American system covers both North America as well as South America, the United States and Canada appear only occasionally in the report of the Inter-American Commission compared to Latin American States. He argues that ‘one has the sense that the system is essentially a Latin American one’; Ibid., p. 4.
471 Ibid., p. 13 and 25; the same is true for the work of the Inter-American Commission.
2.8.3.2 Relevant Provisions for Individuals Deprived of Liberty

Despite the differences between the two systems, both the American Declaration and ACHR stand for a human rights framework that is similar to the international and regional legal frameworks (ICCPR, ECHR and Banjul Charter); they embody civil and political rights. Economic, social and cultural rights can be found in the American Declaration (and OAS Charter) and in the 1999 ‘Protocol of San Salvador’. In addition, the American Declaration and ACHR contain provisions that are either directly applicable (category 1) or especially relevant (category 2) for individuals deprived of liberty.

Both the American Declaration and ACHR embody specific provisions regarding the right to liberty of the person and limitations of that right (arts. I and XXV American Declaration; art. 7 ACHR) and regarding the right to humane treatment (arts. I and XXV American Declaration; art. 5 ACHR).

The American Declaration stresses that every human being has the right to liberty and security of the person in its first article, together with the right to life. Having adopted the right to liberty of the person side by side with the right to life in its first article shows that these three rights are considered the most fundamental rights a human being can have. In addition, article XXV prohibits the deprivation of liberty ‘except in the cases and according to the procedures established by pre-existing law’. In addition every individual who has been deprived of his liberty has the right to challenge the legality of the deprivation and to be tried without undue delay or, otherwise, to be released. The ACHR explicitly embodies the right to personal (and physical) liberty and security in article 7. Arbitrary arrest or imprisonment is prohibited and ‘[n]o one shall be deprived of physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto’. Furthermore, article 7 enshrines a number of legal safeguards in the case of incarceration, including the right to information and recourse to a competent court in order to decide upon the lawfulness of the arrest or detention (including the case of a threatening deprivation of liberty).

Regarding the treatment of individuals deprived of their liberty, article 5 ACHR provides for the right to humane treatment. The explicit right to humane treatment cannot be found in the ECHR, but can be in article 10 (1) ICCPR (and art. 37 (c) CRC). The difference between the ICCPR provision and article 5 ACHR is that the latter combines (components of) the right to humane treatment for

472 Cf for more on the Inter-American system of economic, social and cultural rights see Craven 1998; for civil and political rights under the ACHR and American Declaration see Davidson 1998.
473 Cf e.g. Davidson 1998, p. 233-241.
474 Cf e.g. Ibid., p. 226-231.
individuals deprived of liberty (including treatment with respect for the inherent dignity of the human person) with the right to have one’s physical, mental and moral integrity respected and the prohibition of torture or cruel, inhuman or degrading treatment, which has implications for everyone. Consequently, article 5 ACHR is more comparable to article 37 CRC and can be considered both a category 1 and category 2 provision.475

The right to humane treatment during time in custody is acknowledged in article XXV of the American Declaration as well. In addition, the American Declaration acknowledges the right of every person ‘not to receive cruel, infamous or unusual punishment’ (art. XXVI).476 It does not contain an explicit prohibition of torture or cruel, inhuman or degrading treatment, but it is argued that the Inter-American Commission has assumed that these forms are prohibited under article I of the American Declaration.477

Thus, the prohibition of torture and cruel, inhuman or degrading treatment or punishment (category 2) is acknowledged by both the American Declaration and ACHR as part of everyone’s right to humane treatment, including the general right to have everyone’s physical, mental and moral integrity respected (art. 5 ACHR). In addition, the OAS adopted the Inter-American Convention to Prevent and Punish Torture in 1985, which enshrines a broader definition of torture than the CAT of the UN adopted in that same year.478 The Inter-American Commission has applied the definition of Inter-American Convention to Prevent and Punish Torture under article 5 ACHR.479

Article 5 ACHR furthermore contains specific provisions regarding the treatment of individuals deprived of their liberty, such as that ‘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’ (art. 5 (4) ACHR). This is based on the criminal law principle, presumption of innocence, acknowledged in article XXVI American Declaration and article 8 (2) ACHR. Paragraph 6 of article 5 ACHR provides that the essential aim of deprivation of liberty as a punishment must be ‘the reform and social readaptation of the prisoners’.

Children (‘minors’) subject to criminal proceedings are addressed in article 5 (5), which provides that they ‘shall be separated from adults and be brought before

475 Note that according art. 27 (2) ACHR, art. 5 ACHR is non-derogable.
476 Cf. e.g. the 8th Amendment to the U.S. Constitution which prohibits ‘cruel and unusual punishments’.
479 Davidson 1998, p. 229-230 with reference to Inter-American Commission, Case 10.970, Report 157/95. For more on torture and cruel, inhuman and degrading treatment or punishment see para. 3.6.
specialized tribunals, as speedily as possible, so that they may treated in accordance with their status as minors’. The ECHR lacks a similar provision, but the requirement of separation of children from adults can be found in both the ICCPR (art. 10) and CRC (art. 37).

The protection of children against ill-treatment must be ensured by States Parties through positive steps, according to the Inter-American Court with reference to articles 19 and 17 ACHR in conjunction with article 1 (1). This includes protection of children in their relation with public officials (e.g. prison personnel) or ‘in relations among individuals or with non-State entities’.

The treatment of children deprived of liberty has become more apparent in the Inter-American Court jurisprudence of the last decade. Dohrn provides an interesting overview and concludes that in general a new ‘children’s common law’ is developing (by the Inter-American and European Court of Human Rights). The cases under the Inter-American Court involve violence against children by police (the landmark case Villagrán Morales v. Guatemala; Bulacio v. Argentina) and violations against children in detention, which includes the separation issue of children and adults (Minors in Detention v. Honduras), conditions of deprivation of liberty (Juvenile Reeducation Institute v. Paraguay).

It is particularly interesting that the Inter-American Court referred in these cases to the CRC framework, including the Beijing Rules and JDLs. By doing so it incorporated the CRC standards into the ACHR framework (including the right to petition), which, according to Dohrn with regard to the Villagrán Morales case ‘illustrates the indivisibility of human rights standards in the sense that [the court] begins a process of integrating the provisions of one international human rights treaty with another, in this case using the greater depth of the CRC on matters involving children to interpret and give substance to an article about children in (…) the ACHR’.

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483 Inter-American Court, Judgment of 8 September 2003. Series C. No. 100 (Case of Bulacio v. Argentina).
Finally, both the American Declaration and ACHR acknowledge the right to a fair trial (art. XXVI resp. art. 8), which has (indirect) implications for deprivation of liberty of individuals, including children.\textsuperscript{487} The child is not particularly addressed in both provisions, but, as mentioned above, article 5 (5) ACHR provides that minors must be brought before specialized tribunals and that they must be treated in accordance with their status.\textsuperscript{488} This has implications for the tribunals involved in the decision-making with regard to deprivation of liberty of children as well. The Inter-American Court elaborates more on a child-oriented justice system in its advisory opinion, but little is of particular added value for deprivation of liberty (see para. 137 (9)ff). Article 10 ACHR provides for the right to compensation in the event of ‘a miscarriage of justice’, which may include the deprivation of liberty as part of it.\textsuperscript{489}

2.8.3.3 Conclusion

The Inter-American system of human rights contains a number of legal provisions that are either directly applicable (category 1) or especially relevant (category 2) for deprivation of liberty of individuals, including children. Despite the differences set out above, the provisions contained are in general equal to the provisions of the European human rights system. The same is true in comparison to provisions of International Human Rights Law.

It is argued that the ACHR is somewhat more child-centred (see art. 5 (5)). The Inter-American case law still is relatively young, but it is particularly interesting to note that the Inter-American Court seems to incorporate the standards from the CRC framework into the Inter-American Human Rights System, in cases that are also of significance for children deprived of their liberty. Compared to the European Human Rights System, the Inter-American system lacks the more detailed instruments concerning the treatment of individuals deprived of their liberty, such as the EPR and CPT standards. The Inter-American Court’s advisory opinion provides for a more detailed analysis of the human rights of the child and explicitly stresses the relevance of the children’s rights framework for the position of the child in the Inter-American human rights framework, but contains little specific guidance regarding (the treatment of) children deprived of their liberty.

Nevertheless, the developments in the OAS region are of significance, particularly since the development of specific case law seems to be developing into its own.

\textsuperscript{487} Cf Davidson 1998, p. 241-255.  
\textsuperscript{488} As mentioned in para. 2.3.5 the ACHR is the only treaty that places a special duty on states to create specialized tribunals for children within the criminal justice system – a duty that arguably is more prominent than art. 40 (3) CRC.  
\textsuperscript{489} Cf art. 5 (5) ECHR and art. 9 (5) ICCPR.
2.8.4 African Human Rights Provisions

2.8.4.1 Introduction

In the African region the human rights movement was not really forthcoming until 1981, the year the OAU adopted the Banjul Charter and still the system is criticized for its lack of efficiency. However, the African System of Human Rights has potential for three reasons, in particular for children in Africa. First the Banjul Charter has acknowledged African cultural particularities and traditional values. Second, the OAU adopted the first regionally binding instrument exclusively on the rights of children, the 1990 ACRWC, with its own monitoring body, the African Committee of Experts, which is competent to hear individual communications. Furthermore, during the 1990s attention for children deprived of their liberty increased, resulting *inter alia* in the Kampala Declaration and the establishment of the Special Rapporteur on Prisons and Conditions of Detention in Africa, which could provide for more attention to children deprived of their liberty in the future.

2.8.4.2 The Banjul Charter

Article 6 of the Banjul Charter embodies the right to liberty and security of the person. It contains a broadly formulated limitations clause, which provides that ‘[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained’. This category 1 provision is directly applicable to deprivation of liberty of children and has its counterparts in all of the above mentioned regional and international treaties. However, the Charter is silent about legal safeguards, such as the right to challenge the legality of the deprivation of liberty, and does not embody a provision regarding the treatment of individuals deprived of liberty.

Article 5 of the Banjul Charter contains the prohibition of torture, cruel, inhuman or degrading punishment and treatment, within the prohibition of slavery and the slave trade, as forms of exploitation and degradation of man – in essence infringements on the ‘right to the respect of the dignity inherent in a human being and to the recognition of his legal status’ (category 2). Finally, article 6 contains elements constituting the right to a fair trial, including for example the presumption of innocence and the right to be tried within a reasonable time by an impartial court or tribunal (category 2).
2.8.4.3 ACRWC

As pointed out in paragraph 2.3.5 it is argued that the ACRWC in general sets a higher threshold and better protection for children in Africa, than the CRC. It is also argued that the ACRWC has a more human rights-centred approach than the CRC, since the latter is often formulated towards the States Parties and the former addresses the child explicitly as a holder of rights. Besides the fact that this optimism should be put in perspective, because the implementation of the African children’s rights framework cannot really be assessed due to the ineffectiveness of the reporting system and individual complaints procedure (see also para. 2.3.5), the optimism certainly seems inappropriate concerning children deprived of their liberty. The ACRWC lacks, in particular regarding this group of children, significant provisions that are embodied in the CRC. The ACRWC addresses the position of the child deprived of his liberty in article 17. This article focuses on the administration of juvenile justice, which limits the scope of the relevant provisions for deprivation of liberty. It provides for a number of positive obligations for States Parties, such as the duty to ‘ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment’ and that ‘children are separated from adults in their place of detention or imprisonment’. It lacks any reference to the prohibition of unlawful or arbitrary deprivation of liberty or to the use of arrest, detention or imprisonment as measures of last resort and for the shortest appropriate period of time (cf. art. 37 (b) CRC). Furthermore, no reference can be found to either the right to be treated with humanity, with respect for the inherent dignity of the human person and in a manner that takes into account the special needs of persons of the child’s age (cf. art. 37 (c) CRC), or to the right to maintain contact with the child’s family through correspondence or visits. In addition, it lacks specific procedural safeguards such as the right to challenge the legality of the deprivation of liberty or the right to legal and other appropriate assistance as can be found in art. 37 (d) CRC. It does, however, provide for relevant safeguards such as the presumption of innocence, legal or other appropriate assistance necessary for the child’s defence, prompt information on charges in a language the child understands or through an interpreter and the right to have the case determined as speedily as possible. However, these are acknowledged in the CRC as well.

At the same time, the ACRWC is stricter to some extent. Where article 37 (c) CRC claims that children should be separated from adults, unless it is considered in the child’s best interest not to do so, article 17 (2) (b) ACRWC does not allow this

491 Gose 2002, p. 18
492 Note that the ACRWC does, like art. 3 ECHR, not refer to cruel treatment or punishment.
exception. Furthermore, article 17 (3) ACRWC provides for ‘reformation, re-integration into [the] family and social rehabilitation’ as the ‘essential aim’ of treatment of children under the juvenile justice system. This corresponds with article 40 (1) CRC setting ‘reintegration and the child’s assuming a constructive role in society’ as the ultimate juvenile justice objective. In particular, the ‘family-part’ represents the important role of the family in African society – ‘a key African value’.

In conclusion, article 17 ACRWC affects deprivation of liberty (solely) under the juvenile justice system and addresses some relevant issues in this regard. It combines elements that can be found in article 40 and 37 CRC. However, the ACRWC offers a lower level of protection for children deprived of liberty than the CRC. In addition, the ‘gap’ has not been filled (yet) by jurisprudence or other developments (i.e. development of recommendations, resolutions similar to, e.g. the JDLs or CPT standards), which justifies the conclusion that children deprived of liberty in Africa are better served by the CRC than by the ACRWC.

2.8.5 Conclusion

The regional legal standards relevant to deprivation of liberty of individuals were initially developed through the separate regional conventions. Under the Inter-American human rights system and, in particular, the European human rights system, the independent courts (and commissions) of human rights have proven to be of value for the development of standards for deprivation of liberty under the ACHR (and American Declaration) and ECHR, respectively. The ECHR lacks a legal provision regarding the treatment of people deprived of liberty (cf art. 10 ICCPR and art. 37 (c) CRC), although the ECtHR has developed relevant jurisprudence under article 3 ECHR and has formulated positive obligations for States Parties in this regard. In addition, the position of people deprived of their liberty is comprehensively addressed by the CPT, in its CPT standards, and the European Prison Rules. Both legal instruments provide for detailed guidance regarding the treatment of individuals deprived of their liberty. In this regard they compare with the UN instruments, but there are two interesting differences. First the CPT standards are based on the reporting system of the CPT and have therefore

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493 Cf art. 10 (2) (b) and (3) ICCPR and note that this absoluteness had led to many reservations (albeit mostly by Western (European) Countries); see para. 2.7.3.2. Maybe the level of support for an absolute provision is larger in the African region.
494 Cf Chirwa who argues that this ACRWC provision is ‘more progressive as it strengthens the argument of some leading scholars in international law who contend that rehabilitation is a right of every prisoner’; Chirwa 2002, p. 166; see art. 10 (3) ICCPR. Cf Van Bueren 2006, p. 12 who in general criticizes the aim of rehabilitation; see para. 3.3.
495 Sloth-Nielsen 2004, p. 29.
the potential of being more dynamic than the international instruments. The European Prison Rules are not based on a reporting system, but are subject to revision; its second version dates from January 2006 and represents contemporary penal approaches. Second, the standards set forth in both soft legal instruments are increasingly referred to in the ECtHR’s jurisprudence, which significantly increases their value.

Both the Inter-American and African region have not adopted legal instruments regarding the (minimum quality of) treatment of individuals deprived of their liberty.

However, although the European human rights system embodies significant standards regarding deprivation of liberty of individuals, which includes children, a real child-orientation cannot be identified. The CPT, addressing the position of the child deprived of his liberty specifically in its 9th General Report, European Human Rights Law and Standards, hardly recognizes (let alone addresses) the specific position of the child. Instead, the legal standards tend to refer to UN instruments, in particular the Beijing Rules and JDLs, as the specialists: standard-setting instruments for children deprived of their liberty. However, it is to be expected that the Committee of Ministers adopt a recommendation on the European Rules for Juvenile Offenders Subject to Sanctions or Measures in the (near) future. This would be a significant step forward in the sense that it provides the European region with a set of standards directly applicable to children deprived of their liberty as part of the juvenile justice system.

It is argued that the ACHR is more child-centred according to the text (see e.g. art. 5 ACHR). In addition, it is particularly interesting to note that the Inter-American Court seems to increasingly incorporate the standards from the CRC framework into the Inter-American Human Rights System, also in cases that are of significance for children deprived of their liberty.

Finally, in the African region a general child rights approach can be recognized in the adoption of the ACRWC. However, despite its apparent potential (see para. 2.5.4), African children deprived of their liberty cannot count on a greater level of protection from the ACRWC than that provided for by the CRC. On the contrary the ACRWC has some serious lacunae compared to article 37 CRC, which justifies the conclusion that children deprived of liberty in Africa are better served by the CRC than by the ACRWC. Given the fact that almost all African States have ratified the CRC, one can only express the hope that the African Committee of Experts will use the CRC and the other relevant UN legal standards as a framework of reference in its work under the reporting procedure and regarding future individual communications. In this regard the African legal system can prove its potential and added value, in particular due to the absence of right to file individual petitions under the CRC.


2.9 SOME CONCLUDING REMARKS

International and Regional Human Rights Law has been evolving since World War II. Although the child had been addressed before, the children’s rights framework really started to develop in 1979 the UN Year of the Child. In 1989 the CRC was adopted and has become the most successful treaty in terms of ratifications. Only two countries have not (yet) ratified the children’s rights convention.

Particular international attention for individuals (including children) deprived of their liberty grew in the 1970s. Despite earlier notions, such as the adoption of the Standard Minimum Rules for the Treatment of Prisoners in 1955, it took until the mid-1970s before the international community increasingly started to care about the gross violations of the human rights of people deprived of their liberty. A similar development took place at the regional level. This resulted inter alia in the adoption of the international and regional anti-torture conventions around 1985 and a significant number of other international legal instruments, non-treaties. The ECtHR played a significant role in the recognition of the position of the individual deprived of liberty in the 1970s (see the 1975 case Golder v. UK). The delinquent child and later the child deprived of liberty were addressed in the 1985 Beijing Rules and most in particular the 1989 CRC and 1990 JDLs.

Currently, the child (potentially) deprived of his liberty has been fully acknowledged under International Human Rights Law and Standards. Where the general human rights instruments encompass children deprived of liberty as well, the real child-specific and child rights approach is presented by the CRC. In light of the general CRC principles each child deprived of liberty must in the first place be recognized as a human being in development, independently entitled to all rights under the CRC. In addition, article 37 CRC, in conjunction with the JDLs, provides for specific rights and safeguards related to the special condition of the child. Article 37 CRC and the JDLs generally represent a broad approach, that is: they apply to all children deprived of liberty, regardless of the context. If a child is arrested, detained or imprisoned in the context of juvenile justice, article 37 CRC should be interpreted in light of article 40 CRC, setting the objectives of juvenile justice, on the basis of the principles of fair trial. This is particularly relevant to the legal requirements concerning deprivation of liberty, including the requirements of last resort and shortest appropriate period of time.

Given the specific and significant value of the CRC framework, the question remains: to what extent are the provisions of general Human Rights Law and Standards (still) of added (legal) value? The previous paragraphs have revealed that many general provisions are recognized in the CRC, but that there also are provisions that cannot be found in the CRC. One example of the latter is the right to compensation in the event of unlawful or arbitrary deprivation of liberty; another is the requirement of segregation between unconvicted and convicted individuals.
deprived of their liberty. If a State has both ratified the CRC and another international or regional human rights treaty, the additional protection granted by the latter should be regarded as being applicable to children under article 41 CRC. In the case of conflict the most protective provision must be favoured.

The two main standard-setting human rights instruments under article 37 (c) CRC and article 10 (1) ICCPR, the JDLs and Standard Minimum Rules respectively, are strongly interrelated. Although the JDLs clearly represent the child rights approach and are the primary standards regarding children deprived of their liberty, the Standard Minimum Rules have remained of (added) value regarding specific provisions, particularly where the one size fits all approach of the JDLs falls short.

The ICCPR framework is furthermore of added value, because its first optional protocol established the individual complaints procedure before the HRC; that goes for the regional human rights conventions too, in particular for the ECHR and ACHR. One of the biggest lacunae of the CRC framework is the absence of such a procedure under the CRC, even though the CRC Committee has been productive thus far. It is in this regard also interesting to note that the regional judicial bodies increasingly tend to refer to the CRC framework in their judgments affecting children. In the Inter-American system this includes case law regarding deprivation of liberty of children (in the context of (juvenile) criminal justice). Recently, the ECtHR also referred to the CRC framework in a case regarding the pre-trial detention of a minor.496

Besides the direct legal value of these communication procedures for the safeguarding of the human rights of children, the regional human rights treaties and other instruments, such as the CPT standards and the European Prison Rules (and may be the European Rules for Juvenile offenders in the near future), are also of value for guidance (and inspiration) on the interpretation of the different human rights provisions for domestic legislators and courts. After all, implementation of International Human Rights Law primarily is a domestic matter.

The significant number of international and regional human rights instruments seems to point out that the international community takes the position of the individual, more specifically the child deprived of his liberty, seriously; even though one could also argue that the high number of instruments merely stresses the international community’s inability to effectively protect the rights of those deprived of their liberty. Regardless of the legal value of the separate instruments in terms of hard and soft international law, their presence and assumed interdependence provide a comprehensive set of human rights provisions
concerning deprivation of liberty of children; they serve as a dynamic, detailed and not just incidental call upon domestic legislators and enforcing authorities to respect the human rights and fundamental freedoms of each child (potentially) deprived of his liberty.