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Children's Law Centre Annual Lecture 2012

"Protecting children against torture and while in detention.
The right of children to personal liberty and integrity."
(Article 37 UNCRC)

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Professor Manfred Nowak
Professor of International Law and Human Rights,
University of Vienna
Director, Ludwig Boltzmann Institute of Human Rights
Former UN Special Rapporteur on Torture

Chair
The Honourable Mr Justice Stephens

Belfast, Thursday 3rd May 2012


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ANNUAL LECTURE WELCOME

Paddy Kelly
Director, Children's Law Centre

Lord Chief Justice, members of the judiciary, colleagues, friends, on behalf of the Children's Law Centre I would like to welcome you to our 2012 Annual Lecture. On behalf of us all, Professor Nowak, I would like to extend a very warm Belfast welcome to you. We are absolutely delighted that you are able to be with us today. I am conscious that you had pressing business in Vienna and that you had to make considerable adjustment to your schedule to be with us. Thank you for that. We very much appreciate it.

I would also like to thank Mr Justice Stephens for kindly agreeing to chair today's lecture. I know the many demands which are placed on you as a Judge; we therefore appreciate you making time to be with us today to chair our 2012 Annual Lecture.

As a Professor of international law and human rights with a long résumé of fighting for human rights worldwide, Professor Nowak, your reputation as a fearless advocate and defender of human rights precedes you. Many of us will be aware of the powerful and extensive work you undertook in your role as UN Special Rapporteur on Torture. Your work on Guantánamo and rendition, to the institutionalisation of people with disabilities is well known and your strong stance in respect of CIA agents who used torture tactics was widely reported and commended by those committed to protecting and upholding human rights. CLC is privileged to have such an esteemed champion of human rights deliver our annual lecture.

Professor Nowak, you have stated that torture is a global phenomenon and said quite recently that you think, "torture is practiced in more than 90% of all countries in all regions of the world; big or small, dictatorship or democracy." For some here that will come as a surprise as there is sometimes a tendency to assume that torture is the preserve of countries which do not enjoy democratic governments. It is, however, a salutary warning to us all that we need to be vigilant to protect against torture and cruel, inhuman and degrading treatment wherever we are in the world.

The Children's Law Centre is alert to the need for vigilance in respect of denials of human rights and human rights abuses. We draw on international human rights standards to advocate for protections against such human rights abuses and especially, given our remit

in respect of children's rights, the UNCRC. In particular Article 37, the subject of your lecture today, Professor Nowak, provides CLC with a strong benchmark against which to measure the human rights compliance of practices in this jurisdiction as they relate to torture and the deprivation of liberty. In interpreting the scope of Article 37 we have benefitted greatly from the considerations of the UN Committee on the Rights of the Child, their Concluding Observations and General Comment, and the writings and reflections of learned and hugely experienced human rights practitioners like Professor Nowak.

Professor Nowak, you have in your work highlighted the growing gap between a very high level of legally binding obligations for states and the reality on the ground. The Children's Law Centre has sought to focus attention on the gaps in the UK Government and the Northern Ireland Assembly meeting their legally binding obligations in respect of children by highlighting when the duty bearers have breached children's rights. We have sought to do this not just in our submissions to the UN Committee on the Rights of the Child but in our legal work, training, the work of our youth advocacy group, youth@clc and when commenting on proposed policy and legislation.

In our monitoring of government's non-compliance with its international human rights obligations in respect of children, we are not confident that our government is closing the gap between its obligations and the reality of children's lives. The almost total failure to address the UN Committee on the Rights of the Child's 2008 Concluding Observations in respect of the UK Government is an obvious and stark example.

The Children's Law Centre has, for a long period of time, been on record as raising serious concerns in respect of non-compliance in this jurisdiction with Article 37 UNCRC. CLC have raised these breaches domestically and internationally. Some of these concerns, including the continued use of plastic bullets and tasers against children, the ongoing detention of children with adults in Hydebank Wood, this jurisdiction's extremely low minimum age of criminal responsibility and totally inadequate child and adolescent mental health service provision, are reflected in the 2008 Concluding Observations of the UN Committee on the Rights of the Child.

In our recent engagement with the ongoing Review of Youth Justice in Northern Ireland we have consistently argued the imperative of complying with international standards and in particular the UNCRC as a minimum human rights standard, in determining how we render our youth justice system children's rights compliant and fit for a democratic state in the 21st century. Professor Nowak, your lecture today will provide us with a very timely reminder of our international human rights obligations in respect of children who come in contact with the criminal justice system and will focus our minds on the need

to guard against complacency in respect of torture and cruel, inhuman and degrading treatment.

As you will all be aware CLC publishes its Annual Lecture which we are happy to see building into a very impressive series of booklets. We are particularly lucky this year in that Professor Nowak has provided us with a copy of his lecture in advance. As well as publishing today's lecture we are pleased to say you will be able to pick up a copy of Professor Nowak's lecture at the registration desk straight after the lecture.

Before I hand over to Mr Justice Stephens I would like to thank our friends and colleagues at the Bar for their support in sponsoring today's lecture. This is a wonderful and very appropriate venue for our lecture and we are grateful to the Bar for allowing us to hold our Annual Lecture here and for sponsoring a reception.

Thank you

Paddy Kelly
DIRECTOR

"Protecting children against torture and while in detention. The right of children to personal liberty and integrity. (Article 37 UNCRC)

Professor Manfred Nowak
Professor of International Law and Human Rights,
University of Vienna
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Former UN Special Rapporteur on Torture

1. Introduction

I feel very honoured by your invitation to deliver the 2012 Annual Lecture of the prestigious Children's Law Centre in Belfast. The focus of my lecture relates to my experience as UN Special Rapporteur on Torture from 2004 to 2010. During these six years, I carried out 18 official fact-finding missions to countries in all world regions,[1] three joint studies with other special procedures of the UN Human Rights Council[2] and various follow-up missions.[3] Unfortunately, none of my missions brought me to Northern Ireland, but I had many discussions with British officials in London, above all about planned deportations of terrorist suspects to Arab countries well known for their torture practices, on the basis of diplomatic assurances spelled out in the respective Memoranda of Understanding.

Since torture always takes place behind closed doors, I spent a considerable amount of time

1 The following countries were officially visited upon explicit invitation of the respective governments:
Georgia (including Abkhazia and South Ossetia), Mongolia, Nepal, China (including the autonomous regions of Tibet and Quinjang), Jordan, Paraguay, Nigeria, Togo, Sri Lanka, Indonesia, Denmark (including Greenland), Moldova (including Transnistria), Equatorial Guinea, Uruguay, Kazakhstan, Jamaica, Papua New Guinea and Greece.

2 Joint study on the situation of detainees at the US detention facilities at Guantánamo Bay, UN Doc. E/CN.4/2006/120 of 15 February 2006; Joint study on the implementation of recommendations regarding the situation in Darfur/Sudan, UN Doc. A/HRC/6/19of 28 November 2007; Joint study on secret detention in the fight against terrorism which dealt with a total of 66 states in different regions, UN Doc. A/HRC/13/42 of 19 February 2010.

3 Follow-up missions to Moldova (2009) and Kazakhstan (2010) and assessment missions to Georgia, Moldova, Paraguay (2011) and Uruguay (2012) in the context of an EU-funded project aimed at assisting selected States in their efforts of implementing the respective recommendations of the UN Special Rapporteur on Torture.

during my fact-finding missions in police lock-ups, pre-trial detention centres, prisons, psychiatric institutions and special detention facilities for migrants, asylum seekers, drug users, persons with disabilities and other vulnerable groups, including children. My visits to detention facilities were always unannounced and I insisted on strictly private interviews with detainees of my choice, subject of course to their informed and voluntary consent. In order to prove and document cases of torture, I was assisted by forensic experts, including the well-known Scottish expert Derrick Pounder, and we brought our cameras to document traces of torture as well as harsh and overcrowded prison conditions. In 17 of the 18 countries visited, with the notable exception of Denmark and Greenland, we found cases of torture, partly isolated cases, but in the majority of countries, torture is practiced in the 21st century in a fairly routine or even systematic manner.[4] Statistically speaking, in many cases, this has less to do with repression against political prisoners in military dictatorships, but with the shortcomings of the criminal justice system. Most often the police are under heavy pressure from judges, prosecutors, politicians, the media and the public at large to "solve" crimes. Frequently, they do not know better than to arrest persons who look "suspicious", usually coming from the poorest segments of society, and beat them until they confess to the crimes they were accused of. Prosecutors and judges often rubber-stamp the findings of the police on the basis of confessions extracted by torture. This may seem exaggerated but unfortunately by and large it reflects the reality in the majority of the world's countries in the early years of the 21st century.

In addition, I have found a "global prison crisis". The conditions of detention in most prisons, police-lock-ups and other detention facilities are much worse than most people could imagine. Of the roughly 10 million prisoners and pre-trial detainees[5] most live under conditions of overcrowding, with lack of adequate food, water, hygiene, health care, privacy and similar minimum standards for a dignified existence as human beings. At least one million of the 10 million prisoners worldwide are under the age of 18 years[6] i.e. children in the sense of the UN Convention on the Rights of the Child (CRC). They are held in police stations, pre-trial facilities, prisons, closed children's homes and similar places of detention. The vast majority of these children are accused of or sentenced for a petty offence; contrary to popular belief, only a small fraction are held in relation to a violent crime; most of them are first-time offenders.[7] Like all other detainees, child detainees depend on the State for care. However, owing to their age, their psychological

4 See my study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, A/HRC/13/39/Add.5, 5 February 2010.

5 See International Centre for Prison Studies, London/Essex, World Prison Brief, available at http://www.prisonstudies.org/info/worldbrief.

6 See the landmark study of the independent expert on violence against children, Paulo Sergio Pinheiro, UN Doc. A/61/299 of 29 August 2006, para. 61.

7 See the 2009 GA report of the Special Rapporteur on Torture, UN Doc. A/64/215 of 3 August 2009, para. 63.

stage of development and their physical fragility, children are particularly vulnerable to violence, sexual exploitation and other forms of abuse, both from prison authorities and fellow detainees. In Togo, I visited child prisons where children of less than 10 years of age were held in closed cells for most of the time. In Uruguay, they were a little older but also kept in dirty cells under the most deplorable hygienic conditions for 23 hours a day. In the headquarters of the criminal investigation department in Lagos, Nigeria, I came across an 11 year old boy in an overcrowded "torture room" together with more than one hundred other detainees, most of whom had been seriously tortured in the presence of the others. In Indonesia, as in many other countries, corporal punishment seems to be more widely practiced in detention facilities against children than against adults. In a children's home in Kazakhstan, I found children between the age of three and 16 held together for various reasons, such as street children, orphans, children forcibly separated from their parents, as well as juvenile offenders. The heads of all children, including the youngest, were completely shaved "for sanitary reasons" and most complained of regular beatings and other forms of corporal punishment.

The list of abuses against child detainees seems to be endless but not so well documented. In a recent study, the Copenhagen based International Rehabilitation Council for Torture Victims (IRCT) documented widespread torture against children affected by poverty in Nepal, children in conflict with the law in the Philippines and Indonesia, and against child soldiers in Sri Lanka.[8] The reports of the UN experts Paulo Sergio Pinheiro, Marta Santos Pais and Rhadika Coomaraswamy remind us of how widespread torture and other forms of violence are practiced against children, both during armed conflicts and in times of peace. Rather than repeating these horrific stories my lecture will focus instead on the legal aspects of the rights of children to personal liberty, integrity and dignity and the remarkable progress of international law in this respect during the last decades.

2 Prohibition of torture

Torture is the deliberate infliction of severe pain or suffering, whether physical or mental, on a powerless person, usually a detainee, for a specific purpose, such as extracting a confession or information, punishment, intimidation or discrimination.[9]
While Article 1 of the UN Convention against Torture (CAT) requires, as a further definition criteria, that such pain or suffering is inflicted by or with at least the acquiescence

8 IRCT, Untold Stories: Tortured Children - A Report on the Roots of a Horrific Practice, Copenhagen 2012.
9 Article 1 of the UN Convention against Torture; see Manfred Nowak/Elizabeth McArthur, The United Nations Convention Against Torture, A Commentary, Oxford 2008, 66 et seq.

of a public official, international humanitarian and criminal law applies the crime of torture also to non-State actors.[10] The prohibition of torture is one of the few absolute and non-derogable human rights[11] allowing for no exception, even in times of armed conflict, terrorism and other emergencies.[12] It has acquired the status as a peremptory or jus cogens norm of customary international law.[13] It applies equally to adults and children, but the threshold of severe pain or suffering might be lower for children, taking their particular vulnerability into account.[14]

As the recent case studies by the International Rehabilitation Council for Torture Victims on tortured children in the Philippines, Nepal, Sri Lanka and Indonesia,[15] the reports of the Special Representative of the Secretary-General on violence against children,[16] the Special Rapporteur on Torture[17] and other reliable sources indicate, children are in the same way subjected by police officers to torture for the purpose of extracting confessions and information as adults. Usually, street children and children from poor families are particularly prone to being picked up by the police as the "usual suspects" of petty crimes and being tortured until they confess to these crimes. Often, torture is also used as a means of coercing the families to pay a bribe ("bail") for the release of their child. Most of the tortured children which I interviewed in my function as Special Rapporteur on Torture belonged to the poorest sectors of their societies and became victims of corrupt and dysfunctional systems of criminal justice.

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10 See, e.g., Article 7(2)(e) of the Rome Statute of the International Criminal Court (ICC) or the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Prosecutor v. Kunarac (Case No. IT-96-23 & IT-96-23/1-A), Judgment of 12 June 2002, paras. 146-148. See also William Schabas/Helmut Sax, "Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty", in André Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Leiden/Boston 2006, at 13.

11 Cf., e.g., Articles 3 and 15 of the European Convention of Human Rights (ECHR) 1950, Articles 4 and 7 of the International Covenant on Civil and Political Rights (CCPR) 1966, and Articles 5 and 27 of the American Convention on Human Rights (ACHR) 1969.

12 See also Article 2(2) CAT: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

13 See, e.g., ICTY, Prosecutor v. Furundzija (Case No. IT-95-17/1-T), Judgment of 10 December 1998, para. 153.

14 See, e.g., the jurisprudence of the European Court of Human Rights in Ireland v. United Kingdom (judgment of 18 January 1978), Tyrer v. United Kingdom (judgment of 25 April 1978) or Soering v. United Kingdom (judgment of 7 July 1989) and of the Inter-American Court of Human Rights in Gómez-Paquiyauri Brothers v. Peru, (judgment of 8 July 2004); See also IRCT, Untold Stories, note 8, at 5.

15 IRCT, Untold Stories, note 8.

16 See the latest report of Marta Santos Pais, UN Doc. A/HRC/16/54 of 28 February 2011.

17 See the report of Juan Mendez, UN Doc. A/66/268 of 5 August 2011; See further A/54/42 of 1 October 1999; A/55/290 of 11 August 2000; A/57/173 of 2 July 2002; A/64/251 of 3 August 2009.

More child-specific practices of torture relate e.g. to the forcible recruitment and treatment of child soldiers. Although the Rome Statute of the ICC clearly defines the conscripting or enlisting of children under the age of fifteen years as a war crime[18] and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts of 2000 explicitly prohibits the compulsory recruitment of children under the age of 18 years,[19] hundreds of thousands of children are being recruited worldwide by government armed forces, paramilitaries, civil militia and other armed groups. Most often the children are abducted from their schools, homes, the streets, public gatherings or festivals.[20] If they resist or try to flee, they are often subjected to harsh methods of torture as a punishment or method of coercion. During my mission to Nepal in 2005 I interviewed a 17 year old girl who had been forcibly abducted from her school by Maoist forces. She tried to flee but was captured again. They amputated one toe and told her that her leg would be cut off should she again try to escape. She, nevertheless, escaped again and managed to find her way to Kathmandu, where she was arrested by the police who tortured her as a suspected Maoist.[21] In Sri Lanka, the youngest child soldiers, both girls and boys, forcibly recruited by the LTTE, whom I found in a detention facility of the Terrorist Investigation Department in Colombo, were 12 years old.[22]

Moreover, girls are particularly vulnerable to harmful traditional practices committed by non-State actors, such as female genital mutilation (FGM), honour killings and sati, as well as domestic violence, rape, trafficking, forced prostitution and other forms of sexual violence and exploitation. Although these practices often amount to torture and are explicitly prohibited under international law, which has developed specific State duties to protect women and children against such practices,[23] many thousands of children continue to be subjected to these horrible practices in all world regions.[24]

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18 Article 8(2)(b)(xxvi) of the ICC Statute.

19 Article 2 of the OP to the CRC. See also SC Res. 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009).

20 See IRCT, Untold Stories, note 8, with further references.

21 See UN Doc. E/CN.4/2006/6/Add. 5 of 9 January 2006, para. 31.

22 See UN Doc. A/HRC/7/3/Add. 6 of 26 February 2008, para. 87

23 See, e.g., Articles 19, 24(3), 34, 35 and 36 CRC; Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography of 2000; Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003; Articles 16, 21, 27 and 29 of the African Charter on the Rights and Welfare of the Child 1990; Article 7(1)(g) ICC Statute. See also Manfred Nowak, "Article 6: The Right to Life, Survival and Development", in André Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Leiden/Boston 2005, 31 et seq.

24 See the global studies by Pinheiro, note 6; Santos Pais, note 16; UNICEF, The State of the World's Children 2012: Children in an Urban World, February 2012; UNICEF, State of the World's Children statistical table, 2011; UNICEF, The State of the World's Children 2011, February 2011.

3. Prohibition of cruel, inhuman or degrading treatment

Article 16 CAT, as other provisions in general human rights treaties relating to torture or the right to personal integrity, requires States parties to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1", without however providing any definition for these forms of ill-treatment. While there is agreement that cruel, inhuman or degrading treatment (CIDT) is less severe than torture, two different schools of thought on how to distinguish torture from CIDT have emerged. They have their origin in a dispute between the then two human rights monitoring bodies of the ECHR, the Commission and the Court of Human Rights, in the well known Northern Ireland case, which involved the legal qualification of the five combined deep interrogation techniques which had been used by British security forces against suspected terrorists in Northern Ireland: wall-standing in a "stress position", hooding, subjection to noise as well as deprivation of sleep, food and drink for a longer period of time. While the Commission, on the basis of its experiences in the Greek case,[25] qualified the five combined deep interrogation techniques as torture,[26] the European Court of Human Rights, in a highly controversial judgment, arrived at the conclusion that these interrogation techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[27] In other words, the Court took the position that the distinction between torture and CIDT "derives principally from a difference in the intensity of the suffering inflicted".[28] This approach was, however, not followed by the United Nations and by the majority of legal scholars in this field, including UN Special Rapporteurs on Torture.[29] According to our interpretation, the severity of pain or suffering, although constituting an essential element of the definition of torture, is not a criterion distinguishing torture from cruel and inhuman treatment. Only degrading treatment does not have to reach the level of "severe pain or suffering", but every form of torture, cruel or inhuman treatment requires the infliction of "severe pain or suffering". Whether or not cruel or inhuman treatment can also be qualified as torture depends on the fulfillment of the other definition requirements of torture outlined

25 Report of the Commission of 5 November 1969, (1969) XII Yearbook 186: "The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, …".

26 Report of the Commission of 25 January 1976, ECHR Ser. B, No. 23-1, 410.

27 European Court of Human Rights, Ireland v. United Kingdom (judgment of 18 January 1978), § 167. But see the dissenting opinion of Matscher.

28 Ibid.

29 Cf., e.g., Nigel Rodley, "The Definition(s) of Torture in International Law", 55 Current Legal Problems (2002) 467 at 491; Malcolm D. Evans, "Getting to Grips with Torture", 51 International and Comparative Law Quarterly (ICLQ 2002), 365 et seq.; Manfred Nowak, "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment", 23 Netherlands Quarterly of Human Rights (NQHR 2005), 674 et seq.; Nowak/McArthur, CAT-Commentary, note 9, 69.

above i.e. intention, purpose and powerlessness (usually detention) of the victim. Typical examples of cruel and inhuman treatment, therefore, are the excessive use of force by law enforcement officials outside a situation of detention, such as during arrest, search and seizure, the dispersal of a public gathering or street demonstration, quelling a riot or insurrection. Particularly harsh conditions of detention including overcrowding, lack of food and medicine, and poor hygienic conditions, may also be qualified as inhuman or at least degrading treatment.

Children are often the target of excessive use of force by the police or military forces, such as Palestinian children in Israel and the Palestinian Occupied Territories.[30] Many issues raised by the Children's Law Centre in Belfast, such as the use of plastic bullets (attenuating energy projectiles), tasers, mosquito devices, or stop and search practices by the Northern Ireland police forces would fall in this category of ill-treatment.[31] Whether these practices amount to cruel, inhuman or at least degrading treatment depends on whether they can be regarded as proportional to a legitimate purpose of law enforcement or as excessive use of force. The proportionality test might lead to differences between adults and children on the basis of their higher vulnerability. While the legitimacy of the use of tasers as a less intrusive weapon than fire-arms against adults is still disputed,[32] the Committee on the Rights of the Child has taken the view that tasers and plastic bullets should never be used against children.[33] Similarly, the Committee has expressed concerns at the use of mosquito devices, which are only targeting children and young people.

4 . Prohibition of cruel, inhuman or degrading punishment: capital and corporal punishment

In addition to CIDT, international human rights law also prohibits cruel, inhuman or degrading punishment, without defining which types of punishment may be considered as cruel, inhuman or degrading. Already the English Bill of Rights of 1689 prohibited "cruel and unusual punishment", a phrase which found its way into the 8th Amendment to the US Federal Constitution of 1789 and into Article XXVI of the American Declaration of the Rights and Duties of Man 1948. Later provisions in international human rights instruments, starting with Article 5 of the Universal Declaration of Human Rights, refer

30 See for example UN Doc. A/HRC/16/72 of 10 January 2011, paras. 26 – 31.

31 Cf. Children's Law Centre, "Briefing Paper on Children's Rights Issues in Northern Ireland", Belfast, April 2012, 6 et seq.

32 Cf., e.g., the opinion of the Committee against Torture in relation to the United States and Portugal, UN Docs. CAT/C/USA/CO/2 of 25 July 2006 and CAT/C/PRT/CO/4 of 19 February 2008; See also Amnesty International, Less Than Lethal? The Use of Stun Weapons in US Law Enforcement, December 2008; Amnesty International, USA: Stricter limits urged as deaths following police Taser use reach 500, available at http://www.amnesty.org/en/news/usa-stricter-limits-urged-deaths-following-police-taser-use-reach-500-2012-02-15.

33 See UN Doc. CRC/C/GBR/CO/4 of 20 October 2008, para. 31.

to "cruel, inhuman or degrading punishment".[34] Which punishments must be regarded as cruel, inhuman, unusual or at least degrading remains a highly contested issue among States. Although most people would agree that corporal and capital punishment first come to our mind when thinking about inhuman forms of punishment, I was most strongly criticized by a variety of States in the UN Human Rights Council when I raised these issues in my function as "Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment".[35] In particular, I was accused by representatives of Islamic States of having "exceeded my mandate", thereby, violating the Code of Conduct of UN special procedures.

Historically, *corporal punishment* as a judicial or disciplinary sanction had been widely used in the United Kingdom and the British Commonwealth, often against children and juveniles.[36] In 1978, the European Court of Human Rights had ruled in a landmark judgment that birching of a juvenile as a traditional punishment on the Isle of Man was no longer compatible with the prohibition of degrading punishment in Article 3 ECHR.[37] Shortly thereafter the UN Human Rights Committee, in a General Comment of 1982, expressed the unanimous opinion that the prohibition of Article 7 CCPR "must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure".[38] In 2000, the Committee confirmed this opinion in an individual case against Jamaica involving 10 strokes with the tamarind switch on the naked buttocks in the presence of 25 prison warders,[39] followed by the Inter-American Court of Human Rights in 2005.[40] In recent years, the UN Committee against Torture and the UN

34 On the historical development of these provisions see Manfred Nowak/Karolina Januszewski, "Torture: Europe and the Americas", in Andersen/Borch/Lassen (eds.), Europe and the Americas: Transatlantic Approaches to Human Rights, Copenhagen 2012 (forthcoming).

35 UN Docs A/60/3/ 6 of 30 August 2005 and A/HRC/13/39 of 9 February 2010.

36 Cf. Nigel Rodley, The Treatment of Prisoners Under International Law, Oxford 1999, 309 et seq. In its concluding observations on the UK of October 2008, the CRC-Committee still expressed concern that the defence of "reasonable chastisement" had not been fully removed from legislation in England, Wales, Scotland and Northern Ireland. In addition, it criticised that "corporal punishment is lawful in the home, schools and alternative care settings in virtually all overseas territories and crown dependencies": UN Doc. CRC/C/GBR/CO/4, paras. 40-42.

37 European Court of Human Rights, Tyrer v. United Kingdom (judgment of 25 April 1978).

38 GenC 7/16 of 27 July 1982, para. 2. See Manfred Nowak, UN Covenant on Civil and Political Rights – CCPR Commentary, 2nd edition, Kehl/Strasbourg/Arlington 2005, 167. For an extremely narrow interpretation of this GenC leaving space for some forms of corporal punishment see, however, Dominik McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Oxford 1994, 365. See also Sharon Detrick, A Commentary on the Convention on the Rights of the Child, The Hague/Boston/London 1999, 623.

39 Human Rights Committee; Osbourne v. Jamaica, No. 759/1997, para. 3.3.

40 Inter-American Court of Human Rights, Winston Caesar v. Trinidad and Tobago, Series C No. 123.

Committee on the Rights of the Child also increasingly criticized Islamic States for their continuing use of flogging and amputations based on Shariah law.[41]

Capital punishment is even more controversial than corporal punishment, despite a clear trend towards its abolition under international law.[42] Apart from the further adherence of certain States, including the US, China and many Islamic countries, to a philosophy of retributive justice, this has to do with the fact that most provisions on the right to life in international human rights treaties contain an explicit recognition that the continuing application of the death penalty shall not be regarded as a violation of the right to life.[43] On the basis of a systematic interpretation of international human rights treaties, the recognition of the death penalty as an explicit exception to the right to life was regarded also to be in conformity with the absolute prohibition of cruel, inhuman or degrading punishment. With the gradual recognition that corporal punishment in all its forms constitutes at least degrading punishment, this interpretation has been increasingly challenged in jurisprudence and legal literature alike. In particular, a landmark judgment of the South African Constitutional Court of 1995 paved the way for a new interpretation which regards capital punishment, which is nothing but an aggravated form of corporal punishment, as a cruel, inhuman and degrading punishment in violation of international law.[44]

In relation to *children*, this development had already started earlier. The first provision in a human rights treaty prohibiting the imposition of capital punishment for crimes committed by persons below 18 years of age is not to be found in any European or Latin American human rights treaty, but in Article 6(5) of the CCPR adopted by the

41 Cf. Nowak/McArthur, CAT-Commentary, note 9, 561 et seq.; and Schabas/Sax, note 10, 21 et seq.

42 See Article 6(2 and 6) CCPR 1966; Article 4(2 and 3) ACHR 1969; the 6th and 13th OP to the ECHR 1983 and 2002; the 2nd OP to CCPR 1990; the Protocol to the ACHR to Abolish the Death Penalty 1990; Article 37(a) CRC 1989; Article 5(3) of the African Charter on the Rights and Welfare of the Child 1990; GA Res. 62/149 (adopted on 18 December 2007, by a vote of 99 in favour to 52 against, with 33 abstentions), 63/168 (adopted on 18 December 2008, by a vote of 104 in favour to 54 against, with 29 abstentions), 65/206 (adopted on 21 December 2010, by a vote of 108 in favour to 41 against, with 36 abstentions); See also Amnesty International, Death sentences and executions in 2011, London 2012, available at http://www.amnesty.org/en/library/info/ACT50/001/2012/en; William A. H. Schabas, The Abolition of the Death Penalty in International Law, 3rd ed., Cambridge 2002; Nowak, CCPR-Commentary, note 38, 133 et seq.; Nowak/McArthur, CAT-Commentary, note 9, 566.

43 Cf., e.g., Articles 2 ECHR, 6 CCPR, 4 ACHR and Articles 5, 6 and 7 of the Arab Charter on Human Rights 2004.

44 Constitutional Court of South Africa, State v. Makwanyane and Mchunu, Case No. CCT/3/94, judgment of 6 June 1995.

UN General Assembly in 1966![45] Identical provisions were later adopted in Article 4(5) ACHR of 1969 and Article 5(3) of the African Charter on the Rights and Welfare of the Child of 1990.[46] These provisions, however, linked the prohibition of the death penalty for children with the right to life. Article 37(a) CRC of 1989 is the first provision in an international human rights treaty which puts the prohibition of capital punishment and life imprisonment clearly in the context of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment. This rationale was later followed in Article 2(2) of the Charter of Fundamental Rights of the European Union of 2000, which puts the prohibition of the death penalty in the overall context of the first chapter on human dignity. The understanding that the execution of juvenile offenders would constitute cruel, inhuman or at least degrading punishment also led to the recognition of this provision as a norm of customary international law. In the landmark decision of Domingues v. United States of America, the Inter-American Commission on Human Rights in 2002 even held that this rule had already reached the status of jus cogens.[47] Despite the fact that the US had entered a highly controversial reservation to Article 6(5) CCPR to the effect that juvenile offenders could still be executed,[48] the US Supreme Court ruled by a narrow majority in 2005 that the execution of persons for crimes committed under the age of 18 was contrary to the prohibition of "cruel and unusual punishment" in the 8th Amendment of the US Constitution. In this remarkable judgment, the US Supreme Court made reference to Article 37(a) CRC, notwithstanding the fact that the US remains one of only two countries in the world which have not yet ratified the CRC, and to the "stark reality that the United States is the only country in

45 For the travaux préparatoires of this remarkable provision in the Third Committee of the General Assembly see Marc J. Bossuyt, Guide to the Travaux Préparatoires, Dordrecht 1986, 141 et seq.; Nowak, CCPR-Commentary, note 38, 144 et seq.; Schabas, The Abolition of the Death Penalty, note 42; Schabas/Sax, note 10, 25 et seq. But see already a similar provision in Article 68(4) of the fourth Geneva Convention Relative to the Protection of Civilians of 1949.

46 But see the weaker and extremely problematic provision in Article 7(1) of the Arab Charter on Human Rights of 2004: "Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime." Apart from the exception in the second half of this provision, a literal reading of this provision would suggest that juvenile offenders may be sentenced to death after having reached the age of 18. This would be in clear violation of a norm of jus cogens. See Schabas/Sax, note 10, 5 et seq.

47 Inter-American Commission on Human Rights, Domingues v. United States of America, Case No. 12.285, Report No. 62/02 of 22 October 2002, para. 85. See Schabas/Sax, note 10, 6.

48 The US reserved the right "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Cf. Nowak, CCPR-Commentary, note 38, 145 with further references; Nowak, Article 6, note 23, 20.

the world that continues to give official sanction to the juvenile death penalty".[49] In fact, nine countries are known to have executed offenders who were under 18 at the time the crime was committed since 1990: China, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, United States of America and Yemen.[50] With 19 juvenile offenders executed since 1990, the United States was until recently the country with the highest number of known executions of this sort. In the meantime, Iran has unfortunately exceeded the United States and remains the only country in the world where the practice of juvenile executions overtly continues.[51]

The recognition that the imposition of the death penalty on juvenile offenders constitutes cruel, inhuman or at least degrading punishment might pave the way for the gradual abolition of capital punishment for adults as well.

5. Prohibition of life imprisonment

Article 37(a) CRC is the only provision in a human rights treaty that prohibits life imprisonment. However, due to a mistake[52] that was made in the final moments of the drafting of this provision, the prohibition of life imprisonment for children is limited by the wording "without possibility of release".[53] William Schabas draws from these words, in light of the drafting history, the conclusion that Article 37(a) "allows for the possibility that children will be sentenced to life imprisonment and never released".[54] I respectfully disagree with this interpretation, since this provision needs to be interpreted in a systematic and teleological manner, taking into account the object and purpose of Article 37 as a whole. The 1986 draft of the Human Rights Commission contained an absolute prohibition of both capital punishment and life imprisonment for crimes committed by persons below 18 years of age.[55] In order to meet the concerns of certain States opposing an absolute prohibition of life imprisonment, including Japan and the US, the Canadian delegate proposed to add the phrase "without the possibility of release".[56] In 1989, when they had realized the possible negative consequence of this formulation in the context of a provision prohibiting torture and CIDT, the delegations of Austria, the Federal Republic

49 US Supreme Court, Roper v. Simmons, 543 U.S. 551 (2005).
50 Amnesty International, Executions of juveniles since 1990 – Statistic available at http://www.amnesty.org/en/death-penalty/executions-of-child-offenders-since-1990.
51 See Schabas/Sax, note 10, 29. See Amnesty International, Executions of juveniles since 1990 - Statistic, note 49.
52 William Schabas speaks in this context of an "unfortunate compromise": see Schabas/Sax, note 10, 30.
53 On the travaux préparatoires of this phrase see Detrick, note 38, 627 et seq.; Schabas/Sax, note 10, 7 et seq.
54 Schabas/Sax, note 10, 30.
55 UN Doc. E/CN.4/1986/39, para. 99.
56 Ibid, paras. 104 and 106.

of Germany, Senegal and Venezuela suggested deleting it,[57] but many powerful States with a retributive criminal justice system, above all China, India, Japan, the USSR and the US, objected. In order to reach a compromise, the delegations of China, the Federal Republic of Germany, the Netherlands and Venezuela suggested omitting the reference to life imprisonment altogether,[58] but "Senegal stubbornly insisted it be retained".[59] This was certainly a mistake as Senegal belonged to the group of States in favour of the absolute prohibition of life imprisonment for juveniles. Nevertheless, the insistence of Senegal led to the unfortunate compromise that the text as adopted by the Commission in 1986 remained with the phrase "without the possibility of release". This drafting history must be taken into account when interpreting the text in the context of Article 37 as a whole.

Article 37 combines the human rights of children to personal integrity and liberty by prohibiting all forms of torture and ill-treatment and by limiting arrest, detention and imprisonment of children as a measure of last resort and for the shortest appropriate period of time. In addition, the drafters of Article 37(a) wished to specify two specific forms of punishment, which they considered at least for children as cruel and inhuman: capital punishment and life imprisonment. While the prohibition of the death penalty for juveniles had already been agreed upon before in Article 6(5) CCPR, the prohibition of life imprisonment was meant to further develop international human rights law for children. In fact, one can argue that life imprisonment without the possibility of release even for adults is in contravention of the right to human dignity of detainees, which includes that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".[60] Already in 1977, the German Constitutional Court had adopted such an approach[61] and other courts have followed.[62] In addition, even international criminal law, which only applies to the worst crimes committed by adults, such as genocide and crimes against humanity, prohibits inhuman punishments, such as capital punishment and life imprisonment: Article 77(1) of the Rome Statute authorizes the ICC to impose imprisonment only up to 30 years and life imprisonment only exceptionally "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". In light of these developments in international law, it is difficult to understand how life imprisonment for children can be reconciled with their right to human dignity, the principle of rehabilitation of offenders and the explicit provision in Article 37(b) that imprisonment of a child shall be used only for the shortest appropriate period of time! In other words, I disagree with

57 UN Doc. E/CN.4/1989/48, para. 541.
58 Ibid, 542.
59 Schabas/Sax, note 10, 10.
60 Article 10 CCPR: see Nowak, CCPR-Commentary, note 38, 253 et seq.
61 Constitutional Court of Germany, 45 BVerfGE 187 (1977), 228. See, e.g., Dirk van Zyl Smit, "Is Life Imprisonment Constitutional – The German Experience", Public Law 263, 1992.
62 Cf Schabas/Sax, note 10, 12.

William Schabas who argues that the "unfortunate compromise" in the final moments of the drafting of Article 37(a) "has the unfortunate consequence of restricting the evolution of the general prohibition on torture and cruel, inhuman or degrading treatment or punishment, in much the same way as Article 3 of the ECHR has been restricted in scope by the reference to capital punishment in Article 2(1) of the Convention".[63] On the contrary, one has to take the evolution of the meaning of the term "cruel and inhuman punishment" into account and therefore conclude that capital punishment and life imprisonment as such violate the prohibition of cruel and inhuman punishment, at least when committed by persons below 18 years of age.[64]

6. Deprivation of liberty as a measure of last resort and for the shortest appropriate period of time

It is more difficult to specify in general terms what the phrases "measure of last resort" and the "shortest appropriate period of time" mean. The drafting history of Article 37(b) contains another "unfortunate compromise" which created much confusion. While the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules) provide that all forms of deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases,[65] Article 37(b) CRC does not speak of "deprivation of liberty", as originally proposed,[66] but of "arrest, detention and imprisonment of a child".[67] This led to the conclusion of some authors that "States Parties to the CRC 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".[68] Again, this interpretation based on a fairly confused drafting history,[69] should be taken with a grain of salt. Already in Article 9 CCPR, the word "detention" was used as a generic term applying to all possible forms of deprivation of liberty.[70] It would be strange if the various educational "detention centres" for children were not covered by the term "detention" in Article 37(b) CRC! I agree with Helmut Sax that "such restrictive interpretation would not adequately take into account

63 Ibid, 12. See also, in this context, the judgment of the European Court of Human Rights in Hussain v. United Kingdom, 21 February 1996, ECHR 8, 1996.

64 The practice of the CRC-Committee in the State reporting procedure also tends to interpret Article 37(a) in this manner: cf. Schabas/Sax, note 10, 30 et seq.

65 Rule 2 of the JDL Rules, adopted by GA Res. 45/113 of 14 December 1990.

66 See UN Doc. E/CN.4/1989/48, para. 537.

67 On the travaux préparatoires of Article 37(b) see Detrick, note 38, 629 et seq.; Schabas/Sax, note 10, 51 et seq.

68 See, e.g., Geraldine van Bueren, The International Law on the Rights of the Child, The Hague 1998, 209.

69 According to Helmut Sax, in Schabas/Sax, note 10, 51, the drafting history "resembles a test driving exercise".

70 See Nowak, CCPR-Commentary, note 38, 218 et seq.

the context and purpose of CRC standards in this regard".[71] The object and purpose of the CRC requires, therefore, that the terms "measure of last resort" and the "shortest appropriate period of time" are applied to all forms of deprivation of liberty, including special educational facilities for children or detention of asylum-seeking refugee children.

As a "measure of last resort" means that deprivation of liberty of children shall only be applied in truly exceptional cases and after the respective authorities have tried all possible non-custodial measures. This applies equally to educational measures for children with difficult behaviour, to the treatment of street children, refugee and migrant children, and to the juvenile justice system. If children are arrested by the police on the suspicion of having committed a serious crime, police custody shall never be longer than 24 or a maximum of 48 hours. Pre-trial detention in a judicial institution shall even for adults be an exceptional measure, as is explicitly stipulated in Article 9(3) CCPR.[72] This means it should almost never be applied to juveniles and be replaced by alternative measures, such as close supervision or placement within a family.[73] But even as a punishment after conviction, courts in the juvenile justice system shall apply imprisonment only for violent crimes and persistent offenders.[74] Non-custodial measures such as probation, counselling or vocational training programmes, shall be encouraged.[75] The United Kingdom has long been among the countries in Western Europe with the highest incarceration rate, which also means that the rate of children deprived of liberty is probably higher than in most other Western European countries.[76] According to the latest statistics of the UK based International Centre for Prison Studies, the rate of prisoners per 100,000 inhabitants in the United Kingdom is 146, second in Western Europe only to Spain with a rate of 152.[77] It should also be recalled that the minimum age of criminal responsibility should,

71 Sax in Schabas/Sax, note 10, 84 et seq.

72 Cf. Nowak, CCPR-Commentary, note 38, 233 et seq.

73 See Beijing Rules, rule 13.2 and Havana Rules, rule 17. See also my report as Special Rapporteur on Torture, UN Doc. A/64/215, paras. 65-67.

74 Cf. Schabas/Sax, note 10, 81 et seq. with reference to the practice of the CRC-Committee and relevant soft law standards, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985;
United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990;
the JDL Rules, adopted by GA Res. 45/113 of 14 December 1990; and Guidelines for Action on Children in the Criminal Justice System, recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

75 See Article 40(4) CRC and the UN Standard Minimum Rules for Non-Custodial Measures (the "Tokyo Rules": GA Res. 45/110 of 14 December 1990).

76 Cf. Elizabeth Ayre/Lucy Gampell/Peter Scharff Smith, Introduction, in Peter Scharff Smith/Lucy Gampell (eds.), Children of Imprisoned Parents, Danish Institute of Human Rights, Copenhagen 2011, 3 at 8.

77 International Centre for Prison Studies, World Prison Brief, note 5.

in principle, not be lower than 12 years and should be gradually raised.[78] In her Children's Law Centre Annual Lecture 2008, Professor Yanghee Lee, Chairperson of the CRC-Committee, said that "it was the general understanding of the Committee that industrialized, democratic societies would go even further as to raising it to even a higher age, such as 14 or 16".[79] In this context, the CRC-Committee, in its concluding observations on the United Kingdom of October 2008, expressed serious concern that the age of criminal responsibility was set at "8 years of age in Scotland and at 10 years for England, Wales and Northern Ireland".[80] In the meantime, only the Scottish Government reacted positively to the recommendation from the CRC-Committee by raising its minimum age of criminal responsibility from 8 to 12 years but the age of 10 in England, Wales and Northern Ireland remains among the lowest in the world.[81] This is a matter of serious concern as it raises the number of children deprived of liberty, which indicates, as the CRC-Committee has stressed, "that detention is not always applied as a measure of last resort",[82] which is in contravention of Article 37(b) CRC. Since I have seen many children under the age of 14 suffering in the prisons of various countries and expressed my serious concerns at this violation of international human rights standards,[83] I also feel obliged to request the authorities in the United Kingdom, including in Northern Ireland, to raise the age of criminal responsibility at least to the age of 14 and to apply deprivation of liberty only as a measure of last resort. This request, of course, not only applies to children deprived of the right to personal liberty in the administration of criminal justice, but also to other forms of detention, including the detention of asylum-seeking and migrant children.[84]

7. Conditions of detention

Article 37(c) CRC contains specific provisions, based on Article 10 CCPR, to the effect that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits. These comprehensive set of State obligations, which range from the absolute prohibition of corporal punishment as a disciplinary measure in closed institutions to

78 GenC 10, para. 32 of the CRC-Committee of 25 April 2007; See also UN Doc. A/64/215, para. 67.
79 See Children's Law Centre, note 31, 16.
80 UN Doc. CRC/C/GBR/CO/4, para. 77(a).
81 See Children's Law Centre, note 31, 16 with further references.
82 UN Doc. CRC/C/GBR/CO/4, para. 77(c).
83 UN Doc. A/64/215, para. 67.
84 See in this respect also the concerns expressed by the CRC-Committee towards the UK: UN Doc. CRC/C/GBR/CO/4, paras. 70-71.

the management of juvenile prisons and educational institutions, separate from adult prisons, with properly trained staff and child-specific educational, recreational and work opportunities, have been further elaborated in the respective soft law standards.[85]

During my fact-finding missions as UN Special Rapporteur on Torture, I again found that these standards are consistently violated in many countries. Corporal punishment is even more widespread for children than for adults. Often, children are not separated from adults, pre-trial detainees not from convicted offenders. In addition, the conditions of prisons and special "educational institutions" for children with difficult behavior, street children and orphans are often heart-breaking. Much needs to be done in most countries of the world to comply with the respective minimum standards in Article 37 CRC! In my report to the General Assembly on children in detention I recommended, for instance, that children should only be detained in open institutions, that they should receive individualised treatment, provided with bedding in small group dormitories or individual bedrooms, and that their need for privacy be respected.[86]

In its concluding observations on the United Kingdom of October 2008, the CRC-Committee welcomed the UK withdrawal of its reservation to Article 37(c) CRC relating to the separation of child detainees from adults and called upon the UK Government to also ensure in practice that, "unless in his or her best interest, every child deprived of liberty is separated from adults in all places of deprivation of liberty".[87] In its recent information provided to me, the Children's Law Centre states, however, that "young males under 18 continue to be routinely detained with adults up to the age of 21 and in some cases 23 on remand, committal or conviction, in Hydebank Wood Young Offenders Centre", operated by the Northern Ireland Prison Service.[88] It recommended in this context that "all children should be removed from Hydebank Wood and accommodated in Woodlands JJC".[89]

8. Right to habeas corpus proceedings

In addition to the general right of habeas corpus in Article 9(4) CCPR, Article 37(d) CRC specifies that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action. While Article 9(4) CCPR requires that a court shall decide "without delay" about the lawfulness of any form

85 Cf. Schabas/Sax, note 10, 88 et seq. with further references.
86 UN Doc. A/64/215, para. 68. See also Havana Rules, rules 30-33.
87 UN Doc. CRC/C/GBR/CO/4, para. 78(d).
88 Children's Law Centre, note 31, 17.
89 Ibid, 21.

of detention and shall order the release if the detention was found unlawful or arbitrary, Article 37(d) CRC provides for a "prompt" decision. It is essential that children deprived of liberty are immediately provided by the State ex-officio with free legal assistance in order to challenge the lawfulness of the detention as an exceptional measure and that the respective judicial authority decides within a few days whether the child may be kept in detention or shall be released. Such children-specific habeas corpus proceedings must be conducted in regular intervals, always keeping in mind that the detention of children is only allowed as an exceptional measure for the shortest appropriate period of time.[90]

9. Children of imprisoned parents

On 30 September 2011, the CRC-Committee devoted its Day of General Discussion to the topic of "children of incarcerated parents" and sought to raise awareness about the specific rights and needs of children affected by the imprisonment of their father or mother.[91] Whether babies or small children grow up with their mother (and in very few cases with their father) in a prison or whether they stay with the other parent, with grandparents or other family members, or in a State institution, children are deeply affected by the fact that their father, mother or even both parents are deprived of their liberty. The practice of States in this respect is far from uniform. Some States allow children to stay with their imprisoned parents until the age of 10 or 12, whereas other States do not permit even newly born babies to stay with their imprisoned mother. Most States allow children up to the age of 2 or 3 years to stay with their mothers, in particular if there are no better alternatives, such as growing up with close family members.[92] I agree with the CRC-Committee that the principle of the best interest of the child in Article 3 CRC must always be applied. This means that determining strict general rules of a fixed minimum and maximum age limit for a child to live with his/her incarcerated parent is not very useful and may even result in the lowering of the protection standard for children in some States.[93] Consequently, decisions on whether the best interest of the child are better respected by having the child live with the incarcerated parent or outside the detention facility should always be made on an individual basis.[94]

90 Cf. Schabas/Sax, note 10, 94 et seq.

91 See CRC-Committee, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents", 30 September 2011, available at http://www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCDGDReport.pdf.

92 Cf., e.g., the comparative study carried out by the Danish Institute of Human Rights: Peter Scharff Smith/Lucy Gampell (eds.), Children of Imprisoned Parents, Copenhagen 2011. For a comparative analysis of age limits for children allowed to stay with their parents in prison see Quaker United Nations Office, Babies and Children Living in Prison: Age Limits and Policies around the World, available at http://www.quno.org/geneva/pdf/humanrights/women-in-prison/CRCwrittensubmission-babieslist.pdf.

93 CRC-Committee, Report and Recommendations, note 90 para. 15.

94 Ibid, para. 33.

If children are allowed to live with their parents in a prison, States must ensure a child-friendly environment with adequate facilities for the children to play, to move freely around and to be provided with appropriate food, health and educational facilities supported by qualified prison staff, including nurses. In addition, such children shall be given access to crèches outside the prison, offering them opportunities for socialisation with other children and alleviating the detrimental social effects of imprisonment on their personal development.[95] In my experience, prisons that allow children to stay with their parents are usually cleaner, more open, humane and friendly. Even in countries with very poor prison conditions, children residing with their imprisoned parents bring some light, joy and "normality" into the dark prison reality.

For children left outside when their parent is incarcerated, it is important that States respect their right to regularly visit their parent(s) in a child-friendly environment which is respectful to the child's dignity and privacy.[96] Prison authorities should enable visits to take place outside the detention facility or in special visiting rooms inside the prison with toys, paintings and other child-friendly utensils. In certain Danish prisons, there are special visiting rooms which resemble more a modern kindergarten than a prison, where children can meet their father in normal clothes and an atmosphere which makes them forget that they are in a prison. Such an attitude is in stark contrast to many prisons in the world, where children can visit their parents only in a maximum security environment, i.e. in handcuffs or separated by a window. I will never forget a man in a maximum security prison in Mongolia who spent a 30 years prison term in solitary confinement with the "right" to be visited twice a year by his small children. He told me that these two days per year were the only hope that was left to him. But when he was kept in handcuffs during the visit without the possibility to touch his children, he felt so ashamed and humiliated that he requested his children to refrain from further visits.

The comparative study on children of imprisoned parents mentioned above also contains a case study on Northern Ireland. Despite finding a number of examples of good practices, specifically child-centred visits and the work of the Family Support Officers, the study concludes that "there is a need for deep and long-term cultural and institutional change within the Northern Ireland prison system".[97] The security led culture among prison staff and a culture of denial and compromise within the service as a whole "have stood in the way of family-oriented developments and have too often resulted in a hostile attitude

95 Cf. Rule 36 of the European Prison Rules; the Parliamentary Assembly of the Council of Europe's Resolution 1663 (2009) of 28 April 2009 on Women in Prison; Stephanie Lagoutte, "The human rights framework", in Scharff Smith/Gampell, note 92, 31 at 49 et seq.

96 CRC-Committee, Report and Recommendations, note 91, paras. 38 to 40.

97 Linda Moore/Una Convery/Phil Scraton, "The Northern Ireland case study", in Scharff Smith/Gampell, note 92, 122 at 162 et seq.

to families and children, rather than the respect they deserve".[98] Finally, the study also identified the "need for cultural change within media coverage and public education, viewing children with imprisoned parents as victims and survivors of the criminal justice system and as rights-holders whose needs must be addressed".[99]

Conclusion

The right of children to personal liberty, integrity and dignity, as stipulated in Article 37 CRC, is one of the most important provisions in the CRC. Despite some unfortunate compromises and mistakes during the drafting process, this provision represents a decisive step in the development of human rights, as it joins the rights to personal liberty and integrity, thereby separating the question of capital punishment from the right to life discourse. Read and understood in a systematic manner, Article 37 CRC prohibits torture, cruel, inhuman or degrading treatment or punishment, including all forms of capital and corporal punishment, as well as life imprisonment for persons below the age of 18 years. Moreover, it restricts all forms of deprivation of liberty for children and juveniles, whether in the context of the administration of criminal justice or in relation to other forms of detention, including closed educational facilities or migration detention centres, to a measure of last resort for the shortest appropriate period of time. In the few remaining and exceptional cases of deprivation of liberty, children shall be held in a special child-friendly environment, separated from adults, with the right to be treated in a humane manner taking into account the special needs of their age, including the rights to maintain close contacts with their families and to be assisted by free legal aid in special habeas corpus proceedings for children aimed at challenging their deprivation of liberty before a court. Children of imprisoned parents have the right that their best interests are duly taken into account in every individual case. This may lead to their right to spend a certain time with their incarcerated mother or father in prison, in a child-friendly environment with adequate access to educational, health, recreational and playing facilities. If these children stay with the other parent or family members, they have a right to maintain close contacts with their imprisoned parents by means of regular visits outside the detention facility or in a child-friendly environment inside the detention facility.

98 Ibid, 165, referring also to the Interim Report of 28 February 2011 of the Independent Review Team (2011), Review of the Northern Ireland Prison Service.

99 Ibid, 165.

These are the fairly high human rights standards of the CRC, which are binding on all States with the only exception of the United States and Somalia. They are supplemented by a considerable number of detailed soft law standards. Nevertheless, as I have experienced during my six years as United Nations Special Rapporteur on Torture, to more than a million children deprived of their liberty around the world, these legally binding norms, with their envisaged protection and conditions, "must sound as if they are out of touch with reality".[100] Too many children, whom I met during my fact-finding missions in prisons, pre-trial detention facilities, police lock-ups, psychiatric institutions, migration and asylum detention centres and special educational facilities for children, some as young as three years of age, were held in closed facilities, often locked up for many months and years in severely overcrowded cells, under deplorable sanitary and hygienic conditions, without access to proper food, educational, health or recreational facilities, subjected to torture and corporal punishment, sexual exploitation and inter-prisoner violence. The suffering of these children and the negative impact of such cruel treatment to their further development as human beings is difficult to imagine. There is still a long way to go, even in Europe, in order to narrow this outrageous implementation gap between legally binding minimum standards and the sobering reality on the ground.

100 UN Doc. A/64/215, para. 69.