DISCUSSION PAPER

Administrative detention of children: a global report

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CHILD PROTECTION SECTION

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Abbreviations

Banjul Charter	African Charter on Human and Peoples' Rights
Body of Principles	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CEE/CIS States	Central and Eastern Europe and the Commonwealth of Independent States
CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Court of Human Rights
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
Havana Rules	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDC	International Detention Coalition
IDPs	Internally displaced persons
IOM	International Organization for Migration
MSF	Médecins Sans Frontières
NGOs	Non-governmental organisations
OHCHR	Office of the High Commissioner for Human Rights
Paris Principles	Principles and Guidelines on Children Associated With Armed Forces or Armed Groups
PTSD	Post-traumatic stress disorder
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNHCR Guiding Principles	United Nations High Commissioner for Refugees' Guiding Principles on Internal Displacement
UNHCR Revised Principles	United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers
WHO	World Health Organization

Introduction to Administrative detention of children: A global report

In 2009, the United Nations Children's Fund estimated that there were around 1.1 million children deprived of their liberty by criminal courts worldwide.[1] While judicial detention of children by courts is relatively well documented, little is known about the practice of administrative detention of children. Few publications address the issue and States do not regularly collect or collate statistical data on administrative detention. As a result, information on the extent to which children are exposed to different forms of administrative detention is sparse and discussions of the impact that such detention has on children rare.

Administrative detention occurs when, as a result of a decision of an executive or administrative body, a child is placed in any public or private setting from which he or she cannot leave at will. Administrative detention occurs in some form in all States, although the bodies that have power to order such detention vary from State to State. Bodies and individuals that have the power to administratively detain may include police officers, military panels, immigration officials, health officials, doctors or local government child welfare bodies. While decisions taken to administratively detain a child may vary in terms of context, rationale and legal framework, the common element is that the decision to detain is taken not by a judge or a court, but by a body or a professional, who is not independent from the executive branch of government.

The purpose of this study is to examine:

- What is meant by administrative detention.
- The extent to which administrative detention is used worldwide.
- The contexts and circumstances in which children are placed in administrative detention, and the profile of children held in administrative detention.
- The legal frameworks and procedures used by States to place children in administrative detention.
- The key provisions in international human rights law, including Article 3 of the Universal Declaration of Human Rights (UDHR),[2] Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[3] and Article 37 of the United Nations Convention on the Rights of the Child (CRC),[4] which limit the use of administrative detention.
- The impact of administrative detention on children, including the conditions of detention and child rights implications.

[1] United Nations Children's Fund, Progress for Children, A report card on child protection, No. 8, September 2009.
[2] Universal Declaration of Human Rights, adopted by United Nations General Assembly on 10 December 1948 in Paris. Hereinafter the UDHR.
[3] International Covenant on Civil and Political Rights, adopted by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976. Hereinafter the ICCPR.
[4] Convention on the Rights of the Child, adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. Hereinafter the CRC.

What is administrative detention?

There is no accepted, comprehensive international definition of administrative detention. However, the term administrative detention is taken in this study to cover all situations where a child is deprived of his or her liberty under the power or order of the executive branch of government. One generally accepted description of administrative detention provides that "[d]etention is considered administrative detention if, *de jure* and/or *de facto*, it has been ordered by the executive and the power of the decision rests solely with the administrative or ministerial authority, even if a remedy *a posteriori* (after the event) does exist in the courts against such a decision. The courts are responsible only for considering the lawfulness of this decision and/or its proper enforcement and not for taking the decision itself."[5]

Children who are placed in administrative detention may be detained in a range of different places, including prisons, military facilities or specially designed facilities, such as immigration detention centres, welfare centres or educational facilities. While children will clearly be deprived of liberty when they are not permitted to leave a place of detention at will,[6] severe restrictions on freedom of movement may also amount to deprivation of liberty, for example, house arrest [7] or limiting the person to a defined geographical area, rather than a closed facility.[8] However, in order for a measure of restriction to qualify as a deprivation of liberty under international law, it must reach a certain level of physical constraint. It is not always clear what amounts to a substantial curtailment of freedom of movement, as the circumstances of each individual case must be taken into account.

The European Court of Human Rights (ECHR) addressed this issue in the case of *Amuur v. France*.[9] The Court had to decide whether holding three Somali nationals for a period of 20 days in an airport lounge during the day, and at a hotel under control of Ministry of the Interior overnight, with no contact with the outside world, rare access to a telephone and under

[5] Louis Joinet, Rapporteur of the Sub-Commission on the Fight against Discriminatory Measures and Protection of Minorities, Report on the Practice of Administrative Detention, U.N. Doc. E/CN.4/sub.2/1989/27, para. 17.

[6] Rule 11(a) of United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations General Assembly Resolution 45/113, Annex 45, UN GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990). Hereinafter the Havana Rules.

[7] *Cyprus v. Turkey*, ECHR, Applications Nos. 6780/74 and 6950/75, European Commission of Human Rights report of 10 July 1976, p. 82, para. 235, p. 100, para. 286.

[8] *Guzzardi v. Italy*, ECHR, Judgment of 6 November 1980, Series A, No. 39, p. 33, para. 92; *Engel and others*, Judgment of 8 June 1976, Series A, No. 22, p. 24, paras. 58–59.

[9] *Amuur v. France*, 17/1995/523/609, Council of Europe, ECHR, 25 June 1996. See also *Guzzardi v. Italy*, 1980, para.92. In this case, the applicant, a suspect in illegal mafia activities, was ordered to live for 16 months on a remote island off the coast of Sardinia. He was restricted to a hamlet in an area of the island of some 2.5 square kilometres that was occupied solely by persons subject to such orders, although the applicant's wife and child were allowed to live with him. He was able to move freely in the area and there was no perimeter fence, although he could not move beyond the area. He was also required to report twice daily and was subject to a curfew. The Court held that the applicant's conditions fell within article 5, as this amounted to a deprivation of liberty. In *Ashingdane v. UK*, Case No. A 93 (1985), the European Court found that the compulsory confinement of a mentally ill patient in a mental hospital under a detention order invoked article 5 protections, even though he was in an 'open' (i.e. unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend (para. 42). Some parallels can be drawn from the facts of these cases and the practices of States in relation to asylum seekers. For more information on the distinctions between arbitrary detention and restrictions on freedom of movement, see Harris, D.J. et al., *Law of the European Convention on Human Rights*, Butterworths, London, 1995, p. 98.

surveillance of the border police[10] constituted being "deprived of liberty". The European Court held that in determining whether a person has been "deprived of his liberty" the starting-point has to be the person's situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The Court concluded that the applicants had been deprived of liberty and that the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Although the *Amuur* case applied to an adult, the same reasoning and result is likely to apply to children.

Sometimes what is considered an alternative to deprivation of liberty may in fact simply be an alternative form of deprivation of liberty. Where alternatives to deprivation of liberty are put in place and continue to place restrictions on a child's liberty, for instance, where a child is placed in an educational institution rather than a prison, this may nevertheless still amount to deprivation of liberty.

Context and purpose

Administrative detention is used by States for a wide variety of purposes. These include: controlling immigration and cross-border movement of individuals as a result of conflict; containing children deemed to pose a security threat, such as captured children used by armed forces or by armed groups; ensuring treatment or containment of children with mental health conditions; containing children engaged in drug or alcohol misuse; providing protection to children who are at risk of abuse and exploitation or who might otherwise be living and working on the streets; and addressing criminal offending by children under the age of criminal responsibility and children regarded as anti-social. It is also used by police forces, when detaining a child caught in the commission of an offence, or suspected of having committed a crime, prior to charging that child with a criminal offence. [11]

Administrative detention is recognised as legitimate in certain circumstances, provided that it ensures certain procedural guarantees. While it can be argued that administrative detention provides protection to children in certain circumstances, it is also clear that in some States its use is highly questionable, particularly when it is used to suppress dissent or to avoid the strict evidentiary standards and safeguards required by the State's criminal justice system.[12]

States appear to be increasing their use of administrative detention in response to irregular migration inflows, particularly in relation to unauthorised entries of persons, including children, into States.[13] The administrative detention of migrant children typically involves little or no judicial oversight. It is most commonly used when a child or family does not possess necessary identification documents, when a child or family is travelling on forged documents or documents belonging to somebody else or when a child or family have failed to leave the country after the expiration of a prescribed period of time set by an administrative or judicial body. Detention may

[10] *Amuur v. France*, 1996.

[11] States may also detain children for these purposes following the decision of a judicial body. However, this working paper will focus on administrative detention (the detention of children based on the decision of an executive body).

[12] These issues are addressed in the sections of this working paper.

[13] International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009: <http://idcoalition.org/wp-content/uploads/2009/05/childrenpositionpape.pdf> [accessed 29 January 2011].

also be used when a child's identity is being established, or while his or her asylum claim is being processed. Migrant children may be detained either with their families or, in the case of children who arrive in a State without their families, individually.

The 11 September 2001 Al-Qaida attack on the United States has also seen a renewed interest in, and increased use of, administrative detention to contain security threats in response to a threat posed by non-State armed groups.[14] Many States have used existing laws or promulgated new legal frameworks that include the power for executive bodies to place persons in administrative security detention. While administrative detention in the context of security does not specifically target children, children have been placed in administrative detention under legal frameworks that apply to the population at large, but which offer no special protection to them.

Most States experiencing conflict have provisions in domestic law that permit the administrative detention of captured children used by armed forces or groups. Both international human rights law[15] and international humanitarian law[16] permit the use of administrative detention of prisoners of war, subject to certain safeguards. A more concerning development is the long-term administrative detention of enemy combatants by the United States in Guantánamo Bay, Iraq and Afghanistan.

Some States use administrative detention to respond to criminal or anti-social behaviour, particularly by children living and working on the streets and by children under the minimum age of criminal responsibility, or to "protect" groups of children who are without family care or who are the victims of, or witnesses to, a crime and who are deemed to be in need of protection.[17] Certain groups of children are particularly vulnerable to administrative detention in this context. These include children whose parents are poor, who come from separated families, whose parents are absent, deceased or unable to care for them, children living and working on the streets and girls who are victims of sexual abuse. The use of administrative detention in these circumstances is often aimed at children who are regarded by the public as a social "nuisance". Placing children in administrative detention rather than recognising that such children are in need of child protection services frequently indicates that the State has a non-existent or poorly developed child protection system and is relying upon institutionalisation as a means of addressing family problems.

Virtually all children alleged to have committed a criminal offence will find themselves subject to administrative detention by the police while the allegations against them are investigated. This is the most common form of administrative detention, but in most States, it is of short duration prior to being charged or released.

[14] See International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights', 2009; International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.
[15] See Articles 4, 9 of ICCPR.
[16] International Committee of the Red Cross, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135. Hereinafter the GC III.
[17] See, for instance, United Nations Children's Fund CEE/CIS, 'Lost in the Justice System: Children in Conflict with the Law in Eastern Europe and Central Asia', 2008.

Administrative detention of children for health reasons is found in virtually all States. While primarily it is used for children with serious psychiatric disabilities, some States also use administrative detention for children who have intellectual disabilities or who are alcohol or drug users.[18] While administrative detention for health reasons is common, there is considerable variation between States with respect to the threshold at which such detention can be imposed, the types of mental and other health related conditions for which it may be ordered, as well as the length of any detention. Once again, while the formal reason for the detention is preventive (i.e. to protect the child and others from harm), this form of detention may be over-used or unnecessarily used due to a lack of development of community-based mental health and family services providing care and support to these children and their families.

International legal framework

There is no international instrument that specifically covers the use of administrative detention, whether of adults or of children. Rather, United Nations treaties, standards and norms as well as regional human rights instruments address the issue of deprivation of liberty in all its forms. Such instruments place limitations on the use of detention and, in particular, prohibit the use of illegal or arbitrary detention as well as providing "guarantees" or minimum due process rights that must be provided when a person is deprived of his or her liberty.

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention.[19] Article 9 of the ICCPR provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Human Rights Committee in their General Comment Number 8[20] has stated that Article 9(1) of the ICCPR is applicable to all forms of deprivations of liberty, whether in criminal cases or in

[18] Office of the High Commissioner for Human Rights, Dignity and Justice for Detainees Week, Information Note No. 4, Persons with Disabilities: <www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_4.pdf> [accessed 29 January 2011].

[19] See also Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, UN GAOR A/RES/43/173, 9 December 1988, which sets out a comprehensive list of protections for persons who are subject to administrative detention. Hereinafter the Body of Principles.

[20] Human Rights Committee, General Comment No. 8, Article 9, Right to Liberty and Security of Persons, 30 June 1982, para. 1.

other cases, such as, for example, mental illness, vagrancy, drug addiction, educational purposes and immigration control. Thus, Article 9(1) of the ICCPR covers all cases of administrative detention. While part of Article 9(2) and the whole of Article 9(3) are only applicable to persons arrested or charged with a criminal offence, the rest of Article 9, and in particular the important guarantee laid down in Article 9(4) (the right to control by a court of the legality of the detention), applies to all persons deprived of their liberty by arrest or detention, the Committee stated.

In addition, Article 37 of the CRC limits the use of administrative detention:

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The provisions of Article 37(b) of the CRC are also contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[21] as well as in regional human rights instruments.[22]

In addition, the CRC provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[23] This means that, even where the criteria in Article 9 of the ICCPR and Article 37(b) of the CRC are met, the issue of

[21] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, United Nations General Assembly Resolution 40/33, 29 November 1985. Hereinafter the Beijing Rules.

[22] See, for instance, Article 5, League of Arab States, Arab Charter on Human Rights (1994); Article 6, Organization of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter) (1981), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Article 7, Organization of American States, American Convention on Human Rights, "Pact of San Jose"(1969), hereinafter the American Convention: <www.unhcr.org/refworld/docid/3ae6b36510.html>; Article 1, Organization of American States, American Declaration of the Rights and Duties of Man (1948): <www.unhcr.org/refworld/docid/3ae6b3710.html>; and Article 5 of European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, ETS 5 [websites accessed 29 January 2011].

[23] Article 3 of CRC.

whether the best interests of the child have been a primary consideration must be taken into account in determining whether the detention is lawful.

Other human rights standards, such as the right to non-discrimination[24] and right to protection from unlawful or arbitrary interference with private or family life,[25] must also be considered in determining whether administrative detention is lawful. States parties to the CRC and other human rights treaties undertake to ensure the enjoyment of rights and fundamental freedoms without discrimination based on such grounds as race, nationality or religion. The administrative detention of a particular group of children, chosen purely on the basis of, for example, ethnicity, would be regarded as discriminatory and could amount to unlawful detention.

International human rights provisions relevant to the material conditions and treatment of children once they have been placed in detention also need consideration. Breaches of the prohibition on torture and cruel, inhuman or degrading treatment or punishment[26] and the right of detained children to be treated with humanity and respect for human dignity[27] may lead to the detention being regarded as unlawful.[28]

Guarantees against unlawful and arbitrary detention are also enshrined in regional human rights instruments; in particular, Article 7 of the American Convention on Human Rights (American Convention)[29] and Article 25 of the American Declaration on the Rights and Duties of Man, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and Article 6 of the African Charter on Human and Peoples' Rights (Banjul Charter).

Detention must be lawful

In order to be regarded as lawful, a decision to place a child in administrative detention must be made in accordance with a State's domestic law. According to the Human Rights Committee, "the principle of legality is violated if an individual is arrested on grounds which are not clearly established in domestic legislation."[30] The relevant law must have adequate clarity and regulate the procedure for the administrative detention,[31] while the detention itself must be carried out by

[24] Article 2 of ICCPR; Article 2 of CRC.

[25] Article 17 of ICCPR; Article 8 of European Convention (Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.).

[26] Article 7 of ICCPR; Article 37(1) of CRC; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984.

[27] Article 10 of ICCPR; Article 37(c) of CRC.

[28] The ECHR has also indicated that violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment can lead to the detention no longer being lawful. In *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, 30 January 2010, the ECHR found that the conditions in which children were held in detention, which amounted to cruel, inhuman or degrading treatment, was one factor which led to the determination that the detention was unlawful under the European Convention.

[29] American Convention.

[30] *Clifford McLawrence v. Jamaica*, Human Rights Committee, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996, 1997, para. 5.5.

[31] *Bolanos v. Ecuador*, Human Rights Committee, Communication No. 238/1987; *Domukovsky .v Georgia*, Human Rights Committee, Communication No. 623, 624, 626 and 627/1995, U.N. Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995, 1998.

competent officials or persons authorised for that purpose.[32] Where placing a child in administrative detention does not comply with domestic law, this will render the detention unlawful both in domestic law and international law.

Detention must not be arbitrary

Administrative detention must not only be established in law, and ordered in accordance with the procedures set out in domestic law but, more broadly, it must not be arbitrary.

The Human Rights Committee has found that "'[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[33] The Human Rights Committee also adds that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[34] The starting point in determining whether the administrative detention imposed is arbitrary is the relevant domestic and international law; but the particular circumstances of the case, the context in which administrative detention is ordered or used, the purpose of the detention, the procedures followed in placing a child in administrative detention, alternatives to detention and normal practice, as well as the treatment of a child once in administrative detention must all be taken into account. For the sake of conciseness, this working paper summarises these factors into the terms necessary, proportionate and appropriate.

International law contains rules, standards and case law which provide guidance on the circumstances in which individual detentions will be considered necessary, proportionate and appropriate.[35] Case law from the Human Rights Committee can be used to illustrate circumstances in which administrative detention will be considered arbitrary. In *A. v. Australia*,[36] a case concerning the application of Article 9 to Australia's policy of mandatory detention of asylum-seekers, the Human Rights Committee found that administrative detention of asylum seekers is not, of itself, arbitrary.[37] For example, the fact of illegal entry into the country may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding, lack of cooperation or the need to prevent interference with evidence, which may justify detention for a period. Without such factors, however, detention may be considered arbitrary, even if entry was illegal. In the *A. v. Australia* case, the Australian Government did not advance any grounds for detaining "A" that would have justified the four year period of detention. Therefore, the Committee concluded that the detention was arbitrary.

Thus, there must be grounds put forward by the State for detaining an individual. The Human Rights Committee has also held that, in determining whether administrative detention is necessary, proportionate and appropriate, an assessment must be made of the particular

[32] Principles 2, 4 of Body of Principles.
[33] *Hugo van Alphen v. Netherlands*, Human Rights Committee, Communication No. 305/1988, 1990, para. 5.8; *A.W Mukong v. Cameroon*, Human Rights Committee, Communication No. 458/1991, 21 July 1994.
[34] *Danyal Shafiq v. Australia*, U.N. Doc. CCPR/C/88/D/1324/2004, 13 November 2006, para.7.2; *A. v. Australia*, U.N. Doc. CCPR/C/59/D/560/1993, 30 April 1997, para 9.2.
[35] These are set out at the beginning of each section of this working paper.
[36] *A. v. Australia*, 1997.
[37] Ibid, para. 9.4; *C. v. Australia*, Human Rights Committee, U.N. Doc. CCPR/C/76/D/900/1999, 13 November 2002, para. 4.26.

individual. A blanket policy of administrative detention, for example, of all persons entering a country illegally, does not pay sufficient regard to the circumstances of each individual case,[38] and is highly likely to be considered arbitrary detention.

Even where there are grounds justifying administrative detention, detention must, in addition, still be proportionate. Detention will not be considered proportionate to achieve necessary aims if there are "less invasive means of achieving the same ends".[39] For example, a State needs to demonstrate that compliance with its immigration policy could not have been achieved by means other than detention, such as, for instance, the imposition of reporting obligations.[40]

The Committee has also found that, if the grounds that made the administrative detention necessary, proportionate and appropriate cease to exist, then any continuing detention becomes arbitrary (and therefore unlawful in international law).[41] "[D]etention should not continue beyond the period for which the State can provide appropriate justification."[42]

The provision in Article 37(b) requiring that the detention of children shall only be used as a matter of last resort, and for the shortest appropriate time (a requirement that does not apply when considering detention for adults), suggests that when considering whether the detention of a child is necessary, proportionate and appropriate, a higher threshold is likely to apply than that which is applied to adults.

European Convention approach

A different approach to determining the legality of administrative detention is used in the European Convention. Article 5 of the European Convention provides an exhaustive list of situations in which detention can be lawfully imposed. According to Article 5, administrative detention will only be lawful where it is done for one of the following purposes: (a) after conviction by a competent court; (b) for non-compliance with a lawful order to give effect to an obligation; (c) in order to bring an individual suspected of having committed a crime before a competent court; (d) in relation to a child, by lawful order for the purpose of educational supervision or to bring him (or her) before a competent court; (e) for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; or (f) to prevent a person effecting an unlawful entry into the country or of a person against whom action is taken with a view to deportation or extradition. Therefore, according to the European Convention, where administrative detention is ordered for a purpose other than that listed in Article 5 (i.e. for the maintenance of public order or for security purposes), it will be unlawful, unless it is done after a declaration of a state of emergency.[43]

[38] *A. v. Australia*, 1997, para. 9.4; *C. v. Australia*, 2002, para. 4.26.
[39] *C. v. Australia*, 2002, para. 8.2.
[40] Ibid., para. 4.26.
[41] *A. v. Australia*, 1997.
[42] Ibid., para. 9.4; *C. v. Australia*, 2002, para. 8.2.
[43] See Section 1 on security detention for information on the effect of a declaration of a state of emergency on the right to liberty.

Safeguards

International law states that in order for administrative detention to be lawful, States must provide detainees with a number of safeguards. These safeguards are contained in Article 9 of the ICCPR, Article 37(d) of the CRC and in other international instruments. These safeguards, serve an important function in protecting children from illegal and arbitrary detention and human rights abuses, such as *incommunicado* or unacknowledged detention, and forms of ill-treatment, including torture and other cruel, inhuman or degrading treatment or punishment. This section focuses on the legal procedural safeguards. However, children are also entitled to a range of other safeguards while in detention (i.e. the right to medical care, contact with the family, etc.). Violations of other rights and safeguards, such as the right to protection from torture and the right to medical care/health, will be considered separately in each section of the report.

Right to be informed promptly of the reasons for detention

Article 9(2) of the ICCPR requires that detainees must be informed of the reasons for their arrest.[44] While this requirement appears on the face of it only to apply to persons charged with a criminal offence, it has been held to apply to all persons held in administrative detention.[45] According to the Human Rights Committee, the information given to the detainee must include the substance of the complaint against him or her.[46] The detainee must be given sufficient information about the reasons for the arrest "to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded".[47]

Right to challenge the legality of the detention[48]

One of the most important safeguards in preventing illegal and arbitrary detention and other human rights abuses is the right of the detainee to challenge the legality of the detention, through *habeas corpus, amparo*[49] or another remedy that provides for a judicial review of the legality of the detention. The United Nations Special Rapporteur on the question of torture[50] and the United Nations Working Group on Enforced or Involuntary Disappearances[51] have both recognised the importance of a judicial review of detention in preventing torture, ill-treatment, enforced disappearance and incommunicado detention. According to the Special Rapporteur on Torture, in

[44] Under the Body of Principles 'arrest' is the act of 'apprehending a person for the alleged commission of an offence.' See also Principles 10, 13, 14 of Body of Principles.

[45] Human Rights Committee, General Comment No. 8 (1982), para. 1.

[46] United Nations Committee on Human Rights, *Adolfo Drescher Caldas v. Uruguay*, Communication No. 43/1979, 11 January 1979, U.N. Doc. Supp No 40 (A/38/40) at 192 (1983).

[47] Ibid., para. 13.2.

[48] See Article 9(4) of ICCPR; Article 37(d) of CRC.

[49] That is, the right of every person deprived of their liberty to challenge the legality of their detention before a judicial body. See Principle 11 of Body of Principles. In general, *amparo* action is intended to protect all rights other than physical liberty (which are generally protected by *habeas corpus* remedies). Thus, in the same way that *habeas corpus* guarantees physical freedom, *amparo* protects other basic rights. It may, therefore, be invoked by any person who believes that any of his rights implicitly or explicitly protected by the constitution (or by applicable international treaties) is being violated.

[50] Commission on Human Rights, Reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2003), U.N. Doc. E/CN.4/2004/56, para. 39; (2003) U.N.Doc. E/CN.4/2003/68, para. 26(i).

[51] Human Rights Council, WG on Enforced or Involuntary Disappearance, U.N. Docs. E/CN.41983/14, para. 141; E/CN.41986/18/Add.1, paras. 55–58; E/CN.41989/Add. ,1 para. 136; E/CN.41990/13, para. 346.

adopting measures to counter terrorism, "judicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law."[52]

The right to a judicial review of the legality of detention must be available to all administrative detainees in all contexts, including during armed conflict or a declared state of emergency. The Working Group on Arbitrary Detention provides that "[t]he right to challenge the legality of detention is one of the most effective means of preventing and combating arbitrary detention. As such, it should be regarded not as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency."[53]

The Human Rights Committee has also found that the right to a judicial review of the legality of the detention is a non-derogable right, even during a state of emergency "[e]ven if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective…In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[54]

The Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism concurred with this approach and has found that detention for a prolonged period without contact with lawyers or other persons and without access to courts to supervise the legality and conditions of detention is prohibited under international law, even during states of emergency.[55]

Under Article 14(1) of the ICCPR and Article 37(d) of the CRC, the body hearing a challenge to the legality of a child's detention must be a court or other independent, competent and impartial tribunal, established by law and authorised to review the legality of the detention. The reviewing body must have "judicial character" and must be independent of the executive.[56] The Human

[52] Commission on Human Rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2002), U.N. Doc. A/57/173, para. 7.
[53] Commission on Human Rights, WG on Arbitrary Detention (2003), U.N. Doc. E/CN.4/2004/3, para. 62.
[54] Human Rights Committee, General Comment No. 29, Article 4, Derogations during a State of Emergency (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, paras. 14, 16.
[55] Commission on Human Rights, Protection of human rights and fundamental freedoms while countering terrorism (2005), U.N. Doc. E/CN.4/2005/103, para. 37. Regional human rights bodies have all found the right to *habeas corpus* to be non-derogable, even during an emergency. See Article 27 of American Convention; Articles 4, 14 of Arab Charter on Human Rights; Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1878, Habeas Corpus in Emergency Situations and Advisory Opinion OC-9/87 of 6 October 1987, Judicial guarantees in states of emergency; ECHR, *Lawless v. Ireland*, 1 July 1976; *Ireland v. UK*, 18 January 1978; African Commission on Human and Peoples' Rights, Principle M (5e) of Principles and Guidelines on the right to a fair trial and legal assistance in Africa: '[n]o circumstances whatsoever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures'.
[56] *Mario Torres v. Finland*, Human Rights Committee, U.N. Doc. CCPR/C/38/D/291/1988, 5 April 1990. See also *Vuolanne v. Finland*, Human Rights Committee, Communication No. 265/1987, 7 April, 1989, para. 9.6.

Rights Committee has clarified the meaning of a competent, independent and impartial tribunal, stating that:

> "18. The notion of a *'*tribunal*'* in Article 14, paragraph 1, designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal proceedings that are judicial in nature.
>
> 19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges..., and the actual independence of the judiciary from political interference by the executive branch and legislature."[57]

The Working Group on Arbitrary Detention has stated that "the right to challenge the legality of detention or to petition for a writ of *habeas corpus* or remedy of *amparo* is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary court."[58] Thus, this safeguard requires that the imposition of administrative detention shall not be reviewed by a body which is under the control of the executive, for instance, a court composed of military officers, immigration officials or a panel of local authority staff, who are accountable to the executive. In addition, the right to challenge the legality of the detention must not be circumscribed by law to particular forms of review. In *A. v. Australia***,** the Human Rights Committee noted that the court review of the administrative detention of asylum seekers was limited to determining whether an individual was a "designated person" within the meaning of the Migration Amendment Act 1992. If the criteria were met, the court had no power to review the continued detention of an individual or to order his or her release. In the Committee's opinion, a court review of the lawfulness of detention under Article 9(4) of the ICCPR must include the possibility of ordering release and must not be limited merely to deciding whether the detention was in compliance with domestic law. The review must be real and not merely formal, and the court must be empowered to order release, if the detention is incompatible with the requirements of Article 9(1) or other provisions of the Covenant.[59]

International human rights law requires that a judicial review must take place "without delay" following the detention. The Human Rights Committee, in its general comment on Article 9 of the ICCPR, does not specify a time limit for bringing an administratively detained person before a court in order to satisfy the requirement that detainees are brought before a judge without delay. The Committee did, however, state that "delays must not exceed a few days."[60] In its

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[57] Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial (2007), U.N.Doc. CCPR/C/GC/32, paras. 18, 19. Although this comment refers to criminal trials and the right contained with Article 9(3) of the ICCPR, Article 37(d) also gives children a right to challenge the legality of their detention (civil as well as criminal) before a competent, independent and impartial authority, and thus the same comments are likely to apply.

[58] Commission on Human Rights, WG on Arbitrary Detention (2003), U.N. Doc. E/CN.4/2004/3, para. 84. The Committee has found that asylum seekers and/or refugees must have a right to challenge their detention in a court. Anything less than a court review is not satisfactory. See, for instance, *Torres v. Finland*, 1990 and *Vuolanne v. Finland*, 1989. See also *Amuur v. France*, 1996.

[59] *A. v. Australia*, 1997; *C. v. Australia*, 2002.

[60] Human Rights Committee, General Comment No. 8 (1982), para. 1.

concluding observations on Switzerland, the Committee found that the statutory time limit of 96 hours for a judicial review of an administrative detention decision was excessive and discriminatory, "particularly in light of the fact that in penal matters this review is guaranteed after 24 or 48 hours".[61] The ECHR has also been unwilling to state a maximum time limit by which a judicial review must occur, holding that the meaning of the term "promptly" must be assessed in the circumstances of each case.[62] Where a person is placed in administrative detention for the purposes of countering terrorism, the threat posed by the detainee can be used by States to legitimise the prolongation of the period of detention.[63] However, this must of course be provided for in domestic law and be necessary, proportionate and appropriate. The Committee on the Rights of the Child has recommended that children held in pre-charge police detention should be brought before a court within 24 hours.[64] There would appear to be little reason why this time limit should not apply to children held in administrative detention for other reasons. In addition, Article 37(d) of the CRC also requires that, in the case of children, the court or other body should give a prompt decision.

Under international humanitarian law, administrative detainees also have a right to appeal against their administrative detention, and this appeal must be decided without delay.[65]

Periodic review

In addition to the initial right of judicial review, Article 25 of the CRC requires that any placement of a child in administrative detention must also be subject to periodic review by "competent authorities". This has been interpreted as meaning a review must be undertaken by bodies competent to act and is not a judgement on qualitative abilities.[66] The Body of Principles provides that a judicial or other authority shall be empowered to review as appropriate the continuance of detention.[67] The purpose of a review is to monitor the child's progress and should cover the "treatment" and all the circumstances relevant to his or her placement, including measures taken to control the child, the child's access to the outside world and how the child's education is affected, as well as the reason and justification for the placement.[68] The article does not indicate how often such reviews should be undertaken, and leaves this to the discretion of the State, but it can be assumed that the more involuntary the placement, or the more extreme the treatment, the more frequently a review will be required.[69] Even though an initial period of detention is lawful (i.e. if it is necessary to carry out identity, security or health checks in the context of immigration detention, to contain an emergency or to provide treatment in mental

[61] Human Rights Committee, Concluding Observations: Switzerland (1986), U.N.Doc. CCPR/C/79/Add.70, para. 15.
[62] *Brogan and Others v. UK*, 29 November 1988, 11 EHRR 117 1988, ECHR.
[63] Ibid.
[64] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 83.
[65] Articles 43, 78 of International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. Hereinafter the GC IV.
[66] See Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Revised Third Edition, 2007, United Nations Children's Fund, p. 380.
[67] See also Principle 11, para. 3 of Body of Principles.
[68] See Hodgkin and Newell, op. cit., p. 381
[69] See United Nations Children's Fund, Implementation Handbook for the Convention on the Rights of the Child, UNICEF, 2002.

health cases), subsequent periods of detention may breach Article 9(1) of the ICCPR[70] if the initial reasons justifying administrative detention no longer continue to exist.[71] For child civilians who are detained pursuant to international humanitarian law, reviews must take place at least every six months.[72]

Right to be brought promptly before a judge and to be tried or released

This safeguard applies to children placed in pre-charge, or police, administrative detention. According to Article 9(3) of the ICCPR, a child placed in pre-charge, police administrative detention is entitled to be brought promptly before a judge and either to be tried within a "reasonable time" (if charged) or to be released. The Committee on the Rights of the Child has recommended that, in order to comply with the requirement in Article 37 of the CRC, the child must be brought before a judge "promptly", and the period of administrative detention should be no more than 24 hours.[73]

The right to trial or release is, as stated by the Inter-American Court of Human Rights, "to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of".[74]

According to the Working Group on Arbitrary Detention, "[p]rolonged periods of administrative detention, without remedy, would render the detention illegal. The detainees have a right to be tried without undue delay".[75] Where a detainee is not brought to trial within a reasonable time, States are required to release the detainee.[76]

Guarantees against incommunicado detention

Incommunicado detention, which is secret or unacknowledged detention in which the detainee is not permitted to communicate with the outside world, is forbidden under international law, regardless of the reasons why a person was detained. *Incommunicado* administrative detention is never lawful, even during a state of emergency, including during armed conflict. The International Convention for the Protection of All Persons from Enforced Disappearance provides that "no one shall be subject to enforced disappearance"[77] and that "no exceptional

[70] See, for instance, *Spakmo v. Norway*, Communication No. 631/1995, U.N. Doc. CCPR/C/67/D/631/1995, 11 November 1999, para. 6.3; Human Rights Committee, Concluding Observations: Japan (1998), U.N. Doc. CCPR/C/79/Add.102, para. 19; Human Rights Committee, Concluding Observations: Switzerland (1996), U.N. Doc. CCPR/C/79/Add.70.

[71] *A. v. Australia*, 1997, para. 9.4.

[72] Articles 43, 78 of GC IV.

[73] Committee on the Rights of the Child, General Comment No. 10 (2007), para. 83.

[74] *Suarez Rosero Case*, Inter-American Court of Human Rights (IACrtHR), 28 June 1996, Series C, No. 35, para. 35.

[75] Commission on Human Rights, WG on Arbitrary Detention (1998), U.N. Doc. E/CN.4/1999/63/Add.1, Israel, 1998/10, p. 32, para. 11.

[76] *Mpandajila v. Zaire*, 9 July 1985, Human Rights Committee, Communication No. 138/1983; Article 9(3) of ICCPR.

[77] Article 1(1) of International Convention for the Protection of All Persons from Enforced Disappearance. 'Enforced disappearance' is defined in Article 2 of the Convention as 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'.

circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."[78] The Human Rights Committee has stated, in its general comment on states of emergency, that "the prohibitions against…unacknowledged detentions are not subject to derogation" as this is a norm of general international law applicable at all times and in all situations.[79] The Committee has also found that prolonged *incommunicado* detention may amount to a violation of the prohibition on torture or cruel, inhuman or degrading treatment or punishment.[80]

International human rights law requires that States provide administrative detainees with safeguards to ensure that they are not exposed to *incommunicado* detention or enforced disappearance. States must ensure that detainees are held only in officially recognised places of detention and that a register of detainees is kept.[81] According to the Human Rights Committee, the registers must contain the names of persons detained, as well as the names of persons responsible for their detention. This information should be kept in "registers readily available and accessible to those concerned, including relatives and friends".[82] When a child is placed in administrative detention, he or she is entitled, in international human rights law, to have his or her family immediately notified of their detention, and to communicate with them.[83]

Access to legal assistance

Article 9 of the ICCPR and Article 37(d) of the CRC provide that, respectively, all persons and all children deprived of their liberty by a State shall be given prompt and regular access to a lawyer. In the case of children, States must also provide any other "appropriate assistance".[84] The United Nations Basic Principles on the Role of Lawyers provides that access should be given to a lawyer within 48 hours of an arrest.[85] The Human Rights Committee has affirmed this.[86] The United Nations Special Rapporteur on torture states that detainees have the right to have access to a lawyer within 24 hours of arrest. This includes, explicitly, persons detained pursuant to any anti-terrorist legislation.[87]

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[78] Article 1(2) of International Convention for the Protection of All Persons from Enforced Disappearance.
[79] Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 13(b).
[80] *El-Megreisi v. Libya* (1994), U.N. Doc. CCPR/C/50/D/440/1990, para. 5.4; *El Hassy v Libya* (2007) U.N. Doc. CCPR/C/91/D/1422/2005, para. 6.2.
[81] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Principle 12 of Body of Principles*;* Rule 7 of United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Hereinafter the Standard Minimum Rules for the Treatment of Prisoners.
[82] Human Rights Committee, General Comment No. 20, Article 7, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (1992), para. 11; Principle 17 of Body of Principles.
[83] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37, 92 of Standard Minimum Rules for the Treatment of Prisoners; Principle 19 of Body of Principles.
[84] Article 37(d) of CRC. Other appropriate assistance could be a social worker trained in working with children in conflict with the law, but this should not be regarded as replacing the need for legal representation. See Committee on the Rights of the Child, General Comment No. 10 (2007), para. 49.
[85] Principle 7 of United Nations Basic Principles on the Role of Lawyers, 7 September 1990.
[86] Human Rights Committee, General Comment No. 20 (1992), para. 11; Principle 7 of United Nations Basic Principles on the Role of Lawyers; Rule 7 of Standard Minimum Rules for the Treatment of Prisoners.
[87] Commission on Human Rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2002), U.N. Doc. A/57/173, para. 18.

A child who is administratively detained is entitled to communicate and consult with his or her lawyer[88] and this right should only be withheld in exceptional circumstances, for instance where "it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns."[89] However, in this case, the State should allow access to an independent lawyer, for instance, a lawyer recommended by a bar association.[90]

Box 1: In which circumstances is administrative detention lawful in international human rights law?
According to international human rights law, placing a child in administrative detention will only be permitted as a matter of last resort and for the shortest possible period of time. In order to be lawful in international law, administrative detention:

- Must not be provided for and carried out in accordance with the domestic laws of the State; and
- Must not be "arbitrary". In order to satisfy this requirement, the detention must be necessary in the circumstances of the case, proportionate to the end sought and appropriate (i.e. not unjust or unpredictable).

For child detainees, the threshold for demonstrating that administrative detention is necessary, proportionate and appropriate is likely to be higher than for adults, due to the requirement that detention of children must only be used as a last resort measure and for the shortest appropriate period of time.
In addition, the best interests of the child must be a primary consideration in the decision to place a child in detention.

The following legal procedural safeguards must be provided to detainees:

- The right to be informed of the reasons for the detention.
- The right to be brought promptly before a judge and to judicial review of the legality of the detention.
- The right to periodic review of the legality of the detention.
- The right to trial within a "reasonable time" or to release where a child is accused of a crime.
- The right to have the detention acknowledged and to communicate with relatives and friends.
- The right to legal assistance.

Methodology

Research for this working paper was carried out between October 2008 and September 2009. Researchers initially conducted a review of international laws and standards on the administrative detention of children, and then examined United Nations treaty body documents, including State parties initial and periodic reports, alternative reports and concluding observations submitted to the United Nations Committee on the Rights of the Child, the Human Rights Committee and the Committee against Torture. This was done for all States that underwent review by these committees within the past decade (from 1999 to 2009).[91] In addition, researchers reviewed country visit reports by the United Nations Working Group on Arbitrary Detention and annual reports submitted to the United Nations Security Council by the Special Representative of the Secretary-General on Children and Armed Conflict.[92] The review of United Nations treaty body documents was used to identify countries that employ different forms

[88] Principle 18 of Body of Principles.
[89] Commission on Human Rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2003), U.N. Doc. E/CN.4/2004/56, para. 32.
[90] Ibid.
[91] Where States had undergone two reviews by one committee during this time period, only documents relating to the most recent review were considered.
[92] The authors would like to thank the Coalition to Stop the Use of Child Soldiers for providing collated material from the annual reports of the Special Representative of the Secretary-General on children and armed conflict on the detention of former child soldiers.

of administrative detention of children. A document containing collated excerpts from these searches is attached to this report (See Appendix 7.). In carrying out this review, countries were divided into regions, in order to assist researchers in drawing out regional trends in the use of administrative detention: Central and Eastern Europe and the Commonwealth of Independent States; East Asia and Pacific; Eastern and Southern Africa; industrialised countries;[93] Latin America and the Caribbean; Middle East and North Africa; South Asia; and West and Central Africa. These regions correspond with UNICEF's country groupings.

Researchers found evidence of administrative detention in 67 of the countries reviewed. However, it is likely that this presents only a partial picture of the extent of administrative detention worldwide. The information gained from the United Nations treaty body search was limited in that the issue of administrative detention was not uniformly addressed in State reports. It was not clear whether the lack of information on the use of administrative detention was due to that fact that administrative detention was not used in the particular State, or simply was not addressed in the State report, and was neither raised nor questioned in the alternative report or by the treaty body itself. In States where there is an absence of civil society or non-governmental organisations (NGOs) providing information on administrative detention in alternative reports to the Committees, or where the issue of administrative detention is not identified as a priority by the treaty body itself, the issue may go unmentioned.

The paucity of information is also partially due to the fact that some States are not a party to one or more of the relevant United Nations conventions, and some States have not undergone a periodic review in relation to any of the relevant United Nations conventions over the period of review (1999 to 2009). An added limitation was that even where the treaty body dealt with issues relating to detention, the reports and observations did not always contain sufficiently detailed information to identify whether detention was administrative or judicial. For example, at times, mention was made of the placement of children in need of care and protection in closed institutions, but it was not clear whether the placement decision was made by a judicial or executive body. In some cases, it was possible to identify the use of administrative detention, but not possible to identify whether this applied to children and adults, or adults alone. Overall, the study has concluded that it is extremely difficult to obtain reliable statistical information on the use of administrative detention. In relation to children, very few States keep reliable figures, or indeed any figures, on administrative detention. Equally, few are willing to publicise and share such data. The failure of States to keep such data, and the lack of pressure to produce such data, contributes to the "invisibility" of administratively detained children.

In order to supplement and elaborate the information gathered from the United Nations treaty body searches, the researchers conducted a literature review of academic publications and other reports on the use of administrative detention around the world. Researchers searched worldwide legal, sociological and medical journals. Time limits were not set for the purposes of this

[93] Industrialised countries include: Andorra, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong (China), Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

review.[94] Researchers also conducted an internet-based search of relevant reports produced by other organisations and individuals.

In addition, four questionnaires[95] were devised in order to collect information on the laws and practices of these five types of administrative detention (See Annex B.): immigration detention; detention of children on security grounds; administrative detention of children in conflict with the law; detention of children on welfare grounds; and detention of children for mental health purposes. These questionnaires, which were made available in English, French, Spanish and Russian, were sent out to targeted UNICEF offices in 36 countries identified in the United Nations treaty body searches as using administrative detention, but where more in-depth information on the law and practice of administrative detention was required. Questionnaires were also sent, through the Coordinator of the National Commissions at UNICEF, to eight industrialised countries.[96] The sample of countries was also selected to ensure that there was a wide geographical coverage. Questionnaires were also sent out through the Defence for Children – International network to country offices,[97] along with several other organisations. In total, 33 questionnaires were returned.[98]

An email (in English, French and Spanish), requesting data and information on administrative detention was also sent to over 700 child rights organisations around the world. However, the information sent back as a result of these emails was quite minimal. Two researchers also conducted meetings with representatives from key human rights organisations in Geneva, including: UNICEF; Defence for Children – International; Coordinator of the Inter-Agency Panel on Juvenile Justice; the International Commission of Jurists; the World Organisation Against Torture; and the International Committee of the Red Cross.

In order to examine the use of administrative detention in an in-depth, contextualised manner, seven case studies were also completed. Case study countries were selected in order to allow for the examination of a range of different forms of administrative detention laws and practices in countries across different regions. The case studies in Table 1, below, were completed.

[94] The reason for this was that the researchers hoped to find historical examples of administrative detention in addition to current examples.
[95] Questionnaires were titled: Immigration detention; Detention of children involved in armed forces and/or in hostilities; Detention of children outside the formal criminal justice system (this includes welfare and juvenile justice detention); and Health-related detention.
[96] None of these questionnaires were returned.
[97] The questionnaires were posted on the DCI website and an item was placed in the DCI Newsletter inviting offices to complete the questionnaires.
[98] Questionnaires returned included: Immigration: Belgium (DCI), Canada (DCI), Mexico (UNICEF), Switzerland (DCI); Security: Afghanistan (UNICEF), Algeria (UNICEF), Canada (DCI), DCI Congo (UNICEF), Iraq (UNICEF), Kazakhstan (UNICEF), Occupied Palestinian Territory (DCI), Pakistan (Society for the Protection of the Rights of the Child), Sri Lanka (UNICEF), Switzerland (DCI), Thailand (UNICEF), Turkey (UNICEF); Juvenile justice/welfare: Brazil (DCI), Canada (DCI), Egypt (UNICEF), Jordan (UNICEF), Kazakhstan (UNICEF), Jordan (UNICEF), Liberia (UNICEF), Mexico (UNICEF), Mongolia (UNICEF), Mozambique (UNICEF), Nepal (UNICEF), Netherlands (DCI), Nigeria (UNICEF), Pakistan (Society for the Protection of the Rights of the Child), Philippines (UNICEF), Sierra Leone (UNICEF), Tajikistan (UNICEF), Viet Nam (UNICEF); Health: Belarus (UNICEF), Brazil (DCI), Canada (DCI).

In order to carry out research for the case studies, researchers completed desk-based research to collect relevant laws, policies, data and reports and made contact with local human rights/child rights organisations. In addition, the researchers completed four field visits to countries in which limited information was available through desk-based research. Researchers completed visits to India, Bahrain, Burundi and Guatemala, where they conducted informal interviews with juvenile justice and other professionals, representatives from United Nations and NGOs and children who were in detention or had been detained. They also visited relevant detention and/or welfare facilities[99] in order to make observations on the conditions of administrative detention facilities.

Table 1: Case studies completed

Country/Region	Type of administrative detention examined
Burundi	Pre-charge police detention of children in conflict with the law
Guatemala	Pre-charge police detention of children in conflict with the law
India	Detention of children in need of care and protection (on welfare grounds)
Middle East and North Africa region	Detention of children in need of care and protection (Detention of girls for their own "protection")
Tajikistan	Detention of children outside the formal criminal justice system (detention of children under the minimum age of criminal responsibility and on welfare grounds)
United Kingdom	Detention of asylum-seeking children
United States (Guantánamo Bay)	Administrative detention for security purposes

Difficulties in collecting quantitative data on administrative detention

The researchers experienced considerable difficulty in collecting quantitative data on the number of children currently held in administrative detention. This supports the observation made earlier that there appears to be a lack of detailed information provided to the United Nations treaty bodies on administrative detention of children. While some countries collect and collate information on the number of children in various types of administrative detention, unfortunately this proved to be the exception rather than the rule.

Only 14[100] out of the 33 returned questionnaires contained quantitative data, and only 2[101] of these questionnaire responses contained fairly comprehensive data. The data provided on the other 12 questionnaires was very limited (data was provided only in some categories and/or was only available as a total, without any disaggregations). Where reasons were explicitly provided in the questionnaires for data not being provided, this primarily related to data not being collected or collated by States and, in some cases where data was collected, it was not

[99] The facilities visited are mentioned in each respective case study, and include: Burundi: Mpimba Central Prison, and Regional Police lock-ups in Bujumbura, Gitega and Cipetoke; Bahrain: Dar al Aman Shelter, Manama; Guatemala: *Nuestra Raices* home for returned immigrant children, Quetzaltenango; Police Station in Guatemala, Zone 1; India: Boys Children's Home in Bangalore, Karnataka, Jawharlal Nehru Yenoda Children's Home, Pune.
[100] These included the responses from Brazil (juvenile justice/welfare), Canada (immigration and juvenile justice/welfare), Iraq (security), Kazakhstan (health), Jordan (juvenile justice/welfare); Liberia (juvenile justice/welfare), Mexico (immigration), Mongolia (juvenile justice/welfare), Sierra Leone (juvenile justice/welfare), Switzerland (immigration), Tajikistan (juvenile justice/welfare), Thailand (security), Turkey (security questionnaire completed, but data was actually provided on juvenile justice / welfare).
[101] These included Thailand (security) and Liberia (juvenile justice/welfare).

disaggregated by age. The data provided relied on the capacity of UNICEF, DCI and other organisations to locate and report this information. The lack of data provided may, therefore, also be explained by the lack of institutional capacity or individual capacity of persons who were assigned to complete the questionnaires in UNICEF and DCI country offices and other organisations, to collect and report on administrative detention. However, it may be that this data is not being collected and collated at a national level by States. If this is the case, it raises concerns, as it may mean that the extent of administrative detention of children at a global level is impossible to measure quantitatively. It also means that it is unlikely that the number of children placed in administrative detention is being monitored nationally by many States, and possibly, that the length of time that children spend in administrative detention and the conditions of that detention are also not regularly monitored. Without collecting, collating and monitoring data on children in administrative detention, States are not able to monitor the use of administrative detention of children effectively.

Researchers also found it difficult to access qualitative data in some contexts (i.e. on the conditions of administrative detention facilities in some States). This was a particular difficulty in relation to security administrative detention. The result is that the working paper has had to rely on information that was publicly available and that relates only to a small number of States.[102]

[102] For instance, detailed information was available on the conditions in detention facilities operated by the United States (Guantánamo Bay), and Israel. This is not to suggest, of course, that human rights abuses of children in administrative detention only occur in these countries.

1. Administrative detention for security purposes

The use of administrative detention on national security grounds occurs across all regions of the world, in different contexts and forms. This section considers the use of detention for security purposes for two groups of children: those who have actively participated in hostilities; and those who are considered to pose a security threat to the State as a result of engagement in alleged terrorist activities or anti-State groups.

International law prohibits the use of children under the age of 15 in armed conflict, both as part of State forces and non-State groups,[103] while the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[104] ratified by 132 States, provides that armed groups should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years[105] and that, States should "take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities."[106] Despite the prohibition on the recruitment and use of children by armed forces and groups[107] thousands of children are currently involved in armed conflicts around the world.[108] When these children surrender or are captured, they are often placed in administrative detention by the State in whose power they find themselves, despite the fact that many are below the age of recruitment.

Children who have not been involved in hostilities may also be placed in administrative detention on security grounds. The use of administrative detention to counteract threats to national security has a long history, but became more widespread with the start of the First World War and again in the Second World War. Many States involved in these wars promulgated emergency laws which included the power to place "enemy aliens" in administrative detention. European and Pacific countries administratively detained thousands of persons, including children, who were identified as enemy aliens during the Second World War. These included not only non-nationals living in the State, but also citizens who came from or

[103] Article 38 of the CRC prohibits the recruitment of children under the age of 15 years into State armed forces, and requires States to 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'. International humanitarian law also contains provisions prohibiting the recruitment or use of children under the age of 15 years in armed conflict: Article 77 of Additional Protocol I; Article 4(3) (c) of Additional Protocol II.

[104] United Nations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2005, adopted and opened for signature, ratification and accession by General Assembly Resolution UN GAOR A/RES/54/263 of 25 May 2000. Hereinafter the Optional Protocol.

[105] Article 4(1) of Optional Protocol

[106] Ibid., Article 1.

[107] Articles 2 and 3 of the Optional Protocol prohibit forced recruitment of children under the age of 18 by State forces but permit voluntary recruitment under certain circumstances.

[108] Coalition to Stop the Use of Child Soldiers, 'Questions and Answers': <www.child-soldiers.org/childsoldiers/questions-and-answers> [accessed 29 January 2011].

were linked to countries with which the State was at war. In the United States, over 110,000 persons of Japanese heritage were placed in administrative detention between 1942 and 1945.[109]

The practice of administrative detention for security reasons did not cease with the end of the Second World War, although its use lessened. However, the threat posed by international non-State terrorist groups following the attacks on the United States on 11 September 2001[110] has resulted in a renewed use of legislation permitting administrative detention for security reasons and the introduction of new legislation.[111] Attacks by both international and national terrorist groups have caused loss of life and devastation in a range of countries, particularly in the Middle East and South Asia, but also in the United States and Europe. The use of children in terrorism has increased, with evidence that children have been used as suicide bombers,[112] as decoys in car bombings or to transport explosives.[113]

States have struggled to rise to the challenge of protecting people in their jurisdictions against the real and substantial threat that terrorism poses. A common response of States, in the wake of the 11 September 2001 attacks, has been to put in place an array of counter-terrorism measures aimed at preventing future attacks, including preventive administrative detention. These measures are increasingly applied to children.[114]

Although some States have successfully used the criminal justice system to respond to terrorist threats in the past,[115] perceptions of an intensified and more coordinated global terrorist threat post-2001, has led many States to use administrative detention instead to deal with this threat. Rather than prosecute the wrongdoer in the criminal justice system once a criminal act has been committed, States are using administrative detention to prevent an anticipated criminal act from occurring. By doing so, the aim is to incapacitate suspected terrorists or enemy combatants,

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[109] In the United States, during the Second World War, numerous proclamations were issued under the Alien and Sedition Act 1798, of 6 July 1798 S1, 1 Stat. 577, ordering the internment of non-nationals who were deemed to be a 'security threat'. In 1942, the president of the United States extended the use of administrative detention to include citizens of the United States who came from or were linked to countries with which the United States was at war under Executive Order 9066, 7 Fed. Reg. 1407, 19 February 1942.

[110] Incidents of transnational terrorism quadrupled between 2000 and 2004: see Mack, A., 'Global Political violence: Explaining the Post-Cold War Decline', Coping with Crisis Paper Series, International Peace Institute, New York, March 2007, p. 10.

[111] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009.

[112] See United Nations General Assembly, Children and armed conflict: Report of the Secretary-General (2009), U.N. Doc. A/63/785, para. 10.

[113] See United Nations General Assembly, Report of the Special Representative of the Secretary-General for Children in Armed Conflict (2009), U.N. Doc. A/64/254, para. 7; United Nations Children's Fund, 'Machel Study: 10-Year Strategic Review: Children and Conflict in a Changing World', 2007, 76–77.

[114] United Nations Children's Fund, 'Machel Study', p. 76–77.

[115] For instance, while the United States Government has placed many terrorist suspects in administrative detention in recent times, past large-scale terrorist attacks have been dealt with within the criminal justice system, i.e. the United States criminally prosecuted the terrorists who bombed the World Trade Center in 1993, the Murrah Federal Building in Oklahoma City in 1995, and the United States embassies in Kenya and Tanzania in 1998: see Hakimi, M., 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide', *Case Western Reserve Journal of International Law* 40: 593, 2009. The United States Department of Justice *Counterterrorism White Paper*, 22 June 2006, <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> [accessed 29 January 2011] listed more than 260 criminal prosecutions for terrorist offences.

disrupt terrorist organisations and specific plots and gather information from detainees about terrorist organisations or enemy combatants and plots. It also appears that some States are using administrative detention of children to "side-step" the procedural safeguards and strict evidentiary standards afforded to children in the State's criminal justice systems.[116]

Administrative security detention often strips detainees of important legal safeguards assured to those detained for crimes, including the requirement that authorities have a sufficient evidence base to justify detention, that the child is informed promptly of the charges, that there is a right to trial within a reasonable time and that legal and other assistance is made available. The United Nations Working Group on Arbitrary Detention has expressed concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It noted a further expansion of States' recourse to emergency legislation diluting the right of *habeas corpus* or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism.[117]

While the United Nations Security Council has declared that States must ensure that any measures taken to combat terrorism must comply with their obligations under international law, in particular, international human rights, refugee and humanitarian law,[118] the measures introduced by some States have failed to protect basic legal and human rights, resulting in serious violations.[119]

While children are not generally specifically targeted for administrative detention on the ground of security, in some States, administrative detention laws will apply to the population at large, including children. This fails to recognise that children, by virtue of their unique vulnerability, are entitled to special protections in international law requiring that they be placed in detention only as a last resort and for the shortest appropriate period of time.[120] It appears that States have not considered the unique vulnerabilities of children when devising counter-terrorism measures, including administrative detention laws.

1.1. Statistics

The number of children placed in administrative detention for security reasons globally is difficult to ascertain. Most States do not collect or collate data on children in administrative detention or do not make this data publicly available or known, due to the sensitivity of the information. Even when available, such data may not be easily accessible. The lack of publicly available data is a matter of concern, as it means that the administrative detention of children for security reasons is not a matter of public record, making it difficult to ensure that the use of

[116] See Davidson, T. and Gibson, K., 'Experts Meeting on Security Detention Report', *Case Western Reserve Journal of International Law*, 40: 323, 340, 2009.
[117] Commission on Human Rights, WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 61.
[118] United Nations Security Council Resolution 1456 (2003).
[119] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p.12. See also United Nations Office for the High Commissioner for Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No. 32, p. 19–20: 'There has been a proliferation of security and counter-terrorism legislation and policy throughout the world since…2001, much of which has an impact on the enjoyment of human rights.'
[120] See Article 37(b) of the CRC.

detention and the conditions of detention are monitored and children's rights guaranteed. The following data gives an illustration of the number of children placed in administrative detention for security purposes in the countries from which researchers were able to collect data. [121]

Box 2: Children held in administrative detention for security purposes*

- On average, approximately 20 to 30 children from the Occupied Palestinian Territory are placed in administrative detention every year, although these numbers have recently declined. Children can be ordered to spend up to six months in administrative detention and this six-month period can be renewed indefinitely.
- Since the opening of the Guantánamo Bay detention facility, it has been reported that the United States Government has detained at least 17 people who were under the age of 18 years at the time they were taken into custody.
- In Thailand, from June 2007 to June 2008, 23 children (all Malay Muslims) were placed in administrative detention on security grounds, pursuant to martial and emergency laws that allow military officers to detain children who may be "potentially harmful to the Kingdom or violate any provisions of the martial law as well as the order of the army". Children can spend up to 28 days in detention.
- Since 2002, the United States government has administratively detained approximately 90 children at Bagram airbase in Afghanistan as "unlawful enemy combatants".
- Since 2003, 2,400 children have been placed in administrative detention in Iraq, on the grounds that this was required for "imperative reasons of security". Children have been detained in United States military detention facilities at Camp Cropper (in Baghdad) and Camp Bucca (near Basra). The average length of detention of these children is in excess of 130 days.
- From August 2005 to September 2006, 195 children were held in administrative detention in Nepal, on suspicion of being associated with armed opposition groups. Forty-three per cent of these children were below the age of 16 at the time of their arrest, and the youngest was 11 years old.
- In June 2009 in Sri Lanka, 76 children (53 boys and 23 girls) who were suspected of involvement with the Tamil opposition group (LTTE) were held in preventive detention in a "protective accommodation and rehabilitation centre".

* For sources, see end of section.

1.2. Context and circumstances

Administrative detention is used by some States during times of hostilities, for instance, to contain children who are involved in armed forces or groups. It is also used by some States as a response to security threats, for instance, the perceived threat of terrorism.

1.2.1 Children involved in armed conflict

Children who are recruited, or are suspected of being recruited, by non-State armed groups are vulnerable to administrative detention, despite the fact that many of them will be under the minimum age of recruitment.

Legislation permitting the administrative detention of members of non-State armed groups, those associated with armed groups, members of foreign armed forces or groups or those deemed to pose a security risk as a result of their alleged membership of such armed forces or groups, may not contain specific clauses that exempt children from such detention. Neither does such legislation always set out a minimum age at which a child may be subject to administrative detention, meaning that even young, pre-teen children can be legally detained. In some States, legislation gives military officers the explicit power to detain children used by armed forces or

[121] Data collection methods are set out in the introduction of this working paper.

groups of any age, who have been "captured" by government forces. During the 10-year internal armed conflict in Nepal, between 1996 and 2006, the Government of Nepal promulgated a series of ordinances,[122] giving security forces the power to arrest and detain individuals in preventive detention for a period of up to 12 months. As no minimum age was specified in the ordinances, children suspected of being associated with armed opposition groups were held in administrative detention under these instruments, together with adults.[123]

In Sri Lanka, a government minister has the power to place an individual – including a child – in administrative detention for 3 months, although this 90-day period can be extended to up to 18 months. [124] In addition, under Emergency Regulation 17(1), the Secretary of the Ministry of Defence has the power to make administrative detention orders. The Sri Lankan Government had suspended these provisions following a ceasefire agreement with the Liberation Tigers of Tamil Eelam (LTTE) in 2002.[125] However, after formally pulling out of this ceasefire agreement in January 2008, the Government removed the suspension and renewed these administrative detention powers.

Domestic law in some States also allows military officers to detain captured children used by armed forces or groups on a temporary basis until they are charged with a specific offence and referred to the formal criminal justice system. In Colombia, for example, "captured" children used by armed groups who are suspected of involvement with armed opposition groups may be held in administrative detention by military officers for 36 hours before being referred to civilian police officers, according to domestic law.[126] Pursuant to this power, children are being detained for periods exceeding this 36-hour limit to be interrogated and used for intelligence-gathering purposes by the military.[127]

Even where administrative detention may be intended to be used temporarily to contain children used by armed forces or groups until they are referred to appropriate support services, it has been reported that, in some States, military officers are holding children in administrative detention for prolonged periods, before referring them to child protection professionals or relevant services. Throughout the internal conflict in Angola, for example, thousands of children were recruited and used in armed conflict by both government forces and insurgency groups.[128] Following the end of the conflict in 2002, some 16,000 children used by armed forces or groups required demobilisation.[129] Many children underwent rehabilitation and reintegration

[122] The Terrorist and Disruptive Activities (Control and Punishment) Ordinance in November 2001, followed by a further six ordinances.
[123] Human Rights Watch, 'Children in the Ranks: The Maoist's use of Child Soldiers in Nepal', February 2007, p.54.
[124] Article 9 of Prevention of Terrorism Act 1979.
[125] Human Rights Watch, 'Return to War: Human Rights Under Seige', 2007, p. 71.
[126] Law 906. See 'UN Working Group on Arbitrary Detention concludes Visit to Colombia', 10 October 2008.
[127] Committee on the Rights of the Child, Concluding Observations: Colombia (2006), U.N. Doc. CRC/C/COL/CO/3, para. 80. Children have also reportedly been detained in this manner in Burundi and in Afghanistan (See Report of the Secretary-General on Children and Armed Conflict (2009), U.N. Doc. A/63/785.).
[128] Coalition to Stop the Use of Child Soldiers, Global Report 2004: Angola, 2004: <www.child-soldiers.org/regions/country?id=6> [accessed 29 January 2011].
[129] Ibid.

programmes from 2002 to 2006;[130] however, many children used by armed forces or groups were interned in camps during this time, where some "languished for over a year".[131]

1.2.2 The "war on terror"

Administrative detention has been used by the United States as part of the "global war on terror" in order to contain security threats posed by suspected members of armed opposition groups and terrorist organisations. Unlike other forms of administrative preventive detention the United States Government asserts that the "war" against Al-Qaida and other trans-national groups authorises the government to capture and detain enemy combatants and terrorism suspects anywhere in the world until the "cessation of hostilities".[132] It relies upon international humanitarian law for its authority. [133] The United States Government set up detention facilities at Guantánamo Bay in Cuba in 2001 for enemy combatants and alleged Al-Qaida terrorists. It has been reported that at least 17 people under the age of 18 at the time they were taken into custody were placed in facilities in Guantánamo Bay.[134] .

International security forces (of which United States armed forces form the majority) in Afghanistan also administratively detain and operate their own detention facilities within military bases. Children arrested by coalition forces may be held for up to 96 hours before they are either released or referred to the Afghan authorities (the National Directory of Security).[135] However, some international armed forces have ceased to refer children to the National Directory of Security, and have been keeping children in administrative detention for prolonged periods of time.[136] The United States Government acknowledged, in a report submitted to the United Nations Committee on the Rights of the Child in May 2008, that it had held approximately 90 children in administrative detention in Afghanistan, and was, as of April 2008, holding 10 children in administrative detention at Bagram airbase as "unlawful enemy combatants".[137]

The multi-national forces in Iraq are also authorised[138] "to take all necessary measures to contribute to the maintenance of security and stability in Iraq" including "internment where this

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[130] Coalition to Stop the Use of Child Soldiers, Global Report 2008: Angola, 2008.

[131] Human Rights Watch, 'Alternative Report to the United Nations Committee on the Rights of the Child: Forgotten Fighters: Child Soldiers in Angola', 2003, p. 7. Children have also reportedly been detained in military holding cells in the Democratic Republic of the Congo for prolonged periods before being referred to child protection services (See United Nations Security Council, Reports of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo (2008), U.N. Docs. S/2008/693, para. 29; (2007) S/2007/391, para. 32.).

[132] Amnesty International, Timeline, 'End Illegal US Detention', AI Index 51/148/2008.

[133] The 'war on terror' officially began 14 September 2001 when Congress passed legislation (S.J. Res. 23), authorising the president to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons..'. This was signed into law by the president on 18 September 2001. See the case study on Guantánamo Bay for further details.

[134] Amnesty International, 'Justice at Last or More of the Same?', 2006, p. 31, <www.amnestyusa.org/document.php?lang=e&id=ENGAMR511462006http:///> [accessed 29 January 2011].

[135] The administrative detention framework in Iraq is governed by United Nations Security Council Resolution 1546 (2004) issued under Chapter VII of the United Nations Charter.

[136] United Nations Children's Fund, Questionnaire, Afghanistan.

[137] Committee on the Rights of the Child, Optional Protocol on the Involvement of Children in Armed Conflict: United States State Party Report (2008), U.N. Doc. CRC/C/OPAC/USA/a, p. 13.

is necessary for imperative reasons of security". Once again, operational instructions permit the administrative detention of children.[139]

1.2.3 Preventive detention as a counter-terrorism measure

The use of administrative detention of children on security grounds is not limited to the detention of children involved in hostilities. A significant number of States have introduced or revived legislation that permits preventive detention as a counter-terrorism measure in the wake of the September 2001 attack on the United States. While, as noted above, threats to national security, such as terrorist activities, could be dealt with within a State's criminal justice system, some States have chosen to use administrative detention instead to respond to these threats, citing "the unprecedented nature of the contemporary terrorist threat to justify their departure from previously accepted legal norms".[140]

These States argue that the potential damage caused by terrorist attacks is so great that it justifies placing individuals present in the State, suspected of being capable and willing to carry out such attacks, in administrative detention. The criminal justice system, it is argued, cannot be used to contain such threats. States give various reasons for this assertion. A criminal trial may be inappropriate to deal with intended terrorist acts which are still only at a planning stage. In addition, in some States experiencing armed conflict, there may not be an adequately functioning criminal justice system. Alternatively, a State that faces threats from trans-national terrorist organisations may be unable to rely upon the State where the person deemed to be a risk resides to prosecute that person. Further, a State may be unable to gather sufficient evidence for a successful prosecution, as much of the evidence comes from abroad and is secret intelligence information which the State is not able to produce in court. The International Commission of Jurists[141] has dismissed these arguments and found that conventional criminal justice systems have a long history of tackling terrorist and other organised criminal networks, and has recommended that with adequate resources, criminal justice systems, rather than administrative detention, should be the measure used to tackle terrorism.

Administrative detention legislation will generally grant executive bodies, such as government ministers or police officers, the power to place persons deemed a "security threat" in detention without the need to lay criminal charges against the suspect. These powers often apply to children, although there is little evidence as to the extent to which these powers have actually been used against children globally. In Malaysia and Singapore, for example, authorities are permitted to place individuals in administrative detention on security grounds for up to two years.[142] In Malaysia, the Home Minister may order the detention of a person for an initial period of up to 60 days (renewable by the Home Minister) if the police officer suspects that the person is "acting in any manner prejudicial to the security of Malaysia…or to the maintenance of essential services therein or to the economic life thereof".[143] The number of persons held under

[138] The administrative detention framework in Iraq is governed by United Nations Security Council Resolution 1546 (2004) issued under Chapter VII of the United Nations Charter.
[139] These are contained in letters annexed to the United Nations Security Council resolution which set out a broad range of measures that the MNF-I can take to contain "ongoing security threats".
[140] International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 12.
[141] Ibid., p. 24.
[142] Pursuant to the Internal Security Act 1960 in both countries.
[143] Section 72 of Internal Security Act 1960.

the Internal Security Act 1960 increased from 69 in July 2001 to 107 by December 2005.[144] No figures are obtainable on the age of detainees, so the extent to which these powers have been used against children is unclear, but it is likely that a number of the detainees were children.

In Jordan[145] and Egypt,[146] authorities under the power of the Ministries of Interior may place persons, including children, in administrative detention for up to one year or six months, respectively, on the ground of public security.

In Australia, persons can be detained by a federal police officer for up to 168 hours (seven consecutive days) where they are suspected of having information about a possible security offence;[147] the same maximum time period applies to children.[148] In the United Kingdom, any person suspected of involvement in terrorism can be detained for 28 days by police before they must either be charged or released. [149] The same maximum time period applies to children.

Even in States in which there is no armed conflict or terrorism it is not uncommon to find provisions permitting administrative detention for security reasons. In Botswana, persons (including children) may be arrested without warrant where the Director-General of the Directorate of Intelligence and Security – a body which is under the power of the President – suspects that the person has committed or is about to commit an offence that is a threat to national security.[150] Similarly, in Cameroon, children, may be placed by the police or the national gendarmerie in administrative detention for 15 days renewable indefinitely, for the purpose of maintaining public order.[151]

Administrative detention legislation sometimes applies just in regions or areas within a State that are experiencing unrest. For instance, India acknowledged, in its 1996 report to the United Nations Human Rights Committee that it employed administrative detention in response to a "sustained campaign of terrorism" within its borders.[152] Legislation permits the State to hold an individual, including a child, "with a view to preventing him from acting in a manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India" or

[144] Suara Rakyat Malaysia, 'Submission to the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights', South East Asia, 23–24 July 2006: <http://ejp.icj.org/IMG/SUARAMSubmission.pdf> [accessed 29 January 2011].
[145] A person may be detained if deemed a 'danger to the public' (Crime Prevention Law 1954).
[146] This power is granted pursuant to Egypt's Emergency Law 1958 and declared state of emergency which has been in effect since 1981 (See Human Rights Watch, 'Anatomy of a State Security Case: The 'Victorious Sect' Arrests', 2007, 10.).
[147] Sections 34D(3), 34HC of Australian Security Information Organisation Act 1979. Also, pursuant amendments made to the Criminal Code Act 1995 by the Anti-Terrorism Act 2005, a police officer may place an individual in preventive detention for up to 48 hours at federal level. States have passed complementary legislation that allows for administrative detention of persons for up to 14 days at state level.
[148] Sections 34NA(4)–(10) of Australian Security Information Organisation Act 1979
[149] Schedule 8 of Terrorism Act 2000, as amended by the Terrorist Act 2006. An attempt to extend this time period to 48 days was defeated in Parliament in 2008.
[150] Intelligence and Security Services Act 2007.
[151] Article 2 of Law No. 90/024, 19 December 1990.
[152] Human Rights Committee, Third Periodic Report of State Party: India, para. 50, U.N. Doc. CCPR/C/76/Add.6.

"in any manner prejudicial to the maintenance of public order"[153] in preventive administrative detention for up to two years in Jammu and Kashmir,[154] and up to one year in other parts of the country.[155]

In Thailand, the Martial Law Act 1914 permits persons to be placed in administrative detention on the decision of a military officer for seven days where they are suspected of causing acts that may be "potentially harmful to the Kingdom or violate any provisions of the martial law as well as the order of the army".[156] These powers have been used by authorities in southern Thailand against children from ethnic Malay Muslim communities who are suspected of being involved in the insurgency movement in the region.

Worryingly, some States appear to be using administrative detention of children precisely because it enables them to "side-step" the procedural safeguards and strict evidentiary standards afforded to children in the State's criminal justice system.[157] In Israel, for example, commanders of the Israeli Defense Forces have the power to detain Palestinian children, from the age of 12 years, for up to six months if they have "reasonable grounds to presume that the security of the area or public security require the detention".[158] The initial six-month period can be extended by a six-month period an indefinite number of times by the military commander in the relevant area. The Committee against Torture found, in its recent periodic review of the Government of Israel, that, while the Government claims that administrative detention is used exceptionally, the number of persons placed in administrative detention – 530 according to the government and up to 700 according to non-governmental bodies – suggests that this is not the case.[159] It appears that children will be placed in administrative detention for reasons other than that they pose an imminent threat to the security of Israel. For instance, it is clear that children are being placed in administrative detention as an alternative to charging them with a criminal offence, where there are concerns that there is insufficient evidence to prosecute a child.[160]

1.2.4 Immigration detention as a security measure

Several industrialised States have used immigration law to detain foreign nationals where they are suspected of posing a threat to national security.[161] The International Commission of Jurists found, following a three-year study on counter-terrorism and human rights, that "[g]reater reliance is now being placed on deportations, detention pending deportations, and control schemes when deportation fails, as a way of preventing terrorism."[162] States appear to be relying on immigration law to carry out administrative detention as immigration law generally demands

[153] Article 3 of National Security Act 1980.
[154] Jammu and Kashmir Public Safety Act 1978
[155] National Security Act 1980.
[156] Section 15(b)(i) of Martial Law Act, B.E 2457, 1914.
[157] See Davidson, T. and Gibson, K., op. cit., 340.
[158] Military Law 1591.
[159] See Committee against Torture, Concluding Observations: Israel (2009), U.N. Doc. CAT/C/ISR/CO/4, para. 17.
[160] Davidson, T. and Gibson, K., op. cit., 359; Defence for Children International–Palestine Section, 'Palestinian Child Prisoners', 2009, 76–7; B'TSelem, 'Administrative Detention in the Occupied Territories', (undated): <www.btselem.org /english/Administrative_Detention/Occupied_Territories.asp> [accessed 29 January 2011].
[161] The use of administrative detention to respond to immigration inflows is discussed in Section 2.
[162] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 93. As noted above, security administrative detention is unlawful for States parties to the European Convention, outside the context of a declared state of emergency. Detention for immigration purposes is not, as such, unlawful, for these Member States.

less stringent legal safeguards than detentions carried out within the criminal justice system.[163] In Canada, for instance, the system of "security certificates" allows for the administrative detention of non-nationals, pending deportation. Under Canada's Immigration and Refugee Protection Act 2001, persons will be inadmissible into Canada if they constitute a security threat, in which case a security certificate may be issued by two government ministers "on grounds related to security, the violation of human or international rights, serious criminality or organised crime".[164] Persons that are deemed inadmissible into Canada can be deported,[165] before which they may be placed in administrative detention. Security certificates have not been used in a large number of cases, and to date, have not been used to place children in administrative detention.[166] It is, however, possible to issue security certificates with respect to children.

Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001, the United Kingdom reintroduced indefinite internment without trial for foreign nationals suspected of terrorist activity whom the United Kingdom Government would have deported to their home countries, but for the risk that they would be tortured if sent home. No minimum age was specified in these provisions. The Government repealed Part 4 of the Act after a legal challenge in which the Court found that the Act was "not only discriminatory and so unlawful … but also … disproportionate".[167]

1.3. International legal framework

As set out above, administrative detention is not, as such, unlawful in international law and States may place children in administrative detention on security grounds, but only in very limited circumstances. The use of administrative detention is governed by international human rights law and, in the context of armed conflict, international humanitarian law. International refugee law will also be relevant in relation to some types of administrative security detention.[168]

1.3.1 International human rights law: the right to liberty and security of person

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention.[169] (For details of provisions, see Introduction.).

In addition, the Human Rights Committee's General Comment No. 8 emphasises that most of the elements of Article 9 of the ICCPR are applicable to all types of deprivation of liberty, including all forms of administrative detention. While part of Article 9(2) and 9(3) are only applicable to persons against whom criminal charges are brought, the rest, including the right to

[163] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 93.
[164] Section 34(1) of Immigration and Refugee Protection Act 2001.
[165] Ibid., Sections 77–84.
[166] Only five security certificates have been issued since 11 September 2001 (to April 2005): Ip, John, 'Comparative Perspectives on the Detention of Terrorist Suspects', *Transnational Law and Contemporary Problems*, 2007, Vol. 16, p. 773 and 802.
[167] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent),* [2004] UKHL 56. This ruling was by the House of Lords, the highest court in the UK, now known as the Supreme Court.
[168] International refugee law is discussed in Section 2.
[169] See also Body of Principles, which sets out a comprehensive list of protections for persons who are subject to administrative detention.

control by the court of the legality of the detention, "applies to all persons deprived of their liberty by arrest of detention".[170]

Article 37 of the CRC also limits the use of administrative detention, and adds additional restrictions on the use of administrative detention (See Introduction.).

In addition, the United Nations, Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), provide a further limitation on detention. Not only do they require that detention should be used as a last resort, but also that placing a child in detention should "be limited to exceptional cases".[171] The Beijing Rules reiterate that any detention should be brief[172] and state that this should only occur where the child has committed "a serious act involving violence".[173]

The right to liberty and security of the person is mirrored in regional human rights instruments, including Article 5 of the Arab Charter on Human Rights (Arab Charter), Article 6 of the Banjul Charter, Article 7 of the American Convention, Article 1 of the American Declaration on the Rights and Duties of Man and Article 5 of the European Convention. Further rights and duties can also be found in the Body of Principles.

Under the European Convention (which applies to 47 Member States), deprivation of liberty may only be ordered for one of the purposes contained in Article 5. As Article 5 does not specifically mention detention on security grounds, the only way that administrative detention for security reasons is lawful under the European Convention is in the context of a declared state of emergency and derogation from the right to liberty.[174]

Article 3 of the CRC requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be the primary consideration." This means that the issue of whether the best interests of the child have been a primary consideration must be taken into account in determining whether the detention is appropriate. Other human rights standards, such as non-discrimination[175], are also relevant. For instance, the administrative detention of a particular group of children chosen on the basis of religion, race, nationality or ethnicity is likely to be regarded as unlawful.

In relation to the detention of "captured" children used by armed forces or groups, the United Nations Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict requires that States ensure children are "demobilised or otherwise released from service", and given "all appropriate assistance for their physical and psychological recovery and their social reintegration".[176] According to the Principles and Guidelines on

[170] Human Rights Committee, General Comment No. 8 (1982), para. 1.
[171] Rules 1, 2 of Havana Rules.
[172] Rule 17(b) of Beijing Rules.
[173] Ibid., Rule 17(c).
[174] *Lawless v. Ireland*, 1976, paras. 13, 15; *Ireland v. UK*, 1978, para. 214.
[175] Article 2 of CRC; Article 2 of ICCPR.
[176] Article 6 of Optional Protocol. See also Article 39 of CRC.

Children Associated with Armed Groups (Paris Principles)[177] children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection.[178]

Thus, international standards favour the use of non-punitive measures in dealing with "captured" children used by armed forces or groups. Administrative detention is unlikely to provide such a restorative framework.

1.3.2 Administrative detention must be lawful

It is accepted under Article 9 of the ICCPR, Article 37(b) of the CRC, the Havana Rules[179] and the Body of Principles[180] that a child can be placed in a detention facility under the order of an administrative authority. However, administrative detention of children will only be treated as lawful if the domestic law of the State clearly permits such detention. The relevant law must have adequate clarity and regulate the procedure for the administrative detention,[181] while the detention itself must be carried out by competent officials or persons authorised for that purpose.[182] Where placing a child in administrative detention does not comply with domestic law or domestic procedures, this will render the detention unlawful.

When there are no provisions, the provisions are vague and lack specificity or there are no set procedures for the administrative detention of children for security purposes, any such detention will not be in conformity with the law and will, therefore, constitute unlawful and potentially, arbitrary, detention in breach of Article 9(1) of the ICCPR and Article 37(b) of the CRC.

1.3.3 Administrative detention must not be arbitrary

Even where provisions permitting administrative detention are contained in domestic law, there is also a requirement that the administrative detention must not be arbitrary. The Human Rights Committee has stated that "[a]rbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[183] The Human Rights Committee requires that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[184]

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[177] United Nations Children's Fund, Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, February 2007. Hereinafter the Paris Principles.
[178] Principle 3.6 of Paris Principles.
[179] Rule 20 of Havana Rules.
[180] Principles 2, 4 of Body of Principles. A child who is a prisoner of war (POW) can also be placed in administrative detention under the GC III.
[181] *Bolanos v. Ecuador*, Communication No. 238/1987; United Nations Human Rights Committee, *Domukovsky v. Georgia*, No. 623, 624, 626 and 627/1995.
[182] Principles 2, 4 of Body of Principles.
[183] *Hugo van Alphen v. Netherlands*, 1990, para. 5.8; *A.W. Mukong v. Cameroon*, 1994.
[184] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para. 9.2.

Determining whether the administrative detention of a child is necessary, proportionate and appropriate will depend upon the circumstances of the individual case, and the purpose of the detention. In the case of a child, administrative detention will only be reasonable and proportionate when it meets the requirements of Article 37(b) of the CRC, in that it is used as a matter of last resort and for the shortest appropriate period of time. Detention should "not continue beyond the period for which the State can provide appropriate justification". [185] If it does then it will cease to meet the criteria for lawful administrative detention.[186]

The Human Rights Committee, in the case of Cámpora Schweizer, has summed up the situation in which administrative detention for security purposes may be used: "Administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner."[187]

The International Commission of Jurists Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism[188] provides that "counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination,"[189] and, in relation to the deprivation to liberty in combating terrorism, "[a]dministrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular supervision."[190] The International Commission of Jurists' Declaration requires that States use the criminal justice system to respond to suspected acts relating to terrorism, rather than "resort to extreme administrative measures, especially those involving deprivation of liberty".[191] It could be argued that even more stringent requirements apply to children that limit, even further, the circumstances in which they can lawfully be placed in detention on security grounds. This is by virtue of Articles 37 and 3 of the CRC, which require that children be detained only as a last resort and for the shortest appropriate period of time and that the best interests of the child are a primary consideration in deciding whether to detain a child.

1.3.4 Safeguards

To ensure that administrative detention for care and protection is lawful, States also need to ensure that children are provided with all the necessary procedural safeguards and guarantees contained in Article 9 of the ICCPR, Article 37 of the CRC and other international instruments.[192] The safeguards include:

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[185] *A. v. Australia*, 1997, para. 9.4; *C. v. Australia*, 2002, para. 8.2.
[186] *A. v. Australia*, 1997.
[187] *Campora Schweizer v. Uruguay*, Human Rights Committee, Communication No. 66/1980 (Views adopted on 12 October 1982), U.N Doc. A/38/40, p. 122, para. 18.1. See also the Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc E/CN.4/826/Rev.1, paras. 783–787.
[188] The International Commission of Jurists Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration) was adopted 28 August 2004. Hereinafter the Berlin Declaration.
[189] Principle 1 of Berlin Declaration.
[190] Ibid., Principle 6.
[191] Ibid., Principle 3.
[192] In its Day of General Discussion on Children without Parental Care, the Committee on the Rights of the Child recommended that 'States parties ensure that the decision to place the child in alternative care is taken by a competent authority and that it is based on the law and subject to judicial review to avoid arbitrary and discretionary placements'. The States parties should also ensure that the placement is regularly reviewed in accordance with

- The right to be informed promptly of the reasons for detention and the substance of the complaint against him or her.[193]
- The right to trial or release (if a detainee is the subject of a criminal charge).[194]
- The right to be challenge the legality of the detention.[195]
- The right to protection against *incommunicado* detention,[196] including the right to be kept at officially recognised places of detention,[197] and the right to maintain contact with the family through correspondence and visits.[198]
- The right to access legal counsel and other appropriate assistance.[199]

In addition, Article 14 of the ICCPR provides an additional safeguard, stating that "[i]n the determination of any criminal charge against him….everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee has clarified the meaning of a competent, independent and impartial tribunal, stating:

> "18. The notion of a "tribunal" in Article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision.
> 19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, […] and the actual independence of the judiciary from political interference by the executive branch and legislature…"[200]

1.3.5 Derogation from the right to liberty during a time of emergency

Article 4(1) of the ICCPR provides that in times of public emergency which threaten the life of the nation, a State party may take measures derogating from its obligations under Article 9. However, it may do so only to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law

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Article 25 of the Convention. See U.N. Doc. CRC/C/153, para. 655. See also the Commentary to Rule 3.2 of Beijing Rules.

[193] Article 9(2) of ICCPR. See also Human Rights Committee, General Comment No. 8 (1982). The Human Rights Committee noted that while this requirement appears only to apply persons charged with a criminal offence, it also applies to persons held in administrative detention.

[194] Article 9 (3) of ICCPR.

[195] Article 37(d) of CRC; Article 9(4) of ICCPR.

[196] Article 1 of International Convention for the Protection of All Persons from Enforced Disappearance, 2006; Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 13(b).

[197] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rule 7 of Standard Minimum Rules for the Treatment of Prisoners; Principle 12 of Body of Principles.

[198] Article 37(c) of CRC; Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37, 92, Standard Minimum Rules on the Treatment of Prisoners.

[199] Article 37(d) of CRC; Article 9(4) of ICCPR.

[200] Human Rights Committee, General comment No. 32 (2007), U.N. Doc. CCPR/C/GC/32, paras. 18, 19.

and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[201] Any restrictions must be limited and be of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened.[202] Even in a state of emergency though, international law provides that key safeguards including the right to challenge the legality of administrative detention, and the right to legal representation must be available.[203]

1.4. International humanitarian law

During times of armed conflict or occupation, international humanitarian law also applies to regulate the use of administrative detention. International humanitarian law provisions, which are primarily contained in the four Geneva Conventions of 1949 and two Additional Protocols of 1977, apply to States during international armed conflict and belligerent occupation, and a limited number of provisions apply during non-international (internal) armed conflict. International humanitarian law generally offers less explicit restrictions on the circumstances in which States can administratively detain children,[204] and less elaborated provisions regulating the use of administrative detention.[205] However, it does offer a limited number of general protections and special protections to children who are involved in armed conflicts (either as combatants or for other ancillary purposes) and to child civilians.

In international humanitarian law, different legal standards apply to the detention of children involved in hostilities (this category includes child combatants and children involved in armed conflict in other capacities) who fall within the meaning of "prisoner of war" in international law, and to child civilians. Different standards also apply to children who are involved in or affected by armed conflict of an international nature, as compared to non-international (i.e. internal) armed conflict.[206]

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[201] Article 4(1) of ICCPR; see also Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11.

[202] Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para 2.

[203] Human Rights Committee, WG on Arbitrary Detention (2003), U.N. Doc. E/CN.4/2004/3, para. 62; Article 27 of American Convention; Articles 4 and 14 of Arab Charter on Human Rights; Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1878, 'Habeas Corpus in Emergency Situations'; Advisory Opinion OC-9/87 of 6 October 1987, 'Judicial guarantees in states of emergency'; Article 6 of European Convention ; ECHR, *Lawless v. Ireland*, 1 July 1961, Application No. 332/57; *Ireland v. UK*, 1978; *Salduz v. Turkey*, 27 November 2008, Application no. 36391/02: 'the Court reiterates that Article 6 § 3 (c) [ECHR] may be relevant at the stage of the preliminary investigation in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions'; African Commission on Human and Peoples' Rights; Principle M (5e) of Principles and Guidelines on the right to a fair trial and legal assistance in Africa: '[n]o circumstances whatsoever must be invoked as a justification for denying the right to *habeas corpus*, *amparo* or similar procedures'.

[204] For instance, the explicit requirements of Article 37(b) of the CRC that require States to detain children only as a last resort and for the shortest appropriate period of time are not contained in international humanitarian law.

[205] Pejic, J., 'Procedural principles and safeguards for internment / administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, 87:375, 377: 'Even though internment in international armed conflicts is regulated by the Fourth Geneva Convention and Additional Protocol I, these treaties do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement. In non-international armed conflicts there is even less clarity as to how administrative detention is to be organized'.

[206] It should be noted that children who participate in hostilities will not necessarily lose their status as civilians (and therefore the protections afforded to civilians in international humanitarian law).

1.4.1 Detention of children involved in hostilities in international armed conflict

International humanitarian law is clear that States are prohibited from recruiting children under the age of 15 years in State armed forces both during international[207] and non-international[208] armed conflict and must take all feasible measures to ensure that non-State armed groups do not use children under the age of 15 years in hostilities. Despite these rules, where a child involved in hostilities in international armed conflict is "captured" by a State, the child may become a prisoner of war (POW).[209] Where such children fall into this legal category, they will be entitled to the range of protections afforded to adults POWs under the Third Geneva Convention (GC III).[210] They also enjoy a number of special protections.[211]

A child will be considered a POW where he or she belongs to one of the following categories and has "fallen into the power of the enemy": members of armed forces, militias or volunteer corps of a party to the conflict; organised resistance movements belonging to a party to the conflict;[212] members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power; persons who accompany the armed forces without being members thereof; members of crews; inhabitants of a non-occupied territory, who "take up arms" spontaneously to resist invading forces (as long as they carry arms openly and respect the laws and customs of war); and persons in occupied territories, who had formerly been part of the armed forces of the occupied country.[213]

According to international humanitarian law, during international armed conflict, States may detain prisoners of war from the time they "fall into the power of the enemy and until their final release and repatriation."[214] According to Article 21 GC III, a "detaining power" is permitted to intern POWs and may "impose on them obligations of not leaving beyond certain limits, the camp where they are interned" or, if the camp is fenced in, of "not going outside its perimeter." Camps must be situated "far enough away from the combat zone for POWs to be out of danger".[215] POWs "may not be held in close confinement except where necessary to safeguard their health", and then only for the time that this is necessary.[216] Article 22 GC III prohibits the internment of POWs in penitentiaries. Article 118 GC III provides that POWs must be released and repatriated "without delay following the cessation of hostilities".

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[207] Article 77 of International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Hereinafter Additional Protocol I.
[208] Article 4(3)(c) of Additional Protocol I.
[209] Ibid, Article 77(3).
[210] GC III.
[211] Article 77 of Additional Protocol I.
[212] According to the GC III, to fall into this category, the resistance movement must also fulfil the following criteria: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
[213] Article 4 of GC III.
[214] Ibid., Article 5.
[215] Ibid., Article 19.
[216] Ibid., Article 21.

Detainees also have the right, where any doubts arise over whether they fall within the definition of being a POW, to have their status determined by a "competent tribunal". Until their status is determined, detainees must be afforded the protections contained in the GC III.[217]

Beyond this, international humanitarian law does not provide detailed provisions on legal procedural safeguards for POWs. However, the GC III does include detailed provisions on the conditions of detention, including general provisions that POWs are entitled "to respect for their persons and their honour" (Article 14) and that they shall be treated in a non-discriminatory manner (Article 16). In addition, GC III regulates the conditions of detention, and contains provisions relating to the beginning of captivity: a prohibition on torture and coercion (Section I); quarters, food and clothing (Chapter II); hygiene and medical care (Chapter III); medical personnel and chaplains (Chapter IV); religious, intellectual and physical activities(Chapter V); discipline (Chapter III); labour (Section III); financial resources for POWs (Section IV); relations with the outside world (Section V); and relations between POWs and authorities (Section VI).

The fundamental guarantees contained in Articles 75 and 77 of Additional Protocol I also apply to POWs, and to all other persons in the power of a State Party to an international armed conflict.[218] Article 75 provides that detainees shall be treated humanely and in a non-discriminatory manner. It also contains prohibitions on particular acts, including torture and corporal punishment, and the right to be informed promptly of the reason for the detention, in a language the detainee understands.

Article 77 of Additional Protocol I includes several special protections for children who are in the power of a State Party to an international armed conflict. It provides that "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason."[219] It also provides that children who have been detained shall be held in separate quarters to adult detainees, except where accommodated with adult family members.[220]

1.4.2 Detention of civilians in international armed conflict

According to the Fourth Geneva Convention (GC IV), during international armed conflict, States may place child civilians in administrative detention ("internment"), but only "if the security of the Detaining Power makes it absolutely necessary."[221] This provision makes it clear that internment is the most severe measure of control, and can only be ordered in exceptional circumstances.[222] According to the commentary on GC IV, Article 42 permits a State to intern persons only "if it has serious and legitimate reason to think that they are members of organisations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage".[223] In order to justify internment of

[217] Ibid., Article 5; Article 45 of Additional Protocol I.
[218] Article 75(1) of Additional Protocol I.
[219] Ibid., Article 77(1).
[220] Ibid., Article 77(4).
[221] Article 42 of the GC IV applies to 'aliens in the territory of a party to the conflict'.
[222] Pejic, J., op.cit., 380.
[223] International Committee of the Red Cross, 'Commentary on the Fourth Geneva Convention', Article 42, Geneva, 1958, p. 257–258: <www.icrc.org/IHL.nsf/COM/380-600048?OpenDocument> [accessed 29 January 2011].

civilians, a State "must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security".[224]

Occupying powers may also, according to Article 78 of GC IV, place persons in occupied territories in internment "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons". Internment cannot be used, for example, for the sole purpose of intelligence gathering,[225] or as an alternative to criminal proceedings.[226] It cannot be used as a collective punishment, and States must ensure that the security threat of each individual is assessed before internment is used.[227]

The Fourth Geneva Convention contains several safeguards to which all persons detained in the context of international armed conflict must be entitled. This includes:

- The detention of persons in occupied territories must conform to the principle of legality, as persons must only be interned according to a regular procedure prescribed by the occupying power. Such a procedure must be in accordance with the provisions of the GC IV.[228]
- The decision to place a person in internment must be reviewed as soon as possible. According to Article 43 of the GC IV, interned persons shall be entitled to have their internment "reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining power for that purpose". In occupied territories, a decision to intern a person must be subjected to a right of appeal by a competent body, and appeals shall be decided "with the least possible delay".[229] In contrast to international human rights law, international humanitarian law does not contain a requirement that this review be by a judicial body. However, according to the Commentary on the Convention, where the reviewing body is administrative rather than judicial, the review must, nonetheless, be conducted by a board, rather than a single administrative official, and the board must offer the necessary guarantees of independence and impartiality.[230]
- The internment must be periodically reviewed. Article 43 of the Fourth Geneva Convention provides that "the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit." In occupied territories, the decision to intern a person must be "subject to periodic review, if possible every six months, by a competent body".[231]
- All detained persons must be informed of the reasons for the detention.[232]
- Information that a person has been interned must be available to the person's family within a reasonable time,[233] and the general presumption in the Fourth Geneva

[224] Ibid., p. 258.
[225] Pejic, J., op. cit., 380.
[226] Ibid., 381.
[227] Article 78 of GC IV.
[228] Ibid.
[229] Ibid., Article 43.
[230] ICRC, 'Commentary on the Fourth Geneva Convention', Article 43, Geneva, 1958, p. 260.
[231] Article 78 of GC IV.
[232] Ibid., Article 75(4)
[233] Ibid., Articles 106, 138.

Convention that family contacts must be allowed within a reasonable time frame[234] in all but exceptional circumstances,[235] will apply.

The GC IV also contains a number of provisions regulating the conditions of detention for civilians who have been interned, including: in relation to medical care and hygiene (Articles 81, 91, 92); food and clothing (Articles 89, 90); exercise and carrying out intellectual and spiritual activities (Articles 93–96); financial resources (Articles 97, 98); administration and discipline (Chapter VII); penal sanctions (Chapter IX); and relations with the exterior (Chapter VIII).

The fundamental guarantees contained in Article 75 of Additional Protocol I; and the special protections afforded to children contained in Article 77, as set out above, apply to all detained persons, not just those that meet the criteria of being a prisoner of war.[236]

It is important to note that the above safeguards are only the absolute minimum that must be provided. The Commentary on Article 43 of the GC IV provides that the "procedure provided for in the Convention is a minimum" and that "it will be an advantage, therefore, if States Parties to the Convention afford better safeguards".[237] In particular, it may be that human rights standards continue to apply, which provide more detailed and tailored provisions on safeguards.[238]

International humanitarian law does not deal in detail with the internment of civilians during internal armed conflict and it is likely, in this context, that international human rights law will apply.[239]

1.4.3 Children in non-international armed conflict

During internal armed conflict,[240] different rules apply, as set out in Additional Protocol II to the Geneva Conventions. While there are no detailed provisions on the legal procedural elements and safeguards for internment contained in Additional Protocol II,[241] persons who are deprived of their liberty during non-international armed conflict are entitled to particular minimum protections, including that:

- Sick or wounded detainees be treated humanely.
- Detainees are provided with food and drinking water, safeguards protecting their health and hygiene, and protection from the elements and the dangers of armed conflict.
- Detainees receive individual or collective relief.

[234] Ibid., Articles 106, 107, 116.
[235] Ibid., Article 5. See also Pejic, J., op. cit., 390.
[236] Article 75(1) of Additional Protocol I.
[237] ICRC, 'Commentary on the Fourth Geneva Convention', Article 43, 1958, p. 260.
[238] See subsection below for more detailed consideration of this point.
[239] Pejic, J., op. cit., 378, 379.
[240] Internal armed conflict, for the purposes of international humanitarian law includes armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. It does not include 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts': Article 1 of Protocol II.
[241] During internal armed conflict, it has been argued that, as international human rights law provides a more specific, adapted and detailed framework, it will govern administrative detention during internal armed conflict: see Pejic, J., op. cit.

- Detainees are granted freedom to practice their religion, and receive assistance from persons who perform religious functions.
- If made to work, detainees benefit from working conditions and safeguards that are available to the local civilian population.[242]

Those responsible for the internment or detention of persons shall further ensure that:

- Women and men are held separately.
- Detainees receive and send correspondence.
- Places of internment are not located close to the combat zone.
- Detainees receive medical examinations.
- The physical or mental health of detainees are not endangered "by any unjustified act or omission", including a prohibition on subjecting a detainee to any medical procedure which is not consistent with accepted medical standards. [243]

Detained persons will also be entitled to the general fundamental guarantees afforded to persons in Article 4 of the Additional Protocol II.[244] This includes the right to receive education, that all appropriate steps be taken to reunify children with their families where they have become separated, and that measures shall be taken, where necessary, to remove children from areas in which hostilities are taking place and ensure that they are accompanied by persons responsible for their safety and well-being.[245] These provisions apply to all children in non-international armed conflict, including those that have been detained.[246] However, Additional Protocol II applies only in situations of armed conflict in the territory of a State between its armed forces and dissident armed groups or other organised armed groups "which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".[247] Therefore, Additional Protocol II does not apply to conflicts between two armed groups which are not under the control or authority of a State (it will not apply, for example, where two or more armed groups are competing for power within a State, where the State is not involved or has ceased to exist).[248] Additional Protocol II also does

[242] Article 5(1) of Additional Protocol II.
[243] Article 5(2) of Additional Protocol II.
[244] Article 4 of the Additional Protocol II provides the following fundamental guarantees: 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault; (f) slavery and the slave trade in all their forms;
(g) pillage; (h) threats to commit any or the foregoing acts.
[245] Article 4(3) of Additional Protocol II.
[246] Ibid., Article 4(1).
[247] Ibid., Article 1(1).
[248] See Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (2003), para. 211. The conflicts in Lebanon in the 1980s and Somalia in the 1990s are examples of this kind of non-international armed conflict.

not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[249]

States involved in internal conflict are usually very reluctant to agree that Additional Protocol II applies, and there are very few instances where it has been recognised as applying. The San José Agreement on Human Rights, concluded between the Government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) in 1990, included commitments to comply with Additional Protocol II, and with various human rights norms as well, as did the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law concluded between the Government of the Philippines and the National Democratic Front of the Philippines (NDFP) in 1998.[250]

Article 3 applies to all four Geneva Conventions and is generally referred to as Common Article 3. It also explicitly protects persons in non-international armed conflict, but has also been held to apply to international armed conflict as well. Common Article 3 is sometimes regarded as a treaty in miniature and sets out the minimum of protections to be applied to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". It requires that they shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. It also prohibits murder, mutilation, cruel and inhuman treatment and torture, the taking of hostages, outrages against personal dignity and the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court and affording all the judicial guarantees recognized as indispensable. It does not, say anything specific about administrative detention but the prohibitions contained in Article 3 apply to detainees.

1.4.4 International human rights law or international humanitarian law: Which applies during armed conflict?

International humanitarian law will apply to children affected by armed conflict. It is now well established that international human rights standards also continue to apply during international or internal armed conflict and during occupation,[251] unless the armed conflict/circumstances

[249] Article 1(2), Additional Protocol II.

[250] The non-State armed groups (the FLMN) and the NDFP in the Philippines made a unilateral declaration (or 'declaration of intention') in 1991 in which they stated their commitment to comply with international humanitarian law. See, International Committee of the Red Cross, 'International Committee of the Red Cross Increasing Respect for International Humanitarian Law In Non-International Armed Conflicts': <www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0923/$File/ICRC_002_0923.pdf> [accessed 29 January 2011].

[251] The applicability of certain human rights instruments to occupied territories was recognised as early as 1969, in which it was stated in a report of the United Nations Secretary-General that: 'The Universal Declaration of Human Rights does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict. It sets forth rights and freedoms which it proclaims as belonging to 'everyone', to 'all'…The Declaration proclaims that 'the universal and effective recognition and observance' of the rights and freedoms shall be secured'. The Report also specified that the human rights provisions of the United Nations Charter apply to 'persons living in territories under belligerent occupation' (See Respect for Human Rights in Armed Conflict: Report of the Secretary-General (1969) UN GAOR (No.61) U.N. Doc. A/7720, 12, para. 24.). In 1970, a General Assembly resolution also proclaimed the applicability of international human rights in situations of armed conflict (See Basic Principles for the Protection of Civilian Population in Armed Conflicts, General Assembly Resolution 2675 (XXV) (1970).) Since then, it has become fairly widely accepted that some international human rights conventions apply to occupied

during occupation amount to a threat to the life of the nation and the State has declared a state of emergency. In these circumstances, States can derogate from some international human rights provisions, but only on a temporary basis and to the extent that is "strictly required by the exigencies of the situation".[252]

International human rights instruments continue to apply during armed conflict or occupation in accordance with jurisdictional provisions. Article 2 of the ICCPR provides that each State party "undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant". The Human Rights Committee has stated that the ICCPR applies to States where they are exercising jurisdiction outside of their territories. In its General Comment 31,[253] the Committee found that the phrase "subject to its jurisdiction" in Article 2, means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, including "those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained".[254]

The Committee on the Rights of the Child has found that the CRC continues to apply during times of emergency. Article 2(1) of the CRC provides that "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction." The Committee has repeatedly emphasised that "the effects of armed conflict on children should be considered in the framework of all the articles of the Convention; that States should take measures to ensure the realisation of the rights of all children in their jurisdiction in times of armed conflict; and that the principles of the Convention are not subject to derogation in times of armed conflict."[255]

This means that international human rights law, including provisions regulating the deprivation of liberty in the ICCPR and CRC, will continue to apply during international or internal armed conflict or occupation where a State exercises effective control over a population. In this way, international human rights law will also apply to individuals, where States make arrests or operate detention facilities controlled by them but outside their territory.[256]

As noted above, international humanitarian law offers less restrictions on the circumstances in which children can be placed in administrative detention in the context of armed conflict. As international humanitarian law and international human rights law both apply to children involved in armed conflict, it is unclear which branch of law prevails in a given context or situation. There is no clear answer to this, but some assistance can be obtained from the Geneva

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territories: see the International Court of Justice, 'Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons' (1996), ICJ Reports 1996 (I), para. 25.

[252] See Article 4(1) of ICCPR; Human Rights Committee, General Comment No. 29 (2001), U.N.Doc. CCPR/C/21 Rev.1/Add.11. However, as set out in Section 1, some rights are non-derogable.

[253] Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant (2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13.

[254] Ibid., para. 10.

[255] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child*, Third edition, 2007, 660.

[256] *Lopez Burgus v. Uruguay*, Human Rights Commission, 6 June 1979, U.N. Doc. A/36/30; *Ocalan v. Turkey*, ECHR, 4622/99.

Academy of International Humanitarian Law and Human Rights Law, in its Rule of Law in Armed Conflicts Project, which identified the following approaches to assessing the interaction between international humanitarian law and international human rights law during times of armed conflict, as interpreted by different international bodies.[257]

- **Lex specialis approach**

The approach was adopted by the International Court of Justice, which found, in 2004, that "[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[258]

In accordance with this ruling, the principle of *lex specialis* will operate to regulate which provisions apply during armed conflict. As international humanitarian law is designed to apply during times of armed conflict, it seems to follow that this law should prevail, *lex specialis*, over international human rights law where relevant provisions from each area of law conflict.

However, the principle of *lex specialis* does not indicate that one branch of law is of higher quality than the other, and in determining which body of law governs, it is necessary to look at each particular situation.[259] This requires that the legal norm that explicitly addresses a problem (that is, the norm that is more detailed and adapted) will prevail over the norm that only implicitly addresses it.

- **Complementarity approach**

The Human Rights Committee has emphasised the need to look for a "simultaneous and harmonising" application of the two bodies of law.[260] It has stated that "[t]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[261]

According to the Geneva Academy of International Humanitarian Law and Human Rights Law, this approach provides that "[i]n some cases, international humanitarian law will specify the extant rules and their interpretation, and in other cases it will be international human rights law, depending on which branch of law is more detailed and adapted to the situation."[262]

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[257] Geneva Academy of International Humanitarian Law and Human Rights Law, Rule of Law and Armed Conflicts Project, 'Interaction Between Humanitarian Law and Human Rights Law in Armed Conflicts': <www.adh-geneva.ch/RULAC/print.php?page=13> [accessed 29 January 2011].

[258] 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion', 9 July 2004, para. 106.

[259] Sassoli, M. and Olson, L. M., 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, September 2008, 90: 871, p. 599-627.

[260] Geneva Academy of International Humanitarian Law and Human Rights Law, Rule of Law and Armed Conflicts Project, 'Interaction Between Humanitarian Law and Human Rights Law in Armed Conflicts'.

[261] Human Rights Committee, General Comment No. 31 (2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 11.

[262] Geneva Academy of International Humanitarian Law and Human Rights Law, Rule of Law and Armed Conflicts Project, 'Interaction Between Humanitarian Law and Human Rights Law in Armed Conflicts'.

Administrative detention during armed conflict (including both international and internal armed conflict) may fall into the category of an act that should be governed by both branches of law.[263] According to one expert, "[g]iven the…absence of rules for the internment of individuals in non-international armed conflicts, it is necessary to draw on human rights law in devising a list of procedural principles and safeguards to govern internment in such conflicts."[264] For international armed conflicts, it is also possible that international human rights law can be used to elaborate the particular legal procedural and other safeguards available to detainees. The use of international human rights law as a complementary framework is clearly set out in the Additional Protocols. Article 72 of Additional Protocol I provides that the above mentioned rules governing the treatment of persons in the power of a party to the conflict "are additional to the rules concerning humanitarian protection of civilians…as well as other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict". It can be argued that the provisions of Additional Protocol I also allow the use of human rights law to "fill the gaps" in international humanitarian law relating to internment.[265]

1.5. State laws, policies and practices

State laws and practices on administrative security detention, including the legal basis for detaining children, time limits and lack of safeguards may result in placing children in detention in circumstances that violate international human rights law.

1.5.1 Legal standards of decision making

For administrative detention to be lawful in international human rights law, it must not only be carried out in accordance with the domestic laws of a State, but must be necessary, proportionate and appropriate. In order for administrative detention to be considered necessary, the individual child him or herself must pose a security threat, and detention must be necessary to contain the

[263] Pejic, J., op. cit., 377.
[264] Ibid., 378.
[265] Recourse to human rights law as a legal regime complementary to humanitarian law is expressly recognized in both Additional Protocols to the Geneva Conventions. According to Article 72 of Additional Protocol I: 'The provisions of this Section ['Treatment of persons in the power of a party to the conflict'] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict'. This article allows recourse to human rights law as an additional frame of reference in regulating the rights of internees, who belong to 'persons in the power of a party to the conflict'. There are two further indications — in Article 75 of Additional Protocol I, which is considered to reflect customary law — that human rights law may be drawn on to fill the gaps. First, and this must be stressed, Article 75 (1) states that persons falling within its scope shall enjoy the protection provided for by this article '*as a minimum*' (emphasis added). Given that Article 75 is a 'safety net' meant to cover all persons who do not enjoy more favourable treatment under the Geneva Conventions or Protocol I, and when it is read in conjunction with Article 72, it necessarily follows that the 'minimum' mentioned is supplemented by other provisions of humanitarian and human rights law. Secondly, any possible doubt that Article 75 constitutes a minimum benchmark of protection is dispelled by the final clause thereof: 'No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1' (Article 75(8) of Additional Protocol I): Pejic, J., op. cit., 378.

threat (in the case of children, this means that all other options are considered, as States are required to use detention only as a last resort).

It would appear that some States detain on lesser grounds. The Sri Lankan Prevention of Terrorism Act 1979, for example, provides the power for a minister to place an individual in administrative detention where the Minister "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity".[266] In Thailand, children may be placed in administrative detention on the decision of a military officer where they are suspected of causing acts that may be "potentially harmful to the Kingdom or violate any provisions of the martial law as well as the order of the army".[267] In Jordan, the governor, who reports to the Ministry of Interior, may place persons in administrative detention for up to one year, if the person is deemed a "danger to the public".[268]

These vague and expansive grounds of detention give executive bodies broad powers to place persons, including children, in administrative detention, not just when a child presents a significant security risk, but for lesser reasons. The International Commission of Jurists found, following their three-year study of counter-terrorism and human rights, that administrative detention "is typically applied on an ill-defined basis (such as a generalised threat to national security), often based on unsubstantiated intelligence about the threat posed, and tends to affect a wide range of persons, including those who have no involvement at all in terrorism".[269] For instance, the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights noted that the government in Malaysia had increased the use of its administrative detention powers following the 11 September attacks, raising concerns that administrative detention was being used against non-violent dissidents and political opponents.[270]

The Special Representative on Children and Armed Conflict has expressed concern in relation to the basis on which a child may be administratively detained as a security threat in Iraq. "Anyone who, by his/her presence or actions is likely to pose a threat to Iraqi society" can be administratively detained. The Special Representative found the vagueness of the legal basis for detention "especially troubling due to the fact that children, by their very status as minors, should be considered as 'threats to society' only in the most aggravated of circumstances"[271]

Another example of this is the administrative detention regime in Israel, which allows children aged 12 years and over to be placed in administrative detention where there are "reasonable grounds to presume that the security of the area or public security require the detention".[272] However, the order does not offer a definition of "security" or "public security", and these vague terms appear to have facilitated the detention of children in circumstances other than

[266] Article 9 of Prevention of Terrorism Act 1979.
[267] Section 15(b)(i) of Martial Law Act, B.E 2457 (1914). See also, India: Section 3 of National Security Act 1980; Malaysia: Section 72 of Internal Security Act 1960.
[268] Crime Prevention Law 1954.
[269] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 110.
[270] Ibid., p. 108.
[271] United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Visit of the Special Representative for Children and Armed Conflict to Iraq and the Region (2008), U.N. Doc. OSRSG/CAAC, p. 16.
[272] Military Order 1591.

when they pose an actual imminent threat to the security of Israel.[273] According to one human rights organisation "[t]he authorities use administrative detention as a quick and efficient alternative to a criminal trial, or when they do not want to reveal their evidence."[274] Administrative detention orders are also issued on a regular basis against children after an unsuccessful criminal investigation or where it has not been possible to obtain a confession from the child in interrogation.[275]

Concerns have also been expressed Israel imposes administrative detention orders in an "automatic and categorical way", rather than being based on a thorough individualised assessment of the security risk posed by an individual,[276] thus exposing children to the possibility of arbitrary detention. The manner of assessment of children to determine whether they pose a security risk was also an issue raised by the Special Representative on Children and Armed Conflict following her visit to Iraq. She noted that little was known of what safeguards were in place for children being assessed, or about those who conducted the initial assessments with children and whether they were versed in communicating with children, who might themselves be victims.[277]

1.5.2 Legal time limits

Time limits on the use of administrative detention should be provided for in the domestic laws of a State, bearing in mind that the Convention on the Rights of the Child requires that administrative detention of children should only be used for "the shortest appropriate period of time".[278] Despite this provision, the domestic laws of some States do not specify a maximum period of time for which a child may be held in administrative detention. As a result, children can find themselves detained for long periods of time, either awaiting charge or trial, or until an armed conflict has finished. The cessation of hostilities and demobilisation of children may not, necessarily, mean the end of administrative detention. In his April 2008 report to the United Nations Security Council, the Secretary-General noted that the United Nations Mission in the Democratic Republic of the Congo (MONUC) had documented cases of government soldiers arresting children previously recruited by armed groups. Children were detained,[279] allegedly because they posed a threat or were thought to have useful information. Some children were held for weeks or even months without charge.[280] Similarly, following the formal cessation of the civil conflict in Burundi in 2005, it was reported that children, as young as age nine, who were recruited and involved in hostilities as part of the Hutu rebel group, the National Forces of Liberation (*Forces Nationales de Libération*), were detained in military camps or prison for

[273] Davidson, T. and Gibson, K., op. cit.
[274] B'TSelem, 'Administrative Detention in the Occupied Territories', (undated).
[275] Davidson, T. and Gibson, K., op. cit.
[276] Ibid., 360.
[277] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Visit of the Special Representative for Children and Armed Conflict to Iraq and the Region (2008), U.N. Doc. OSRSG/ CAAC, p.16.
[278] Article 37(b) of CRC.
[279] United Nations Security Council, Report of the Secretary-General on MONUC 2008/218, 21 April 2008, para 70.
[280] Twenty of the children were reportedly never associated with any armed group. (Human Rights Watch: Submission to the Committee on the Rights of the Child for the Periodic Review of the Democratic Republic of the Congo, August 2008, p. 10).

months and, in some cases, for over a year, without any charge being laid and without any legal assistance.[281]

A further problem contributing to lengthy periods of administrative detention for children in States where there has been armed conflict is either the absence of a system for the administration of justice, or a reduced and often inadequate system, such as occurred in Côte d'Ivoire.[282]

Even where a State aims to process all children who have been forced to be involved in hostilities or suspected terrorism through the juvenile justice system, children may still be placed in administrative detention by military officers, before being referred to juvenile justice professionals. For example, in Afghanistan, the recently adopted Law on Combat Against Terrorist Offences 2008 aims to ensure that persons detained on suspicion of having committed a terrorism-related offence, or suspected of having links to terrorist activities or organisations, are processed through the criminal justice system, rather than administratively detained.[283] This law requires that child terrorist suspects are treated in accordance with the Afghan Juvenile Justice Code 2005.[284] Under this law, children suspected of committing a terrorist offence may be arrested by institutions responsible for combating terrorist offences, including the Ministry of Interior (police) and the National Directory of Security. Under the Juvenile Justice Code, an arresting officer may hold a child suspect for up to 48 hours, before referring the child to the prosecutor.[285] However, in practice, it has been reported that the National Directory of Security is holding children for extended periods of time in administrative detention, in contravention of the provisions of the Afghan Juvenile Justice Code.[286] The Secretary-General reported in 2008 that "while children in conflict with the law must be referred to juvenile rehabilitation centres, children as young as 12 have been detained by the National Directorate of Security."[287]

The Secretary-General also reported on the case of a 15-year-old boy held in administrative detention in 2008 where "[t]he country task force on Monitoring and Reporting…documented the case of a 15 year-old boy detained by the National Directorate of Security after surrendering

[281] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Burundi (2007), U.N. Doc. S/2007/686, paras. 29–32. The report notes that children were detained between September and December 2006, and that while some had been released, others continued to be held in pre-trial detention by the police.

[282] See Report of the Secretary-General on Children and Armed Conflict in Côte d'Ivoire (2007), U.N. Doc. S/2007/515, para. 32. The children were released after United Nations Operation in Côte d'Ivoire (UNOCI) reached agreement with government forces.

[283] 'Afghanistan: United Nations agency welcomes new law on combating terrorism', *United Nations News Service*, 32 July 2008:<www.un.org/apps/news/story.asp?NewsID=27538&Cr=Afghan&Cr1> [accessed 29 January 2011].

[284] Article 5 of Law on Combat Against Terrorist Offences 2008. The Juvenile Code stipulates that detention of a child should be used as a last resort and for the shortest possible time (Article 8). Juveniles can only be detained in Juvenile Rehabilitation Centres (as opposed to adult prisons). It includes other protections, such as the child's right to legal defence; the police's obligation to inform the child's parents/legal guardian upon arrest; prohibition of torture, capital punishment and life sentence; and stipulates that children's cases should be dealt with by specialized prosecutors and judges only. The Juvenile Code sets the minimum age of criminal responsibility at 12 years.

[285] Articles 13 and 14 of Juvenile Justice Code 2005.

[286] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict (2009), U.N. Doc. S/2009/158.

[287] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Afghanistan (2008), U. N. Doc. S/2008/695, para. 27.

to the police. He had been lured by the Taliban into taking part in a suicide operation. The boy is still detained, and has now spent more than five months in the custody of the National Directorate of Security without appropriate judicial follow-up."[288]

Where conflicts have no definitive temporal limits, children may be exposed to the possibility of indefinite detention. The United States Government, for example, has placed children in indefinite detention in its facilities in Guantánamo Bay. As noted above, international humanitarian law provides that in "cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties"[289] a person having committed a belligerent act and having fallen into the hands of the enemy may be detained as a prisoner of war. The Convention requires, however, that prisoners of war must be released and repatriated without delay after the cessation of active hostilities.[290] The United States has relied upon international humanitarian law as justification for its administrative detention of enemy combatants in its global war on terror. This presents a significant problem, as unlike most international conflicts, which are time limited, "the fight against terrorism is not temporally contained. It takes place across the globe and likely will continue for decades without any clear indicia of victory or defeat. Applying the law of armed conflict in this context would mean that States could detain, potentially indefinitely, persons captured anywhere in the world based only on reasonable suspicion that they pose some sort of security threat."[291] As a result, several children have been detained in Guantánamo Bay for up to seven years, without review by an independent body as to the legality of the detention.[292]

Some States set clear maximum time limits for administrative detention on security grounds. However, these maximum time limits can be quite long. In Iraq, for example, the multi-national forces are not permitted to administratively detain children for longer than 12 months.[293] In Egypt, authorities from the Interior Ministry and the State Security Investigation are permitted to detain children for up to six months.[294] Thailand and Australia provide for shorter maximum time limits for administrative detention: 30 days[295] and 14 days,[296] respectively.

In other States, although time limits for administrative detention on security grounds are provided for in domestic law, these may be extended resulting in lengthy and, in some cases,

[288] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict (2009), U.N. Doc. S/2009/158.
[289] Article 2(1) of GC III
[290] Ibid, Article 118.
[291] Hakimi, M., 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide', *Case Western Reserve Journal of International Law*, 40:593, 606, 2009.
[292] For instance, Omar Khadr and Mohammad Jawad, who were detained at ages 15 and 16/17 respectively. See Section 9 for full details of their detentions.
[293] Coalition Provisional Authority, Memorandum No. 3 (Revised), Criminal Procedures, CPA/MEM/27 June 2004/03, Section 6, MNF-I Security Internee Process Point 5.
[294] Human Rights Watch, 'Anatomy of a State Security Case: The 'Victorious Sect' Arrests', 2007, p. 10.
[295] Section 11 Emergency Decree on Public Administration in Emergency Situations, B.E 2548, 2005.
[296] Pursuant amendments made to the Criminal Code Act 1995 by the Anti-Terrorism Act 2005, a police officer may place an individual in preventive detention for up to 48 hours at federal level. States have passed complementary legislation that allows for administrative detention of persons for up to 14 days at state level.

indefinite detention, in violation of international human rights law.[297] In Sri Lanka, for example, persons may be detained for three months, but this may be extended, in three month periods, up to 18 months.[298] In Israel**,** the armed forces have the power to detain children in the occupied Palestinian territory for up to six months. However, the initial six-month period can be extended by a further six months an indefinite number of times by the military commander in the relevant area,[299] posing a risk that children will be placed in administrative detention for "inordinately lengthy periods".[300] In Malaysia too, an initial 60-day administrative detention period can be extended for up to two years by the Minister of Internal Security, without any judicial oversight,[301] and can be renewed indefinitely. Likewise, in Cameroon, persons, including children, may be placed in administrative detention for 15 days renewable indefinitely.[302]

1.5.3 Judicial review

The right to challenge the legality of detention before an independent and impartial tribunal must be available to all administrative detainees in all contexts, including during armed conflict or a declared state of emergency. As noted earlier, according to international humanitarian law, there is no requirement that the body conducting the review is judicial. However, it must be "competent" and sufficiently independent. This safeguard is of fundamental importance. According to international human rights law, the reviewing body must be a judicial body or other independent, competent body that is authorised to review the legality of the detention. Article 14 ICCPR requires that the reviewing body must have a "judicial character".[303] The judicial review itself must deal with the substantive justification for the detention and ensure that the detention is in accordance with domestic law and necessary, proportionate and appropriate (i.e. not arbitrary). In order to satisfy Article 9 of the ICCPR, the judicial body must be able to order release of the detainee, and must not be limited to reviewing compliance with domestic law.[304] Any review must take place "promptly" following the detention.[305] An ongoing and periodic assessment is also required in order to ensure that the initial reasons justifying administrative detention continue to exist.[306]

In contravention of Article 9(4) of the ICCPR and Article 37(d) of the CRC right to challenge the imposition of administrative detention before a judicial or other competent body, some States do not provide for any judicial oversight of administrative detention. The Terrorist and Disruptive Activities (Control and Punishment) Ordinances, for example, which permitted administrative

[297] See International Commission of Jurists, Memorandum on the International Legal Framework on Administrative Detention and Counter-Terrorism, 2005, p. 12; Pejic, J., op.cit.
[298] Article 9 of Prevention of Terrorism Act 1979.
[299] Military Order Regarding Administrative Detention, No. 1591, 2007.
[300] Committee against Torture, Concluding Observations: Israel (2009), U.N. Doc. CAT/C/ISR/CO/4, para. 17.
[301] Section 8 of Internal Security Act.
[302] Article 2 of Law No. 90/024.
[303] *Torres v. Finland*, 1990.
[304] International Commission of Jurists, Memorandum on the International Legal Framework on Administrative Detention and Counter-Terrorism, 2005, p. 22.
[305] The Human Rights Committee, in its General Comment on Article 9, did not specify a time limit for States to satisfy the requirement that detainees are brought 'promptly' before a judge. The Committee did, however, state that 'delays must not exceed a few days'. Human Rights Committee, General Comment No. 8 (1982), para. 2. The Committee on the Rights of the Child recommends that a child be brought before a judge within 24 hours. Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 84.
[306] *A. v. Australia*, 1997, para. 9.4.

detention in Nepal from 2001 to 2006, did not contain the right to have the legality of the detention reviewed by a judicial body.[307]

In other States, domestic laws provide for reviews of administrative detention, but these reviews are carried out by members of the executive and not by independent and impartial judicial body. The Prevention of Terrorism Act 1979 in Sri Lanka, for instance, allows for review of the detention decision, but this is only before an advisory board, whose recommendation is not binding on the minister.[308]

The administrative detention framework in Iraq also provides for the possibility of review, but again, not before an independent judicial body. Although an initial review of the detention must take place within seven days, the decision of the judge conducting the review only amounts to a recommendation. The Deputy Commanding General of Detainee Operations in the MNF-I must approve this recommendation before a detainee is released. A detainee in Iraq may also appeal against their detention in writing to a combined review and release board, a seven-officer, majority-Iraqi entity [309] but, once more, the recommendation of the board must be approved by the Deputy Commanding General for Detainee Affairs.

The review and appeal mechanisms provided to children detained at Guantánamo Bay until recently,[310] also failed to meet international human rights standards. Initially, the 2001 Military Order allowing administrative detention of enemy combatants in Guantánamo Bay prohibited any detainee held under it from seeking any remedy in any proceeding in any United States, foreign or international court. However, in June 2004, two Supreme Court cases, *Rasul v. Bush*[311] and *Hamdi v. Rumsfeld*,[312] ruled that United States federal courts had jurisdiction to hear *habeas corpus* petitions from Guantánamo detainees from both foreign and United States nationals. These decisions were legislatively overruled by the United States Detainee Treatment Act 2005. Section 1005(e) of the Act stripped United States federal courts of *habeas corpus* jurisdiction over Guantánamo detainees and military orders introduced specialised review mechanisms: the Combatant Status Review Tribunals [313] and Administrative Review Boards[314] to

[307] Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal (2006), U.N. Doc. A/61/374, para. 11.
[308] Article 10 of Prevention of Terrorism Act 1979.
[309] United Nations Children's Fund, Questionnaire Response, Iraq. Children in administrative detention in Iraq were not permitted to access legal counsel, but instead their cases were handled by military advisers: United Nations, Press Release, Press Conference by Secretary-General's Special Representative for Children in Armed Conflict on Her Visit to Iraq, 30 April 2008.
[310] In January 2009, President Obama issued an executive order, the Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities. A review of the status of all detainees was ordered and a date was set for the closure of the detention facility. While the date set for the closure was missed, the government has begun reviewing and repatriating or transferring some detainees to third countries: see Reprieve, 'Change We Can Believe In? An evaluation of President Obama's first year in office', 19 January 2009: <www.reprieve.org.uk/static/downloads/2010_01_19_PUB_Obama_Anniversary__Report.pdf> [accessed 29 January 2011].
[311] *Rasul v. Bush*, 542 U.S. 446, 124 Supreme.Court, No. 03–334, argued 20 April 2004, decided 28 June 2004.
[312] *Hamdi v. Rumsfeld*, 542 U.S. 507, Supreme Court, No. 03–6696, argued 28 April 2004, decided 28 June 2004
[313] United States Department of Defense, Order Establishing Combatant Status Review Tribunals, 7 July 2004: <www.defenselink.mil/news/Jul2004/d20040707review.pdf> [accessed 29 January 2011].

review the lawfulness of detention of Guantánamo detainees. Neither of these two bodies could be regarded as amounting to an independent judicial review of the legality of detention, as required by Article 9(4) of the ICCPR.[315] Both bodies were staffed by military officers, and could only recommend a particular course of action, which then needed to be approved by the Secretary of Defense. In addition, the procedural rules governing the Combatant Status Review Tribunal and the Administrative Review Board placed restrictions on the right of detainees to be present at hearings, and on their right to see the information and evidence on which the allegation that they are enemy combatants is based. These factors all undermined the legality and legitimacy of the process.[316]

According to a report submitted to the United Nations by five mandated experts from the United Nations Commission on Human Rights, the detention of terror suspects at Guantánamo Bay is "governed by human rights law, and specifically Articles 9 and 14 of ICCPR",[317] which cover the right to liberty and security of person and the right to a fair trial by a competent, independent and impartial tribunal. In this report, the five experts found that the denial of the Guantánamo detainees' right to challenge the legality of the deprivation of liberty, constituted a violation of Article 9 of the ICCPR.[318]

In Israel, under the Military Order 1591, all administrative detainees must be brought before a military court within eight days of arrest for the Court to decide on the legality of the detention. In addition, an appeal may be lodged with an administrative court of appeal, which has the power to confirm or cancel the order, or to reduce the length of detention specified in the order. According to the Government of Israel, this procedure "adheres to and in several respects surpasses the protections to the rights of detainees as provided in Article 79 of the IV Geneva Convention and in Articles 4 and 9 of the International Covenant on Civil and Political Rights".[319] However, the right of review and appeal falls far short of international standards.

First, according to the order, the detention decision will only be reviewed after eight days, a period which is more than the "few days" which the Human Rights Committee sets as the maximum time frame,[320] and very much greater than the 24 hours recommended by the Committee on the Rights of the Child.[321] Second, reviews are conducted by military courts, rather than civilian judicial courts. Judges appointed to military courts are usually military officers on regular or reserve duty. Prosecutors are officers of the military advocate general who

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[314] United States Department of Defense, Order Re: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantánamo Bay Naval Base, Cuba, 11 May 2004: <www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf> [accessed 29 January 2011].

[315] Which provides that '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

[316] Commission on Human Rights, Situation of Detainees at Guantánamo Bay (2006), U.N. Doc. E/CN.4/ 2006/120, para. 28.

[317] Ibid., para. 26.

[318] Ibid., paras. 27–19, 84.

[319] State of Israel, Ministry of Justice, Foreign Relations and International Organisations Department, 'The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism', p. 4.

[320] Human Rights Committee, General Comment No. 8 (1982), para. 2.

[321] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 84.

are not all qualified lawyers.[322] This violates the right for children to have detention reviewed by an impartial and independent judicial body.[323] There is no specialised juvenile court or juvenile judges to review administrative detention orders imposed on children. Third, neither detainees, nor their lawyers, are given access to the evidence on which the decision has been made to place children in administrative detention. [324] The use of classified evidence in administrative detention review and appeal proceedings has reportedly "become almost an automatic procedure, with detainees denied access to the majority of evidence other than a general statement saying that they present a risk".[325] It is clearly impossible for a detainee to challenge the legality of his or her detention where he/she are denied access to the evidence on the grounds for which they are considered a security threat and on which they are detained.

1.5.4 Legal representation

Many of the States currently detaining children for security purposes do not permit free access to legal assistance and representation. Without access to legal assistance most children will have little chance to challenge the legality of their detention. It appears, for instance, that Palestinian children who are administratively detained by Israeli armed forces do not have automatic access to lawyers. When children are detained and interrogated in the absence of a lawyer, there is an increased probability that children will make forced or false confessions. The Human Rights Committee has stated that Israel should ensure that no one is held in detention for more than 48 hours without access to a lawyer.[326]

Even greater restrictions were placed on legal assistance to children held in Guantánamo Bay. The procedural rules that governed reviews by the Combatant Status Review Tribunals and Administrative Review Boards did not provide detainees with the right to a defence counsel.[327]

The Terrorist and Disruptive Activities (Control and Punishment) Ordinances that permitted administrative detention in Nepal from 2001 to 2006 did not provide the right to access legal counsel for child detainees, [328] while in Thailand children are frequently denied access to lawyers "on the basis that since they are not accused of anything, they do not enjoy the constitutional right to consult a lawyer".[329]

[322] Defence for Children International–Palestine Section and Save the Children Sweden, 'Child Rights Situation Analysis: Right to Protection in the occupied Palestinian territory', 2008, 69.
[323] Article 9(4) of ICCPR.
[324] Hakimi, M., op. cit.
[325] Davidson, T. and Gibson, K., op.cit., 361.
[326] Human Rights Committee, Concluding Observations: Israel (2003), U.N. Doc. CCPR/CO/78/ISR.
[327] Commission on Human Rights, Situation of Detainees at Guantánamo Bay (2006), U.N. Doc. E/CN.4/ 2006/120, para. 28.
[328] Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal (2006), U.N. Doc. A/61/374, para. 11.
[329] International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, 109.

1.5.5 Communication with family members

Children placed in administrative detention are entitled, in international human rights law, to have their family immediately notified of their detention, and to communicate with them.[330] This is an important safeguard, as it provides a guarantee against *incommunicado* (secret or unacknowledged) detention. There have been reports of child detainees in Thailand,[331] Nepal and Algeria[332] being denied contact with family members. The report of the Secretary-General on Children and Armed Conflict in Nepal, for example, noted that children were detained in army barracks and were denied access to family members sometimes for up to six months. One boy, aged 16, had been detained for 10 months without any means of communicating with relatives.[333] Families of Palestinian children detained in Israel also face difficulty in maintaining contact with their children. It has been reported that around 30 per cent do not receive family visits, as family members have not been granted permission by Israeli authorities to travel to the prisons in Israel.[334]

1.6. Child rights at risk

As discussed above, children can be placed in administrative detention without access to important procedural safeguards and substantive rights to which they are entitled in international human rights law. This has had the effect of exposing children to grave human rights abuses, in addition to the abuse of the right to liberty and security of person.

The International Commission of Jurists study found that "[i]t is clear from this account of the material gathered in Hearings around the world, and the past experiences, that the policy and practice of administrative detention has given rise to many human rights violations. It is equally clear that the problems with the practice arise in part because there are lesser guarantees available to administrative detainees than are accorded to criminal suspects (for example, prompt access to the courts and counsel of one's own choosing)."[335]

1.6.1 Right to freedom from torture and other cruel, inhuman or degrading treatment or punishment and to be treated with humanity and respect[336]

Reports have indicated that torture and other cruel, inhuman and degrading treatment of Guantánamo detainees, including children, is widespread. [337] From 2001, a series of United

[330] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37, 92 of United Nations Standard Minimum Rules on the Treatment of Prisoners.
[331] International Commission of Jurists, Legal Memorandum, 'The Implementation of Thailand's Emergency Decree', July 2007.
[332] Amnesty International, 'Algeria: Unrestrained Powers: Torture by Algeria's Military Security', 2006, p. 20.
[333] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Nepal, U.N. Doc. S/2006/1007, December 2006, para. 26.
[334] Defence for Children International–Palestine Section and Save the Children Sweden, 'Child Rights Situation Analysis: Right to Protection in the Occupied Palestinian Territory', 2008, p. 67.
[335] See International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 110.
[336] Article 37 of CRC.
[337] See, for instance, the reports by Centre for Constitutional Rights: 'Current Conditions of Confinement at Guantánamo: Still in Violation of the Law', 23 February 2009, New York; 'Guantánamo Six Years Later': <http://ccrjustice.org/files/GuantanamoSixYearsLater.pdf> [accessed 29 January 2011]. Amnesty International:'United States of America - Justice at Last or More of the Same? Detentions and Trials after Hamdan v. Rumsfeld', 18 September 2006, AMR 51/146/2006; 'United States of America. Uploaded briefing to the Human

States Department of Defense memoranda were issued dealing with treatment and conditions of Guantánamo detainees. [338] On 2 December 2002, the Secretary of Defense authorised a number of interrogation techniques, including: the use of stress positions, detention in isolation for up to 30 days; placing a hood over a detainee's head during transportation and questioning; deprivation of light and auditory stimuli; removal of all comfort items; removal of clothing; interrogation for up to 20 hours; and using detainees' individual phobias (such as fear of dogs) to induce stress.[339]

These memoranda were rescinded on 15 January 2005, but were replaced by the Secretary of Defense, on 16 April 2005, with a number of other similar techniques.[340] These included: removal of comfort items; change of scenery, including exposure to extreme temperatures and deprivation of light and stimuli; altering the environment to create moderate discomfort; adjusting sleeping times; and isolating the detainee. Evidence indicates that these techniques were used on child detainees.[341]

The Parliamentary Assembly of the Council of Europe stated that these techniques resulted in detainees being subjected to ill treatment amounting to torture. The United Kingdom Supreme Court has also found that the treatment amounted to torture and held that "some of the practices authorised for use in Guantánamo Bay by the US authorities would shock the conscience if they were ever to be authorised for use in our own country."[342] Further, the five holders of mandates of special procedures of the Commission on Human Rights held in a report that "stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering, so as to amount to torture."[343]

Rights Committee on the implementation of the International Covenant on Civil and Political Rights', 12 July 2006, AMR 51/111/2006; 'International Protection for Guantánamo's Victims', September 2008, AMR 51/095/2008; AMR 51/095/2008, 'United States of America: Guantánamo – an icon of lawlessness', 6 January 2005, AMR 51/002/2005; 'USA: Guantánamo: Lives torn apart – The impact of indefinite detention on detainees and their families', 6 February 2006, AMR 51/007/2006. See also International Committee of the Red Cross, 'Report on Fourteen 'High Value' Detainees in CIA Custody', 14 February 2007.

[338] United States Department of Justice, Memorandum for Alberto R. Gonzales, 1 August 2002, p.46: <www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [accessed 29 January 2011]; Secretary of Defense, Memorandum for the Commander, United States Southern command of 16 April 2005 on 'Counter Resistance Techniques in the War on Terror'. See also Guantánamo Bay case study for further details.

[339] Jerald Phifer to Commander of Joint Task Force 170, Memorandum of 11 October 2002, 'Request for Approval of Counter-resistance Techniques', which was attached to William J. Haynes II to Secretary of Defense, Memorandum of 27 November 2002, 'Counter-resistance Techniques', approved by Secretary Rumsfeld on 2 December 2002: <www.washingtonpost.com/wpsrv/ nation/documents/dodmemos.pdf> [accessed 29 January 2011].

[340] Secretary of Defense, Memorandum for the Commander, United States Southern command of 16 April 2005 on 'Counter Resistance Techniques in the War on Terror'.

[341] For instance, Defence for Children International–Palestine Section, 'Palestinian Child Prisoners', 2009, 47, 48.

[342] See A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) of 8 December 2005, Session 2005-06, UKHL 71 per Lord Hope at para. 126.

[343] Commission on Human Rights, Situation of Detainees a Guantánamo Bay (2006), U.N. Doc. E/CN.4/ 2006/120, para. 52.

The arrest and detention of children have been said to be a terrifying experience for Palestinian children, with children being arrested by Israeli forces in the early hours of the morning when they are still in bed.[344] Once arrested, children are often bound and sometimes blindfolded and are not told where they are to be taken.[345] There are reports that children are subjected to: physical abuse, including denial of access to toilets, food and water; exposed to extremes of cold and heat; position abuse and verbal abuse, as well as to threats of abuse; attack by dogs; and electric shocks. In one case, Defence for Children International–Palestine recorded "a combination of techniques such as solitary confinement for five days, position abuse using a small metal chair tied to the floor with hands tied behind the back and the threat to arrest the child's mother and siblings".[346] Such techniques, as with Guantánamo, are likely to fall within the definition of torture and have a significant negative impact on the physical and mental health and well-being of children.

The Secretary-General also reported, following a country visit to Nepal in 2006, that the majority of children who had been held in administrative detention had been subjected to torture or ill-treatment after arrest, mainly during interrogations.[347] Human Rights Watch also noted in their 2007 report that children were subject to abuse while in detention including repeated and brutal beatings, interrogation and forced labour.[348]

1.6.2 Conditions of detention facilities

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty set out detailed standards on the conditions of detention. In particular, children must be placed in facilities that "meet all the requirements of health and human dignity".[349] The conditions in detention centres in which children are held in administrative detention are, in some States, so poor so as to amount to degrading treatment, in contravention of Article 37(a) of the CRC and Article 1 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment.[350]

Material conditions are poor for Palestinian children administratively detained by Israel. Common complaints made by children included "overcrowding, poor ventilation and access to natural light, poor quality and inadequate amounts of food, harsh treatment by prison officials and boredom".[351] It has also been reported that child administrative detainees do not receive sufficient food to meet daily nutritional requirements, in contravention of Article 20 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners.[352]

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[344] Defence for Children International–Palestine Section, 'Palestinian Child Prisoners', 2009, p. 25.
[345] Ibid.
[346] Ibid., p 47.
[347] United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Nepal (2006), U.N. Doc. S/2006/1007, para. 26.
[348] Human Rights Watch, 'Children in the Ranks', February 2007.
[349] Rule 31 of Havana Rules.
[350] See, for instance, Committee against Torture, Concluding Observations: Burundi (2007), U.N. Doc. CAT/C/BDI/CO/1, para. 17.
[351] Defence for Children International–Palestine Section, 'Palestinian Child Prisoners', 2009, 18.
[352] Article 20(1) of the Standard Minimum Rules on the Treatment of Prisoners provides that 'every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.'

The Experts reporting to the United Nations Commission on Human Rights on the situation of detainees at Guantánamo Bay took the view that the conditions in which the detainees were kept seem to have been used to counter resistance and induce stress,[353] and were closely linked to investigation techniques. In particular, although the maximum period of permitted isolation was 30 days, detainees were put back in isolation after very short breaks so that they were effectively in isolation for up to 18 months. According to the Human Rights Committee prolonged solitary confinement and similar measures aimed at causing stress violate the right of detainees under Article 10(1) of the ICCPR and Article 37(c) of the CRC to be treated with humanity and with respect for the inherent dignity of the human person, and might also amount to inhuman treatment in violation of Article 7(1) of the ICCPR and Article 37(a) of the CRC.[354]

1.6.3 Right to education

Some children held in administrative detention are unable to realise their right to education, in contravention of international human rights law.[355] Children held in administrative detention in the occupied Palestinian territory for example, only receive a limited amount of education, and no education at all in interrogation centres. In two of the prisons visited by DCI–Palestine recently, education was found to be limited to two hours a week.[356] Children can spend months, and sometimes years, in administrative detention and could miss significant amounts of education as a result.

1.6.4 Right to highest attainable standard of health

According to international human rights law, children have the right to the highest attainable standard of physical and mental health.[357] Subjecting children to torture and to cruel, inhuman or degrading treatment or punishment while held in administrative detention, as outlined above, can clearly give rise to a violation of the child's right to health. The detention itself can also have a very negative impact on the health of children. Child health professionals and human rights organisations in the Occupied Palestinian Territory have documented the impact of detention on Palestinian children and have observed the widespread presence of post-traumatic stress disorder (PTSD). The psychological impact of administrative detention is, for many children, compounded by gaps in education and unemployment.[358] Being placed in detention, often without an understanding of the reasons for detention and without access to a lawyer or visits by family members, is extremely stressful for children. [359]

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[353] Commission on Human Rights, Situation of Detainees a Guantánamo Bay (2006), U.N. Doc. E/CN.4/2006/120, para. 53: 'The ICRC feels that interrogators have too much control over the basic needs of detainees. That the interrogators attempt to control the detainees through use of isolation'; DoD, International Committee of the Red Cross Meeting with MG Miller on 9 October 2003, memo from JTG GTMO-SJA to Record (9 October 2002).

[354] Commission on Human Rights, Situation of Detainees a Guantánamo Bay (2006), U.N. Doc. E/CN.4/2006/120, para. 53

[355] Article 28(1) of CRC; Article 13 of International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Hereinafter the ICESCR. See also Article 77(1) and (2) of Standard Minimum Rules on the Treatment of Prisoners.

[356] Defence for Children International–Palestine Section, 'Palestinian Child Prisoners', 2009, 18.

[357] Article 24(1) of CRC; Article 12 of ICESCR.

[358] Cook, C. et al., *Stolen Youth: The Politics of Israel's Detention of Palestinian Children*, Pluto Press (Published in association with Defence for Children International–Palestine Section), London, 2004, p. 7.

[359] Save the Children Sweden, Save the Children's Work with Children in Detention-Exposed to Violence and Abuse, 2005, p. 7.

Children in administrative detention may also be denied the right to receive medical treatment. It has been reported that child administrative detainees in the Occupied Palestinian Territory "are not given regular medical checkups, and it can take up to 6 months before a prisoner is seen by a specialist, if the medical conditions warrant it".[360]

1.7. Conclusion

The last decade has seen a renewed use of security legislation, particularly as a counter-terrorism measure. Indeed, the International Commission of Jurists found, following a three-year worldwide inquiry into the impact of counter-terrorism measures on human rights, that "States appear to rely increasingly on administrative detention as a preventive measure instead of seeing the measure as exceptional and temporary, and necessarily linked to a genuine emergency."[361]

While the detention may be lawful within a State's domestic law, the question of whether it is necessary, proportionate and appropriate remains. The failure to respect children's rights, such as the need to use detention only as a last resort and for the shortest appropriate time, inevitably raises the possibility at least in relation to the States described in this section, that the form of security detention of children practised constitutes unlawful detention.

The Report of the Special Representative of the Secretary-General for Children and Armed Conflict in 2009 recommended that Member States should ensure that children who, under international law, are accused of crimes allegedly committed while they were associated with armed forces or groups are considered primarily as victims, and that they are treated in accordance with international law and other relevant standards on juvenile justice, and within a framework of restorative justice and social rehabilitation.[362] The same approach should be taken with children suspected or accused of terrorism. As pointed out by the International Commission of Jurists, conventional criminal justice systems have a long history of tackling terrorist networks. Specialised juvenile courts, adequately resourced and with well-trained judges, should be responsible for hearing cases involving allegations of terrorism against children.

* Sources for Box 2: Children held in administrative detention for security purposes: Defence for Children International/Palestine Section, Palestinian Child Prisoners – The systematic and institutionalised ill-treatment and torture of Palestinian children by Israeli authorities, 2009, p 75; Defence for Children International, Palestine, Child Detainee Figures (last updated 11 January 2010), <www.dci-pal.org/english/camp/freedomnow/display.cfm?DocId=902&Category Id=16>; Amnesty International, 'Justice at Last or More of the Same?' (2006), p. 31, <**Error! Hyperlink reference not valid.**>; Martial Law Act, B.E 2457 (1914), section 15(b)(i); Emergency Decree on Public Administration in Emergency Situations, B.E 2548 (2005), section 11; United Nations Children's Fund, Questionnaire Response, Thailand; United States State Party Report to the United Nations Committee on the Rights of the Child, Optional Protocol on the Involvement of Children in Armed Conflict, Forty-eighth session, 22 May

[360] Addameer Prisoners' Support and Human Rights Association, 'Early Adulthood, Stolen Childhood', <www.addameer.org/detention/children.html> [accessed 29 January 2011].
[361] International Commission of Jurists, 'Assessing Damage, Urging Action', 2009, p. 106.
[362] Report of the Special Representative of the Secretary-General for Children and Armed Conflict, United Nations Security Council WG on Children in Armed Conflict (2009), U.N. Doc. A/64/254.

2008, CRC/C/OPAC/USA/a, p. 13; Human Rights Watch, 'US: Respect Rights of Child Detainees in Iraq – Children in US Custody Held Without Due Process', <www.hrw.org/en/ news/2008/05/19/us-respect-rights-child-detainees-iraq>; United Nations Security Council, Report of the Secretary-General on Children in Armed Conflict, A/63/785-S/2009/158, General Assembly, Sixty-third session, 26 March 2009, para 67; Human Rights Watch, 'US: Respect Rights of Child Detainees in Iraq – Children in US Custody Held Without Due Process', May 2008, <www.hrw.org/en/news/2008/05/19/us-respect-rights-child-detainees-iraq>; United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Nepal (December 2006), United Nations Doc. S/2006/1007, para. 26; United Nations Children's Fund, Questionnaire Response, Sri Lanka [websites accessed 29 January 2011].

2. Administrative detention for immigration purposes

This section looks at the use of administrative detention for the purposes of immigration. It examines the placement of children and/or families in closed institutions or settings from which they are not free to leave at will, [363] as well as the confinement of child refugees, asylum seekers and internally displaced children and their families in refugee camps.

International migration has increased dramatically over the last few decades as modern forms of travel facilitate movement. Political upheavals across the globe in the post-cold war era, and the ensuing economic and social transition, as well as conflict in many countries, has fuelled the movement of children as well as adults.

The number of people forcibly uprooted by conflict and persecution worldwide stood at 42 million at the end of 2008, a figure which includes 16 million refugees and asylum seekers and 26 million internally displaced persons (IDPs) uprooted within their own countries.[364] The International Labour Organisation estimates that at least 2.4 million people are trafficked for the purpose of forced labour around the world every year, nearly half of whom are believed to be children under the age of 18.[365] Migration is also caused by other global phenomena, such as natural disasters, "climate change, the food crisis and the financial and economic crisis".[366]

Box 3: Unaccompanied children seeking asylum

In 2008, more than 16,300 asylum applications were lodged by unaccompanied children in 68 different countries, constituting about 4 per cent of the total number of asylum claims lodged in those countries. This figure is part of a rising trend of applications by unaccompanied children, up from 11,300 claims in 58 countries in 2007, and 9,900 claims in 64 countries in 2006. Europe received more than 13,100 or 80 per cent of the 16,300 claims in 2008. The United Kingdom registered the highest number in Europe with close to 4,000 claims, followed by Sweden (1,500), Norway (1,400), and Austria (770). Kenya and Malaysia were important destination countries for unaccompanied children outside Europe with 990 and 630 asylum claims respectively.
Source: UNHCR, 2008 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons, 2009.

[363] See, for instance, Global Detention Project, 'Finland Detention Profile': <www.globaldetentionproject.org /countries/europe/finland/introduction.html>; Committee on the Rights of the Child, Concluding observations: Germany (2008), U.N. Doc. CRC/C/OPAC/DEU/CO/1, para. 16; Amnesty International, 'The Netherlands: The detention of irregular migrants and asylum seekers', June 2008: <www.schipholwakes.nl/rapport_ vreemdelingendetentie.pdf>; Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007: <www.jrseurope.org/news_releases/10%20NMS%20report.htm> [websites accessed 29 January 2011].
[364] Office of the United Nations High Commissioner for Refugees, 2008 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons, June 2009: <www.unhcr.org> [accessed 29 January 2011].
[365] International Labour Office, Declaration of Fundamental Principles and Rights at Work, 'Q&A on Forced Labour: Combating Forced Labour': <www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour /QxA_FL_FS.pdf> [accessed 29 January 2011].
[366] Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants (2009), U.N. Doc. A/HRC/11/7, para. 21.

In line with this general trend of increased migration, the numbers of children migrating with their families has risen, as has the number of unaccompanied (sometimes referred to as separated)[367] children. Although statistics on the numbers of unaccompanied children are not readily available,[368] six years ago there were estimated to be up to 100,000 unaccompanied children living in Europe at any given time.[369]

The reason why children migrate, either with their families or unaccompanied, may be due to fear of persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion,[370] or due to the threat of forced marriage, forced labour or conscription into armed forces. Children also cross borders for economic reasons: to escape poverty and social deprivation or to join other family members already settled in another State.[371] Others may be compelled to leave as a result of famine or in order to ensure the safety and security of themselves and their families from the random destruction of war or internal conflict.

States have expressed increasing concern about irregular immigration and national security needs since the attack on the twin towers in New York in September 2001. The result of that concern has been a significant increase in the worldwide use of immigration detention in general. Children have not been exempted from this phenomenon.[372]

Despite a range of international human rights bodies and experts speaking out against the routine use of detention as a form of immigration control, detention continues to be a frequent response to violations of immigration laws and regulations, such as unauthorised entry into a State.[373] Most migration laws do not adopt a children's rights perspective, nor do they have specific

[367] Children referred to as 'unaccompanied' are those separated from parents or other relatives, or as not being cared for by an adult who, by law or custom, is responsible for doing so. Children referred as 'separated' are those that may be accompanied by adult family members or caregivers. See Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005), U.N. Doc. CRC/GC/2005/6, paras. 7, 8.

[368] 'Age is not a common variable of disaggregated statistical data on international migration', acknowledged by Report of the Special Rapporteur on the human rights of migrants (2009), U.N. Doc. A/HRC/11/7, para 20.

[369] Integrated Regional Information Networks, United Nations Office for the Coordination of Humanitarian Affairs, 'A Gap in their Hearts: the experience of separated Somali children', 2003, at: <www.irinnews.org/pdf/in-depth/Gap-In-Their-Hearts-English.pdf> [accessed 29 January 2011].

[370] These are the traditional five grounds for persecution outlined in Article 1(2) of the 1951 United Nations Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950 and entered into force 22 April 1954. Hereinafter the 1951 Convention.

[371] Amnesty International, 'Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees', POL 33/005/2007, November 2007: <www.unhcr.org/refworld/docid/476b7d322.html>; Bhabha, J. and Crock, M., 'Seeking asylum alone: unaccompanied and separated children and refugee protection in Australia, the UK and the US, A comparative study', 2007: <www.humanrights.harvard.edu/images/pdf_files/SAA_Comparative_Report.pdf> [accessed 29 January 2011].

[372] Goodwin-Gill, G.S., 'Article 31 of the 1951 CRSR: Non-penalization, detention and protection', October 2001, a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, at: <www.unhcr.org/protect/PROTECTION/3bcfdf164.pdf>, p.1,2, cited in International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009: <http://idcoalition.org/wp-content/uploads/2009/05/childrenpositionpape.pdf> [websites accessed 29 January 2011].

[373] Amnesty International, 'Irregular Migrant and Asylum Seekers – Alternatives to Immigration Detention', April 2009: <www.amnesty.org/en/library/info/POL33/001/2009/en> [accessed 29 January 2011]; Report of the Special Rapporteur on the human rights of migrants (2009), U.N.Doc. A/HRC/11/7, para. 42.

provisions on children. This leaves children particularly vulnerable to suffering deprivation of liberty for immigration purposes.[374]

In some States, infringement of immigration laws is treated as a criminal matter, often in an attempt to discourage illegal or irregular immigration.[375] In the majority of States, however, the power to order the detention of illegal immigrants and asylum seekers falls within the remit of an administrative body. This working paper focuses on administrative detention and does not address judicial proceedings under the criminal law of a State, although it does recognise that there is a growing concern about the use of criminal prosecution and custodial sentencing of children for "crimes of arrival".[376]

The administrative detention of migrant children is most commonly applied to children or families who do not possess the necessary identification documents, have travelled on forged documents or documents belonging to somebody else or have failed to leave the country after the prescribed period of time set by an administrative or judicial body has expired. In addition, detention may be used while a child's identity is being established, or while their asylum claim is processed. Such detention may continue once a claim has been refused, pending expulsion from the country. The objective of administrative detention is often to ensure that another measure, such as deportation or expulsion, can be implemented. Alternatively, on occasion, administrative detention of migrants may be used and justified on grounds of public security and public order. Typically, immigration detention involves little or no judicial oversight.

In most States, conditions for administratively detained migrant children are inadequate. Children are deprived of a range of rights to which they are entitled, including the right to education, physical and mental health, privacy, information, and rest and leisure. They can also find themselves detained with adults and subject to an adult regime and treatment.[377]

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[375] Offences cover the irregular crossing of the State border; using false documents; leaving their residence without authorisation; irregular stay; breaching or overstaying their conditions of stay. However, various United Nations bodies have opposed the treatment of irregular migration as a criminal offence, for instance, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Seventh session, U.N.Doc. A/HRC/7/12, 25 February 2008, para. 50, stated: '…it is important that irregular migration be seen as an administrative offence and irregular migrants processes on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals. The often erratic and unlawful detention of migrants is contributing to the broader phenomenon of the criminalization of irregular migration'. See also Economic and Social Council, Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants, submitted pursuant to Commission on Human Rights Resolution 2002/62 (2002), U.N. Doc. E/CN.4/2003/85, paras. 17, 60, 73.

[376] For instance, Section 2 of the United Kingdom's Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which specifies offences of failure to produce documents without reasonable excuse, which is being used against children. Illegal entry into and exit from Greece are criminal offences under Article 83 of Law 3386/2005, although prosecutors reportedly do no press charges for illegal entry.

[377] Report of the Special Rapporteur on the human rights of migrants (2009), U.N.Doc. A/HRC/11/7, para. 43.

2.1. Statistics

"[I]f children are not counted, then they just do not figure in policy discussions… until this information is publicly available, children will continued to be forgotten" -- Refugee Council USA, *Children not counted just don't count,* 20 June 2007

Little information is available on the numbers of children administratively detained for immigration reasons, but it is estimated that as many as one million children are affected by immigration detention polices worldwide.[378] The lack of information available is due largely to a general failure on the part of States to collect and collate data on the number of children detained, the length of their detention and the reasons for their detention.[379] Country reports from NGOs and governmental agencies or bodies are only able, at best, to provide snapshot evidence (statistics of the number of children detained on a particular day or during a particular time period during which the data was collected), which is of limited use.

Box 4: Data on administratively detained children in the United Kingdom

In the United Kingdom, statistics published by the government in the past did not include information on the total number of children detained over a period of time, the length of their detention, nor the outcome of that detention, including whether or not the children were subsequently removed from the United Kingdom. This absence of comprehensive statistics made it difficult to monitor the use of detention for children and to hold the government to account.

Following significant pressure from NGOs, human rights bodies and the Children's Commissioner for England, the collection of official statistics has now improved, and the Home Office Quarterly Asylum Statistics now provide a snapshot figure of the number of children detained on one day each quarter, broken down by average length of detention

The quarterly statistics also record the number of children who have left detention in a three-month period, what proportion had sought asylum, the child's gender, how long they were detained, and the outcome of their detention (removal, bail or release). However, the limitations of snapshot data mean that it is not possible to identify the length of detention of an individual child or the average length of detention. For example, a child could be detained for up to 89 days and not appear in any published statistics because the detention takes place between the two snapshot dates. Since there are significant concerns about the length of time for which children are detained with no prospects of their removal from the United Kingdom, the absence of this data represents a significant gap in the evidence base. Despite these gaps, Government ministers and spokespersons have repeatedly used existing snapshot statistics to argue that very few children are detained. In addition, the monitoring figures that were provided during an inspection of the Yarl's Wood Immigration Removal Centre showed that the length of cumulative detention contained in the statistics collated by the Home Office were wholly inaccurate. For example, two children who had been in detention for 275 days were later said to have been in detention for 14 and 17 days.
Source: See Crawley, H. and Lester, T., 'No place for a child, Children in UK immigration detention: Impacts, alternatives and safeguards', 2005, Save the Children, p. 7; and Her Majesty's Chief Inspector of Prisons, 'Report of an unannounced inspection of Yarl's Wood Immigration Removal Centre 4–8 February 2008', August 2008, para. 4.22.

[378] International Detention Coalition, Media Release, 'Universal Children's Day - Countries must stop the detention of children', 20 November 2009: <http://idcoalition.org/idc-media-release-universal-childrens-day-countries-must-stop-the-detention-of-children/> [accessed 29 January 2011].
[379] United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice (1999), U.N. Doc. EC/49/SC/CRP.13.

In a recent International Detention Coalition (IDC) survey of 20 countries,[380] 60 per cent of respondents reported that their State did not collect or publish official statistics on the numbers, or the demographic make-up, of people detained for immigration purposes. Respondents noted that where official statistics were available, they were often out-of-date, were not comprehensive and were of questionable reliability. More than 20 per cent of respondents reported that the numbers of people detained were unknown, due both to a lack of available official figures and restricted NGO access to places of detention.[381]

Table 2 below contains available statistical evidence on the numbers of children detained in a selection of industrialised countries. The statistics can only serve as a partial illustration of the use of administrative detention in relation to migrant children. They clearly indicate the paucity of reliable information, even in States with well established statistical services. In addition, available statistics are often not directly comparable, because they might be snapshot (See above.) or relate only to unaccompanied or separated children. In addition, the statistics may not be disaggregated or may have been collected using different methodologies.

Table 2: Available statistical evidence on children detained in a selection of industrialised countries*

Country	**Number of migrant children administratively detained**	**Issue**
Austria	874 (2008)	This figure is for the whole year.
Canada	61, of which 10 were unaccompanied (December 2008)	It is not clear whether this figure is for the whole year or a snapshot.
Finland	8 (2009)	This figure is for Helsinki detention centre only, between January and April 2009.
Germany	377 (2005 – 2007)	This figure is for unaccompanied minors detained in various Federal States, but five States did not provide any information.
Greece	269 (2008)	This is a snapshot figure.
Italy	2,646 (2008)	This figure is for the Lampedusa Immigration Detention Centre only.
Mexico	5,983 (2007)	This includes both accompanied and unaccompanied children.
Netherlands	160 (2008)	This includes unaccompanied minors only.
United Kingdom	470 (2009)	Statistics are for the first half of 2009. These also refer to children in families.
United States	8,300 (2007)	This number does not reflect the total number of migrant children in government custody as the Department of Homeland Security retains custody of some children who are detained with their parents as well as some children who are not detained with their parents, but whom the agency may consider to be "accompanied".

* For sources, see end of section.

[380] Countries surveyed: Australia, Belgium, Canada, Egypt, Hong Kong, Hungary, Indonesia, Israel, Japan, Kenya, Lebanon, Malaysia, Mexico, South Africa, Spain, Sri Lanka, Thailand, Tunisia, United Kingdom, United States.
[381] International Detention Coalition, 'Global Detention Survey Summary of Findings', October 2008: <http://idcoalition.org/wp-content/uploads/2009/06/idcglobalsurveyfindings.doc> [accessed 29 January 2011]. Hereinafter the IDC Global Detention Survey, 2008.

The lack of accurate data makes it very difficult to ensure that children are being detained lawfully and that international standards on detention, including the requirement that administrative detention only be used as a measure of last resort; in exceptional circumstances; and for the shortest possible period of time,[382] are being met.

2.2. Context and circumstances

There are two forms of administrative detention commonly used for immigration purposes. The first form, found mostly in industrialised countries is to place children and/or families in closed institutions or settings from which they are not free to leave at will. [383] The second form of administrative detention, found in a number of developing States, consists of the confinement of refugees, asylum seekers and IDPs in refugee camps. These camps, often created initially in response to an emergency, may become permanent due to a lack of political settlement allowing those living there to return home. Some States, faced with a sizeable long term population as a result of this lack of settlement, decide to restrict the freedom of movement of those living there. Residents of the camps are prevented from living or resettling elsewhere in the country. Although not placed in a closed institution, the restriction of liberty may be such as to amount to administrative detention, albeit in a larger area than a closed detention institution.

Detention facilities for migrants vary enormously from State to State, as does the type of regime to which migrants are subjected. While some States have established purpose built or specially adapted facilities for the administrative detention of migrants,[384] in other cases premises, such as schools, warehouses, sports stadiums,[385] ships and containers,[386] existing prisons or police stations, are used.

2.2.1 Detention at airports

Detention centres may also be found in airport transit zones[387] or other points of entry to the State. The detention of migrants at airport transit zones may be undertaken with the knowledge

[382] Article 37(a) of CRC.

[383] See, for instance, Global Detention Project, 'Finland Detention Profile'; Committee on the Rights of the Child, Concluding observations : Germany (2008), U.N.Doc. CRC/C/OPAC/DEU/CO/1, para. 16; Amnesty International, 'The Netherlands: The detention of irregular migrants and asylum seekers', June 2008: <www.schipholwakes.nl/ rapport_vreemdelingendetentie.pdf>; Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007, at: <www.jrseurope.org/news_releases/10%20NMS%20report.htm> [websites accessed 29 January 2011].

[384] Office of the High Commissioner of Human Rights, Administrative Detention of Migrants: <www2.ohchr.org/ english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf> [accessed 29 January 2011].

[385] See, for instance, South Africa where up until November 2008 children and families were detained in an old dilapidated sports hall on a military base in Musina commonly known as SMG. Ventner, S., 'Notorious detention facility closes', *Pretoria News*, 22 November 2008.

[386] International Detention Coalition, 'Detention of Refugees, Asylum Seekers and Migrants': <www.rcusa.org/ uploads/pdfs/Launch%20en.doc> [accessed 29 January 2011].

[387] France has 85 *zones d'attente* in various ports of entry. The zones hold individuals who are not authorised to enter the country until they can leave France or, in the case of asylum seekers, until a preliminary hearing of their case can be arranged. The zones are intended for very short-term detention and often lack permanent holding structures. Typically, people are held in these facilities for only a few hours. However, there have been cases of excessively long confinement in the zones. While the legal limit of detaining persons in *zones d'attente* is 48 hours,

of government officials at the airport or simply on the instructions of airline companies.[388] Migrants can be held for a matter of hours only before being returned to their countries. The place of detention makes it difficult, and sometimes impossible, for an individual to access any outside assistance, thus preventing an application for asylum being made even in the presence of legitimate claims. A Human Rights Watch report of 2009 on France highlighted that from 2008 to 2009, around 1,500 migrant unaccompanied children arrived at Roissy Charles de Gaulle airport in Paris, and were detained by police in the "so-called airport transit zone", with the French government "hold[ing] on to a legal fiction that the airport transit zone implies some kind of extra-territorial status"[389] to which normal domestic law does not apply. From January to May 2009, out of 265 unaccompanied children who were held in the transit zone, 51 children were deported, whereas 200 were granted permission to enter France.[390]

2.2.2 Children with families

While there is an increasing trend in States not to subject unaccompanied migrant children to administrative detention (See below.), the detention of accompanied children appears to have grown over the last decade. This is largely due to policy change on the part of governments, particularly in the developed States. A recent report on family detention in the United States by the Women's Commission for Refugee Women and Children notes that "the recent increase in family detention represents a major shift in the [United States] government's treatment of families in immigration proceedings".[391] Similarly, in the United Kingdom, until 2001**,** families with children were rarely detained, and, where they were, this was only for a few hours prior to removal. In 2001, new Immigration Service instructions were issued permitting the detention of families for longer periods, which has resulted in families with children now being subject to the same immigration detention policy as single adults in the United Kingdom.

The detention of children with families has also been found to occur in developing States, including Egypt,[392] Malaysia,[393] South Africa,[394] Thailand[395] and Eritrea.[396] While obtaining

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this may be extended with court orders to a total of 20 days. Global Detention Project, 'France country profile': <www.globaldetentionproject.org/countries/europe/france/introduction.html> [accessed 29 January 2011].

[388] In some countries fines are imposed on companies that allow into the country people not in possession of valid papers.

[389] Human Rights Watch, 'Lost in transit: 'Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport', 29 October 2009, p. 2: <www.hrw.org/en/node/86211> [accessed 29 January 2011].

[390] Ibid., p. 49.

[391] Brane, M. and Butera, E., 'Locking up family values: the detention of immigrant families', Women's Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, February 2007, p.1.

[392] See, for instance, Human Rights Watch, 'Sinai Perils: Risks to Migrants, Refugees and Asylum Seekers in Egypt and Israel', 12 November 2008, p. 64: <www.unhcr.org/refworld/docid/491aebbd2.html> [accessed 29 January 2011].

[393] In June 2007, a government delegation reported that 360 children were being held in immigration depots with their mothers. See International Federation for Human Rights & Suara Rakyat Malaysia (Pranom Somwong & Marie Huberlant), 'Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination', FIDH Migration and Asylum Policies Report No. 489/2. March 2008: <www.fidh.org/IMG/pdf/MalaisieCONJ 489eng.pdf> [accessed 29 January 2011].

[394] See, for instance, Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa', December 2008: <www.lhr.org.za/sites/lhr.org.za/files/LHR%20detention%20monitoring%20report%2010%20Dec %2008.pdf> [accessed 29 January 2011].

[395] In June, Thailand's Third Army began relocating some 7,500 Lao Hmong who had integrated with Thais in Petchabun Province and placed them in a barbed-wire enclosed camp nearby with one access point controlled by the

information on countries that detain children, especially small children, in families has proved problematic, it may be assumed that, in many States, where the detention of women and children is not directly prohibited, it occurs.

2.2.3 Detention of unaccompanied/separated children

"Unaccompanied children" are defined as children "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so".[397] While such children are still subject to administrative detention in some countries, such as Germany[398] or the Netherlands,[399] for example, the trend of developed States has been to move away from this practice, and to prohibit detention of unaccompanied children in closed detention centres.[400] This change has been effected through amendments to legislative powers, State practice and also recent case law in, for instance, Belgium,[401] South Africa,[402] and the United States.[403]

However despite changes in law and policy, the detention of unaccompanied children is still occurring in some of these States. This is generally due either to incomplete policy or legal changes, lack of awareness of legal changes, lack of training of front-line staff or a lack of adequate accommodation, foster parents or resources for unaccompanied children. In some cases, although children have been moved out of closed detention centres, the alternative facilities in which they are placed, while not labelled as detention centres, nevertheless restrict the child's freedom of movement in a manner that continues to constitute a deprivation of liberty.

In the United States, up until 2003, unaccompanied children were held in custody by the Immigration and Naturalization Service pending a resolution of their legal case. A report by the Women's Refugee Commission found that conditions of confinement at this time were wholly inappropriate, with one-third of the children held in juvenile detention facilities intended for the incarceration of youth offenders. [404] Many children were placed with child offenders and were subject to handcuffing and shackling, forced to wear prison uniforms, and locked in prison cells. In 2002, responsibility for unaccompanied children was transferred to the Office of Refugee Resettlement with a great improvement in treatment. Unaccompanied children are now placed in

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military. See United States Committee for Refugees and Immigrants, 'World Refugee Survey 2008 – Thailand', 19 June 2008: <www.unhcr.org/refworld/docid/485f50d6c.html> [accessed 29 January 2011].

[396] In June 2008, up to 1,200 Eritrean asylum seekers were forcibly returned from Egypt to Eritrea and imprisoned, including returned women with children. See Amnesty International, 'Eritrea/Egypt – Up to 1,200 forcible returned asylum seekers', 13 August 2008; Human Rights Watch, 'Egypt: Stop Deporting Eritrean Asylum Seekers', 8 January 1998.

[397] Committee on the Rights of the Child, General Comment No. 6 (2005), U.N. Doc. CRC/GC/2005/6, para.7.

[398] European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Germany: <http://emn.sarenet.es/Downloads/prepareShowFiles.do;?directoryID=115> [accessed 29 January 2011].

[399] Ibid., The Netherlands.

[400] International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.

[401] *Mayeka and Mitunga v. Belgium*, 12 October 2006, Application No. 13178/03, at the ECHR.

[402] See *Centre for Child Law and Isabelle Ellis v. The Minister for Home Affairs and others* in 2004, High Court of South Africa (Transvaal Provincial Division) Case No. 22866/2004, 8 September 2004.

[403] *Flores v. Reno*, United States Supreme Court, 507 US 292, 1993.

[404] Women's Refugee Commission, 'Halfway Home: Unaccompanied Children in Immigration Custody', February 2009, p. 3, 4.

single purpose non-secure "children's shelters" for immigration violations, rather than in juvenile detention facilities.[405] However, the transfer has not ended the practice of administrative detention entirely. The agencies involved often fail to recognise that a child is unaccompanied, are not fully aware of their responsibilities under the law and fail to transfer children quickly enough or at all, resulting in some children remaining inappropriately in custody.[406]

While policy may change, it may not change for all migrant children, but only certain categories. In Lithuania, for example, legislation provides that unaccompanied child asylum seekers can only be detained in exceptional cases.[407] Once an application for asylum has been made, an unaccompanied child must be accommodated at the Refugee Reception Centre, an open centre that provides care and education, unless the appointed guardian for the child requests otherwise.[408] If, however, an unaccompanied child does not seek asylum, he or she will be held in a closed detention centre, frequently a juvenile offender detention facility pending removal.[409] The same issue is evident in Australia. In 2006, Australia amended its immigration legislation. The provisions permitting automatic prolonged administrative detention of unaccompanied children were repealed and replaced with a provision that requires that children only be held in immigration detention as a matter of last resort.[410] While the new amended law applies to all children in Australia, it does not apply to children detained in the offshore processing centres of Nauru or Papua New Guinea or to Christmas Island.[411] The detention arrangements for the 68 children, including 41 unaccompanied children held on Christmas Island in June 2009, were reported to be little better that prison: a "fenced in facility which currently holds the 68 children consists mostly of metal, concrete and gravel, tiny demountable buildings, with small claustrophobic bedrooms. The children are under guard and not free to leave the fenced perimeter of the facilities".[412]

[405] Bhabha, J. and Crock, M., op. cit.

[406] As immigration enforcement has increased, the number of unaccompanied children has also increased. In 2002, Immigration and Naturalization Service apprehended and detained approximately 5,000 unaccompanied alien children a year. In 2007, more than 8,300 children were transferred from Department of Homeland Security to Division of Unaccompanied Children's Services custody. See Women's Refugee Commission, 'Halfway Home: Unaccompanied Children in Immigration Custody', February 2009, p. 4.

[407] Article 114 of Law on the Legal Status of Aliens, No. IX-2206 [Lithuania], IX-2206, 29 April 2004.

[408] Ibid., Article 79. See also the European Council on Refugees and Exiles, 'Country Report 2004', on post-accession Lithuania: <www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDCOI&id=43b29d394> [accessed 29 January 2011].

[409] International Organization for Migration, European migration network, Institute of Social Research, Audra Sipavičienė, A. et al., On the Road: Unaccompanied Minors in Lithuania, Vilnius, 2009: <www.iom.lt/documents/Unaccompanied%20minors_EN.pdf> [accessed 29 January 2011].

[410] See Section 4AA of Australian Migration Act 1958.

[411] Amnesty International, 'Harming Children', 8 December 2009: <www.amnesty.org.au/refugees/comments/22248/> [accessed 29 January 2011]. There were 665 people in immigration detention on Christmas Island in September 2009. Tayler, P. and Rintoul, S., 'Kevin Rudd denies change in asylum policy', *The Australian*, 4 September 2009.

[412] Amnesty International, 'Harming Children', 8 December 2009. See also Amnesty International, 'Detention conditions inappropriate and out of step with Government's stated values', 16 December 2009 : <www.amnesty.org.au/news/comments/22287/> [accessed 29 January 2011].

Lack of implementation of changes has been evident in South Africa where, despite legislation providing that unaccompanied children should not be detained,[413] and judgments by the courts that such detention is unlawful,[414] children continue to be administratively detained in the Lindela holding facility together with adults.[415] Similarly, while unaccompanied asylum seeking children are not officially subject to administrative detention in Japan, but should instead be placed in specialised institutions for children, or in foster care,[416] children still fall through the net and are, on occasion, administratively detained. In 2007, Amnesty International highlighted the case of a 16-year-old Kurdish boy who had been detained for months without charge and had recently attempted to commit suicide as a result of his prolonged administrative detention in Japan.[417] Israel also suffers the same difficulties of implementation. Unaccompanied children under the age of 12 should be accommodated by the Ministry of Health and Social Welfare, either in a children's home or possibly in a foster home, while children over 12 are placed in Israeli boarding schools. However, Human Rights Watch reported the case of a 15-year-old Darfuri boy, who in 2008 was reported to have been detained for nearly eight months, at times with adults.[418]

A lack of adequate reception facilities to deal with unaccompanied children can also result in the use of administrative detention, an issue for Southern European countries such as Spain, Italy and Greece.[419] Although the detention of unaccompanied children in Spain has been prohibited since 2006, it has been reported that such detention was used as a temporary response to the arrival of around 900 unaccompanied children from Africa, a number that 'flooded' its protection system.[420] Four emergency centres (*Dispositivo de emergencia de atención de los menores extranjeros no acompañados en Canarias* – DEAMENAC) were opened in the Canary Islands,[421] regulated by an order issued by the Social Affairs Department. Although not legally

[413] Section 28(2) of the South African Constitution provides that 'A child's best interests are of paramount importance in every matter concerning the child'. In terms of Section 29(2) of the Refugees Act, 'The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time'. The Immigration Regulations provide that detained minors SHALL be kept separately from adults and in accommodation appropriate to their age, and further that unaccompanied minors SHALL not be detained (Art. 1(d) of Annexure B to regulation 28(5).

[414] *Centre for Child Law and Another v. Minister of Home Affairs and Others* (2005 (6) SA 50 (T)), the South African High Court held that unaccompanied foreign children found in South Africa must be dealt with under the Child Care Act 74 of 1983 in the same manner as South African children, before being dealt with in accordance with the Immigration Act. The Child Care Act requires that children be brought before a children's court to determine if they are in need of care. As such, they should not be detained at Lindela as 'illegal foreigners' together with adults.

[415] Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa', December 2008: <www.lhr.org.za> [accessed 29 January 2011].

[416] United Nations High Commissioner for Refugees, 'Alternatives to Detention of Asylum Seekers and Refugees', April 2006, POLAS/2006/03: <www.unhcr.org/refworld/docid/4472e8b84.html> [accessed 29 January 2011].

[417] Amnesty International, 'Open letter to the Minister of Justice of Japan', March 2007: <http://asiapacific.amnesty.org/library/Index/ENGASA220022007?open&of=ENG-JPN> [accessed 29 January 2011].

[418] Human Rights Watch, 'Sinai Perils', 12 November 2008.

[419] Fekete, L., 'Detained: foreign children in Europe', *Race & Class*, 49:1, 2007.

[420] Human Rights Watch, 'Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 26 July 2007, 19:4(D): <www.unhcr.org/refworld/docid/46b71bbf2.html> [accessed 29 January 2011].

[421] The Canary Islands autonomous community is in charge of social affairs and services, while the competence over migration policy, repatriation procedures, status of non-citizens, and applications for asylum remains with the central government. At the national level, the Ministry of Labour and Social Affairs coordinates policies and practice on unaccompanied migrant children.

termed 'detention', these emergency facilities effectively cut children off from services, and significantly restricted their freedom of movement without taking into account their needs.[422] Similarly, in Greece, Doctors without Borders (Médecins Sans Frontières (MSF)) reported in late 2009, that an old warehouse with capacity for 300 people was being used to accommodate more than 900 people, including more than 100 unaccompanied minors, many of whom had been in detention for 50 days or more.[423]

2.2.4 Detention of children thought to be adults

While some States have legislation and policies that do not permit administrative detention of unaccompanied children for immigration reasons, in practice children may be detained where there is a dispute over their real age, that is, where the child claims to be under the age of 18, while the State maintains that the individual is an adult. In such cases, according to international standards, children should be given the benefit of the doubt and not detained.[424] However, some States continue to detain age-disputed children, until there is agreement that the individual is indeed a child. In Belgium, for example, although the law provides that unaccompanied migrant children should be transferred directly to an open visitor centre, the child, if thought to be an adult, will be detained in a closed detention centre for foreigners at the border, pending verification of his age, for a period of up to three days. One report states that "in practice, taking into account weekends and holidays, this can result in detention for up to 11 calendar days."[425] In Ireland, NGOs have reported cases in which unaccompanied children have arrived without the necessary documentation and have been detained on immigration matters under the Immigration Act , for up to several weeks before an age assessment finds them to be a child.[426]

Age assessment is, at best, an 'inexact science' [427] and the measures used can only give an estimated rather than an actual age. The Committee on the Rights of the Child has recommended that in undertaking age assessments, authorities 'should not only take into account the physical appearance of the individual, but also his or her psychological maturity'.[428] Where it is not clear following the assessment whether the child is in fact a child or an adult, the Committee has recommended that, "in the event of remaining uncertainty, (the assessment) should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such".[429] The United Nations High Commissioner for Refugees takes the same position.[430] This recommendation is not always heeded and in many States,

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[422] Human Rights Watch, 'Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 19:4(D), 26 July 2007, p. 3, 66.
[423] Médecins Sans Frontières, 'People without any hope living in the Pagani detention centre in Lesvos, Greece', 10 September 2009: <www.msf.org> [accessed 29 January 2011].
[424] Committee on the Rights of the Child, General Comment No. 6 (2005), U.N. Doc. CRC/GC/2005/6, para.31.
[425] European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Belgium.
[426] Section 9(8) of Immigration Act 2004. See European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Ireland.
[427] Royal College of Paediatrics and Child Health, 'The Health of Refugee Children: Guidelines for Practitioners', 1999, p. 13.
[428] Committee on the Rights of the Child, General Comment No. 6 (2005), U.N. Doc. CRC/GC/2005/6, para.7.
[429] Ibid.
[430] See United Nations High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, para. 5.11:

unaccompanied children will be placed in detention centres and remain there while their asylum application is determined or while an appeal in being made against the age assessment.[431] This policy results in those who are later recognised as being children, remaining in detention with adults, without the special protection to which they are entitled.[432]

In the United States, child welfare advocates have expressed concern that children may be placed in the custody of the wrong agency because they are misclassified as adults,[433] while in the United Kingdom, there has been substantial evidence that children have been wrongfully classified as adults and subjected to administrative detention with adults. Of 165 age disputed cases at Oakington Immigration Removal Centre in 2005, 89 (53.9 per cent) turned out to be children. In another period, over 72 per cent were determined to be children.[434] In 2008, the Refugee Council's Children's Panel worked with 59 age-disputed young people in detention, just under a quarter of whom were found to be children.[435] In a survey of 20 countries by the International Detention Coalition, age-disputed cases "remain a concern in all of the countries surveyed"[436] with children sometimes spending weeks[437] or months in detention before their status is recognised. [438]

2.2.5 Detention in refugee camps

Refugee camps are created to provide shelter and basic needs in times of emergency or crisis to IDPs or refugees who have crossed the border from a neighbouring State. Most camps are intended to be temporary, with refugees returning home within weeks or months. In reality, however, most refugee situations last much longer than this, and many refugees find themselves living in camps for extended periods with restrictions placed on their freedom of movement.

The United States Committee for Refugees and Immigrants defines a protracted refugee situation as a population of 10,000 or more, restricted to a camp or segregated settlement for 5 years or longer.[439] 7.89 million of the world's 12 million refugees and asylum seekers have been in camps

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<www.unhcr.org/refworld/docid/3ae6b3360.html> [accessed 29 January 2011]. This also means that the margin of error should be given in favour of the individual.

[431] For instance, although Malta claims not to detain unaccompanied children (under Reception Regulations, Regulation 14 (1)), reports indicate that in practice it has taken several months to settle age-dispute cases, during which time the child is detained - JRS-Europe Report, Section 9.8; Bolton, S., 'The Detention of Children in Member States' Migration Control and Determination Processes' Briefing Paper, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, 2006: <www.libertysecurity.org/article1185.html> [accessed 29 January 2011]

[432] See, for instance, Human Rights Watch, 'Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece', December 2008.

[433] Congressional Research Service, 'Unaccompanied Alien Children: Policies and Issues', March 2007.

[434] Refugee Children's Consortium, 'Submission to the Joint Council of Human Rights Enquiry into Children's Rights', February 2009.

[435] Bail for Immigration Detainees, 'Out of sight, out of mind: Experiences of immigration detention in the UK', July 2009, p. 28.

[436] Countries surveyed: Australia, Belgium, Canada, Egypt, Hong Kong, Hungary, Indonesia, Israel, Japan, Kenya, Lebanon, Malaysia, Mexico, South Africa, Spain, Sri Lanka. Thailand, Tunisia, United Kingdom, United States. International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.

[437] See, for instance, the situation in Spain. Human Rights Watch, 'Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 19:4(D), July 2007.

[438] See, for instance, Malta. JRS-Europe Report, Section 9.8; Bolton, S., op. cit.

[439] United States Committee for Refugees and Immigrants, *World Refugee Survey 2006*:

for 5 years or more, 7,132,200 of them for 10 years or more.[440] Many refugees have lived their whole lives in closed camps.[441] While there are no figures for the numbers of children living in such camps, a conservative estimate would put the figure at over 2 million at any one time.

Restrictions on freedom of movement may be so great that a child living in a refugee camp finds him or herself effectively subject to administrative detention.[442] Those resident in the camp may have to obtain a permit to leave the camp, only be allowed to travel a certain distance from the camp, or for a certain period of time. If they fail to comply with the terms of the permit, they may be at risk of arrest, imprisonment and deportation, despite the fact that they are refugees. The deprivation of liberty may continue for years with children and grandchildren being born in the camps with no right to leave them.[443]

An example of long-term restrictions on the liberty of residents of refugee camps can be found in Nepal, where for more than a decade, 100,000 refugees (including 37,241 children) [444] of Nepalese ethnic origin from Bhutan have been living in seven camps administered by United Nations High Commissioner for Refugees (UNHCR)**.**[445] Although Nepal has permitted the refugees to stay on its territory, it has, to date, ruled out local integration as a durable solution.[446] Refugees need to apply for permission from the government authorities in the camps whenever they want to leave the camps for more than a day, and so-called 'out passes' are issued only for a maximum of one week.[447.]

The use of confinement and internment in camps has also occurred in Sri Lanka, following the government declared victory over the Liberation Tigers of Tamil Eelam (LTTE), in May 2009.

<www.refugees.org/article.aspx?id=1614> [accessed 29 January 2011].

[440] Ibid.

[441] See International Detention Coalition, 'Detention of Refugees, Asylum Seekers and Migrants – Position of the International Detention Coalition': <www.rcusa.org/uploads/pdfs/IDC%20Position%20on%20Detention,%204-1-09.pdf>; 'Detention of Refugees, Asylum Seekers and Migrants': <www.rcusa.org/uploads/pdfs/Launch%20en.doc> [websites accessed 29 January 2011].

[442] Fieldman, S., Tufts University, 'Development Assisted Integration: A Viable Alternative to Long Term Residence in Refugee Camps?': <www.du.edu/korbel/cord/symposia/2007/feldman07.pdf> [accessed 29 January 2011].

[443] International Detention Coalition, 'Detention of Refugees, Asylum Seekers and Migrants – Position of the International Detention Coalition'.

[444] 'Bhutanese Refugee Children Forum Central Office Report', December 2006, cited in Refugee Youth Project, 'Bhutanese Refugee Children's Research', 2008: <www.refugeeyouthproject.org.uk/assets/Uploads/Nepal/RYP-Nepal-Report-08.pdf> [accessed 29 January 2011].

[445] Committee on the Rights of the Child: Second Periodic Report of States Parties Due in 1997, Nepal (2004), U.N. Doc. CRC/C/65/Add.30.

[446] Nepal is not a party to the 1951 Convention or its 1967 Protocol, nor has it adopted national refugee legislation. Instead, the legal status of asylum seekers and refugees in Nepal is governed by the Aliens Act supplemented by administrative directives, leaving the legal status of the Bhutanese refugees in Nepal far from secure. See also Human Rights Watch, 'Last Hope', May 16 2007: <www.hrw.org/en/node/10953/section/10#_ftn180> [accessed 29 January 2011].

[447] Each camp has a camp supervisor appointed by the government who is authorized to issue out passes to refugees, allowing refugees to leave the camps for a specific purpose and for a specific period of time. In practice, the authorities often turn a blind eye to refugees leaving the camps without first applying for permission. At times, however, the provision is strictly enforced, most recently after refugee protests had been organized outside the camps. 'Bhutanese Refugees Virtually Imprisoned In Camps', *The Himalayan TimesOnline (Kathmandu),* 2 August 2006, at: <www.thehimalayantimes.com> [accessed 29 January 2011].

By the end of May 2009, it was reported that 300,000 IDPs, at least 50,000 of whom were children, had fled fighting and were detained in some 40 camps spread across four districts.[448] Management of the camps was supervised by the military, which placed severe restrictions on IDPs leaving the physical confines of the camps. Although the government called these facilities "welfare villages", the restriction of liberty was such as to amount in practice to administrative detention.[449] Inhabitants were unable to return voluntarily to their homes or to choose their own residence elsewhere in the country.[450] The United Nations Guiding Principles on Internal Displacement, an authoritative framework for the protection of displaced persons derived from international law, provides that, consistent with the right to liberty, IDPs "shall not be interned in or confined to a camp".[451] This principle is yet to be fully enforced and the policy of restricting the liberty of residents of refugee camps continues in many counties across the world as, it is argued, this approach can cater better to the needs of refugees and their hosts, and at the same time accommodate security concerns.[452]

2.3. Legal framework

The use of administative detention for immigration purposes is governed by international human rights law and international refugee law. These bodies of law set out the circumstances in which children can be placed in administrative detention, and the conditions and safeguards that States must guarantee.

2.3.1 Right to liberty and security of person

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention[453] (For details of provisions, see Introduction.)

General Comment No. 8 of the Human Rights Committee emphasises that Article 9 of the ICCPR is applicable to all types of deprivation of liberty, including all forms of administrative detention. While part of Article 9(2) and 9(3) are only applicable to persons against whom criminal charges are brought, 'the rest, and in particular the important guarantee…i.e. the right to control by the court of the legality of the detention, applies to all persons deprived of their liberty by arrest of detention'. The Human Rights Committee in General Comment No. 15 has also

[448] According to the United Nations Office for the Coordination of Humanitarian Affairs, as of 3 July 2009 there were 278,850 people in camps and 4,329 in hospital in Vavuniya alone. See: <www.reliefweb.int/rw/fullMaps_Sa.nsf/luFullMap/6D9374C261ACBAA4852575EF005307D6/$File/map.pdf?OpenElement> [accessed 29 January 2011].

[449] Amnesty International, 'Unlock the camps in Sri Lanka – Safety and Dignity for the displaced now', 10 August 2009.

[450] There was no fixed schedule for resettlement, but government representatives said that most displaced people would be resettled by the end of 2009, or within 180 days. 'Tamil refugees may end up in permanent camps, say aid workers', *Times Online*, 3 July, 2009: <www.timesonline.co.uk/tol/news/world/asia/article6626563.ece> [accessed 29 January 2011].

[451] Principle 12 of United Nations High Commissioner for Refugees, Guiding Principles on Internal Displacement (1998), U.N. Doc. E/CN.4/1998/53/Add.2. Hereinafter UNHCR Guiding Principles.

[452] Hovil, L., and Chrispus Okell, M., The Right to Freedom of Movement for Refugees in Uganda, in Hollenbach, D., (ed.) 'Refugee Rights: Ethics, Advocacy, and Africa'.

[453] See also the Body of Principles, which sets out a comprehensive list of protections for persons who are subject to administrative detention.

emphasised that the rights contained in Article 9(1) apply to every person regardless of their status: 'each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens'.[454]

The right to liberty and security of the person is mirrored in regional human rights instruments, including Article 5 of the Arab Charter, Article 6 of the Banjul Charter, Article 7 of the American Convention, Article 1 of the American Declaration on the Rights and Duties of Man and Article 5 of the European Convention. Further rights and duties can also be found in the Body of Principles.

In addition to the rights contained in the CRC and the ICCPR, provisions relating to immigration detention can be found in international refugee law. The provisions of the United Nations Convention Relating to the Status of Refugees 1951[455] and its 1967 Protocol[456] do not apply to all migrants, but do apply to refugees[457] and asylum seekers, including children. Although there is no explicit provision in the 1951 Convention that prohibits arbitrary detention, Article 31(1) provides that States 'shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.[458] While 'penalty' has been most commonly associated with criminal penalties, it has been argued that it has a wider application,[459] and is likely to cover, and thus prohibit, administrative detention for those asylum seekers and refugees who fall within its provisions.

The Guidelines of the United Nations High Commissioner for Refugees (UNHCR) recognise that the right to liberty is a fundamental right and that it is 'inherently undesirable'[460] to detain asylum seekers. However, the guidelines accept that there are exceptions to this presumption and

[454] Office of the High Commissioner for Human Rights, General Comment No. 15: The position of aliens under the Covenant: 11/04/86, para 2.
[455] 1951 Convention, United Nations, Treaty Series, Vol. 189, p. 137.
[456] United Nations General Assembly, Protocol Relating to the Status of Refugees, 30 January 1967, United Nations, Treaty Series, Vol. 606, p. 267.
[457] Although the provisions of the 1951 Convention can also apply to *de facto* refugees, not just those who have been granted status. The UNHCR Executive Committee foresees that the 1951 Convention refugee definition should not be the sole basis for protection where there are de facto refugees. In October 2005 UNHCR's Ex Com issued a Conclusion (ExCom Conclusion 103) that encouraged 'the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol', and that states granting complementary protection should ensure 'the human rights and fundamental freedoms of such persons without discrimination'. See Conclusion on the Provision of International Protection including through Complementary Forms of Protection, UNHCR Conclusion No. 103 (LVI), 7 October 2005.
[458] Article 31 of 1951 Convention.
[459] See, for instance, Cholewinski, R., 'Enforced Destitution of Asylum Seekers in the United Kingdom' (1998) 10 *IJRL* 3; Goodwin-Gill G, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, 185; Edwards, A., 'Tampering with Asylum: The Case of Australia', 15(3), *IJRL*, 192, 2003.
[460] United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Introduction, para. 1. Hereinafter UNCHR Revised Guidelines.

that detention may be acceptable (provided the necessary safeguards are in place) where it is necessary in an individual case (and where it is provided for in law):

- To verify identity;
- To determine the elements on which the claim to refugee status or asylum is based;
- To deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;
- To protect national security or public order.[461]

Detention of asylum-seekers for any other purposes, "for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law".[462] Any detention that does take place should not be automatic or unduly prolonged. The detention of an individual which is justified by the fact that proceedings against him or her (such as removal) are in progress, can cease to be justified if the proceedings concerned are not conducted with due diligence.[463] In particular, the detention of a person for the entire duration of a prolonged asylum procedure is not justified.[464]

The UNHCR Guidelines provide an even stronger presumption against the administrative detention of children for immigration purposes. Guideline 5 asserts that "minors who are asylum seekers should not be detained" and, if they are, this detention should, in accordance with Article 37(b) of the CRC, be a measure of last resort and for the shortest appropriate period of time:

If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. Efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families[465].

Children who have been trafficked into a State must not be placed in administrative detention in any circumstances.[466]

In conformity with the approach taken in the Refugee Convention, the United Nations Committee on the Rights of the Child has made similar recommendations, stating that, as a general rule, unaccompanied child refugees or asylum-seekers must not be placed in administrative detention by States.[467] All efforts, 'including acceleration of relevant processes,

[461] United Nations High Commissioner for Refugees, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975–2009 (Conclusion No. 1 – 109) Conclusion No. 44 (1986). See also Guideline 3 of UNHCR's Revised Guidelines.
[462] Guideline 3 of UNHCR's Revised Guidelines.
[463] See, for instance, *Kolompar v. Belgium*, Judgment of 24 September 1992, ECHR, Series A No. 2350C).
[464] Introduction, para, 3 of UNHCR's Revised Guidelines.
[465] Ibid., Guideline 5.
[466] Guideline 2, para. 6 of the United Nations Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002), U.N. Doc. E/2002/68/Add.1 provides that States should consider 'Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody'.
[467] Committee on the Rights of the Child, General Comment No. 6 (2005), U.N. Doc. CRC/GC/2005/6, para. 61.

should be made to allow for the immediate release from detention of unaccompanied or separated children and for their placement in other forms of appropriate accommodation'.[468]

Difficult questions arise where a decision is taken to detain one or both parents of a child, but in the view of the United Nations Special Rapporteur on the Human Rights of Migrants in 2009,[469] detention of children "should not be justified on the basis of maintaining the family unit. As in all cases involving children, the child's best interests shall be a primary consideration,[470] and detention of children will never be in their best interests".[471] A rights-based approach implies that 'adopting alternative measures for the entire family; States should therefore develop policies for placing the entire family in alternative locations to closed detention centres.[472]

2.3.2 Administrative detention must be lawful

Article 9(1) of the ICCPR, Article 37(b) of the CRC and Article 5(1) of the European Convention all require that any detention of a child for immigration purposes must be in accordance or in conformity with the law. Any detention must be carried out by competent officials or persons authorised for that purpose.[473] Thus, a child may only be detained where the domestic law explicitly provides an administrative body with the power to do so. Any such detention must also be ordered in accordance with domestic procedures.[474] Where there are no provisions or specific procedures permitting administrative detention for immigration purposes, such detention will not be in conformity with the law and will, therefore, constitute unlawful detention in breach of Article 9(1) of the ICCPR and Article 37(b) of the CRC.[475]

2.3.3 Administrative detention must not be arbitrary

Article 9(1) of the ICCPR and Article 37 of the CRC require not only that administrative detention must be lawful, but also that it must not be arbitrary. The Human Rights Committee has stated that "[a]rbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[476] This means that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[477] The CRC also requires that detention must be used as a measure of last resort and for the shortest possible period of time.[478] The best interests of the child should, in addition, be a primary consideration in the decision to place the child in detention.[479] The Human Rights Committee has found that the administrative detention of asylum seekers will not, of itself, constitute arbitrary detention. The fact of illegal entry into the country may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding, lack of cooperation or the need to prevent

[468] Ibid.
[469] Report of the Special Rapporteur on the human rights of migrants (2009), U.N.Doc. A/HRC/11/7.
[470] Article 3 of CRC.
[471] Report of the Special Rapporteur on the human rights of migrants (2009), U.N.Doc. A/HRC/11/7.
[472] Ibid.
[473] Principles 2, 4 of Body of Principles.
[474] A lack of procedures may lead to the detention being considered unlawful. See *H and L v. the United Kingdom*, ECHR, Application No 45508/99, 5 October 2004.
[475] *Bolanos v. Ecuador*, Communication No 238/1987; *Domukovsky v. Georgia*, No. 624, 625, 626 and 627/1995.
[476] *A.W. Mukong v. Cameroon*, 1994, p. 181, para. 9.8.
[477] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para 9.2.
[478] See Article 37(b) of CRC.
[479] Article 9(1) of ICCPR; Article 37(b) of CRC.

interference with evidence, which may justify detention for a period. Without such factors, however, detention may be considered arbitrary, even if the child's entry into the country was illegal. [480] Thus a mandatory policy of administrative detention of all asylum seekers, without a requirement of assessment of the particular individual to determine whether the detention is necessary, proportionate and appropriate, has been found by the Human Rights Committee in the case of *A. v. Australia* to be unlawful and arbitrary. [481]

In addition, the Human Rights Committee has found that if the grounds for detention (which makes the administrative detention necessary, proportionate and appropriate) cease to exist, then any continuing detention becomes arbitrary (and therefore unlawful in international law).[482] Therefore, detention "should not continue beyond the period for which the State can provide appropriate justification".[483]

Detention will not be considered proportionate to achieve necessary aims if there are "less invasive means of achieving the same ends".[484] For example, a State needs to demonstrate that compliance with its immigration policy could not have been achieved by means other than detention, such as, for instance, the imposition of reporting obligations,[485] sureties or other conditions which would take account of the particular circumstances of the individual concerned.[486] If the detention is found not to be proportionate, it will be regarded as arbitrary.[487]

2.3.4 Other relevant human rights standards

Other human rights standards, such as the right to non-discrimination[488] and the right to protection from unlawful or arbitrary interference with private or family life[489] must also be considered in determining whether administrative detention is lawful. States Parties to the CRC and other human rights treaties undertake to ensure the enjoyment of rights and fundamental freedoms without discrimination based on such grounds as race, nationality or religion. The

[480] *A. v. Australia*, 1997, para. 9.4
[481] Ibid; *C. v. Australia*, 2002, para. 9.4.
[482] *A. v. Australia*, 1997.
[483] Ibid., para. 9.4; *C. v. Australia*, 2002. See also United Nations Human Rights Council 5th Session of the Working Group on Universal Periodic Review, 4-15 May 2009 - ICJ Submission to the Universal Periodic Review of Malta: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MT/ICJ_MLT_UPR_S5_2009_InternationalCommissionofJurists.pdf>. Maltese legislation does not provide for a maximum term of administrative detention, and there is no automatic judicial review. The ICJ has called for 'regular periodic judicial review of the necessity and proportionality of administrative detention' in Malta. The ECHR has ruled on more than one occasion that there is a lack of remedy under Article 5(4). Bolton, S., op. cit. Detainees may apply for judicial review of the detention order to the Immigration Appeals Board. The Board 'may grant release on grounds of unreasonableness of the order concerning duration of detention and lack of real prospect of deportation but in a considerable number of cases, including many cases where the identity of the detainee cannot be ascertained, it cannot release the person even when the detention is unreasonable. whose decision is final'. See also para. 8.2.
[484] *C. v. Australia*, 2002, para. 4.26.
[485] Ibid.
[486] Ibid., para 8.2; *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, Human Rights Committee, U.N. Doc. CCPR/C/79/D/1069/2002, 6 November 2003, para 9.3.
[487] See *Muskhadzhiyeva and Others v. Belgium*, 2010.
[488] Article 2 of ICCPR; Article 2 of CRC.
[489] Article 17 of ICCPR; Article 8 of European Convention; Article 8 of CRC.

administrative detention of a particular group of children, chosen purely on the basis of, for example, ethnicity, could be regarded as discriminatory, and could amount to unlawful detention.

International human rights provisions relevant to the material conditions and treatment of children once they have been placed in detention also need consideration. Breaches of the prohibition on torture and cruel, inhuman or degrading treatment or punishment[490] and the right of detained children to be treated with humanity and respect for human dignity[491] are likely to lead to the detention being regarded as unlawful and arbitrary. In the recent case of *Muskhadzhiyeva v. Belgium,*[492] the ECHR held that detaining four extremely vulnerable children in a closed, adult, detention centre, while awaiting deportation, was ill-suited to the children's needs, and constituted a violation of the children's Article 3 of the ECHR right not to be subjected to inhuman or degrading treatment or punishment.

2.3.5 Safeguards

In addition to the requirements that any detention must be in conformity with the law and necessary, proportionate and appropriate, States need to ensure that children are provided with all the necessary procedural safeguards and guarantees. The safeguards include:

- The right to be informed promptly of the reasons for detention and the substance of the complaint against him or her;[493]
- The right to be challenge the legality of the detention;[494]
- The right to protection against incommunicado detention,[495] including the right to be kept at officially recognised places of detention,[496] and the right to maintain contact with the family through correspondence and visits;[497]
- The right to access legal counsel and other appropriate assistance;[498]
- In addition, Article 25 CRC requires that the child's case should be reviewed at regular intervals, not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release. [499]

[490] Article 7 of ICCPR; Article 37(1) of UNCRC; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[491] Article 10 of ICCPR; Article 37(c) of CRC.
[492] *Muskhadzhiyeva and Others v. Belgium*, 2010.
[493] Article 9(2) of ICCPR. See also Human Rights Committee, General Comment No. 8 (1982). The Committee noted that while this requirement appears on the face of it only to persons charged with a criminal offence, it also applies to persons held in administrative detention.
[494] Article 37(d) of CRC; Article 9(4) of ICCPR.
[495] Article 1 of International Convention for the Protection of All Persons from Enforced Disappearance*;* Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 13(b).
[496] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rule 7 of Standard Minimum Rules for the Treatment of Prisoners; Principle 12 of Body of Principles.
[497] Article 37(c) of CRC; Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37, 92 of Standard Minimum Rules on the Treatment of Prisoners.
[498] Article 37(d) of CRC.
[499] WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 58.

In cases of administrative detention for immigration purposes, the Working Group on Arbitrary Detention has held that the State must:

- Provide notification of the custodial measure to any asylum-seeker or immigrant, in a language he or she can understand, as well as the remedies he/she is able to apply for.
- Bring any asylum-seeker or immigrant placed in custody promptly before a judicial or other authority.
- Set out in law the maximum period for which administrative detention can be ordered and that such detention may in no case be unlimited or of excessive length.[500]
- Ensure that the administrative detention is subject to regular 'judicial reviews'.[501]

2.4. State laws, policies and practices

2.4.1 Legal basis for detention

The grounds for administrative detention of migrants vary significantly from State to State, and even within the same State. However, most governments of developed States detain refugees, asylum seekers and migrant children in one or more of the following situations:

- Upon entry to the country, for the purposes of establishing identity, or in the case of asylum seekers while their application for asylum is being processed or determined. Reception policies involving a strong element of detention are also used, sometimes with the intention of deterring future arrivals.[502]
- Pending a final decision in their applications for asylum or other requests to remain in the country.
- Pending transfer to another country[503] or final removal when they are no longer permitted to remain in the country. This measure concerns migrants who do not have the right to stay on the territory of the State: migrants who entered the country irregularly, people whose permit to stay is no longer valid and persons whose application for asylum has failed.

The legislative criteria permitting administrative detention of migrants frequently gives a high degree of discretion to the decision maker. For example, a State may provide that foreign

[500] Principle 1, 2, 3, 4, 7, 8, in Commission on Human Rights, WG on Arbitrary Detention, Deliberation No. 5: Situation regarding immigrants and asylum-seekers (1999), U.N. Doc. E/CN.4/2000/4, Annex II. See also reports of the Commission on Human Rights, WG on Arbitrary Detention: (1998), U.N. Doc. E/CN.4/1999/63, paras. 69–70, 76–78; Addendum: Visit to Australia, 24 May–6 June 2002 (2002), U.N.Doc. E/CN.4/2003/8/Add.2; Addendum: Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers (1998), U.N. Doc. E/CN.4/1999/63/Add.3, paras. 26–40. See also Human Rights Committee: Comments: Cameroon (1994), U.N. Doc. CCPR/C/79/Add.33, para. 22; Concluding Observations: Cameroon (1999), U.N. Doc. CCPR/C/79/Add.116, para. 19; Concluding Observations: Israel (2003), U.N. Doc. CCPR/CO/78/ISR, para 12; Concluding Observations: Switzerland (1996), U.N. Doc. CCPR/C/79/Add.70, para. 26, cited in ICJ Memorandum on administrative detention and terrorism, December 2005.

[501] Views of the 29 March 2004, Communication No. 1051/2002, *Mansour Ahani v. Canada*, Human Rights Committee, U.N. Doc. CCPR/C/80/D/1051/2002, 15 June 2004, para 10.2; Views of 3 April 1997, Communication No 560/1993, *A. v Australia*, 1997, para. 9.4; Human Rights Committee, Concluding Observations: Israel (1998), U.N. Doc. CCPR/C/79/Add.93, para. 21.

[502] United Nations High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03.

[503] For instance, under Dublin II Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003) in Europe.

nationals can be detained when immigration officers have "reasonable" grounds to believe that the person is illegally present in the State, is a danger to the public, that the individual is unlikely to appear for an examination or hearing or where the officer is not satisfied about the identity of the person. Anti-terrorism legislation also allows for the detention of migrants on the basis of threats to national security.[504]

Other grounds for detention of asylum seekers and irregular migrants include medical reasons,[505] the existence of a threat to public order, public security or public policy,[506] suffering from a mental disorder or mental defectiveness, inability to maintain oneself or one's dependents[507] and a risk of absconding.[508] The high degree of discretion and the broad power of immigration and other law enforcement officials to detain, often coupled with a lack of adequate training, can give rise to abuses and to human rights violations. Such conditions can also result in *de facto* discriminatory patterns of arrest and the deportation of irregular migrants.[509]

In some States, however, the criteria for detention are simply that the individual is illegally present in the country. In light of the findings of the Human Rights Committee in the case of *A. v. Australia*,[510] it can be argued that automatic detention based simply on an illegal migrant's presence in the country breaches Article 9(1) of the ICCPR, unless a legitimate purpose of the detention can be found. Furthermore, "justification for… detention based on the country's general experience that asylum seekers abscond if not retained in custody"[511] is unlikely to constitute a legitimate purpose.

Regardless of the finding of the Human Rights Committee, some States continue to retain a mandatory policy of detention based on illegal presence in the State.[512] In the Libyan Arab Jamahiriya, for instance, Articles 17 and 18 of the 1987 Law Regulating Entry Residence and Exit of Foreign Nationals to/from Libya permit the deportation and detention of non-citizens who have entered the country without a valid visa, overstayed their residence permit, or had their visa revoked.[513] The European Commission, during a 2004 mission to Libya, was unable to acquire information from Libyan authorities on procedures and criteria for the detention of non-

[504] Commission on Human Rights, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (2002), U.N. Doc. A/57/173. See Section 1 on security detention.
[505] As in Czech Republic and Lithuania, see Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.
[506] Ibid.
[507] Ibid., as in Malta.
[508] Ibid., Czech Republic, Hungary.
[509] See Costa Rica in Commission on Human Rights, Report submitted by Ms. Gabriela Rodríquez Pizarro, Special Rapporteur on the human rights of migrants: Addendum: Communications sent to Governments and replies received (2005), U.N.Doc. E/CN.4/2005/85/Add.1, paras 11–51.
[510] *A. v. Australia*, 1997.
[511] *Danyal Shafiq v. Australia*, 2006, para. 7.3.
[512] Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Addendum : Mission to Mexico (9–15 March 2008), U.N. Doc. A/HRC/11/7/Add.2, 24 March 2009. See also Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico: Walls, Abuses, and Deaths at the Borders – Flagrant Violations of the Rights of Undocumented Migrant son their Way to the United States', March 2008: at: <www.fidh.org/IMG/pdf/USAMexiquemigran488ang.pdf> [accessed 29 January 2011].
[513] Global Detention Project, 'Libya Detention Profile': <www.globaldetentionproject.org/countries/africa/libya/introduction.html> [accessed 29 January 2011].

citizens. Futher, interviews conducted by the European Commission team with irregular immigrants revealed that detainees "seem to have been arrested on a random basis",[514] with deportation orders based on decisions made for groups of nationalities, rather than individual cases. According to the United States Committee for Refugees and Immigrants' 2008 World Refugee Survey, the Government of Libya does not formally charge irregular immigrants upon arrest, and non-citizens can remain in detention indefinitely.[515] While the Libyan government maintains that the arrest of foreigners who are in the country illegally is necessary for public order, it is likely that the breadth of powers to detain, the length of detention and the conditions in which children are kept, may result in the detention of children being regarded as unlawful in international law, on the basis that it will amount to arbitrary detention.

2.4.2 Measure of last resort: Alternatives to detention

International human rights standards outline that for the administrative detention of a child to be lawful, it must be shown that no less restrictive measure would suffice. In other words, States must use and make available alternative measures both in law and in practice, and give consideration to "less invasive means of achieving the same ends".[516] A policy of routinely detaining irregular migrants, without considering the use of less restrictive alternatives, is likely to be regarded as unnecessary, disproportionate and inappropriate in international human rights law, rendering any administrative detention of this type potentially arbitrary. Alternative measures, such as reporting requirements, sureties or other conditions, should always be considered before detention and must take into account the particular circumstances of the individual. The Working Group on Administrative Detention and the United Nations Human Rights Committee have repeatedly underlined States' obligation to ensure that alternatives to detention are thoroughly considered, when assessing the necessity, proportionality and appropriateness of detaining an individual, particularly in the context of immigration detention.[517]

The appropriateness of different alternatives to detention will depend on the individual's stage in the immigration/asylum process. Accompanied children tend to be detained with their parents in order to maintain family unity, usually on the basis of the risk of their parent(s) absconding, despite research commissioned by the UNHCR which found that the rate at which asylum seekers abscond, prior to a final rejection of their claim and/or the real prospect of removal from the territory, was low, particularly in destination States.[518] A United Kingdom study[519] of bailed

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[514] European Commission, 'Technical Mission to Libya on Illegal Immigration 27 November – 6 December Report': <www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf> [accessed 29 January 2011].

515 United States Committee for Refugees and Immigrants, 'World Refugee Survey: Libya: Statistics for Libya', 2008: <www.worldrefugeesurvey.org/index.php?title=Libya> [accessed 29 January 2011].

[516] *C. v. Australia*, 2002, para. 8.2. (The case considered the necessity and proportionality of using detention against an asylum-seeker.).

[517] *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, 2003, para. 9.3. The case concerned a complaint of arbitrary detention made by an Afghan asylum-seeker and her young children, where a mother and her two children were detained over two years and ten months on the basis of their unlawful presence in Australia. The Committee concluded that since less intrusive measures were not considered, the detention of the complainant and her children without appropriate justification was found to be arbitrary and contrary to Article 9(1) of the ICCPR. See also *Omar Sharif v. Australia*, Human Rights Committee, U.N. Doc. CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2; *C. v. Australia*, 2002, para. 8.2.

[518] United Nations High Commissioner for Refugees, 'Alternatives to Detention of Asylum Seekers and Refugees', April 2006, POLAS/2006/03, p. iv.

asylum detainees showed that 90 per cent complied with their bail conditions and a United States study showed an 84 per cent compliance rate.[520] Restrictive alternatives involving close supervision or monitoring, for the purpose of ensuring compliance with asylum procedures are, arguably, seldom required in destination States where most asylum seekers wish to remain.[521] Therefore "destination States should be able to implement effective alternatives to detention, including unconditional release or admission to the community with only the minor duties to report addresses and appear for appointments."[522]

A recent UNHCR study, Alternatives to Detention of Asylum Seekers and Refugees, describing the system in several Nordic States, Switzerland, New Zealand and Lithuania, recognised that best practice requires legislation which establishes a sliding scale of measures from least to most restrictive, allowing for an analysis of proportionality and necessity of every measure.[523] The study concludes that, where detention is one extreme end of a range of measures, with unconditional release at the other, States are more likely to ensure the application of alternatives in practice.

A continuum of immigration control measures exists in the legislation of many States. They create a range of more or less restrictive alternatives to detention. The most typical measures include: release on bail, bond or surety;[524] release to NGO supervision; reporting requirements;[525] directed residence; residence in open centres; residence in semi-closed centres;[526] electronic monitoring.[527]

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[519] Bruegel and Natamba, E., 'Maintaining contact: what happens after detained asylum seekers get bail?', Social Science Research Paper No.16, London South Bank University, 2003.

[520] Vera Institute of Justice Appearance Assistance Programme, in United Nations High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, p.231.

[521] United Nations High Commissioner for Refugees, 'Alternatives to Detention of Asylum Seekers and Refugees', April 2006, POLAS/2006/03.

[522] Ibid.

[523] Ibid.

[524] The availability of this is often limited by lack of knowledge of and access to legal procedures, as well as the limited financial means of detainees. In Canada, the government funded Toronto bail programme tries to make bail more accessible by offering to supervise those who have no family or other eligible guarantors or sureties able to offer bonds. See United Nations High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, para. 94.

[525] Ibid.

[526] Open centres, semi-open centres, directed residence, and restrictions to a specified district are already used by many States, particularly in Europe, for asylum-seekers during the processing of their claim. The nature of the centres and the restrictions placed on freedom of movement vary greatly. In some countries, movement is restricted in practice as asylum-seekers have to report to or stay in their accommodation centres at certain times. In other countries asylum-seekers are not allowed to choose their place of residence, but may do so under certain conditions or at a certain stage of the asylum procedure. In some countries, asylum-seekers are free to leave their place of residence without any authorisation or by submitting a formal request which is routinely accepted. Others have a more stringent system of limited days of absence, reporting obligations or virtually no possibility of leaving apart from in exceptional circumstances. European Commission, Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum-seekers, COM/2007/0745, Brussels, 26 November 2007, Section 3.4.1. '*Free movement and residence*': <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0745:EN:HTML> [accessed 29 January 2011].

[527] Electronic monitoring covers a range of different forms of surveillance, which vary in intensity and the degree to which they limit an individual's freedom of movement, liberty or privacy. For example, Global Positioning System

In the case of New Zealand, both the decision to detain, as well as any decision applying alternative measures or granting unconditional release, is periodically reviewed to ensure that it takes into account the changing circumstances that may affect an asylum-seeker.[528]

In the International Detention Coalition's recent survey of 20 States,[529] 41 per cent of respondents indicated that there are functioning alternatives to detention in their State. States, such as Australia, Belgium, [530] Canada, United Kingdom and United States, have recently begun, or are exploring, alternatives to detention, using some of the mechanisms listed above. In addition, some States have developed other alternatives, such as accelerated release into the community through NGO facilitation,[531] hostels under the supervision of International Organization for Migration (IOM)[532] and the development of small alternative pilots by a number of NGOs, with individuals released into their care with detainee sponsorship or assurance of support.[533]

Box 5: The Swedish model

The Swedish model has been used as an example of an effective alternative to detention. One of the most important elements of this model is that no child under 18 may be held in detention for more than three days, or in extreme circumstances, six days. After this, a child will generally be released with their family into accommodation at a refugee centre, where they will report daily to the Department. However, where a member of the family is believed to pose a potential threat to national security, or where a person's identity cannot be ascertained, the family is notified that the father is to be held in detention, while the mother and children are released into group homes and allowed to visit him during the day. The Immigration Department 'assures the family that their case is of the utmost priority, and they are regularly informed of the status of their case. In situations where there is only a child and a father, and there may be strong reasons not to release the father, the child is released into a group home for unaccompanied children, and has regular access to the father'.
Source: Mitchell, G., 'The Swedish Model of Detention', 2000: <www.safecom.org.au/sweden.htm>; International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.

In 2006, the Prime Minister of Australia announced that all children should be released from immigration detention.[534] The Australian Migration Act 1958[535] now affirms that, as a matter of

(GPS) 'electronic tracking' allows continuous tracking of an individual. See Amnesty International, 'Irregular Migrants and Asylum-Seekers – Alternatives to Immigration Detention', April 2009: <www.amnesty.org/en/library/asset/POL33/001/2009/en/08b817ac-d5ae-4d47-a55c-20c36f7338cf/pol330012009en.pdf> [accessed 29 January 2011].

[528] United Nations High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03.

[529] IDC Global Detention Survey, 2008. Countries surveyed: Australia, Belgium, Canada, Egypt, Hong Kong, Hungary, Indonesia, Israel, Japan, Kenya, Lebanon, Malaysia, Mexico, South Africa, Spain, Sri Lanka. Thailand, Tunisia, United Kingdom, United States.

[530] Following a petition drive by NGOs in Belgium in 2006, the government took a decision to research alternatives to detention for accompanied children. Discussed in International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009. See also European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Belgium.

[531] See IDC Global Detention Survey, 2008, Lebanon.

[532] See ibid., Indonesia.

[533] See ibid., United States, Australia.

[534] See Crock, M. et al., *Future Seekers II: Refugees and Irregular Migration in Australia*, Federation Press, 2006, p. 164–165.

[535] S 4AA of Migration Act 1958.

principle, children shall only be held in immigration detention as a matter of last resort. Under the changes, a community sector organisation, contracted by the Australian government, provides care and residential accommodation to children and their families. The Minister for Immigration can stipulate different conditions for each family, such as reporting requirements. However, in general, detainees may go about their daily activities, such as shopping or attending school, without the accompaniment of a guard. The pre-existing detention centres and residential housing centres will continue to be used: the first for individuals, the second for families taken into custody for breaching residential housing orders or for whom removal is imminent.[536]

Concerns remain, though, in relation to some alternatives introduced by States, which have been hastily implemented without adequate development and consideration.[537] The conditions of some alternative measures can also continue to impose severe restrictions on freedom of movement[538] with some forms of detention simply being labelled alternatives to detention, but offering a very limited alternative.[539] At this stage, many alternatives are simply small pilots and not developed as programs for broader application.[540] For example, in November 2007, the United Kingdom Home Office ran a 10-month pilot scheme to persuade families at the end of the asylum process to return home voluntarily. Subsequent evaluation of the scheme found that "the government made it clear from the outset that it was not interested in the impact of the pilot on the minors involved; it was concerned with cost and with the number of families leaving the UK." There were insufficient efforts to build the trust of those involved[541] and the project was considered a failure.[542]

The same considerations are relevant to children who are returned to their State of origin. In some States, children have been reported as routinely detained for irregular emigration. This practice is evident in Morocco where a child who is found to have emigrated irregularly[543] can be punished with a fine and/or imprisonment of up to six months on return. [544]

[536] International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.
[537] See IDC Global Detention Survey, 2008, Belgium, United Kingdom, United States.
[538] Ibid., United States, Indonesia.
[539] Ibid., for instance, separate family detention centres being called alternatives in the United States.
[540] Ibid., Canada, Australia, United Kingdom, United States.
[541] See Children's Society and Bail for Immigration Detainees, 'An evaluative report on the Millbank Alternative to Detention Pilot', May 2009: <www.childrenssociety.org.uk/resources/documents/media/17148_full.pdf >; Nandy, L., 'A fair deal for children?', *The New Statesman*, 18 September 2008: <www.newstatesman.com/politics/2008/09/families-children-asylum>: 'The merits of trust have been demonstrated by models in other countries, such as the Hotham Mission in Australia. In a two-year pilot, more than 200 asylum-seekers were given an independent charity worker to support them through an asylum process designed to integrate them into the community or help them to return home. Eighty-five per cent of those refused asylum were not detained and returned home voluntarily. None absconded'. [websites accessed 29 January 2011].
[542] See Children's Society and Bail for Immigration Detainees, 'An evaluative report on the Millbank Alternative to Detention Pilot', May 2009.
[543] Article 50 of Moroccan Act on Immigration and Emigration, Law No. 02-03.
[544] Human Rights Watch, 'Returns at Any Cost Spain's Push to Repatriate Unaccompanied Children in the Absence of Safeguards', October 2008. See also Royal Decree 2393/2004, Article 92(4); and Ministry of Labour and Social Affairs Protocol on unaccompanied foreign children, cited in Observatorio de la Infancia, 'Protocolo de Menores Extranjeros no Acompañados,' Ministerio de Trabajo y Asuntos Sociales, Madrid, December 2005.

2.4.3 Legal time limits

Migrants often remain in administrative detention for long periods of time, particularly if they are held awaiting deportation or removal. The reasons for this include the time taken to hear asylum claims and appeals against deportation, the need for consulates to process travel documents and for the State to make travel arrangements.[545] The procedure can be particularly time consuming where there is no diplomatic representation of the country of citizenship of the migrant and where the State of destination does not have the means of financing the deportation or removal. The State of origin or the receiving country may also refuse to accept the migrant, which can further hinder removal. Difficulties also arise where a migrant has crossed the border irregularly, without papers, and the government of the alleged State of citizenship refuses to recognise the person as a citizen, creating another situation that may lead to indefinite detention.

Migrants may also face long periods in administrative detention because, owing to the situation in their countries of origin, they cannot be deported (sometimes known as 'non-removable'),[546] but the national immigration laws do not allow for their release. Yet other migrant children simply fall through the gaps in legislation, policy and practice. Many reports document the detention of children in centres for indefinite periods,[547] with little or no coherent rationale governing why they are detained for longer or shorter periods.[548] The excessive length of detention of migrants for administrative offences has been considered by the Working Group on Arbitrary Detention as a disproportionate punishment.[549]

Even where limits on the length of detention are contained in legislation, the limits imposed may not be adhered to in practice. In Italy, for example, it has been reported in 2009 that, despite a 48-hour limit imposed by the law, children have often had to remain in the centre for more than 20 days, with some remaining for over 37 days, after which they have been transferred to reception centres for adults on the mainland, instead of residential care for children.[550] Similarly, in South Africa, after being declared an illegal foreigner by an immigration officer, the child may

[545] For example, in 2008, an eight-year-old Iranian boy was held in Yarl's Wood immigration removal centre in the United Kingdom for six weeks before being released because solicitors began High Court proceedings against the Home Office, challenging the legality of his detention. See <www.childm.org.uk> [accessed 29 January 2011].
[546] See Greece in Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants: Communications sent to the governments and replies received (2002), U.N. Doc. E/CN.4/2003/85/Add.1, paras. 48–81.
[547] 'In Cambodia, some ethnic Montagnard children from Vietnam have been held in detention sites for as long as two years'. See International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009. See, for instance, Human Rights Watch, 'Unwelcome Responsibilities Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 2007.
[548] See, for instance, Human Rights Watch, 'Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece', December 2008, p. 55.
[549] See Commission on Human Rights, Civil and political rights, including questions of torture and detention: Opinions adopted by the WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6/Add.1, on the case of Mr. Benatta who entered the United States on 31 December 2000 on a non-immigrant visa authorizing him to remain in the country until 30 June 2001 and subsequently detained for 14 months and still under detention at the time of the decision.
[550] Save the Children, *News*, at: <www.savethechildren.net/alliance/media/newsdesk/2009-01-26a.html> [accessed 29 January 2011].

be detained for up to 30 days without a warrant.[551] However, there have been reports of unlawful detention of asylum seekers beyond the 30-day limit.[552]

2.4.4 Right to a review

Article 9(3) of the ICCPR provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release. However, this does not apply to those who are held in administrative detention for immigration purposes. Migrants have to rely on Article 9(4) of the ICCPR which provides that anyone who is "deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". Article 37(d) of the CRC also gives children the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. The right to challenge is one of the most important safeguards in preventing unlawful and arbitrary detention and other human rights abuses.

The lack of a right to automatic judicial review in cases of administrative detention, but only a right to make an application to the court to challenge the detention, means that, in practice, many children will not have their case considered by an independent court. Children may not know of their right to challenge, be afraid to challenge authority fearing that it might damage their case, or simply have no access to legal representation or assistance to mount such a challenge. In those States where the law does not provide for automatic judicial review, children may spend considerable lengths of time locked up in closed centres with no independent scrutiny of their detention.

In Germany, [553] unaccompanied minors taken into detention for the purposes of removal in North Rhine-Westphalia, were detained for an average of 40 days in 2006, and 19.5 days in 2007.[554] In the United Kingdom, while applications for bail may be made to an immigration judge,[555] the "detention of children can – and sometimes does – continue for lengthy periods with no automatic [judicial] review of the decision."[556] As a result, in the first half of 2009, 470 children entered immigration detention, and on the 30 June 2009, one third of all the children in detention

[551] After 30 days an extension must be obtained from a magistrate's court. This warrant may only extend the detention for a further 90 days. S. 34 (10d, 2002 Immigration Act. See also, Section 29(1) 1998 Refugees Act. See Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa', December 2008: <www.lhr.org.za> [accessed 29 January 2011].

[552] Human Rights Watch, 'Living in the Margins', p. 41. See also, in Estonia the court may order detention for two- to three-month periods: Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.

[553] Eighty-six unaccompanied minors were detained during this time.

[554] European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Germany.

[555] However, in order to apply for bail, the child first needs to know that he or she can make such an application and needs to have a legal representative who will make the application for him or her.

[556] United Kingdom Joint Committee on Human Rights, Evidence session, 21 February 2007, see House of Lords/House of Commons, Joint Committee on Human Rights, 'The Treatment of Asylum Seekers Tenth Report of Session 2006-07', Volume II, Oral and written evidence, HL Paper 81-II/ HC 60-II, 30 March 2007, para. 255, 258: <www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm> [accessed 29 January 2011].

had been held for longer than 28 days.[557] Fifty-six per cent of detained children were released back to their communities in the United Kingdom, "their detention having served no purpose other than wasting taxpayer's money and traumatising the children involved". [558] While there is a requirement that there be ministerial authorisation of detention of any child beyond 28 days,[559] this is not an independent process, and since its introduction authorisation has very rarely been refused.[560] The Commissioner for Human Rights of the Council of Europe has highlighted that "it is of particular concern that current UK legislation provides for no maximum time of administrative detention under Immigration Act powers."[561] This, in conjunction with the lack of statutory criteria for detention, means that the United Kingdom has one of the most open-ended and unsupervised detention systems in Europe[562] inevitably resulting in the arbitrary detention of some children.

The national legislation of some States, in compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[563] provides that, for detention to be lengthened beyond the period of time stipulated in the law, a court order to this effect must be obtained by the competent administrative authority. The extension of detention must be ordered by a judicial authority once every 96 hours in Switzerland,[564] after 72 hours in Sweden,[565] Slovak Republic[566] and Denmark,[567] and within 48 hours in Portugal.[568] In Canada, detainees have the right to a review hearing within 48 hours before the Immigration and Refugee Board. If the Immigration Review Board determines the detention necessary, another hearing

[557] United Kingdom Home Office, 'Control of Immigration: Quarterly Statistical Summary, United Kingdom, April – June 2009': <http://rds.homeoffice.gov.uk/rds/stats-release.html> [accessed 29 January 2011].
[558] Shah, A., *'Bail for Immigration Detainees'*, quoted in McVeigh, K., 'Ministers under fire for locking up immigration children', *The Guardian*, 30 August 2009.
[559] Formally announced 16 December 2003. See United Kingdom Home Office, Press Release, Stat 054/2003, 16 December 2003: <www.ind.homeoffice.gov.uk/ind/en/home/news/archive/2003/december/government_ welcomes.html> [accessed 29 January 2011].
[560] For instance, Detention Services Policy Unit to BID, 7 October 2004: 'Ministerial authorisation of the detention of a family beyond 28 days has never been refused'. Liam Byrne in evidence to Joint Committee on Human Rights, February 2007, in response to question 528: 'To date I have not refused any request for extended detention.'
[561] The WG on Arbitrary Detention identified 'the desirability to set up a maximum period of detention by law which must in no case by unlimited or excessive in length'. See Human Rights Council, WG on Arbitrary Detention (2008), U.N. Doc. A/HRC/7/4.
[562] The United Kingdom is one of a small number of European States (including Sweden, Denmark, Finland, Netherlands, Estonia, Lithuania: see ECRE Press Release, 18 June 2008) that have failed to adopt a time limit to detention. The European Union has adopted a maximum limit of 18 months in 2008 Returns Directive. Although this period has been widely criticised as excessive, the United Kingdom derogates and will not implement it.
[563]Principles 9, 11 of Body of Principles.
[564] Article 80, para. 2 of the Federal Law of 16 December 2005 on Strangers/Aliens (LEtr).
[565] Chapter 10 of Aliens Act 2005: <www.regeringen.se/content/1/c6/06/61/22/bfb61014.pdf> [accessed 29 January 2011].
[566] European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Slovak Republic.
[567] The overall average of detention duration (January 2006 to July 2006) is 42 days. In relation to administrative detention, the legal maximum duration is three days, but it can be prolonged if decided by the court after which it is no longer considered to be 'administrative detention'. See Detention in Europe, Denmark: <www.detention-in-europe.org/index.php?option=com_content&task=view&id=160&Itemid=193 [accessed 29 January 2011].
[568] Act 23/2007 of 2007.

must take place within seven days of the first review.[569] In other countries, the length of internment before coming before a judge is much longer. In Israel, the Entry Into Israel Law 1952 requires reviews within 14 days of detention, although interestingly, the 1996 Criminal Procedure Law requires a detainee to be brought before a judge within 24 hours from initial detention, and within 48 hours in exceptional cases. In Malaysia, the time period is considerably longer: between 28 and 30 days,[570] a length of time which is likely to be found not to meet the requirements of 'without delay'[571] or 'speedily'.[572]

When a child does challenge the decision to administratively detain him or her, the challenge must be heard without delay. While no time limit is specified in the ICCPR or the CRC, a wait of 96 hours for a review of a detention decision, or a decision to extend detention, has been found by the United Nations Human Rights Committee to be excessive and discriminatory.[573] In order to meet the requirements of Article 9(4) of the ICCPR, any judicial review of a child's detention must include the possibility of ordering release, and must not be limited merely to whether the detention was in compliance with domestic law. The review must be real and not merely formal, and the court must be empowered to order release if the detention is incompatible with the requirements of Article 9(1) or other provisions of the Covenant.[574]

According to international human rights law, the reviewing body must be a judicial body or other independent, competent body which is authorised to review the legality of the detention. The reviewing body must have a 'judicial character',[575] and detention should not be reviewed by a body which is under the control of the executive, for instance, a court composed of immigration officials. In Italy, detention may be ordered by the police chief, but within 48 hours, the detainee must be brought before a justice of the peace. The initial order for detention can be for up to 30 days, and can be renewed for another 30 days on application to the court. However, although a 'judicial' review, it is unclear how independent a view the magistrate is prepared to take. The United Nations Working Group on Arbitrary Detention, reporting following its mission to Italy in 2009 noted that in one centre visited, the justice of the peace would order the 30-day extension automatically upon request of the police without holding a hearing. The Working Group concluded that review "appears to be in most cases an empty formality".[576] The Working Group went on to note that "it is striking to consider that in the criminal justice system, decisions on remand detention are taken by professional judges and appealable to a tribunal composed of

[569] Canada's detention policy is established in Division 6 of the Immigration and Refugee Protection Act, Section 55 of which provides the grounds for detaining irregular non-citizens.
[570] See International Federation for Human Rights & Suara Rakyat Malaysia (Pranom Somwong & Marie Huberlant), 'Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination', Migration and Asylum Policies Report No. 489/2, March 2008: <www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf> [accessed 29 January 2011].
[571] Article 9(4) of ICCPR.
[572] Article 5(4) of European Convention.
[573] '…particularly in the light of the fact that in penal matters this review is guaranteed after 24 or 48 hours depending on the [Swiss] canton concerned'. Human Rights Committee, Concluding Observations: Switzerland (1996), U.N. Doc. CCPR/C/79/Add.70, para. 15.
[574] *A. v. Australia*, 1997; *C. v. Australia*, 2002, para 9.5.
[575] *Torres v. Finland*, 1990.
[576] United Nations Security Council, WG on Arbitrary Detention: Addendum: Mission to Italy (2009), U.N. Doc. A/HRC/10/21/Add.5.

three professional judges, while the administrative detention of migrants is only reviewed by a single justice of the peace."[577]

A failure to provide children with a review before an independent, competent court or body, may lead to the detention being considered unlawful in international law. In Egypt, according to a Human Right Watch report of 2008, the majority of migrants in detention were those captured at borders, including children, who were subsequently brought before a military tribunal for illegally entering Egypt at a non-authorised border crossing, or for attempting to enter the Sinai peninsula (a designated "security zone") without authorisation, or for attempting to cross the border with Israel.[578] The military tribunals apply domestic Egyptian law, but their rulings cannot be appealed, thus denying children the right to a review contained in Article 9(4) of the ICCPR.[579]

Sufficient judicial and administrative capacity is also vital if the right to review is to be meaningful. For example, a Human Rights Watch report of 2008 on Israel highlighted the fact that despite the duty placed on a quasi-judicial Reviewing Authority to review Ministry of Interior detention decisions no more than 14 days following the detention,[580] in fact, authorities detained many potential asylum seekers for weeks or even months due, in part, to there being fewer than 10 detention review officials; an insufficient number for the cases that require review.[581]

In addition to the initial right of judicial review, administrative detention must also be subject to periodic review by a court or other independent, competent body.[582] Even though an initial period of detention may not be unlawful or arbitrary (i.e. if it was necessary to carry out identity, security or health checks in the context of immigration detention, or to contain an emergency), subsequent periods may breach Article 9(1) of the ICCPR.[583] An ongoing and periodic assessment is required in order to ensure that the initial reasons justifying administrative detention continue to exist.[584]

[577] Ibid.
[578] Egyptian law prohibits entry or attempted exit from the country through any points other than designated border crossings, prescribing punishments of up to six months' imprisonment and a fine, or from two to five years' imprisonment and a fine where the crossing occurred in specially designated prohibited areas, also referred to as security zone. Presidential Decree-Law No. 89 for 1960, Entry and Residence of Aliens in the Territories of the United Arab Republic and Their Departure Therefrom, Articles 3, 41.
[579] Furthermore, even when the tribunal orders the release of a detained child or family, in practice detention may continue for a lengthy period. See Human Rights Watch, 'Sinai Perils', 12 November 2008, p. 63.
[580] Human Rights First, 'Israel': <www.humanrightsfirst.org/refugees/reports/cntry_rev_02/Israel.pdf> [accessed 29 January 2011].
[581] Human Rights Watch reported that there were fewer than 10 detention review officials in the whole country as of early March 2008. See Human Rights Watch, 'Sinai Perils', 12 November 2008.
[582] See also Principle 11, para. 3 of Body of Principles.
[583] See, for instance, *Spakmo v. Norway*, Human Rights Committee. Case No. 631/1995, para. 6.3. See also Human Rights Committee: Concluding Observations: Japan (1998), U.N. Doc. CCPR/C/79/Add.102, para. 19; Concluding Observations: Switzerland (1996), U.N. Doc. CCPR/C/79/Add.70.
[584] *A. v. Australia*, 1997. para. 9.4.

2.4.5 Right to legal advice and representation

As has been seen above, the right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not always guaranteed in cases of administrative detention.[585] Where such remedies are provided for in law, it is crucial that quality legal advice and representation is freely available to children and/or their families. Where a State grants a right of judicial review but makes this dependent upon an application being made by the detained migrant, most will not apply, due to lack of awareness that he or she can make such an application or due to a range of other difficulties. These include a lack of awareness of the grounds for challenging detention, difficulty in accessing their case file, a lack of access to free legal counsel, lack of interpreters and translation services and of information in a language they can understand on the right to instruct and retain counsel[586] and, in the case of some children, lack of legal capacity (depending on age and development).[587] Without access to free, quality legal advice, the right to appeal will be virtually meaningless, yet few States make free legal advice available or accessible.[588]

In Mexico, there are reports of serious deficiency regarding information, communication and access to judicial protection,[589] with detained migrants often misinformed or even uninformed about their rights and about the reasons and forms of detention, as well as a lack of access to lawyers and interpreters.[590] There are no public lawyers assigned to migrants' detention centres[591] and none who work in a detention centre on a regular basis. While in detention, children have a right to receive a visit from their consulate representative,[592] but most unaccompanied minors never speak with their consulate before leaving Mexico.[593] Access to legal representation is the exception, not the rule,[594] and detained children may be unaware of the reasons for their detention, the procedure that will be followed, or their right to appeal.[595] In

[585] This does not in any way imply that such rights are widely guaranteed in the cases of judicial proceedings. It was in fact reported by special procedures and treaty bodies that migrants often suffer from de facto or de jure discrimination in judicial proceedings. See, for instance, Maldives and United States in Commission on Human Rights, Report submitted by Ms. Gabriela Rodríquez Pizarro, Special Rapporteur on the human rights of migrants: Addendum: Communications sent to Governments and replies received (2005), U.N.Doc. E/CN.4/2005/85/Add.1; Report of the Human Rights Committee (Vol. I) (2002), U.N. Doc. A/57/40 (Vol. I), 47, para. 77.
[586] See Report of the Human Rights Committee (Vol. I) (2002), U.N.Doc. A/57/40 (Vol. I), 71, para. 426.
[587] See Thailand in Commission on Human Rights, Report submitted by Ms. Gabriela Rodríquez Pizarro, Special Rapporteur on the human rights of migrants: Addendum (2005), E/CN.4/2005/85/Add.1.
[588] Although, for instance, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 outlines that 'The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary' and that 'the third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance' (Article 13(3)).
[589] Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008.
[590] United Nations Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Addendum: Mission to Mexico (9-15 March 2008) (2009), U.N. Doc. A/HRC/11/7/Add.2.
[591] Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008.
[592] Article 36 of Vienna Convention on Consular Relations 1963.
[593] Fieser, R., 'Teens Making the Trek: Unaccompanied Minors Attempt to Immigrate to the United States': <http://education.crs.org/resources/stories_photos/teens_making_trek.pdf> [accessed 29 January 2011].
[594] Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008.
[595] Ibid.

Latvia[596] and Greece,[597] detainees are reportedly not provided with free legal assistance to make the required applications, making all legal remedies virtually inaccessible. Similar problems are evident in the United States. A report in 2009 noted that children in the custody of Immigration and Customs Enforcement still "have no systematic access to legal representation…and often have no guardian or advocate defending their rights or best interest".[598]

2.5. Child rights at risk

Administrative detention for immigration purposes can have devastating effects on children, not only because of its harshness and inappropriately punitive impact but also because of the indeterminacy and isolation that accompany it,[599] as well as the poor conditions and lack of education, health care, leisure and play facilities. In addition, for many children who are detained with their families, the detention has a significant impact on the ability of parents to care for their children in such adverse circumstances.

2.5.1 Rights to freedom from torture and cruel, inhuman or degrading treatment or punishment and to be treated with humanity and respect[600]

When an administrative decision is taken to detain an unaccompanied child or a family with children, little consideration appears to be given by States to the best interests of the child. [601]

[596] Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007. See also, a report on Lampedusa when it was in use for detention in Italy in early 2009, which pointed out that at that time, decisions about refugee claims were being made on the island itself, 'with no refugee lawyers on the island..[so that] the chance of claimants getting access to legal advice is extremely limited': <http://inside.org.au/the-mediterranean-solution/> [accessed 29 January 2011].

[597] Children in administrative detention are reportedly not entitled to legal aid free of charge and rarely have access to pro bono lawyers. Public prosecutors entrusted to act as their temporary guardians 'believe that they cannot challenge children's detention'. Human Rights Watch, 'Left to Survive', December 2008. European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Greece.

[598] See Women's Refugee Commission, 'Halfway Home: Unaccompanied Children in Immigration Custody', February 2009.

[599] Bhabha, J., 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly*, 2009, 31, p. 410-451.

[600] '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' and 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment' Article 37 of CRC.

[601] For example, the current process of reviewing children's detention in the UK lacks clarity and does not give sufficient attention to children's welfare or to the impact detention has on them. The Parliamentary Joint Committee on Human Rights stated in 2007 that: 'We are concerned that the current process of detention does not consider the welfare of the child, meaning that children and their needs are invisible throughout the process – at the point a decision to detain is made; at the point of arrest and detention; whilst in detention; and during the removal process. We are particularly concerned that the detention of children can – and sometimes does – continue for lengthy periods with no automatic review of the decision. Where the case is reviewed (for example by an immigration judge or by the Ministers after 28 days), assessments of the welfare of the child who is detained are not taken into account. It is difficult to understand wheat the purpose of welfare assessments are if they are not taken into account by Immigration Service staff and immigration judges'. Joint Committee on Human Rights (JCHR) evidence session, 21 February 2007, see House of Lords/ House of Commons, Joint Committee on Human Rights, 'The Treatment of Asylum Seekers Tenth Report of Session 2006-07', Volume II, Oral and written evidence, HL Paper 81-II/ HC 60-II. Published 30 March 2007, paras. 255, 258: <www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm> [accessed 29 January 2011].

Reports from international bodies, State bodies and NGOs, as well as case law from regional bodies and the Human Rights Committee, referred to in this chapter, lead to the inevitable conclusion that children's rights are not a priority and are not fully implemented by immigration detention centres.

At times, child migrants in administrative detention may find themselves detained in common prisons, either because no other specific facility exists, or because those that exist are full. Human Rights Watch noted that in Egypt children who had attempted to cross into or out of the country irregularly were held in ordinary prisons with adult prisoners.[602] Others will be detained in special facilities.[603] These may include centres designed specifically for migrants but may also be places such as schools, warehouses, airport terminals, sports stadiums and similar facilities that have been converted into centres for short term detention.[604] Although international standards require that children should be kept separately from adults (unless they are with family members),[605] the lack of suitable facilities for children can lead to them being inappropriately placed with non-related adults. For instance, Libyan detention authorities fail to make any distinction between adults and unaccompanied children, and do not hold unaccompanied children in separate facilities.[606]

2.5.2 Conditions of detention facilities

Detention centres can vary greatly.[607] With poor infrastructure and often untrained staff, the conditions in many centres are extremely poor. Overcrowding[608] is a major issue in many centres leading to a serious deterioration in living conditions, including lack of beds and clean bedding,[609] poor hygienic conditions[610] and inadequate provision of food.[611] Facilities that have

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[602] Human Rights Watch, 'Sinai Perils', 12 November 2008.

[603] See Commission on Human Rights: Migrant workers: Addendum: Visit to Spain (2004), U.N.Doc. E/CN.4/2004/76/Add.2; Report submitted in conformity with resolution 2004/53 of the Commission on Human Rights: Visit to Italy (2004), U.N. Doc. E/CN.4/2005/85/Add.3; Report of the Special Rapporteur on the human rights of migrants: Visit to the Islamic Republic of Iran (2004), U.N. Doc. E/CN.4/2005/85/Add.2.

[604] See Section 2.2.3.

[605] Rule 29 of Havana Rules.

[606] European Commission, 'Technical Mission to Libya on Illegal Immigration, 27 Nov. – 6 December 2004 Report'.

[607] For an overview of detention centres in Eastern Europe, see, for instance, Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.

[608] See, for instance, 'Overcrowding of boat people on Italian island worries UN refugee agency', *United Nations News Service*, 23 January 2009: <www.unhcr.org/refworld/docid/4982d0b71e.html> [accessed 29 January 2011]. See also Thailand in Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants: Communications sent to the governments and replies received (2002), U.N. Doc. E/CN.4/2003/85/Add.1; see Amnesty International, 2005 report on Malta: <www.unhcr.org/cgibin/texis/vtx/rsd/rsddocview.html?tbl=RSDCOI&id=429b27ed23> [accessed 29 January 2011].

[609] See International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009 on occurrence of this in Malaysia, Mexico.

[610] Ibid.; 'Amnesty International Report 2005 – Malta': <www.unhcr.org/refworld/docid/429b27ed23.html>. Amnesty International found a catalogue of unacceptable conditions and ill-treatment of minors while in detention, see 'Amnesty International Report 2006 – Spain': <www.unhcr.org/refworld/docid/447ff7a611.html>. See also Human Rights Watch, 'Unwelcome Responsibilities Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 2007. In May 2008 on the island of Leros in Greece, more than 100 children in a detention facility were reported to be on hunger strike in protest at their conditions, see <http://news.bbc.co.uk/1/hi/world/europe/7419667.stm>; The European Commission, 'Technical Mission to Libya

been converted into detention centres often lack basic infrastructure,[612] such as ventilation systems, outdoor spaces or adequate sanitary conditions.[613] Reports repeatedly highlight the poor infrastructure, overcrowding and generally sub-standard conditions in immigration detention centres. In Mexico, the migration station of Tapachula, in which children are detained, has been built in the style of a juvenile detention centre with no natural light, no windows that open, no outdoor recreation area and just two bathrooms.[614] In Greece, Human Rights Watch has reported that the conditions of detention of unaccompanied minors are unacceptable, with overcrowding and unhygienic conditions.[615] Similar conditions are present in detention facilities in Libya [616] and Malaysia.[617] In Malta, Médecins Sans Frontières (MSF) recently withdrew its service from the country's immigration detention centres, protesting that the living conditions there are "too crowded and inimical to human dignity".[618] In Egypt, [619] detained migrants reported overcrowded cells. In one small, dirty jail cell shared by over 20 inmates, a detainee stated that "there was nowhere to put my children down, and the toilet was in the corner. The room was probably three metres [square], it was really small. The toilet [a hole in the ground] was right there, we had to sleep lying on top of it."[620]

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on Illegal Immigration 27 November to 6 December 2004 Report' 'found overcrowding, detainees claiming to have been fed only bread and water, detainees held for seven months or more without legal review, detention of unaccompanied children'. The report, on the visit of the Union for Europe of the Nations Group-Nordic Green Left delegation to the Lampedusa Detention Centre 25 July 2005 found 'suffocating' heat and poor ventilation in the four prefabricated containers used for sleeping accommodation, inadequate beds and bedding, widespread dermatitis among detainees caused by the use of salt water in the showers, and insufficient drinking water (one bottle per day for two people): <www.jrseurope.org/news_releases/25Julyreportonmep'svisit.htm>. According to detainees, the authorities cleaned the camp the night before the delegation arrived. In addition, more than 900 detainees were in the camp only four days before, more than four times the centre's capacity. For a full discussion of detention conditions in Greece see Human Rights Watch, 'Greece – Stuck in a Revolving Door', p. 68–85, cited in Human Rights Watch, 'Left to Survive', December 2008 [websites accessed 29 January 2011].

[611] See Malaysia in Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants: Communications sent to the governments and replies received (2002), U.N. Doc. E/CN.4/2003/85/Add.1. See also reports of the United Nations Committee on the Elimination of Racial Discrimination, Sixtieth session (4–22 March 2002), U.N. Doc. A/57/18, para. 380; Sixty-first session (5–23 August 2002), U.N. doc. CRC/C/114, 25, para. 161. In SMG in South Africa, 'Occasionally detainees are also given pap (thick porridge) with a boiled chicken foot and very watery gravy. No provision is made for baby food or nutritional requirements of pregnant or breastfeeding women. The detention area is split down the middle, with tin roofing and barbed wire, constructed into a wall that separates the men from the women and infants'. See Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa', December 2008.

[612] 'Amnesty International Report 2005: Malta'.

[613] Rules 32–38 of Havana Rules. The deprivation of liberty applies to any type of detention or imprisonment or the placement of a person in a custodial setting from which he or she is not free to leave at will by order of a judicial, administrative or other public authority.

[614] Contravening Rules 31–37 of Havana Rules. See Fieser, R., op.cit.

[615] Human Rights Watch, 'Left to Survive', December 2008; Human Rights Watch, 'Greece: Escalating Risks for Migrants, Unaccompanied Children', 12 October 2009; Médecins Sans Frontières, 'People without any hope living in the Pagani detention centre in Lesvos, Greece', 10 September 2009.

[616] The detention centres were found to be overcrowded and dirty: Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', 2009: <www.hrw.org/sites/default/files/reports/italy0909web_0.pdf [accessed 29 January 2011].

[617]Global Detention Project, 'Malaysia Detention Profile': <www.globaldetentionproject.org/countries/asia-pacific/malaysia/introduction.html> [accessed 29 January 2011].

[618] European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors', Malta.

[619] Human Rights Watch, 'Sinai Perils', 12 November 2008.

[620] Ibid.

The lack of adequate provision of food has been noted in many monitoring reports, especially for children and pregnant women. Detention centres rarely cater for children, who are expected to eat the same food as adults, with little consideration either for age or culture. [621] In South Africa, Lawyers for Human Rights reported that "occasionally detainees are also given pap (thick porridge) with a boiled chicken foot and very watery gravy. No provision is made for baby food or nutritional requirements of pregnant or breastfeeding women."[622]

2.5.3 Discipline and violence

According to a report from 2008, Immigration and Customs Enforcement Rules in the United States still permit children to be disciplined based on the adult prison protocol, including the use of restraints (this includes the use of strait jackets), steel batons and strip searches.[623] Disciplinary measures also include seclusion or confinement and isolation, [624] which contravene the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[625] There are reports of staff in other centres using violence against child detainees who were accused of breaching the centre's rules. [626] Allegations have been made in relation to Libya, where it has been noted that "[t]reatment by guards ranges from negligent to brutal, and corruption is endemic."[627] Detainees at Lindela in South Africa have also reportedly been subject to violent abuse,[628] as have children in Malaysia. [629]

2.5.4 Right to education[630]

Immigration detention can have a highly negative effect on a child's educational development.[631] In most cases of administrative detention there is little or no provision for either education for

[621] Human Rights Watch, 'Pushed Back, Pushed Around', 2009. See also conditions in Global Detention Project, 'Malaysia Detention Profile'. Similar problems have been noted in Greece: see Human Rights Watch: 'Left to Survive', December 2008; 'Greece: Escalating Risks for Migrants, Unaccompanied Children', 12 October, 2009.
[622] See Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa', December 2008.
[623] Women's Commission for Refugee Women and Children and the Lutheran Immigration and Refugee Service, 'Locking Up Family Values – the Detention of Immigrant Families', February 2007, at: <www.womenscommission.org/pdf/famdeten.pdf> [accessed 29 January 2011]; Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008, p. 43.
[624] Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.
[625] Havana Rules.
[626] See Human Rights Watch, 'Nowhere to turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco', May 2002: <www.hrw.org/reports/2002/spain-morocco/spnmorc0502.pdf> [accessed 29 January 2011]; Human Rights Watch, 'Unwelcome Responsibilities Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 2007; and IDC Global Detention Survey, 2008.
[627] Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', 2009: <www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> [accessed 29 January 2011].
[628] Consortium for Refugees and Migrants in South Africa, 'Protecting refugees and asylum seekers in South Africa', 2007.
[629] See <www.globaldetentionproject.org/countries/asia-pacific/malaysia/introduction.html> [accessed 29 January 2011].
[630] Article 28 of CRC.
[631] International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.

children or for adequate recreational activities.[632] In the Canary Islands, in 2007, as well as being isolated, detained children reportedly received substantially fewer hours of education, often limited to one or two subjects.[633] While improvements have now been made, Yarl's Wood Immigration Removal Centre in the United Kingdom has often been criticised for its lack of suitable education provision.[634]

2.5.5 Right to highest attainable standard of health[635]

Inadequate access to medical treatment is a frequent problem,[636] with very few centres providing a medical check-up upon arrival or regular provision of medical and mental health services to detainees. [637] There is often limited or no access to translation or interpretation services, making it difficult for detainees to request medical attention, to explain to the administrators of the detention centre or to doctors what is wrong with a child or the symptoms from which the child is suffering, previous medical history and current medication, allergic reactions to drugs etc. Equally, the doctor may be unable to explain the nature of the illness suffered and the need for treatment. A failure to provide children suffering physical ailments with adequate pain relief, failure to deliver childhood immunisations and failure to provide prophylactic treatment against malaria for children being returned to areas where malaria is endemic have also been noted.[638] Access to medical assistance may be especially curtailed when children and families are detained in police stations or holding facilities that are not easily accessible. The report on the implementation of the European Union Reception Directive found that "in most of the detention centres visited, asylum seekers and migrants complained systematically about insufficient and inadequate medical care, the difficulties of consulting or communicating with doctors and the lack of specific care (in particular, for pregnant women and victims of torture) and of appropriate medicines."[639]

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[632] See Amnesty International, 'Malta: Investigation of incidents at Hal-Safi Detention Centre finds excessive use of force and ill-treatment of detainees by armed forces', 22 December 2005: <www.amnesty.org/en/library/info/EUR33/002/2005/en> [accessed 29 January 2011]; Human Rights Watch, 'Unwelcome Responsibilities Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 2007, Chapter VII.

[633] Human Rights Watch, 'Unwelcome Responsibilities Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands', 26 July 2007, Chapter VII.

[634] See, for instance, Report on an unannounced follow-up inspection of Yarl's Wood by chief inspector of prisons, Anne Owers, 13 to 16 February 2006.

[635] 'The right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health', Article 24 of the CRC.

[636] For instance, in detention by ICE in the United States, see Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008.

[637] See Spain in Commission on Human Rights, Report submitted by Ms. Gabriela Rodríquez Pizarro, Special Rapporteur on the human rights of migrants: Addendum: Communications sent to Governments and replies received (2005), U.N.Doc. E/CN.4/2005/85/Add.1. In Egypt, one child was separated from her father and detained in a regular jail cell with prisoners to whom she was not related, which 'took a toll on the girl's health, and resulted in stomach problems, vomiting and blisters all over her body'. She was not eating, and clearly unwell but received no medical assistance. See Human Rights Watch, 'Sinai Perils', 12 November 2008.

[638] 'The mental and physical health difficulties of children held within a British immigration detention centre: 'A pilot study', *Child Abuse and Neglect, the International Journal*, September 2009.

[639] European Parliament Report on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: Visits by the Committee on Civil Liberties 2005–2008 (2008/2235(INI)).

Periods of detention can have a profoundly negative, long-term[640] impact on a child's mental and physical health. Reports from Australia on the effects of immigration detention on children found excess rates of suicide, suicide attempts and self-harm, suicide attempts by pre-pubertal children, and high rates of mental disorders and developmental problems,[641] including severe attachment disorder for young children.[642] In the United Kingdom, in 2007, 157 people held in detention centres required medical treatment after self-harming,[643] and children have been reported to suffer depression, weight loss and bedwetting.[644] In a scientific study conducted in 2009, the first of its kind in the United Kingdom, a sample of 24 detained children (aged 3 months to 17 years) in Yarl's Wood Immigration Removal Centre were individually assessed, and found to be suffering high levels of mental and physical health problems.[645] Despite the harm that detention can cause, when a case is reviewed (for example, by an immigration judge or by the Ministers after 28 days), welfare assessments of detained children are often not taken into account.[646]

Conditions at accommodation centres and administrative detention facilities have been criticised by human rights advocates on the ground that asylum seekers with mental illnesses receive no special attention or treatment and are accommodated in the same centres as healthy asylum seekers. In addition, there are no special rehabilitation services for children who have been victims of "abuse, neglect, torture or cruel, inhuman or degrading treatment, or children who have suffered from armed conflict".[647]

Detention can severely undermine the ability of parents to care for their children, stripping parents of their roles as arbiter and architect of the family unit[648] and resulting in depression.[649]

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[640] McVeigh, K., op. cit.

[641] In France, the administrative detention centres (CRA) have been found to be unsuitable for children, even though family areas have been created in some of them: children who experience separation from their school and everyday environment show signs of serious mental distress - Report of the Defenseure des enfants – Children's Ombudswoman – to the United Nations Committee on the Rights of the Child on the Application of the International Convention on the Rights of the Child, 4 February 2009: <http://defenseurdesenfants.fr/english presentation.php#Report_Geneve> [accessed 29 January 2011].

[642] Dudley, M. and Blick, B., Appendix E to 'The heart of the nation's existence – a review of reports on the treatment of children in Australian detention centres', *ChilOut*, 2002; Mares, S. and Jreidini, J., 'Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues', *Australian and New Zealand Journal of Public Health*, 2004, 520; Human Rights and Equal Opportunity Commission, 'A Last Resort? National Enquiry into Children in Detention', April 2004; Steel, Z. et al., 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia', *Australian and New Zealand Journal of Public Health*, 2004, 534, cited in International Detention Coalition, 'Children in Immigration Detention Position Paper', May 2009.

[643] Bail for Immigration Detainees, Briefing Paper, 'Access to Immigration Bail', March 2009: <www.biduk.org/library/Briefing%20paper%20on%20access%20to%20bail%20February%2009.pdf> [accessed 29 January 2011].

[644] McVeigh, K., op. cit.

[645] 'The mental and physical health difficulties of children held within a British immigration detention centre: A pilot study', *Child Abuse and Neglect, the International Journal*, September 2009.

[646] Joint Committee on Human Rights, evidence session, 21 February 2007, see House of Lords/ House of Commons, Joint Committee on Human Rights, 'The Treatment of Asylum Seekers Tenth Report of Session 2006-07', Volume II, Oral and written evidence, HL Paper 81-II/ HC 60-II. Published 30 March 2007, paras. 255, 258.

[647] See, for instance, in Slovakia. Vselkova, M., 'Reception Conditions and the Impact of the EU Directive in Slovak Republic', Slovak Humanitarian Council, May 2007: <http://pomocprawna.home.pl/dosciagniecia/ ICF/9Slovakia.pdf > [accessed 29 January 2011].

[648] Brane, M. and Butera, E., op. cit.

The overall picture that emerges from many of the national reports on immigration detention is one of "a general feeling of apathy, isolation, discontent and, at times, even despair, among the detainees", attributed to the poor conditions of detention, the length of detention and the restricted regime imposed on detainees, including the inability to go outdoors, and the lack of activities to occupy the time.[650]

Overall, conditions for children and families who are placed in immigration detention are a very real cause for concern, regardless of whether the State is a developing State or an industrialised State. In February 2007, the United States-based Women's Commission for Refugee Women and Children and the Lutheran Immigration and Refugee Service published a report examining the detention conditions of families in the two Bureau of Immigration and Customs Enforcement detention centres for families in the United States.[651] The report found that facilities still looked and felt like prisons. Some families with young children had been detained in these facilities for up to two years. At night, children as young as age six were being separated from their parents, and separation was used as a disciplinary tool. Children in detention displayed widespread and obvious psychological trauma. There was visible deterioration in detainees' mental health over the course of their stay, with pregnant women receiving inadequate prenatal care, and children frequently sick and losing weight. According to the organisations that wrote the report, new standards still "fall far short of ensuring appropriate conditions for families".[652]

2.5.6 Monitoring by States[653]

Detention centres for migrants are generally run by the prison department, the police or the ministry responsible for immigration. However, in some States, detention centres are run and staffed by private contractors.[654] Many reports have found that the staff in administrative detention centres receive inadequate training, and are not subject to State or independent monitoring. The lack of accountability and training can lead to incidents of abuse and discrimination, and even of ill-treatment and torture by prison guards, police and immigration officers and private staff.[655]

The regulations of some migrant holding facilities provide for internal complaint or grievance mechanisms. However, internal complaint mechanisms are not always easily accessible, due to linguistic barriers, the lack of confidentiality of such procedures and the detainees' lack of confidence in the system. In some States, migrants do not have appropriate access to information

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[649] Human Rights and Equal Opportunity Commission, 'A last resort? A summary guide to the national inquiry into children in immigration detention', 2004, p.33.

[650] Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.

[651] Brane, M. and Butera, E., op. cit., p.23.

[652] Ibid. See also Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008, p. 43.

[653] 'States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision', Article 3(3), CRC.

[654] See Report submitted in conformity with resolution 2004/53 of the Commission on Human Rights: Visit to Italy (2004), U.N. Doc. E/CN.4/2005/85/Add.3.

[655] See Japan in Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants: Communications sent to the governments and replies received (2002), U.N. Doc. E/CN.4/2003/85/Add.1.

on how to make a complaint.[656] In addition, some migrants, especially those seeking asylum, fear that making a complaint about treatment may have a negative impact on the government's consideration of their claim. When a complaint is made, the decision of the internal review mechanism is usually final, and such mechanisms frequently allow only for internal disciplinary measures rather than a form of redress to the complainant.

Mechanisms for external oversight of migrant holding facilities are not always in place. Some States have officially established independent mechanisms, such as an Ombudsman, who can report on conditions in detention.[657] In other States, the court has the right to monitor conditions in the centres,[658] or prison inspectors include immigration detention centres in their remit.[659] However, not all States have such a system of inspection. Most States, but not all, permit some form of external access to their detention centres by international organisations, including the ICRC, representatives of human rights institutions, the Office of the UNHCR, the IOM, or regional mechanisms, such as the European Committee for the Prevention of Torture or the Commissioner for Human Rights of the Council of Europe provide an invaluable monitoring role. Some also permit NGOs and intergovernmental organisations to report on conditions in the centres.

An International Detention Coalition survey of 23 members found that 61 per cent of respondents stated that there was no official monitoring body for places of detention in their country, including: Belgium, Canada, Indonesia, Japan, Kenya, Lebanon, Poland, Spain, Sri Lanka, Thailand, and Tunisia. It was reported that while the United States does not have an official monitoring body that has the comprehensive mandate to cover all immigration detention centres, some monitoring occurs in an ad hoc manner and at different levels, such as ad hoc NGO investigation and reports, investigations by federal Inspector General Staff and periodic monitoring by the American Bar Association.[660] In South Africa, insufficient access to detention facilities prevents effective monitoring of detention practice.[661] Without monitoring and inspection by external bodies, the risks of abuse and violence to detainees are inevitably, higher.

[656] Fédération internationale des ligues des Droits de l'Homme, 'United States – Mexico', March 2008.

[657] See, for instance, Ombudsman's Recommendation, Conclusion No. 12280/01/2.2, 12280/01/2.2, Greece: Greek Ombudsman, 2001: <www.unhcr.org/refworld/docid/3f4f86824.html>; Vanuatu Ombudsman Report on Detention of a 12-Year-Old Child in Santo Prison [2003] VUOM 2; 2003.02, 24 February 2003: <www.paclii.org/vu/ombudsman/2003/2.html> [websites accessed 29 January 2011].

[658] See, for instance, Poland in Jesuit Refugee Service, 'Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union', 2007.

[659] See, for instance, the United Kingdom, where immigration detention centres fall within the remit of the Inspector of Prisons. Reports available at: <www.justice.gov.uk/inspectorates> [accessed 29 January 2011].

[660] IDC Global Detention Survey, 2008.

[661] Consortium for Refugees and Migrants in South Africa, 'Protecting Refugees & Asylum Seekers in South Africa', 2007, p. 32–33. The report notes that in 2007 non-nationals are increasingly being held at a number of prisons that are not designated by the director general of the National Immigration Branch as centres to hold people being detained for immigration offenses. In addition to the detention centre in Musina, the report cites the prisons at Pollsmoor (Western Cape) and Westville (KwaZulu-Natal).

2.6. Conclusion

A significant number of children world-wide are administratively detained for immigration purposes. For some children, such detention will be short-term, while for others it can stretch into months or years. Case law from regional bodies and the Human Rights Committee as well as reports from a range of human rights bodies and organisations show that detention is rarely a measure of last resort, or for the shortest appropriate time, and the safeguards provided in Article 9(1) and 9(4) of the ICCPR and Article 37 of the CRC are rarely vouchsafed to children. Few States have introduced alternatives to detention and few consider the best interests of the child when ordering that the child or family be administratively detained. Much of the detention that takes place would be likely, if challenged, to be considered unlawful and possibly arbitrary. However, with limited access to legal representation there is little opportunity for a child to challenge his or her detention in court. Children in administrative detention for immigration purposes are largely 'invisible'. An inability to speak the native language, and a lack of a social or family network in the detaining State leaves these children with nobody to advocate on their behalf. This, together with an absence of official monitoring of detention centres can result in poor conditions, abusive treatment and a lack of facilities and care, all of which have a significant impact on children's well-being, and their right to liberty, health, education and family life.

Sources for Table 2: Available statistical evidence on children detained in a selection of industrialised countries: (Austria): Questionnaire Response, Fronek, H., Asylukoordination osterreich. 161 unaccompanied children were detained in 2008 pending deportation; (Canada):Canadian Council for Refugees, 'Canada, the rights of the child and refugee and immigrant children', March 2009, at <www.ccrweb.ca/documents/CRCrecommendations.pdf> ; (Germany): European Migration Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors'; (Greece): Reply by the Deputy Minister of Interior to a Member of Parliament, 11 August 2008 to Human Rights Watch. It was not clear how many of these children were unaccompanied. Thirty-two were kept in the Amygdaleza detention centre for unaccompanied children, 64 in Mitilini, Lesvos Island, 35 on Samos Island, 24 on Rhodos Island, 12 in the Evros region, 79 in Attika region (among those 33 in Petrou Ralli detention centre), and 55 children were detained in the rest of Greece. In Human Rights Watch, 'Left to Survive - Systematic Failure to Protect Unaccompanied Migrant Children in Greece', 11 December 2008; (Finland): Global Detention Project, 'Finland Detention Profile'; International Save the Children Alliance, 'Save the Children reports that in 2008, 2646 children, for the most part unaccompanied minors, passed through the island's reception centre, often held in critical and inadequate conditions', January 2009: <www.savethechildren.net/alliance/media/newsdesk/2009-01-26a.html>; (Mexico): National Institution of Migration, at <www.inm.gob.mx/estadisticas/2007/rechazos.mht>, quoted in UNICEF Mexico, Questionnaire Response; (Netherlands): European Migration. Networks Studies, 'Reception, Return and Integration Policies for, and numbers of, unaccompanied minors'; (United Kingdom): United Kingdom Home Office, Control of Immigration: Quarterly Statistical Summary, United Kingdom - Fourth Quarter 2009: <www.homeoffice.gov.uk/rds/immigration-asylum-stats.html#immigasylumstats> ; (United States) Number transferred from Department of Homeland Security to Division of Unaccompanied Children's Services custody. Department of Health and Human Services, Office of Inspector General, Department of Unaccompanied Alien Children's Services: Efforts to Serve Children, March 2008. See Women's Refugee Commission, 'Halfway Home: Unaccompanied Children in Immigration Custody', February 2009, OE1-07-06-00290 , p. 1: <http://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>. The numbers for 2009 are expected to be lower. [websites accessed 29 January 2011].

3. Administrative detention of children in conflict with the law

This section examines the administrative detention of 'children in conflict with the law'. The term 'children in conflict with the law' refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence. While many children who are in conflict with the law will not be subject to any action by the police or will simply be warned against further offending behaviour, a number of children find themselves administratively detained while the alleged crime is investigated and further information gathered. Once apprehended by the police, a child will generally be administratively detained for a short period of time while his or her name and address is taken and they are asked some basic questions, before being released. Other children, however, find themselves detained for several days, weeks or even months, until such time as they are taken before a court or released. A child can be detained in a police vehicle, or in a waiting room or an interview room at the police station. Alternatively, the child may be placed in a cell at the police station, in a juvenile facility, in a police isolation facility or even a prison, either separately, with other juveniles, or in some States, with adults

In most States, after initially being detained by the police, children who are accused of committing an offence are taken before a court to be charged and tried, are released or diverted onto a non-custodial programme. However, in a few States, the case will be considered instead by an administrative body or panel that has the power to place a child found to have committed an offence in administrative detention, usually in a closed educational facility, a re-education centre or a detention centre.

Under strictly defined conditions and with specific safeguards, international law recognises and accepts the use of administrative detention in relation to children who have committed an offence. However, in practice, children who are administratively detained are afforded few, if any, of the guarantees, protections or due process rights that apply to children in the juvenile justice system.[662] Reports indicate a high frequency of abuse and even conduct amounting to torture or other inhuman, cruel and degrading treatment or punishment. Children are frequently denied access to family; to medical care; and to legal representation while detained.

3.1. Statistics

Accurate data on the number of children apprehended and administratively detained for investigation by the police is not readily available. However, it is possible to get some idea of numbers from States' 'arrest[663] statistics', which record the number of arrests that the police make in a given time period. However, arrest figures need to be treated with caution. There is a lack of uniformity between States as to what constitutes an 'arrest'. Some States treat children as 'arrested' when they are apprehended on suspicion of having committed a crime, which may or

[662] See, for instance, Article 37 of CRC; Article 9 of UDHR; Article 9 of ICCPR; Body of Principles; Beijing Rules; Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10.
[663] Under the Body of Principles 'arrest' is the act of 'apprehending a person for the alleged commission of an offence.

may not result in a charge. Other States only regard a child as arrested once it is decided that there is enough evidence to prosecute a child. Yet others treat a child as arrested when the child is formally charged with an offence. The number of 'arrests' appearing in the statistics are therefore likely to vary, depending upon which definition of arrest is used by the State in question.

There are further limitations to arrest statistics: the number of arrests is not the same as the number of people arrested, because an unknown number of children are arrested more than once during the year. If, for instance, a child is arrested three times in one year, depending upon the manner in which statistics are kept, he or she may appear three times in one year's statistics. In addition, not all States produce arrest statistics. While local police stations may keep a record of how many children are arrested, these figures, which are sometimes kept only in a hand-written log or record-book, are not sent to a central statistical body and are not collated or made generally available to the public. The failure to collect such statistics may be due simply to practice or to a lack of resources, in particular a lack of computer facilities at the local level.

Bearing all these limitations in mind, arrest statistics can nevertheless be used as a very rough indication of the numbers of children detained by the police globally. The numbers are significant, with police detention being the most likely cause of children suffering administrative detention. In the United States, for example, there were 1,623,083 arrests of under 18-year-olds in 2008.[664] In 2007, 82,608 juveniles were arrested in Japan[665], while, according to data from England and Wales, 273,041 children aged 10 to 17 years were arrested in 2008/2009; and, in the same year, 218,686 arrests were made of young people aged between 18 and 20 years.[666]

Statistics on the number of children living and working on the streets who are subject to police detention are almost impossible to obtain. Police detention of children living and working on the streets for anti-social behaviour, such as begging or loitering, may be unlawful and thus highly unlikely to be recorded.

3.2. Context and circumstances

3.2.1 Children suspected of committing a crime

As a general rule, States permit the police to apprehend and detain a child either when he or she is caught in the act of committing an offence, or where there is reasonable cause to suspect the child of having committed a criminal offence. Police detention differs from other forms of administrative detention, in that an order for administrative detention is not obtained following a hearing or the filing of evidence before an administrative body. Rather, the decision will usually be taken by an individual police officer handling the child's case. The purpose of the detention is

[664] See Crime in the United States 2008, Washington, D.C.: Federal Bureau of Investigation, 2009, tables 29, 32, 34, 36, 38, 40.

[665] Ministry of Internal Affairs and Communications of Japan, *Japan Statistical Yearbook*, 'Juvenile Offenders Arrested of General Offences under Penal Code by Type of Crime and Age (1985-2007)', p.777: <www.stat.go.jp/data/nenkan/pdf/yhyou25.pdf> [accessed 29 January 2011].

[666] United Kingdom Home Office Statistical Bulletin, Police Powers and Procedures 2008/09, Povey, D. et al., 15 April 2010: <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb0610.pdf > [accessed 29 January 2011].

generally two-fold: to allow investigation of the offence and to gather initial information from the suspect child and/or to secure the child's attendance before a court so that the child may be formally charged.[667]

3.2.2 Children recognised as having committed an offence

Where a child is accused of an offence by the police, the case will, in most States, be sent to a juvenile court or a criminal court for trial. However, in a number of States, a child who is accused of a criminal offence or anti-social behaviour, may have their case decided by an administrative body instead and, if found to have committed the offence, be subject to administrative detention. The most common form of administrative detention is placement in some form of educational centre from which the child is not free to leave at will. This practice is most evident in China, although also occurs in a number of other States, such as the Democratic People's Republic of Korea, where children under the age of 17 can be administratively detained for 'public education measures',[668] a form of detention about which the United Nations Committee on the Rights of the Child has expressed concern.[669]

In 1981, the Chinese Government explained its plan for administrative detention of children, stating that "[t]he small number of juveniles who have committed minor criminal offences, who have been educated repeatedly but will not reform, who cannot be managed by their family or by society and whose offences are not sufficiently serious to warrant arrest and criminal conviction, shall be sent to work in study schools if they are young and, if they are older, shall be sent to RTL [Re-education through labour]."[670]

Reports also indicate that, on occasion, China has used RTL to punish children who are suspected of a criminal offence but have not been convicted of the offence due to insufficient evidence to satisfy the criminal burden of proof at a criminal trial.[671] In 2003, there were 82 correctional work study schools in China,[672] although the number has since diminished.[673] The schools are administered by the Ministry of Education, with children spending two to three years at a school. During this time, children are not allowed to leave the school, make phone calls, receive visits or return home without prior approval.[674] While the Chinese Government does not

[667] Police administrative detention can also be used in the context of security detention to detain children from political opposition groups or from groups that are traditionally discriminated against by a State government. Such detention can allow different time frames for the police to conduct their investigation and bring a child before a court for formal charge. This type of administrative detention for political or security reasons is discussed in further detail at Section 1.

[668] Under Article 11.2 of Criminal Law. Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: The combined third and fourth periodic reports of States parties due in 2007: Democratic People's Republic of Korea (2008), U.N. Doc. CRC/C/PRK/4, para. 208.

[669] Ibid., 70–72.

[670] Pronounced at the Five Major Cities Meeting in 1981, p.4.2, see Biddulph, S., *Legal Reform and Administrative Powers in China*, Cambridge University Press, 2007, p.7.

[671] Biddulph, S., op. cit., p. 195.

[672] PRC Ministry of Education, 'Basic Statistics of Correctional Work-Study Schools', 2003: <www.moe.gov.cn/edoas/website18/info14284.htm> [accessed 29 January 2011].

[673] See 'Implementation of the Convention on the Rights of the Child in the Republic of China', a parallel NGO report by Human Rights in China,: <www.crin.org>, Alternative Reports, July 2005 [accessed 29 January 2011].

[674] Notice on Suggestions to Improve Correctional Work Study School. See Wong, D. S.W., 'Changes in Juvenile Justice in China', *Youth and Society*, 4 June 2001, 92,499.

publish regular information on the numbers of inmates held in RTL camps, it has admitted that in 2009 that there were 320 camps with 190,000 inmates,[675] including both adults and children. There are no separate figures for children held in RTL camps, although the NGO, Human Rights in China,[676] in its alternative report to the Committee on the Rights of the Child in 2005, was able to provide evidence that in May 2000, 3,895 children were held in four of the RTL facilities. Various NGOs have identified other RTL camps which hold juveniles. While there are no statistics detailing the numbers of children held, the number clearly runs into thousands.

3.2.3 Detention of children living and working on the streets

Children living and working on the streets face a particularly high risk of being apprehended by the police, not necessarily because they are suspected of having committed a criminal offence, but because they are frequently regarded as behaving in an anti-social manner. Children who live and work on the street risk being detained in order to 'clean' the streets,[677] to show the public that action is being taken to address what is often viewed as a public nuisance or to remove the children from public view. While is some cases, concern for the welfare of children living and working on the streets may underlie police detention, in many instances the purpose is simply to cause the children to move away from the area in which they are congregating, working or living.

Detention of children living and working on the streets commonly follows police raids. The children may be detained for short periods in police vehicles or at the police station. While in most cases, detention is short term and the child is released without charge, in other cases children may be held for extended periods of time by the police, or placed in a detention centre by an administrative body or by the police themselves.

Detention of children living and working on the streets by the police is not region specific and there are reports of the practice occurring throughout the world.[678] In Sudan, for instance, children living and working on the streets "are regularly picked up by the police who extract bribes, beat, humiliate and harass them", before releasing them onto the streets once more, without charging them with a criminal offence.[679] The Committee on the Rights of the Child has also expressed concern about reports from the Democratic Republic of the Congo that the military and police regularly harass, threaten, beat or arrest children living and working on the streets.[680]

In Viet Nam, too, it is reported that police in Hanoi routinely conduct round-up campaigns to clear public areas of homeless people and children living and working on the street, largely for the purposes of keeping the children off the streets.[681]

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[675] Human Rights Council, Universal Periodic Review, Fourth Session, 2–13 February 2009, China, para. 66.
[676] Human Rights in China, Shadow report submitted to the Committee on the Rights of the Child, 2005, para. 47.
[677] See, for instance, Human Rights Watch, 'Children of the Dust: Abuse of Hanoi Street Children in Detention', 2006, 35.
[678] It should be noted that some children living and working on the streets can be administratively detained by the police for committing administrative or status offences.
[679] Sudanese Organization Against Torture, 'Annual Report on the Human Rights Situation in Sudan', 2002, cited in World Organisation Against Torture, 'Rights of the Child in Sudan', 1 October 2002, 36
[680] Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Democratic Republic of the Congo (2009), U.N. Doc. CRC/C/COD/CO/2.

In South Asia, the arrest and detention of children living and working on the streets by police officers on grounds such as vagrancy, indecent behaviour or prostitution, being a public nuisance, incorrigible or exposed to moral danger is reported to occur in Bangladesh, Nepal, Pakistan and Sri Lanka.[682] In Bangladesh and Sri Lanka children living and working on the streets and children forced into prostitution are reported as being held "by the police without being formally charged and without any record of their arrest, and may be detained in so called 'safe custody' for unspecified times until taken before a court".[683] In Bangladesh, specifically, "there are allegations that homeless and children living and working on the streets are rounded up by the law enforcing agencies, often for a silly cause or without any causes."[684]

The detention of children to clear the streets in anticipation of an international event in a country is a recognised phenomenon. For example, in Viet Nam, in August 2003, the Government issued a decision to "take all 'wanderers, beggars, and child job seekers' into social protection centres before the South East Asia Games"[685] hosted by Viet Nam in December of that year. It was also reported in early 2010, by child rights groups in South Africa that children living and working on the streets in the major cities were being rounded up into makeshift camps or simply driven to the city outskirts and 'dumped' in order to clean up the streets in advance of the 2010 FIFA World Cup.[686]

3.3. Legal framework

3.3.1 Right to liberty and security of person

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention (For details of provisions, see Introduction.).

The provisions of Article 37(b) of the CRC are also contained in the Body of Principles. The right to liberty and security of the person is mirrored in regional human rights instruments, including Article 5 of the Arab Charter, Article 6 of the Banjul Charter, Article 7 of the American Convention, Article 1 of the American Declaration on the Rights and Duties of Man and Article 5 of the European Convention.

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[681] Human Rights Watch, 'Children of the Dust', 2006, 35–7.
[682] United Nations Children's Fund/Inter-Parliamentary Union, 'Improving the Protection of Children in Conflict with the Law in South Asia', 2007: <www.ipu.org/PDF/publications/chil_law_en.pdf> [accessed 29 January 2011].
[683] Ibid.
[684] Bangladesh Shishu Adikhar Forum, 'Alternative Report on the implementation of UNCRC in Bangladesh 2001-2006', Dhaka, Bangladesh, December 2007.
[685] Volkmann, C., '30 years after the war: Children, families and rights in Vietnam', *International Journal of Law, Policy and the Family*, 19:1, p. 23–46, 2005, citing Ministry of Labour, War Invalids and Social Affairs (2003) Decision No 2886/LDTBXH-BTXA. Hanoi: 22 August.
[686] See, for instance, 'Metro police deny charges of street children abuse', *Times Live*, 14 February 2010: <www.timeslive.co.za/sundaytimes/article305799.ece>; Casa Alianza, 'Urgent Action - STOP South Africa World Cup round ups of Street Children and the homeless', 7 April 2010: <www.casa-alianza.org.uk/northsouth/CasaWeb.nsf/CasaNews/7B9FC5AC8354DB55802576FE003FC097?OpenDocument> [websites accessed 29 January 2011].

The Havana Rules provide a further limitation on detention and not only require that detention should be used as a last resort, but also that placing a child in detention should "be limited to exceptional cases".[687] The Beijing Rules reiterate that, under Rule 17(b), any detention should be brief and state that under Rule 17(c) this should only occur where the child has committed "a serious act involving violence".

In addition, Article 3 of the CRC requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be the primary consideration." This means that the issue of whether the best interests of the child have been a primary consideration must be taken into account in determining whether the detention is necessary and proportionate. Other human rights standards, such as non-discrimination, are also relevant.[688] For instance, the administrative detention of a particular group of children chosen on the basis of religion, race, nationality or ethnicity is likely to be regarded as disproportionate and therefore arbitrary.

3.3.2 Administrative detention must be lawful

Under certain strictly defined conditions and with specific safeguards, international law recognises and accepts the use of administrative detention in relation to children who have committed an offence. For example, it is accepted in the Havana Rules[689] and in the United Nations Body of Principles,[690] that, a child can be received in a detention facility as a result of an order of an administrative authority, and not just a judicial authority. However, administrative detention of children who have committed an offence or who are deemed to be anti-social will only be treated as lawful if the domestic law of the State clearly permits such detention. The relevant law must have adequate clarity and regulate the procedure for the administrative detention,[691] while the detention itself must be carried out by competent officials or persons authorised for that purpose.[692]

When there are no provisions, the provisions are vague and lack specificity or there are no set procedures for the administrative detention of children who commit an offence or an anti-social act, any such detention will not be in conformity with the law and will, therefore, constitute unlawful detention in breach of Article 9(1) of the ICCPR and Article 37(b) of the CRC. United Nations bodies have raised concern about the practice of a number of States in this respect. For instance, the Committee on the Rights of the Child noted in its Concluding Observations to the State report of the Philippines, that arrests and detention of children living and working on the streets were not in conformity with domestic law,[693] a concern echoed by the Human Rights

[687] Rules 1, 2 of Havana Rules.
[688] See, for instance, Article 2 of the CRC, which states that 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.
[689] Rule 20 of Havana Rules.
[690] Principles 2, 4 of Body of Principles.
[691] *Bolanos v. Ecuador*, Communication No. 238/1987; *Domukovsky v. Georgia*, No. 623, 624, 626 and 627/1995.
[692] Principles 2, 4 of Body of Principles.
[693] Committee on the Rights of the Child: Concluding Observations: Philippines (2005), U.N. Doc. CRC/C/15/Add.259, paras. 83, 84. The Law permitting the detention of children living and working on the streets was too vague and lacking in specificity making the detention not 'in conformity with the law'.

Committee.[694] The United Nations Working Group on Arbitrary Detention[695] has also found the administrative detention of children in RTL not to be in conformity with Chinese domestic law.[696] The Working Group concluded, following a mission to China, that proper procedures had not been followed when decisions were made to subject a child to administrative detention, thus making the detention of children in RTL "unlawful" within the meaning of Article 9 of the ICCPR and Article 37 of the CRC. The Working Group stated that "[f]rom reliable sources, including interviews with persons affected, it is clear that in the overwhelming majority of cases, a decision on placement in a re-education centre is not taken within a formal procedure provided by law. The Commission vested with the power to take this decision in practice never or seldom meets, the person affected does not appear before it and is not heard, no public and adversarial procedure is conducted, no formal and reasoned decision on a placement is taken (or issued for the person affected). Thus, the decision-making process completely lacks transparency. In addition, recourse against decisions is often considered after the term in a centre has been served."

3.3.3 Administrative detention must not be arbitrary

Even where provisions permitting administrative detention are contained in domestic law, there is also a requirement that the administrative detention must not be arbitrary, as mentioned above.

Determining whether the administrative detention of a child is necessary and proportionate will depend upon the circumstances of the individual case, and the purpose of the detention. In the case of a child, administrative detention will only be necessary and proportionate when it meets the requirements of Article 37(b) of the CRC, in that it is used as a matter of last resort and for the shortest appropriate period of time. Detention should "not continue beyond the period for which the State can provide appropriate justification".[697] If it does then it may become arbitrary (i.e. because it will no longer seen as necessary and proportionate), and therefore unlawful. [698]

3.3.4 Safeguards

To ensure that administrative detention of children who are alleged to, accused of or are recognised as having committed an offence is lawful, States need to ensure that such children are provided with all the necessary procedural safeguards and guarantees (For a detailed list of safeguards, see Introduction.). These include the right to be informed, at the time of arrest, of the reasons for arrest, and to be informed promptly of any charges; to be presumed innocent until proven guilty according to law; if arrested or detained on a criminal charge, to be brought promptly before a judge or other officer authorised by law to exercise judicial power and a right to trial within a reasonable time or release; not to be detained in custody awaiting trial as a general rule, however, release may be subject to guarantees to appear for trial; the right to

[694] Human Rights Committee: Concluding Observations: Philippines (2003), U.N. Doc. CCPR/CO/79/PHL, para. 14.
[695] WG on Arbitrary Detention: Addendum: Mission to China (2004), U.N. Doc. E/CN.4/2005/6/Add.4.
[696] The Law Concerning Administrative Sanctions of 1996, the Legislation Law of 2000, Articles 62 and 63 and the Constitution, Article 67(2) all provide that only the National Peoples' Congress or its Standing Committee can make laws. Neither body has passed a law on RTL, and thus the 1982 and 1992 Regulations, which were issued by the Ministry of Public Security and the Ministry of Justice respectively, and which are the basis upon which children are placed in administrative detention in a RTL camp is not valid domestic law.
[697] *A. v. Australia*, 1997, para. 9.4; *C. v. Australia*, 2002, para. 8.2.
[698] *A. v. Australia*, 1997.

challenge the legality of the detention; the right to protection against incommunicado detention, including the right to be kept at officially recognised places of detention; and the right to maintain contact with the family through correspondence and visits. They also include the right to access legal counsel and other appropriate assistance and, in addition, Article 25 of the CRC requires that the child's case should be reviewed at regular intervals, not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release.

The ICCPR and CRC[699] provide an additional safeguard that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law", with the Human Rights Committee clarifying the meaning of a competent, independent and impartial tribunal (See Introduction.).

In addition, Article 3 of the CRC requires that the best interests of the child remain the primary consideration "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". This means that even where the State ensures all the safeguards cited above are implemented, the issues of whether the best interests of the child have been a primary consideration must be taken into account in determining whether the detention is necessary and proportionate. Other human rights standards, such as non-discrimination, are also relevant.[700] For instance, the administrative detention of a particular group of children chosen on the basis of religion, race, nationality or ethnicity is likely to be regarded as disproportionate and, therefore, arbitrary.

3.4. State laws, policies and practices

3.4.1 Legal time limits

Although most States have passed legislation limiting the period of time for which children can be held in police detention, the length of time varies considerably across States. The Committee on the Rights of the Child has recommended that children should not be held in police detention for longer than a maximum period of 24 hours.[701] After that time, a child should be brought before a judge and an order for a further period of detention sought, or the child should be released.

The maximum length of permitted police detention (before the child is taken before a judge) varies significantly across States[702]: from as little as 6 hours in Guatemala,[703] to 24 hours in Brazil,[704] Egypt,[705] India[706] and Kosovo,[707] to six months in Saudi Arabia[708] (See Table 3 below.).

[699] Article 14(3) of ICCPR; Article 40(2)(b)(iii) of CRC.
[700] See, for instance, Article 2 of the CRC, which states that 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.
[701] The Human Rights Committee also adds that the detention must be 'necessary in all the circumstances of the case and proportionate to the ends being sought'.
[701] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 83.
[702] See Table 2.
[703] Article 6 of Constitution, 1985 (amended in 1993); Article 195 of Law on Integral Protection of Children and Adolescents, 2003.
[704] Constitución Federal, 1988; Estatuto de La Niñez y Adolescencia, 1990.

There is no clear regional pattern applicable to police detention, but some countries within the Middle East and North Africa region permit particularly long periods of police detention of children. For example, Algeria allows children to be detained pre-charge for up to 12 days, a time frame that can be extended,[709] while Iran's Criminal Procedure Code permits police detention of up to one month, which can also be renewed.[710]

Table 3: Examples of length of police detention*

Length of police detention permissible under domestic law	State
6 hours	Guatemala
24 hours	Brazil
24 hours	Egypt
24 hours	Kosovo
2 days	Nigeria
72 hours (10 days for homicide)	Sierra Leone
7 days	Burundi
12 days	Algeria
14 days (28 days for terrorism offences)	Pakistan
25 days	Nepal
1 month	Iran
6 months	Saudi Arabia
6 months (drug trafficking) or 45-90 days (depending on crime)	Mozambique
8 months	Mongolia

* For sources, see end of section.

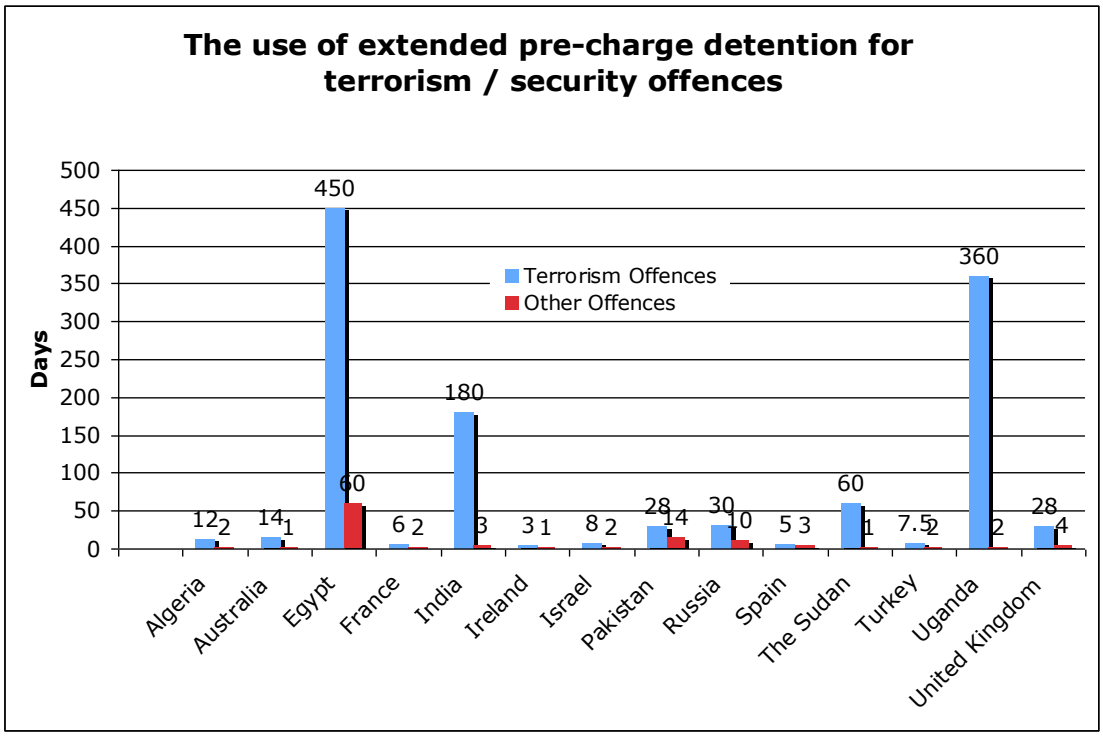
Any period of police detention longer than 24 hours must, on the face of it, be regarded as potentially amounting to unnecessary and disproportionate (i.e. arbitrary) detention, rendering it unlawful, unless there are reasons that can justify the longer detention.[711]

A particular issue arises in relation to children held in police detention for suspected terrorism offences. Since the terrorist attacks in the United States on the 11 September 2001,[712] many States have passed laws which permit extended periods of police detention for persons suspected of committing a terrorist offence.[713] These periods generally exceed the periods of detention permitted by domestic law for other crimes. The rationale for this is that terrorist offences often take longer to investigate, as evidence and information may be sought from abroad and take longer to obtain. According to the Working Group on Arbitrary Detention, many administrative

[705] Article 180 of Penal Code (Law 58 of 1937) as amended (in Arabic).
[706] Section 10 of Juvenile Justice (Care and Protection of Children) Act 2000, as amended.
[707] Article 63 of Juvenile Justice Code, 2004.
[708] Human Rights Watch, 'Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System', 2008, 2, 3.
[709] Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding observations: Algeria (2007), U.N.Doc. CCPR/C/DZA/CO/3, para. 77.
[710] United Nations General Assembly, Report of the Secretary-General on the situation of human rights in the Islamic Republic of Iran (2008), U.N. Doc. A/63/459, para. 6.
[711] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 83 states that 'Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours.'
[712] See Section 1.
[713] For instance, in England and Wales, the period for pre-trial detention was increased from 14 days to 28 days in 2006 and an attempt to further extend this to 42 days was defeated in Parliament in 2008.

detention regimes introduced or toughened following the post-11 September terrorist attacks are aimed at "circumventing the legal time limits governing police custody".[714] Children can find themselves detained for very much longer periods of time than the 24-hour limit recommended by the Committee on the Rights of the Child,[715] before they are brought before a judge. Figure 1 4 contains examples[716] of the extended periods of police detention used by States for terrorism-related offences.

Figure 1



As Figure 1 illustrates, the maximum periods of police detention for terrorism-related offences are far greater than for other offences. While the purpose of police detention is to carry out investigations with a view to laying criminal charges on an individual, extended police detention may be used in circumstances which do not ultimately lead to an individual being charged with an offence. For example, of the 26 children arrested under terrorism legislation and placed in police detention in the United Kingdom, only 5 (15 per cent) were ultimately charged with an

[714] WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 61.
[715] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 83.
[716] The table of countries is not exhaustive and other States may use extended periods of pre-charge detention for security/terrorism offences. Algeria: Article 51 of Code of Criminal Procedure; Egypt: Article 91 of Criminal Procedure Code; Israel: Israeli military orders: see Defence for Children International, 'Palestinian Child Prisoners' (2008); Pakistan: Anti-Terrorism Act 1997; Russia: Article 100, part 2 of Criminal Procedure Code, as amended by Federal Law on Amending the Criminal Procedure Code of the Russian Federation, No. 18-FZ, 22 April 2004; Spain: Terrorism offences: s.520 Law of Criminal Procedure; other offences: s.17.2 Law of Criminal Procedure; United Kingdom: Terrorism offences – Schedule 8 Terrorism Act 2000; other offences – s.44 of Police and Criminal Evidence Act 1984.

offence.[717] While such a low rate of arrests leading to criminal charges may be explained by the inability to collect sufficient evidence to substantiate criminal charges, it may indicate that police detention is being used in the context of terrorism as a form of preventive detention.[718]

3.4.2 Right to be brought promptly before a judge

While most States set maximum time periods for police detention, not all States comply with their own domestic statutory provisions or guidelines. Concerns about children being held for longer than the maximum permitted time in domestic law have been raised by the Committee on the Rights of the Child[719] in relation to a number of States, including Sierra Leone,[720] where children in conflict with the law often suffer from extended periods of pre-charge detention despite the statutory limit of 72 hours.[721] Similar concerns were raised by members of the Committee on the Rights of the Child[722] in relation to practices in Burkina Faso and by the United Nations Special Rapporteur against torture[723] and the World Organisation Against Torture[724] about failure to implement time limits for police detention in Cameroon. Reports on extended periods of police detention of children beyond that permitted in domestic law have also been noted in relation to Uganda[725] and Burundi,[726] where children are regularly held in police detention for months, despite the legal limit in domestic law of 14 days.

The extension of police detention beyond the permitted maximum is not confined to Africa. An Alternative Report to the Committee on the Rights of the Child on the Philippines indicated that there have been reports of some children languishing in police administrative detention for "weeks or even months"[727] while in Pakistan, a Human Rights Watch report has indicated that despite Pakistani laws requiring that children are brought to a magistrate "within twenty-four hours of their arrest" many children are "held in police lockups for considerably longer periods before being produced in front of a magistrate, often for two weeks, and in one case, for three months".[728]

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[717] United Kingdom Home Office Statistical Bulletin, Operation of Police Powers under the Terrorism Act 2000 and Subsequent legislation: Arrests, Outcomes and Stop and Searches, 26 November 2009: <www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf p. 19> [accessed 29 January 2011].

[718] Preventive detention is detention that is not imposed as the punishment for a crime, but in order to prevent a person from committing a crime, if that person is deemed likely to commit a crime.

[719] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 80.

[720] Child Rights Coalition Sierra Leone, 'A Complementary report by non-governmental organizations to the State Party report of Sierra Leone' (2005), on the implementation of the Convention on the Rights of the Child, 37.

[721] Ibid.

[722] Committee on the Rights of the Child, Burkina Faso (1994), U.N. Doc. CRC/C/15/Add.19.

[723] Commission on Human Rights, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38: Addendum: Visit by the Special Rapporteur to Cameroon, U.N. Doc. E/CN.4/2000/9/Add.2, 1999, para. 49.

[724] 'Détentions abusives', *Cameroun Actualités*, 30 December 1997, cited in World Organisation Against Torture, 'Rights of the Child in the Republic of Cameroon,' 2001, 31.

[725] 'NGO Complementary Report to the Government of Uganda First Period Report on the CRC', Uganda Child Rights NGO Network (2000): <www.crin.org/resources/infoDetail.asp?ID=5881&flag=legal> [accessed 29 January 2011].

[726] See Section 6.

[727] Southeast Asia Coalition to Stop the Use of Armed Soldiers, 'Alternative Report: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict', (OP-CRC-AC), 2008.

[728] Human Rights Watch, 'Prison Bound: The Denial of Juvenile Justice in Pakistan', 1999, p. 52.

There are seemingly a number of reasons for detention beyond the maximum permitted time. Those given include a lack of police resources, making it impossible to complete investigations within the set time-frame,[729] a backlog of cases pending in the courts, resulting in children having to wait before being given the opportunity to appear before a court and a lack of appropriately trained police and investigators. Other contributing factors are a lack of understanding of the legislation, a weak or non-existent police inspection system, a lack of judicial oversight, a lack of court management and a lack of legal representation for children, resulting in a failure to challenge extended police detention.[730] A further contributing factor is likely to be the lack of welfare resources for children living and working on the streets in many of the States using extended periods of police detention.

The Child Rights Coalition reporting on the police detention of children beyond the legal limit of 72 hours in Sierra Leone, noted that "[o]nly one juvenile court exists in the country, in Freetown…The solitary existing court consists of what is actually a makeshift court, comprising court officials (including Justices of the Peace and Magistrates) who have not been trained in children's rights or child crime…The system results in extended delays for children in Remand Homes or jails awaiting trial. It is not unheard-of for a child to live for years in a prison or Remand Home without even having faced preliminary trial."[731]

A requirement that a child prove, through production of identification documents, that he or she is under the age of eighteen can also result in children being held over the maximum permitted time. For example, in Ecuador, the United Nations Working Group on Arbitrary Detention reported that by law, if a suspect is reported to be a minor, it must be presumed to be true. In such cases, persons stating that they are minors must be placed under the authority of the Prosecutor for Juvenile Offenders, and in the custody of the appropriate social services. The Working Group, however, met several persons who claimed to be minors and who were held in overflowing police cells and pre-trial detention centres, awaiting documentary proof of their age.[732]

3.4.3 Right to trial before a competent, independent and impartial tribunal

Article 9(3) of the ICCPR provides that anyone arrested or detained on a criminal charge has a right to trial within a reasonable time. The right to trial is further elucidated in Article 14 of the ICCPR, which states that, in the case of a criminal charge being laid against the child, the child is

[729] See Section 6. The police stated that a lack of paper or pens to complete a file, and the lack of police patrol vehicles in which they could travel to interview witnesses made it difficult to complete an investigation within the set time-frame.

[730] The difficulty caused by limited resources has been reported by the Government of Burkina Faso (U.N. Doc. CRC/C/65/Add.18). The government expressed concerns that children were often held for far longer than the permitted 24 hours. Alternative Reports to the Committee on the Rights of the Child on Sierra Leone also indicate that children in conflict with the law often suffer from extended periods of police detention despite the statutory limit of 72 hours: Child Rights Coalition Sierra Leone, 'A Complementary report by non-governmental organizations to the State Party report of Sierra Leone' (2005), 37.

[731] Child Rights Coalition Sierra Leone, 'A Complementary report by non-governmental organizations to the State Party report of Sierra Leone' (2005), 37.

[732] Human Rights Council, WG on Arbitrary Detention: Addendum: Mission to Ecuador (2006), U.N. Doc. A/HRC/4/40/Add.2, paras. 73–75.

entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. In order to meet this standard, any 'trial' must be before a tribunal that is independent of the executive branches of government. Thus, an administrative body which contains members of the executive is unlikely to be regarded as fulfilling the requirements of Article 14 of the ICCPR. Despite these very clear provisions, children may find that the criminal case against them is dealt with by an administrative body, which does not fulfil the criteria of independence and impartiality, without the matter ever coming to trial before a court.

In China, a number of organisations have reported that children are not given a full hearing before a competent, independent and impartial authority before being deprived of liberty.[733] The body that applies for a child to be administratively detained in a re-education through labour camp (RTL), is the same body that is also competent to render the decision to detain the child in an RTL. Further examples of failure to bring a child to trial can be found in the Sudan**,** where children living and working on the streets are taken directly to reform centres and detention camps by the police,[734] without any pretence of a trial.

Children living and working on the streets are vulnerable to long-term administrative detention, sometimes for many months or even years, without ever being formally charged, seeing a judge or appearing before a tribunal or court. For instance, in Rwanda, it has been alleged that children are apprehended and placed in the Gikondo Detention Center without any form of trial or hearing at all.[735] Similarly, in Argentina, the United Nations Working Group on Arbitrary Detention expressed concern about the treatment of children living and working on the streets, and, particularly, about the detention of children living and working on the streets and children exploited in begging without a hearing: "Preliminary investigations are carried out in the police stations and a judicial file is opened…The Judge intervenes only *a posteriori*…All of the children interviewed at the Social and Educational Guidance Centre (COSE) in Mendoza stated that they had never been taken before a judge."[736]

3.4.4 Right to challenge the legality of detention

In addition to the right to a trial before a competent, independent and impartial authority, Article 9(4) of the ICCPR and Article 37(d) also give a child the right to challenge the administrative decision to detain before a court.[737] In China, the Administrative Procedure Law of 1996 purports to provide a right of judicial challenge to children as required by these Articles. However, the Working Group on Arbitrary Detention found that, in practice, there was no genuine right for a child to challenge his or her administrative detention.[738] A recent United

[733] Amnesty International, 'People's Republic of China: Abolishing "Re-education Through Labour" and Other Forms of Punitive Administrative Detention', AI17/016/2006, May 2006, p. 11

[734] World Organisation Against Torture, 'Rights of the Child in Sudan, Alternative Report to the Committee on the Rights of the Child', 2002, 16.

[735] Human Rights Watch, 'Swept Away: Street Children Illegally Detained in Kigali, Rwanda', 2006, 6.

[736] Commission on Human Rights, WG on Arbitrary Detention: Addendum: Visit to Argentina (2003), U.N. Doc. E/CN.4/2004/3/Add.3, paras. 55-56.

[737] Article 37(d) and Article 40(2)(b)(iii) of the CRC provides that a child should have a right to challenge the detention before a court or before a competent, independent and impartial authority. Article 9 (3) of the ICCPR is narrower: the right is to challenge before a court. The CRC provision would allow challenges to be made to specially established bodies that deal with juvenile justice cases if they exist in the State, provided that the body meets the criteria set out in Article 37(d).

[738] WG on Arbitrary Detention: Addendum: Mission to China (2004), U.N. Doc. E/CN.4/2005/6/Add.4, para. 70.

Nations Committee against Torture shadow report of a survey conducted by the Chinese Human Rights Defenders in 2008 shows that "only 5% of the one thousand interviewees sent to RTL applied for administrative review or filed an administrative lawsuit. Out of those 50 individuals, only one was granted a shorter punishment…None of the fifty managed to overturn the initial RTL decision using the two remedies."[739]

3.4.5 Access to legal assistance

The legislation of most States permits children apprehended and detained by the police to have access to legal assistance and representation. However, in practice, the police do not always inform the child of his or her right to legal assistance. Further, unless the child or his family are able to pay for such legal representation, it is generally not available. Most States do not have a legal aid system that pays a lawyer to represent a child detained by the police, although the bar associations of many States seek to provide lawyers prepared to represent a child without payment.[740] In those States where children are provided with free legal representation under a legal aid scheme, payment rates are often very low, resulting in children receiving representation either from newly qualified, and inexperienced lawyers or from law students.[741] While the CRC does not address the issue of free legal aid, the ICCPR enshrines the right to free legal assistance if the child or parents cannot pay. The extent to which States implement this right and provide free legal aid to children varies significantly. The Committee on the Rights of the Child has highlighted the problems facing children living and working on the streets in the Philippines in accessing legal assistance[742] and has also commented on the lack of legal assistance to children who are detained in Togo.[743] Legal representation should be available to children as soon as they are detained by the police and throughout the process until final resolution following trial or the child is released. Without some form of free legal aid, it is difficult to ensure that effective legal representation will be available to the child.[744]

The mere fact that legal representation is permitted, does not, however, ensure that children receive it. Access to legal representation may be frustrated due to obstruction on the part of the police or prosecution service. A report for the United Nations High Commissioner for Human Rights noted in Nepal, for instance, that "children facing criminal charges were regularly without legal representation …..and lawyers who had tried to see them had been denied access."[745] In China, children who are involved in "non-penal correctional measures", such as custody or

[739] Ibid.; Chinese Human Rights Defenders, 'Re-education through Labor Abuses Continue Unabated: Overhaul Long Overdue', 4 February 2009, p. 12.
[740] See, for instance, Antigua, Tajikistan and Georgia.
[741] See Hamilton, C., 'Guidance for Legislative Reform on Juvenile Justice', United Nations Children's Fund, 2011.
[742] Committee on the Rights of the Child: Concluding Observations: Philippines (2005), U.N. Doc. CRC/C/15/Add.259, para. 90.
[743] Committee on the Rights of the Child: Concluding Observations: Togo (2005), U.N. Doc. CRC/C/15/Add.255, para. 74.
[744] See Economic and Social Council Resolution 1997/30 (Guidelines for Action on Children in the Criminal Justice System), para. 16 which emphasises that 'priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice'.
[745] Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal (2006), para. 92.

education measures, are not provided with legal representation.[746] Human rights groups from Tibet have also alleged that children in RTL programmes were not "granted access to a lawyer at any stage".[747]

Although in the majority of States, however, children are permitted to have legal representation when in police detention or when a body or panel is deciding whether to order a period of administrative detention, this is not always in the case. In Bangladesh, for example, children who are held under the Vagrancy Act, 1943, and who face being held for long periods of time before being produced before a Magistrate, are not entitled to legal representation.[748]

3.5. Child rights at risk

3.5.1 Conditions of detention facilities

Children in administrative detention are vulnerable and reports indicate a high frequency of abuse or even torture or other inhuman, cruel and degrading treatment or punishment. Frequently denied access to family,[749] to medical care and to legal representation while detained, it is not common for children to complain of the treatment that they receive. The isolation of these children, the lack of written guidance on the safeguards to be applied and the lack of external oversight or monitoring of the detention prior to the child being taken before a court can all lead to an increase in vulnerability,[750] or even death in some cases, as detailed in *Villagrán-Morales et al. v. Guatemala*.[751]

Allegations of treatment amounting to torture or other cruel, inhuman or degrading treatment have been made with respect to Tibetan children held in detention in China, who are reported as having been beaten, subjected to electric shocks, and other psychological forms of torture.[752] Human Rights Watch has also collected detailed allegations about the treatment of children held in detention in Viet Nam, including "corporal punishment, collective punishment, placement in isolation, deprivation of food and medical treatment, and denial of family contact",[753] all of which are prohibited by the United Nations Havana Rules.[754]

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[746] Human Rights in China, Alternative Report, 'Implementation of the Convention on the Rights of the Child in the People's Republic of China' (2005), para. 45.
[747] International Campaign for Tibet, 'Alternative Report for the Committee on the Rights of the Child, Violations of the Convention on the Rights of the Child in Tibetan Autonomous Areas of China', Section H of Special Protection Measures (2005).
[748] Committee on the Rights of the Child: Concluding Observations: Bangladesh (2009), U.N. Doc. CRC/C/BGD/4, para. 383.
[749] See, for instance, Georgia, where the legislation permits children to be held for 72 hours in police isolation without any family visits, before being taken before a court.
[750] Of 23 children in police detention in Burundi interviewed for this study, 7 out of 23 stated that they had been abused. This was probably an under-estimate of the level of abuse as some were anxious about speaking in case their complaint was made known to the police. See Section 6.
[751] Case of the "Street Children", *Villagran-Morales et al. v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), 19 November 1999.
[752] International Campaign for Tibet, 'Alternative Report for the Committee on the Rights of the Child, Violations of the Convention on the Rights of the Child in Tibetan Autonomous Areas of China', Section H of Special Protection Measures (2005), para. H.1.
[753] Human Rights Watch, 'Children of the Dust', 2006, 43.
[754] Rule 67 of Havana Rules.

Abusive treatment is not confined to one geographical area. In Burundi, children are kept in small and overcrowded cells, with many children claiming that they have to sleep in turn due to lack of space. Sanitary facilities are extremely poor, with no separate toilet areas and no soap for washing. The police in Burundi lack funds to feed the children in police detention, leaving children reliant on families or the kindness of others for food.[755] According to the Committee against Torture, these types of conditions and treatment amount to inhuman and degrading treatment, in contravention of international law.[756] Similar comments have been made by Human Rights Watch in relation to Kenya, where it was reported that once arrested, children living and working on the streets are held in deplorable conditions, including run-down facilities, inadequate supplies of water and inoperative sanitary installations, inadequate and dirty bedding materials, the frequent use of corporal punishment and no provisions whatsoever to meet the recreational and educational needs of children.[757] The Committee on the Rights of the Child has expressed its concern at reports of inhumane conditions for children in police detention in Benin[758] while the Human Rights Committee have also noted the precarious material conditions in which children living and working on the streets were detained in Rwanda.[759]

In order to safeguard children, all facilities need to set minimum standards of treatment and care. These are contained in the Havana Rules. Standard setting alone is unlikely to provide adequate protection for children, however, and it is essential that States set up an inspection and monitoring body that is independent of both the police and the body responsible for ordering the child's detention and for running the detention facility. [760]

3.5.2 Separation from adults and the right to maintain contact with family

Article 10(3) of the ICCPR and Article 37(c) of the CRC require that children should be detained separately from adults or from convicted children, but reports of a failure to separate adults from children in detention facilities are commonplace and are particularly evident when children are detained in short term police detention.[761]

Although Article 37(c) provides that every child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances, this right is also not always fully implemented, or indeed implemented at all. The Committee on the Rights of the Child has recommended that States should set out clearly in law, the exceptional circumstances that may limit this contact and not leave it to the discretion of the competent authorities.[762] However, in some States family visits are only allowed with express permission.

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[755] See Section 6.
[756] Committee against Torture, Conclusions and Recommendations: Burundi, U.N. Doc. CAT/C/BDI/CO/1, para. 17.
[757] Human Rights Watch, 'Kenya- Rights at Risk: Issues of Concern for Kenyan Children, A Report Prepared for the Committee on the Rights of the Child', 19 April 2001.
[758] Committee on the Rights of the Child, Concluding Observations: Benin (2006), U.N. Doc. CRC/C/BEN/CO/2, para. 75.
[759] Human Rights Committee, Concluding Observations: Rwanda (2009), U.N. Doc. CCPR/C/RWA/CO/3, para. 16.
[760] Ibid., Rules 72–78.
[761] See, for instance, Viet Nam in Human Rights Watch, 'Children of the Dust', 2006; United Nations Children's Fund, Questionnaire Response, 2009, 5.
[762] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 87.

In Mongolia, no family visits are allowed in the police lock-ups without express permission from the police.[763] A further example of this practice would also appear to apply to children detained in RTL camps in China. NGOs have reported that children are prohibited from contacting family members unless they obtain express permission, which is rarely granted.[764]

In other States, the lack of family visits can be due to a failure to inform parents that children are being held by the police in administrative detention; or because the place of detention is too far from the family home. In Viet Nam, evidence suggests that parents are not notified of the detention of their children and the child is not able to inform them that he or she has been detained or the place of that detention.[765] The effect of not seeing family was described by the children in police lock ups in Burundi. When interviewed, most children said that they had not had any visitors during their time in detention and they had found this extremely distressing.[766]

3.6. Conclusion

In a significant number of States, children who have been suspected or accused of committing an offence are administratively detained. For some children, such detention will be short-term, while for others it can stretch into months or years. Although international human rights instruments require that detention be a measure of last resort and for the shortest appropriate time, these principles are rarely adhered to. Few States have introduced alternatives to detention and few consider the best interests of the child when ordering that the child be administratively detained. The safeguards provided in Articles 9(1) and 9(4) of the ICCPR and Article 37 of the CRC are also seldom available to children. With limited access to legal representation there is little opportunity for a child to challenge his or her detention in court. Children may not know or understand that legal assistance can be obtained, or there may be a lack of free legal representation and an inability on the part of the child and/or family to pay for legal services. This, together with minimal written guidance on the safeguards to be applied and the lack of external oversight or monitoring of the detention prior to the child being taken before a court, results in poor conditions, abusive treatment, and a failure to respect the rights of the child.

There is likely to be little change to practices which breach children's rights without further and better implementation of juvenile justice systems. This, as a minimum, requires good training for all personnel working within the juvenile justice system, including the judiciary, prosecutors, social workers, police, custody officers, NGOs and lawyers. It also requires that children and the population at large are far better informed about their rights and that all places of detention are regularly monitored and good quality legal assistance is readily available.

* Sources for Table 3: Examples of length of police detention: Guatemala: Article 195 of Integral Law for the Protection of Children and Adolescents;Article 6 of Constitution of Guatemala, 1985, amended 1993; Brazil: Constitución Federal de 1988; Estatuto de La Niñez y Adolescencia (ECA – Ley 8.069/1990); Egypt: Article 180

[763] United Nations Children's Fund, Questionnaire Response, Mongolia, 2009.
[764] Human Rights in China, Shadow report submitted to the Committee on the Rights of the Child, July 2005, para. 47.
[765] Human Rights Watch, 'Children of the Dust', 2006.
[766] See Section 6.

Penal Code (Law 58 of 1937) as amended (in Arabic); Kosovo: Article 63 Juvenile Justice Code (2004); Nigeria: Section 35 of Nigeria Constitution (1999); Sierra Leone: Child Rights Coalition Sierra Leone, complementary report by NGOs to the State party report of Sierra Leone (2005) on CRC implementation (2005); Burundi: Article 60, Loi No. 1/015 du 20 juillet 1999 portant reforme du code de procedure penale; Algeria: Human Rights Committee, Concluding observations: Algeria (2007), U.N. Doc. CCPR/C/DZA/CO/3, para. 77; Pakistan: Society for the Protection of the Rights of the Child, Questionnaire Response, 2009, 13; Nepal: UNICEF Questionnaire Response, 2009, 11; Iran: Report of the Secretary-General on the situation of human rights in the Islamic Republic of Iran (2008), U.N. Doc. A/63/459, para. 6; Saudi Arabia: Human Rights Watch, 'Adults Before Their Time', 2008, 2-3; Mozambique: UNICEF, Questionnaire Response, 2009, 13; Mongolia: UNICEF, Questionnaire Response, 2009, 11.

4. Administrative detention of children in need of care and protection

This section examines the use of administrative detention of children by States for what is what is generally termed "welfare" purposes. While the purpose of such detention may be to ensure that children receive any necessary care and protection, it is arguable that in some instances the underlying reason for the use of administrative detention in a welfare context is to exert control over a child or particular groups of children whose behaviour is seen as socially undesirable. Administrative detention for welfare purposes can be used for children without parental care, including children living and working on the streets, children who are 'out of control' or behaving in a manner which offends social norms, children who are under the age of criminal responsibility but are in conflict with the law, children who are anti-social or commit status or administrative offences and children who are victims and witnesses.

In developed States, social services are generally responsible for the care and protection of children at risk of abuse, exploitation and neglect. If children are without parental care, or cannot safely be left in the care of their family, alternative care is provided by the State, either in foster families, through adoption or, in the case of older children, in small scale, residential children's homes. In developing States, where social services and protection services for children are often poorly developed or non-existent, there is likely to be a greater reliance on institutional, residential care rather than family-based care in the community.

Institutional care of children usually takes place in open children's home, with children attending local community schools. In some States, and for some children, however, care and protection takes the form of administrative detention in closed educational or welfare institutions. Such administrative detention may be ordered by the police, a local executive body, a social welfare body or a specialist panel. Some children also find themselves administratively detained not because an order has been made for their detention, but because the nature of the institutional regime is such that the child is not free to leave at will and is detained in practice. [767]

Members of the Committee on the Rights of the Child have criticised the use of any form of deprivation of liberty (including administrative detention) for children who have not committed a crime but have simply been abandoned, mistreated or who are beyond parental control.[768] However, the practice of placing children in need of care and protection in administrative detention still continues in a considerable number of States.

[767] Rule 11(b) of the Havana Rules provides a definition of the deprivation of liberty as: 'any form of detention or imprisonment or the placement of a person in another 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'.
[768] Committee on the Rights of the Child, Summary Record of the 148th meeting (1994), U.N. Doc. CRC/C/SR.148, paras. 34–35; Committee on the Rights of the Child, Consideration of reports submitted by States parties to under article 44 of the Convention: Concluding Observations: Nigeria (2005), U.N. Doc. CRC/C/15/Add.257, para. 78(h).

There is very little available evidence on the numbers of children detained for the purpose of care and protection. This is partially due to the lack of central collation of figures, but also partially due to the number of bodies that can place a child in administrative detention, each of whom may record the decision, but do not share their figures with a central statistical body. A further difficulty is that administrative detention figures are not broken down by reason for detention. Thus, for example, in Mongolia 1,041 children in need of care and protection were administratively detained in 2008, but the underlying cause of their detention is unknown.[769] Some figures do, however, exist, in relation to placement of children under the minimum age of criminal responsibility who are administratively detained as a result of being found to have committed a criminal act. In Bulgaria, for instance, in 2009, there were 6,294 children administratively detained in "child pedagogic" institutions,[770] while in 2008, 139 were detained in Tajikistan[771] and 294 in Liberia.[772]

4.1. Context and circumstances

4.1.1 Children without family care

Children may need care and protection for a variety of reasons. They may be at risk of abuse, neglect or exploitation within their families, or may be without parental care due to parental death, illness, abandonment or imprisonment. Children may be homeless, have run away from home or been thrown out of the home, often due to family breakdown and a parent's remarriage. Children without parental care and left to fend for themselves may be regarded by the State as vagrants or as children living and working on the streets.

Where there is a well-developed child protection system, government child protection or social services have responsibility for a child in need of protection. In developing States, however, it is often the police who undertake a protection role, and are responsible for ensuring the child is provided with accommodation and care on an emergency basis. In some States, and particularly in those States who were formally part of the Soviet Union, as well as those influenced by the Soviet model, emergency accommodation in the form of emergency placement centres, reception centres or temporary isolation centres is generally under the management of the police.[773] Children can be placed there by the police or by a local executive committee responsible for children. In those ex-Soviet Union States which retain emergency administrative detention, children can generally be placed in detention from the age of 3 to 18 years of age.[774] It is not uncommon for children in such centres to be placed in isolation, sometimes in a locked cell, for a

[769] United Nations Children's Fund, Questionnaire Response, Mongolia, 'Data on Administrative Welfare Detention', 2009, 1.
[770] National Statistics Institute of Bulgaria, 'Anti-Social Acts of Minor and Juvenile Persons in 2009', 6 April 2010: <www.nsi.bg/SocialActivities_e/Crime2009l.htm> [accessed 29 January 2011]. See also, Cipriani, D., 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective', Ashgate, 2009, Table 5.1, p. 98.
[771] United Nations Children's Fund, Questionnaire Response, Tajikistan, 2009, 16.
[772] United Nations Children's Fund, Questionnaire Response, Liberia, 2009, 14.
[773] See, for instance, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine and Uzbekistan.
[774] In Kazakhstan, for instance, children who are homeless or neglected, found without parental care or removed from their parents due to the risk of harm or neglect and who are aged between three and 18 years old or can be placed, prior to a court decision, in a Temporary Isolation Centre. United Nations Children's Fund, Questionnaire Response, Kazakhstan, 2009, 15. A similar practice occurs in Azerbaijan and Moldova.

period of up to 3 days,[775] and to spend up to 60 days and sometimes up to 6 months in detention.[776] The primary purpose of this form of administrative detention is to provide children with immediate care and support and to prevent them from coming to harm while the administrative authorities seek to reunite them with their families or to arrange alternative accommodation.[777]

The use of administrative detention for children in need of care and protection is not limited exclusively to Central and Eastern Europe and the Commonwealth of Independent States (CEE/CIS States). For example, members of the Committee on the Rights of the Child have raised concern about the placement of children in facilities in Chile,[778] and in Malawi, where children who are in need of care and protection can be administratively detained in reformatory institutions meant for children in conflict with the law.[779] In Mongolia, children may be detained in police detention for up to 14 days "if their address, parents and guardians are unknown, and there is a potential threat to their life or health due to lack of parental supervision".[780]

Even where children are not the subject of an administrative detention order, they may nevertheless, find themselves detained in practice due to the regime of the centre or home. In India, for example, domestic law[781] does not permit the administrative detention of children in need of care and protection. However, such children are often placed in observation homes together with children in conflict with the law. The homes are "closed", with locked doors, and children cannot leave at will.[782] Although there is no intention to place children in need of care and protection in administrative detention, in practice they are deprived of their liberty by the nature of the regime.

4.1.2 Children who are 'out of control' or whose behaviour is deemed socially undesirable

Children may find themselves administratively detained on the basis that they are "out of control" and require protection. The concept of being 'out of control' can include engaging in sexual behaviour, taking drugs, refusing to behave in accordance with social norms, or even disobeying parents or misbehaving at school. Girls in particular, are likely to find themselves subject to this form of detention if they offend social norms relating to sexual behaviour, while boys are more likely to be regarded as out of control if they are engaged in criminal or anti-social

[775] See, for instance, Kyrgyzstan and Moldova.
[776] See, for instance, Azerbaijan and Kyrgyzstan. Although the regulations only permit detention for a period of up to 60 days, in practice, if the police have not located a child's parents, the child may stay very much longer. For instance, in Kyrgyzstan, detention in temporary centres is initially for up to 30 days and nights but can be extended for a further 15 days (UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 28, 29).
[777] See, for instance, Regulation 1.2 of the Regulations on Temporary Children's Centres (Tajikistan), No. 774 of 2005.
[778] Committee on the Rights of the Child, State Report: Chile (1994), U.N. Doc. CRC/C/SR.148, paras. 34, 35, 38; Committee on the Rights of the Child, Concluding Observations: Chile (2002), U.N. Doc. CRC/C/15/Add.173, 2002, paras. 53, 54.
[779] Committee on the Rights of the Child, Concluding Observations: Malawi (2009), U.N. Doc. CRC/C/MWI/C02, para. 68. Children can be detained 'at the Pleasure of the President' and it is not clear that court proceedings are necessary to impose this sentence.
[780] United Nations Children's Fund, Questionnaire Response, Mongolia, 2002, 17.
[781] The relevant legislation is the Juvenile Justice (Care & Protection) Act 2000.
[782] Para. 5 of Guidelines for Legislative Reform, and interview with Raj Mangal Prasad, Vice-President of Pratidhi on 8 April 2009: <www.pratidhi.org> [accessed 29 January 2011].

behaviour. Children may be placed in administrative detention either by order of the police, the prosecutor or a social welfare agency or even, in the Philippines, by licensed agencies and individuals.[783] Children can also, in some States, self refer to protect themselves from the consequences of breaching social norms, which can include threats or intimidation, or a complete lack of support and care.[784]

Girls can be placed in administrative detention if they offend against social norms relating to sexual behaviour in a number of States in the Middle East and in North Africa, including, in Libya,[785] Jordan,[786] Saudi Arabia[787] and Syria.[788] The reason given by States for detaining girls who breach social behaviour norms, is the risk that such girls face from their families and communities, including physical and mental abuse and rejection, regardless of whether the girls were victims or consenting parties.[789] Detention in such circumstances is seen by the States using it, as 'protective' and for the purpose of preventing children from committing further offensive acts.[790] Such an approach has been criticised by human rights groups as discriminatory and as constituting arbitrary detention.[791]

Children may also be administratively detained even when they have completed a sentence or where they have been found innocent of a criminal charge. Such detention is justified as being for the children's own 'protection'. For example, the Minister of Social Affairs in Saudi Arabia has broad powers to order a girl or young woman to be detained indefinitely. Such powers may be exercised solely on the guardian and institution staff's assessment of that girl "remains in need of additional guidance and care".[792]

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[783] Presidential Decree No. 603 (Child and Youth Welfare Code), the Republic Act No. 7610 (Special Protection of Children Against Child Abuse, Exploitation and Discrimination) and Supreme Court Administrative Matter No. 02-01-19 (Rule on Commitment of Children) authorise social workers, and licensed agencies and individuals to administratively deprive of liberty children who are without parental care, homeless, or victims of crimes (United Nations Children's Fund Philippines Response to Juvenile Justice Questionnaire, 2009, 8, 9).

[784] For instance, Human Rights Watch, 'A Threat to Society? Arbitrary Detention of Women and Girls for "Social Rehabilitation"', 2006, p. 22.

[785] Ibid.

[786] See, for instance, U.N. Doc. A/HRC/4/33/Add.3; Human Rights Watch, 'Guests of the Governor: Administrative Detention Undermines the Rule of Law in Jordan', May 2008.

[787] See, for instance, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk: Addendum: The Next Step: Developing Transitional Indicators on Violence Against Women (2008), U.N. Doc. A/HRC/7/6/Add.5; Human Rights Watch, 'Adults Before Their Time', 2008.

[788] See, for instance, Human Rights Watch, 'Syria: No Exceptions for Honour Killings', 28 July 2009: **Error! Hyperlink reference not valid.**> [accessed 29 January 2011].

[789] In Libya, the Law against Sexual Offences 1973 provides for the admission of girls to social rehabilitation facilities if they have been sexually active in any way – including if they have been assaulted or raped. Under these *zina* laws (laws governing extra-marital sex), it is not necessary for a girl to be convicted of such a 'crime', before she can be brought to a social rehabilitation home under the order of the prosecutor (Human Rights Watch, 'A Threat to Society?', 2006, p. 2).

[790] See, for instance, in Libya, Human Rights Watch, 'A Threat to Society?', 2006.

[791] For instance, ibid.; Human Rights Watch, 'Adults Before Their Time', 2008.

[792] See Council of Ministers Decree 868 of 29 July 1975 (19/7/1395), in Ministry of Labor and Social Affairs, Collection of Laws and Regulations of the Ministry's Agency for Social Affairs, p. 99; Article 18 of Girls' and Young Women's Welfare Institution Regulations; Article 8 of Ministry of Labor and Social Affairs Decree 2083 of 24 January 1976 (22/1/1396) cited in Human Rights Watch, 'Adults Before Their Time', 2008, 38.

Children living and working on the streets are particularly prone to being regarded as socially undesirable and vulnerable to administrative detention. In Viet Nam, children living and working on the streets may be placed in social protection centres, usually by the police, where "[there] are places for the temporary custody of those who have been picked up by the district authorities during their campaigns. These centres are for people who have not committed any serious crimes, but whose behaviour and lifestyle may pose a threat to social order and security. They are, therefore, gathered or arrested without any order from the court or from any judiciary bodies."[793]

Viet Nam is not alone in placing children living and working on the streets in detention centres. In Turkey, children in need of protection and those at risk of coming into conflict with the law, including children living and working on the streets, can be administrative detained.[794] Initially detained in police stations, children living and working on the streets can be transferred to a longer term institution for care and protection.[795]

In some States, parents themselves can abandon children in institutions for being 'beyond parental control'. In Belize, for example, under the Certified Institutions (Children's Reformation) Act of 1939, parents can bring their children to the Youth Hostel and leave them there for displaying "uncontrollable behaviour".[796] If children run away, this can constitute a criminal offence and they can find themselves sentenced to prison.[797]

Information about the use of administrative detention for children using or misusing drugs is difficult to obtain. In some cases, children may be confined to a treatment centre as a form of treatment for addiction, but in other cases the purpose of the detention is rather to address what is viewed by some as incorrigible and socially undesirable behaviour. In Viet Nam, for example, children who are identified as drug users can be subject to administrative detention in rehabilitation centres under Article 29 of the Law on Drug Protection and Fight.[798] Local authorities (People's Committees) may place children aged 12 to 18 in mandatory institutionalised detoxification if: the child has undergone family- and community-based detoxification but is still addicted; the child has received repeated education at communes, wards or district towns but is still addicted; or the child has no permanent accommodation. The length of administrative detention can last from one to two years.[799]

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[793] Terre des Hommes Foundation, 'A Study on Street Children in Ho Chi Minh City', 2004, p. 153. Survey conducted in 2000 and supplemented by group discussions by service providers in 2002.

[794] United Nations Children's Fund, Questionnaire Response, Turkey, 2009, 2. This can take place under the Law on Responsibilities and Authority of Police and the Regulations on Responsibilities and Authority of Gendarme by the police and gendarme.

[795] United Nations Children's Fund, Questionnaire Response, Turkey, 2009, 2.

[796] Committee on the Rights of the Child, Concluding Observations: Belize (2005), U.N. Doc. CRC/C/15/Add.252, para. 42; National Organization for Prevention of Child Abuse and Neglect, 'The Reality of Life for Children and Adolescents with the Convention on the Rights of the Child in Belize', 2005, p. 11: <http://crin.org/resources/infoDetail.asp?ID=4875&flag=legal> [accessed 29 January 2011].

[797] Children and Adolescents in Belize, 2004, 11: < www.crin.org/docs/resources/treaties/crc.38/Belize_ngo _report.pdf> [accessed 29 January 2011].

[798] Law on Drug Prevention and Fight (No. 23/2000/QH10 of December 9, 2000).

[799] Decree 135/2004/ND-CP on Regulations on the organisation and operation of treatment facilities under the Ordinance on Handling Administrative Violations and the regime applicable to minors, and people in voluntary treatment facilities, 10 June 2004, Article 24.

4.1.3 Children under the age of criminal responsibility in conflict with the law

A child who is below the minimum age of criminal responsibility[800] cannot be "alleged as, accused of, or recognised as having infringed the penal law"[801] as the penal laws of the State do not apply to that child. The Committee on the Rights of the Child has stated in paragraph 31 of its General Comment 10, that "..[c]hildren who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below [the minimum age of criminal responsibility] the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests."

The "special protective measures" have been interpreted by some States to include administrative detention. In the CEE/CIS[802] region, children are likely to face administrative detention for committing criminal acts under the age of criminal responsibility. This is part of the legacy of the Soviet Union era,[803] which relied heavily on administrative detention as a special protective measure for such children. While many of the CEE/CIS States have undertaken legislative reform of their child protection system since the fall of the Soviet Union in 1991, most of these States continue to retain some form of administrative detention for this group of children, usually within a "special school", a special vocational school or a closed educational facility. Little regard is paid to the seriousness of the acts committed when a decision is made on the length of time a child can be administratively detained. Rather the length of detention is set out in Regulations, and is usually for a period of three years or until the child has finished the compulsory years of education.[804] This type of detention is known to occur in Tajikistan, Azerbaijan,[805] Uzbekistan[806] and in Georgia where children aged 8 to 14 years old may be detained in a special school.[807]

Administrative detention of children below the minimum age of criminal responsibility also occurs in other States that were subject to Soviet influence. For example, children in Bulgaria

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[800] CRC. Article 40(3)(a) requires all States to establish a minimum age below which children are presumed not to have the capacity to infringe the penal law.

[801] Article 40(1) of CRC.

[802] Includes: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Macedonia. Moldova, Montenegro, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and, formerly, Georgia: <www.unicef.org/infobycountry/ceecis.html> for a complete list of CEE/CIS States [accessed 29 January 2011].

[803] For further discussion of the legacy of Soviet Union rule on the minimum age of criminal responsibility, see Cipriani, D., op. cit., p. 84–7.

[804] See, for instance, Azerbaijan, where children can be administratively detained at the Special School at Mardakan (United Nations Children's Fund Azerbaijan, in cooperation with Professor Carolyn Hamilton, 'Azerbaijan: The Position of Children in Conflict with the Law', Executive Summary, 2007); Tajikistan, where children can be detained at the Republican Special School in Dushanbe (Regulation 3.1 of Regulation of the Republican Special School for children and teenagers who need special education, No.134, 27 March 2002); Kazakhstan, where children can be administratively detained under Article 491 of Criminal Procedure Code by the police (Ministry of Internal Affairs), representatives of the Ministry of Justice or Courts (United Nations Children's Fund, Questionnaire Response, Kazakhstan, 2009, 3).

[805] United Nations Children's Fund Azerbaijan/C. Hamilton, 'Azerbaijan: The Position of Children in Conflict with the Law', Executive Summary, 2007, 2.

[806] Prosecutor General's Office, Uzbekistan, 'Response to Juvenile Justice Questionnaire', 2009.

[807] Hamilton, C., 'Georgia Juvenile Justice Assessment', Children's Legal Centre, 2007, p. 8.

can be placed in closed institutions for up to six months.[808] In Viet Nam, children below the minimum age of criminal responsibility can be sent to reformatories for committing criminal acts,[809] while in Cuba, "child welfare councils" can assign children below the minimum age of criminal responsibility to 'specialised institutions'.[810]

The administrative detention of children below the minimum age of criminal responsibility is not limited to States with an historic Soviet influence. In Liberia, it is reported that children below the minimum age of criminal responsibility can be detained at educational and welfare institutions as well as in prisons and police stations, by a range of institutions, including social workers from the Ministry of Health and Social Welfare.[811] According to the Women and Children Protection Section of the Liberian National Police, over a 12-month period in 2008, a total of 294 children below the minimum age of criminal responsibility were detained in administrative detention. Of these, 11 were detained for 48 hours or less, 50 for 7 days or less, 150 for up to 28 days, 45 for 3 months or less, 25 for up to 6 months, 10 for up to a year and 3 for 18 months.[812]

4.1.4 Children who commit status offences and administrative offences

In some States children may be subject to sanctions for committing status offences. These offences can be committed only by persons occupying a particular status. Very often status offences can be committed only by children and are offences that would not be criminalised if committed by an adult. Although the sanctions imposed for status offences and administrative offences are not always regarded as 'welfare' measures, these offences are referred to here because the range of offences that fall into this category have a significant overlap with the behaviours considered in relation to a child who is 'out of control' and generally result in the child being placed in the same form of administrative detention. Status offences can include chronic or persistent truancy, running away, being ungovernable, incorrigible or simply badly behaved with parents or at school, violating curfew laws, or possessing alcohol or tobacco.[813] The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)[814] require States to legislate to ensure that any conduct not considered an offence, or not penalised if committed by an adult, is not considered an offence and is not penalised if committed by a child.[815] In addition, the Committee has made a very clear recommendation that States should not subject children to administrative detention for status offences. [816]

Despite this and even though the acts are not harmful to others, children are still subject to administrative detention for status offences in the ex-Soviet Union States[817], as well as in

[808] Placement is ordered by the Local Commissions for Combating Anti-social Acts of Minors and Adolescents (UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 25; U.N. Doc CRC/C/BGR/CO/2, 2008, para.68(c)).
[809] Article 24 of Ordinance on Handling of Administrative Violations (Viet Nam) No. 44/2002/PL-UBTVQH10 of 2 July 2002.
[810] U.N. Doc. CRC/C/8/Add. 30, para. 70, 1997.
[811] United Nations Children's Fund, Questionnaire Response, Liberia, 2009.
[812] Ibid., 14.
[813] UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 25, FN 6.
[814] United Nations Guidelines for the Prevention of Juvenile Delinquency: Resolution adopted by the General Assembly, 14 December 1990, UN GAOR A/RES/45/112. Hereinafter the Riyadh Guidelines.
[815] Ibid., Guideline 56.
[816] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 8.
[817] UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 13.

China[818], Viet Nam[819] and Nigeria, for example, where children can be administratively detained in Borstal institutions or approved schools.[820] In Nepal, children can be detained for "truanting", in which case they will be arrested by the police and can be held, lawfully for up to seven days before a bail hearing, which may, in any event, be delayed.[821]

Administrative offences differ slightly from status offences in that they are not applicable to children only. They commonly include regulatory offences, such as traffic or property violations, but can also include anti-social behaviour such as vagrancy,[822] and, thus, once again, there is often an overlap with the "out of control" behaviours and status offences. Children who commit these latter offences are often regarded as in need of care and protection and can be administratively detained in re-education or corrective education centres, for example in China,[823] the Democratic People's Republic of Korea[824] and Viet Nam.[825] There is evidence that children as young as age 10 can be detained for committing administrative offences in Nepal,[826] and placed in prisons rather than a juvenile facility, sometimes with adults[827].

4.1.5 Children who are victims and witnesses[828]

Article 39 of the CRC provides that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any

[818] See, for instance, Article 10 of Ministry of Public Security's Temporary Measures on re-education through Labour (1982 Temporary Measures) of 21 January 1982.
[819] Some administrative offences or behaviour contributing towards administrative offences, such as 'insulting adults', could be considered status offences and are punishable according to the Ordinance on Handling of Administrative Violations (Viet Nam) No. 44/2002/PL-UBTVQH10 of 2 July 2002. United Nations Children's Fund Viet Nam, 'A Report on the Situation Analysis of Juvenile Justice in Viet Nam and Evaluation of the Contemporary Juvenile Justice System', 2005, 31.
[820] United Nations Children's Fund, Questionnaire Response, Nigeria, 2009, 4. The Child Rights Act 2003, when fully implemented, should cause this practice to cease.
[821] United Nations Children's Fund, Questionnaire Response, Nepal, 2009, 10.
[822] UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 16, Box 3; In its response to the questionnaire provided for this working paper, the Women and Children Protection Section of the Liberian National Police reported that a total of 71 children were detained for committing an administrative offence, with the majority of children detained for between 7 and 28 days.
[823] See, for instance, the 1982 Temporary Measures, which set out six targets: counter-revolutionary and anti-party, anti-socialist elements whose crimes are not sufficiently serious to warrant criminal sanction; those who form groups to commit murder, armed robbery, rape, arson and other gang crimes, whose crimes are not sufficiently serious to warrant criminal sanction; those who commit unlawful or criminal acts of hooliganism, prostitution, theft, fraud, etc., who do not reform after repeated education, whose crimes are not sufficiently serious to warrant criminal sanction; those who disrupt social order by inciting the masses to create disturbances and fights, pick quarrels and cause a disturbance, stir up trouble, whose crimes are not sufficiently serious to warrant criminal sanction. Those who have a work unit, but who, for a long time, refuse to labour or who disrupt labour discipline, ceaselessly cause trouble without cause, disrupt the order of production, work, study and teaching or living or obstruct official business whose crimes are not sufficiently serious to warrant criminal sanction; and those who instigate others to commit others to commit unlawful and criminal acts but whose offences are not sufficiently serious to warrant a criminal sanction.
[824] Committee on the Rights of the Child, Concluding Observations: Democratic People's Republic of Korea, U.N. Doc. CRC/C/PRK/CO4 2009, paras. 70–2.
[825] Article 24 of Ordinance on Handling of Administrative Violations (Viet Nam) No. 44/2002/PL-UBTVQH10 of 2 July 2002.
[826] United Nations Children's Fund, Questionnaire Response, Nepal, 2009, 5.
[827] Ibid.
[828] See also Section 1.

form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

The United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime[829] provide much greater detail on how child victims and witnesses should be treated. They require that child victims be treated in a caring and sensitive manner,[830] with minimum interference in the child's private life[831] and protection from any safety risks before, during and after the justice process.[832] The guidelines suggest that where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. These could include ordering pre-trial detention of the accused or placing the accused under house arrest.[833] In some States, however, there is a failure to address the risks facing the child. Rather than take action to ensure that the alleged perpetrator and those supporting him do not threaten or intimidate the child, the child victim or witness is instead administratively detained as a protective or safety measure.[834]

This form of administrative detention is found most notably in the Middle East, North Africa and Central Asia regions to protect girls who have been sexually abused, trafficked or exploited. Where States or particular ethnic or religious groups have restrictive social codes of conduct for women, sexually active girls risk violence, and even death, if believed to have brought dishonour on the family.[835] These consequences hold true whether the sexual activity was consensual or as a result of rape, sexual assault or exploitation. Little distinction is made in terms of consequences between being a victim of a sexual crime or committing a sexual crime. Girls who make allegations of a sexual crime against a man may be administratively detained in Bahrain,[836] Jordan,[837] Libya[838] and Saudi Arabia, either by an administrative body, or by voluntarily admitting themselves to such a centre.[839] Once admitted into a centre, girls are not free to leave at will, and are subject to restrictive conditions. Detention in such centres can be long term and in some cases, children may never leave. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment commented on his visit to the Juweidah

[829] United Nations Economic and Social Council Resolution 2005/20 (2005). Hereinafter the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.
[830] Guideline 10 of Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.
[831] Ibid., Guideline 12.
[832] Ibid., Guideline 32.
[833] Ibid., Guidelines 34(c), 34(d).
[834] See, for instance, Human Rights Watch, 'Honoring the Killers: Justice Denied for "Honor" Crimes in Jordan', 2004, 8. For more information about honour crimes generally, see Zuhur, Sherifa, 'Gender, Sexuality and Criminal Laws in the Middle East and North Africa,' Women for Women's Human Rights, 2005, 22-33.
[835] See Human Rights Watch, 'Honoring the Killers', 2004, 8. Honour killings are found in a wide range of States, including, Bangladesh, Brazil, Ecuador, Egypt, India, Israel, Italy, Morocco, Pakistan, Sweden, Turkey (Pelin Turgut, 'Honour Killings Still Plague Turkish Province', *The Turkish Star*, 14 May 1998) Uganda and United Kingdom. The practice is condoned by the Taliban in Afghanistan. See Nebehay, '"Honor Killings" of Women Said on Rise Worldwide", *Reuters*, 7 April 2000.
[836] For instance, at the Dar Al Aman shelter. See Section 11; 'Al Balooshi Inaugurates Dar Al Aman Care Centre', *Bahrain News Agency*, 23 November, 2006: <http://english.bna.bh/?ID=52864> [accessed 29 January 2011].
[837] Human Rights Watch: 'Guests of the Governor', May 2008; 'Honoring the Killers', 2004, 25-26.
[838] See Law Against Sexual Offences 1973.
[839] Human Rights Watch, 'A Threat to Society?', 2006.

(Female) Correction and Rehabilitation Centre for Women and Girls in Jordan,[840] that while there were no allegations of ill-treatment, "[n]evertheless, the Special Rapporteur, after talking to women concerned, is highly critical of the current policy of taking females under the provision of the Crime Prevention Law into 'protective' detention because they are at risk of honour crime. According to the Special Rapporteur, depriving innocent women and girls of their liberty for as long as 14 years can only be qualified as inhuman treatment, and is highly discriminatory."[841]

In Viet Nam, children who are the victims of sexual exploitation may be subjected to administrative detention in a rehabilitation institution under Article 23 of the Ordinance on Prevention and Fight against Prostitution, 2003, which provides that "[p]rostitutes shall, depending on the nature and seriousness of their violations, be administratively sanctioned,… or sent into medical treatment establishments."[842] The decree allows the People's Committee, an administrative body, to sentence children aged 16 and over who have already received education or rehabilitation measures, or who are homeless. Such children can be detained in a rehabilitation centre for three to eighteen months.[843]

4.2. Legal framework

4.2.1 Right to liberty and security of person

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention (For details of provisions, see Introduction.).[844]

General Comment No. 8 of the Human Rights Committee emphasises that Article 9 of the ICCPR is applicable to all types of deprivation of liberty, including all forms of administrative detention. While part of Article 9(2) and 9(3) are only applicable to persons against whom criminal charges are brought, the rest, and particularly "the right to control by the court of the legality of the detention, applies to all persons deprived of their liberty by arrest of detention", under the Committee's General Comment No. 8.

Article 37 of the CRC, also limits the use of administrative detention, and adds additional restrictions on the use of administrative detention (For details, see Introduction.).

The provisions of Article 37(b) of the CRC are also contained in the Beijing Rules.[845] and in the Body of Principles. The right to liberty and security of the person is mirrored in regional human

[840] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Addendum: Mission to Jordan (2007), U.N. Doc. A/HRC/4/33/Add.3.
[841] Ibid., p. 18.
[842] Article 23 of Ordinance on Prevention and Fight against Prostitution, 2003
[843] Article 16(4) of Decree No. 178/2004/ND-CP, 15 October 2004, detailing the implementation of a number of articles of the Ordinance on Prostitution; Article 26(1) of Ordinance on Handling of Administrative Violations (Viet Nam) No. 44/2002/PL-UBTVQH10, 2 July 2002. United Nations Children's Fund Viet Nam and MOLISA, 'Creating a Protective Environment for Children in Viet Nam: An Assessment of Child Protection Laws and Policies, Especially Children in Special Circumstances in Viet Nam', 2009, 51.
[844] But see also Body of Principles, which sets out a comprehensive list of protections for persons who are subject to administrative detention.

rights instruments, including Article 5 of the Arab Charter, Article 6 of the Banjul Charter, Article 7 of the American Convention, Article 1 of the American Declaration on the Rights and Duties of Man and Article 5 of the European Convention.

4.2.2 Administrative detention must be lawful

According to the provisions of Article 9(1) of the ICCPR, Article 37(b) of the CRC and the Body of Principles, any decision to deprive a child of his or her liberty and place the child in administrative detention, must be in conformity with domestic law. The relevant law must have adequate clarity and regulate the procedure for the administrative detention,[846] while the detention itself must be carried out by competent officials or persons authorised for that purpose.[847] Where placing a child in administrative detention does not comply with domestic law or domestic procedures, this will render the detention unlawful.

The law must make it clear when an offence will be committed. For example, in Saudi Arabia, girls may be administratively detained if they commit the offence of seclusion (*khalwa*) or mingling (*ikhtilat*). The evidentiary standards required to prove that the offence has been committed, however, are not set out clearly in legislation and appear to be variable, depending upon the geographical area. Human Rights Watch has noted in a 2008 report that "[a] senior counsellor to the Ministry of Justice defined seclusion and mingling as "being out of sight in a closed place with only a member of the opposite sex" while a Ministry of Social Affairs supervisor defined it as a girl being 'in an apartment by herself, or with a group of others, or sitting in a place where it is not natural for her to be" and the president for the Commission for the Promotion of Virtue and the Prevention of Vice as "mingling of the sexes is prohibited in public and permitted in private unless for the purposes of corruption."[848]

Such a lack of clarity is likely to result in any detention being regarded as not "in conformity with the law" and thus unlawful.

Procedures set out in the law must also be complied with. Where for instance, the regulations provide that a lawyer or prosecutor must be present before an order can be made for administrative detention, a lack of a lawyer will render the detention unlawful. Similarly, if the regulations require that there be a hearing at which the child must be present before a decision is reached on administrative detention, a failure to comply with this requirement will also render the detention unlawful.

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[845] There are several international instruments pertaining to juvenile justice, the primary being the CRC and the Beijing Rules. Further guidance is provided by the Riyadh Guidelines; Havana Rules; Guidelines for Action on Children in the Criminal Justice System, United Nations Economic and Social Council, 21 July 1997, Resolution 1997/30 [Hereinafter the Vienna Guidelines.]; and by Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10.

[846] *Bolanos v. Ecuador*, Human Rights Committee, Communication No. 238/1987; *Domukovsky v Georgia*, Human Rights Committee, Communication No. 623, 624, 626 and 627/1995.

[847] Principles 2, 4 of Body of Principles

[848] See Human Rights Watch, 'Adults Before their Time', 2008, 35–36.

4.2.3 Administrative detention must not be arbitrary

Where administrative detention is carried out in accordance with domestic law, there is a further requirement: that any administrative detention ordered must not be arbitrary (See Introduction.). The Human Rights Committee has stated that "'[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[849] This means that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[850]

Determining whether the administrative detention of a child is necessary and proportionate will depend upon the circumstances of the case, and the purpose of the detention. In the case of a child, administrative detention will only be reasonable and proportionate if it is a measure of last resort (when all other options for care and protection have been considered) and for the shortest appropriate period of time, under Article 37(b) of the CRC.[851]

In addition, in making any order for administrative detention of a child, the best interests of the child should be the primary consideration, under Article 3 of the CRC, and the right of the child to have his or her own views heard and taken into account also apply, under Article 12 of the CRC. Detention should "not continue beyond the period for which the State can provide appropriate justification".[852] If it does it will cease to meet the criteria for lawful administrative detention and will then become unlawful and/or arbitrary.

4.2.4 Safeguards

To ensure that administrative detention for care and protection is lawful, States also need to ensure that children are provided with all the necessary procedural safeguards and guarantees contained in Article 9 of the ICCPR and Article 37 of the CRC. The safeguards include:

- The right to be informed promptly of the reasons for detention and the substance of the complaint against him or her.[853]
- The right to trial or release (if a detainee is the subject of a criminal charge).[854]
- The right to be challenge the legality of the detention.[855]
- The right to protection against *incommunicado* detention,[856] including the right to be kept at officially recognised places of detention,[857] and the right to maintain contact with the family through correspondence and visits.[858]

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[849] *A. W. Mukong v. Cameroon*, p. 181, para. 9.8.
[850] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para. 9.2.
[851] See also Rule 19 of the Beijing Rules, which applies both to children in juvenile justice and in welfare and care proceedings and provides that *'The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period*'.
[852] *A. v. Australia*, 1997, para 9.4; *C. v. Australia*, 2002, para. 8.2
[853] Article 9(2) ICCPR. See also Human Rights Committee General Comment No. 8 Right to Liberty and Security of Persons (Article 9), 30 June 1982. The Human Rights Committee noted that whilst this requirement appears on the face of it only to apply persons charged with a criminal offence, it also applies to persons held in administrative détention,
[854] Article 9 (3) of ICCPR.
[855] Article 37(d) of CRC; Article 9(4) of ICCPR.
[856] Article 1 International Convention for the Protection of All Persons from Enforced Disappearance; Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 13(b).

- The right to access legal counsel and other appropriate assistance.[859]

To ensure that administrative detention for care and protection is lawful, States also need to ensure that children are provided with all the necessary procedural safeguards and guarantees contained in Article 9 of the ICCPR and Article 37 of the CRC.

4.3. State laws, policies and practices

In contravention of international human rights law, administrative detention of children in need of care and protection is commonly used in contexts in which detention is not necessary or proportionate. Legal safeguards required by international law are also rarely guaranteed.

4.3.1 Legal standards of decision-making

Article 20 of the CRC requires States to provide special protection to children who are temporarily or permanently deprived of their family environment, and to ensure that such children are provided with alternative care in accordance with national laws. It also sets out the form of care that can be provided by the State which includes, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children.[860] The language of Article 20(3) implies that children in need of care and protection should only be placed in "suitable" institutions "if necessary", with placement in an institution being the least preferable option. The United Nations Guidelines for the Alternative Care of Children[861] stress that "use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests."

In addition, members of the Committee of the Rights of the Child have frequently noted and criticised the use of any form of deprivation of liberty for children who have not committed a crime, but have simply been abandoned or mistreated,[862] who are beyond parental control[863] or are in need of protection.[864]

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[857] Article 17, International Convention for the Protection of All Persons from Enforced Disappearance; Rule 7 of the United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (Standard Minimum Rules for the Treatment of Prisoners*)*; and Principle 12, Body of Principles.

[858] Article 37(c) of CRC and Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37 and 92 of Standard Minimum Rules on the Treatment of Prisoners.

[859] Article 37(d) of CRC; Article 9(4) of ICCPR.

[860] Article 20(3) of CRC.

[861] Human Rights Council, Guidelines for the Alternative Care of Children, 15 June 2009, U.N. Doc. A/HRC/11/L.13. Hereinafter the Guidelines for the Alternative Care of Children.

[862] Committee on the Rights of the Child, Consideration of reports of States parties: Chile, (1994), U.N. Doc. CRC/C/SR.148, paras. 34, 35.

[863] Committee on the Rights of the Child, Consideration of reports submitted by States parties to under article 44 of the Convention: Concluding Observations: Nigeria (1996), U.N. Doc. CRC/C/15/Add.61.

[864] See, for instance, Committee on the Rights of the Child, Consideration of reports of States parties: Chile (1994), U.N. Doc. CRC/C/SR.148, paras. 34, 37.

Despite the recommendations of the Committee of the Rights of the Child in relation to the use of administrative detention, and the limitations placed on the use of residential care and the deprivation of liberty by the CRC and the Beijing Rules,[865] administrative detention of children continues to be used as a measure for ensuring children care and protection in a wide range of States. Such detention is rarely challenged domestically, and has not been challenged at international level. It may be difficult, were such a challenge to be made, for a State to demonstrate that the administrative detention of children in need of care and protection is a necessary and proportionate response. Potentially, such detention could be treated as arbitrary and, therefore, unlawful.

Members of the Committee on the Rights of the Child addressed the issue of arbitrary detention in its concluding observations to Nigeria's periodic report in 1996.[866] At that time, Nigeria had national legislation[867] that permitted the administrative detention of children for 'stubbornness' or being 'beyond parental control', and for status offences, such as vagrancy, truancy or wandering. The members of the Committee were of the view that administrative detention of abandoned children or children living and/or working on the streets did not appear to be compatible with the provisions of Article 37(b) of the Convention, which requires that the arrest, detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time; and that such detention could be considered arbitrary and incompatible with the CRC.[868] It is highly likely that the same criticism could be made of the many States who continue to use administrative detention for children in need of care and protection.

4.3.2 Legal time limits

International instruments do not contain a stated legal limit for administrative detention for the purposes of care and protection. Rather, any such detention should be for the shortest appropriate period of time.[869] In practice, the duration of administrative detention of children in need of care and protection varies dramatically across States: from days[870] or months[871] to indefinite time frames.[872]

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[865] See also Guidelines for the Alternative Care of Children which, although focusing on the care of children rather than administrative detention, recommends that administrative detention should not be used for children in need of care and protection.

[866] Committee on the Rights of the Child, Consideration of reports submitted by States parties to under article 44 of the Convention: Concluding Observations: Nigeria (1996), U.N. Doc. CRC/C/15/Add.61.

[867] Section 3 of Children and Young Persons Law (Nigeria).

[868] Although a Children's Rights Act was passed in 2003, this had not been implemented in all States by the time of the Concluding Observations to Nigeria's second periodic report in 2005. See Committee on the Rights of the Child, Consideration of reports submitted by States parties to under article 44 of the Convention: Concluding Observations: Nigeria (2005), U.N. Doc. CRC/C/15/Add.257, para.78.

[869] Article 37(b) of CRC.

[870] In temporary shelters in Mongolia, (UNICEF, 'Juvenile Justice in Mongolia', 2002, p. 17), Tajikistan (UNICEF, Questionnaire Response, Tajikistan, 2009, 9; Regulation 31 of Regulations on the Commission on Minors, No. 178 of 1995 [for pre-trial detention of children below the minimum age of criminal responsibility]), or Liberia (UNICEF, Questionnaire Response, Liberia, 2009, 14).

[871] In Kazakhstan, where children can be detained in Temporary Centres for an initial period of 30 days, which can be extended, by both courts and prosecutors, for up to six months (Questionnaire Response, Kazakhstan, 2009, 7), or in Azerbaijan, placements can be ordered for up to six months by the Local Commissions for Combating Anti-social Acts of Minors and Adolescents. UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 25; Committee on the Rights of the Child, Concluding Observations: Bulgaria, U.N. Doc CRC/C/BGR/CO/2, 2008, para.68(c).

In Kyrgyzstan, Kazakhstan and other CEE/CIS States which continue to operate temporary reception centres, children can generally be held in administrative detention for up to 30 days, a time frame that can be extended for up to 6 months in order to find them a place to live, find their parents, or other legal guardians.[873] In Mongolia, children may be detained under the Law on Temporary Detention of Children without Supervision for up to one week.[874] Administrative detention in Viet Nam, although ostensibly used for temporary detention, can last for between two weeks and six months.[875]

On occasion, the administrative detention of children for welfare purposes can be without time limitations. For example, in Saudi Arabia, girls may only be able to leave 'protective custody' if they can be released to family members or legal guardians, who may, of course, never come to "collect" them.[876] Similarly, in the Libya, girls may be released from protective custody in the juvenile girls home (which houses both victims of crime as well as girls in conflict with the law)[877] only if their fathers are willing to accept them home.[878] If no family member comes to collect a young girl, as may be the case due to the social stigma of being detained in an observation home, she may never leave.[879]

4.3.3 Judicial review

Article 9(4) of the ICCPR provides that anyone who is deprived of liberty shall be entitled to take proceedings before a court, in order that the court may decide without delay if the detention is lawful. Article 37(d) of the CRC also gives a child the right to challenge the legality of the deprivation of liberty before a court or before a competent, independent and impartial authority and a right to a prompt decision on any such action.

While many States that permit administrative detention, especially the ex-Soviet Union States, have regulations that set out the criteria and the procedures to be followed in reaching a decision on whether to place a child in administrative detention and provide for reviews, these provisions are generally unknown to children and their parents, and are rarely implemented fully by those working under them.

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[872] For instance, in Saudi Arabia: Council of Ministers Decree 868 of July 29, 1975 (19/7/1395), in Ministry of Labor and Social Affairs, Collection of Laws and Regulations of the Ministry's Agency for Social Affairs, p. 99; Article 18 of Girls' and Young Women's Welfare Institution Regulations; Article 8 of Ministry of Labor and Social Affairs Decree 2083 of 24 January 1976 (22/1/1396), cited in Human Rights Watch, 'Adults Before Their Time', 2008.

[873] United Nations Children's Fund, Questionnaire response, Kyrgyzstan, 2009; Regulations on the Center of Social Adaptation of children, approved by the Bishkek Major's Office, 2 March 2002 (Bishkek and Osh both have such centres). See, also, Kazakhstan (UNICEF, Questionnaire Response, Kazakhstan, 2009, 7).

[874] Committee on the Rights of the Child, Concluding Observations: Mongolia (2005), U.N. Doc. CRC/C/15/Add.264, para. 62.

[875] Human Rights Watch, 'Children of the Dust', 2006, 2.

[876] Human Rights Watch, 'Adults Before Their Time', 2008, 39.

[877] Benghazi Home for Juvenile Girls houses girls (both Libyan and non-Libyan) below the age of 18. See Human Rights Watch, 'Libya: A Threat to Society?', 2006, p. 16.

[878] Human Rights Watch, 'Libya: A Threat to Society?', 2006, p. 16.

[879] Human Rights Watch, 'Adults Before Their Time', 2008, 39.

The situation in Azerbaijan is illustrative of the practice in many developing States that continue to use administrative detention for children. The Regulations About Commissions (collegial organ) on Minors' Affairs and Protection of their Rights[880] require that a child's case be reviewed and a decision made by the commission within one month of the date of registration of the case.[881] If the commission has a case before it of a child who has committed a crime, but is under the age of criminal or administrative responsibility, the regulations provide that the review can only take place in the presence of the minor and his parents or legal representatives, and the persons attending the session should be heard during the proceedings.[882] The NGO Alliance however, in its report on the commissions, notes that in practice, the commissions do not verify the alleged facts concerning commission of a crime, but make decisions based on a presumption that the child has committed the acts of which he is accused. Parents attend the commission review occasionally and children rarely. When children do attend, the commission does not explain either the procedures or the right of the child to be heard.

When children are not living with their parents or families, they might not even be informed that the review will take place and will not be invited to attend the review. The child is not represented by a lawyer at the review and the researchers did not find one case in which lawyers had participated in the commissioner meetings. The members of the commission represent various State bodies, but there is no requirement that any of them should have knowledge of law or child development or psychology. The commissioners have the power to order detention for up to three years in a special school, and to extend the detention until the end of the compulsory years of school if requested to do so. The child could, technically, appeal against the decision to a court, but no information is provided to the child, his parent or guardian indicating that this is a possibility.[883]

There is little evidence in any of the States using administrative detention for children in need of care and protection that children are informed of their right to a legal review of the decision to detain. Indeed, Human Rights Watch in their report on children administratively detained in social protection centres in Viet Nam noted that "none of the children we spoke with were aware of any process for challenging the legality of their detention."[884]

4.3.4 Legal representation

Article 37(d) of the CRC provides that a child who is deprived of liberty shall have the right to prompt access to legal and other appropriate assistance. In practice, very few children will have access to legal representation at the time a decision is made to place them in administrative detention. It is even rarer for children to access legal representation once an order for administrative detention has been made, and virtually unknown for a decision to detain to be challenged. There are a number of reasons for this lack of legal representation. As noted by the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or

[880] No date of adoption, 'second reading'.
[881] Article 12 of Regulations About Commissions (collegial organ) on Minors' Affairs and Protection of their Rights.
[882] Ibid., Article 14.
[883] Azerbaijan NGO Alliance for Children's Rights Juvenile Justice in Azerbaijan, 1998–2005. There is similar evidence in relation to the Central Asian States of Tajikistan, Krygyzstan, Kazakhstan, Uzbekistan and Turkmenistan.
[884] Human Rights Watch, 'Children of the Dust', 2006, 43.

punishment in his report to the fifty-fifth session of the General Assembly,[885] children may be denied access to legal representation, even in the case of older children, because of their status as children. In cases reported to the Special Rapporteur, children were only represented by their parents or legal guardians, who may not always act in the best interests of the child. This is particularly the case where the parent is seeking to have a child admitted to administrative detention as is possible, for example, in many of the CEE/CIS States,[886] or where the parent agrees with the decision to detain. Even where this is not so, parents generally lack knowledge of the legal procedures or the basis upon which they can challenge a decision to place a child in administrative detention. In addition, they are frequently unwilling to confront or challenge authority.

Other reasons for the lack of legal representation include a lack of knowledge on the part of the child and/or parent that legal representation is available or that the decision to detain can be challenged. It is difficult for children and parents to access relevant law and regulations governing administrative detention for care and protection purposes or to have the means to pay for legal representation. Few States provide free legal aid for non-criminal cases, even where the child is at risk of being deprived of liberty. Further difficulties arise where the child does not have a parent, the parent has abandoned or abused the child or where the parent refuses to engage with the process and attend the hearing of the child's case before the administrative body. The child is unlikely to know the date of the hearing, or indeed that a hearing is taking place, making it virtually impossible for the child to be legally represented.

Overall, there is very little evidence that decisions to place a child in administrative detention for care and protection are challenged, unless there is an NGO or lawyer whose particular interest is in representing such children, as, for example, in Tajikistan, where lawyers regularly attend at all administrative detention institutions and represent children.[887]

4.4. Child rights at risk

Children, who are administratively detained for the various "welfare" related purposes described in this section, are frequently denied the procedural safeguards outlined in international human rights law. Furthermore, the nature of the administrative detention can be such that children's substantive human rights are also violated. Without consistent enforcement of rights governing the decision to detain, the length of detention, the availability of judicial review and legal

[885] United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General (2000), UN GAOR A/55/290, para. 13.

[886] For example in Tajikistan, the Director of the Republican Special School indicated that parents often ask him to admit their children to the institution. Although he noted that he is required by law to reject such requests, if children are abandoned at the school they may then be placed at the Temporary Centre (Children's Legal Centre and United Nations Children's Fund, 'Children in Conflict with the Law', Tajikistan, 2004, 16). In Azerbaijan, parents frequently submit requests to the Commission on Minors to place their children in closed institutions for children in need of care and protection (Children's Legal Centre and United Nations Children's Fund Azerbaijan, 'Legal Analysis of the Child Protection System in Azerbaijan', 2008, 38).

[887] In Tajikistan, there is a duty lawyer scheme, through which lawyers are reimbursed costs to attend administrative detention institutions and represent children. For example, NGO Child Rights Centre, a local NGO in Dushanbe, provide legal assistance to children within the Special Vocational School to ensure their administrative detention complies with national laws. (NGO Child Rights Centre, Annual Report of Activities, 2007–2008).

representation, children in administrative detention are exposed to further potential abuse of their rights and welfare.

4.4.1 Rights to freedom from torture and cruel, inhuman or degrading treatment or punishment and to be treated with humanity and respect[888]

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated in 2000 that he had "received information according to which children have been subjected to cruel, inhuman or degrading treatment in non-penal institutions". The Special Rapporteur explained that "residential institutions caring for children who become wards of the State after being orphaned or removed from parental care for their own protection are in some cases alleged to permit inhuman forms of discipline or extreme forms of neglect." In this regard, the Special Rapporteur emphasised that "particularly in the case of extremely young children, such abuses can amount to cruel and inhuman treatment".[889]

According to the Special Rapporteur, the reported conditions for girls who are detained in the "protective" shelters in Jordan could be tantamount to inhuman or degrading treatment or punishment. For example, the Special Rapporteur found, following a country visit to Jordan, that "depriving innocent women and girls of their liberty for as long as 14 years can only be qualified as inhuman treatment, and is highly discriminatory."[890]

4.4.2 Conditions of detention facilities

The often prison-like conditions of administrative detention institutions are among the foremost concerns regarding the administrative detention of children for "welfare" purposes. In Kyrgyzstan, for example, a study has found that many "institutions are like prisons – locked and military run."[891]

The harsh conditions that children face in "welfare" administrative detention can have damaging effects. For example, evidence indicates that the conditions for many children in re-education through labour camps in China do not meet international standards.[892] Reports point to overcrowding, ill-treatment, longs hours of forced labour and poor detention conditions. Evidence from Tibetan children who have undergone re-education through labour has shown that "[c]hildren apprehended for political activities are held … in severely substandard conditions and deprived of minimal needs, such as food, heat, clothing, adequate sanitation and hygiene items …..Upon transfer from a 'pre-sentencing' detention centre to a prison or RTL camp, some children, like adult prisoners, must perform hard labour."[893] The Committee on the Rights of the

[888] Article 37(a) of CRC.
[889] United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General (2000)**,** UN GAOR A/55/290, para. 11.
[890] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Jordan (2007), U.N. Doc. A/HRC/4/33/Add.3, para. 13.
[891] UNICEF CEE/CIS, 'Lost in the Justice System', 2008, 37.
[892] Human Rights Watch, 'Where Darkness Knows No Limits: Incarceration, Ill-Treatment, and Forced Labor as Drug Rehabilitation in China', January 2010: <www.hrw.org/en/node/87466/section/5> [accessed 29 January 2011].
[893] Tibetan Justice Centre, 'A Generation in Peril: The Lives of Tibetan Children Under Chinese Rule, Detention, Torture and Other Maltreatment by State Actors': <www.tibetjustice.org/reports/children/detention/b.html> [accessed 29 January 2011].

Child in their 2005 concluding observations[894] to the second periodic report raised concerns about the widespread use of re-education through labour and violations of International Labour Organization (ILO) Conventions No. 29, 138 and 182.[895]

Similarly, reports on India have revealed that, although children are placed in children's homes due to a lack of parental care, some find themselves placed in observation homes for children in conflict with the law and as a result of the placement, administratively detained. These reports note the inadequacies of physical living conditions, frequently finding instances of overcrowding[896] and poor physical infrastructure with, for example, dilapidated buildings, dirty, damp rooms, dormitory style rooms, open toilets, no working taps and doors and no mattresses.[897]

Overall poverty in a State, such as Tajikistan, which is one of the poorest Central Asian countries, can also lead to harsh material conditions in places of administrative detention. For example, in Tajikistan, the Special School and the Special Vocational School has had little in the way of material goods, including sufficient bedding and clothing for the children, and the provision of sufficient food of adequate nutritional quality is also a regular problem.[898]

4.4.3 Discipline and violence

Reports indicate that children detained for welfare purposes can suffer inappropriate discipline, as well as violence. For example, in Belize, the Certified Institutions (Children's Reformation) Act allows parents to send their child to a juvenile detention centre known as the Youth Hostel, for being "out of control". An alternative report to the Committee on the Rights of the Child in 2004[899] stated that "[c]orporal punishment and harsh treatment" of children administratively detained in the Youth Hostel in Belize was rife. Indeed, the problem was reportedly so great that "[i]n 2002 there was such concern about the systematic harsh punishment of children at the Youth Hostel that NGO human rights monitors were called in." In Libya, girls reported facing prolonged periods of solitary confinement in social rehabilitation centres.[900] In Saudi Arabia, girls in social observation homes may be punished by being placed in isolation if it is considered necessary. This includes girls who are found to have, even treatable or minimally infectious, sexually transmitted diseases.[901]

[894] Committee on the Rights of the Child, Concluding Observations: China (2005), U.N. Doc. CRC/C/CHN/CO/2.
[895] Ibid., para. 84. Also see ILO Conventions No. 29 (Forced Labour Convention 1930); No. 138 (Minimum Age Convention 1973); No. 182 (Worst Forms of Child Labour Convention 1999).
[896] In a report examining institutions in nine states, incidents of overcrowding were reported in nearly all: Child Relief and You (CRY) for the Ministry of Social Justice and Empowerment, Government of India, 'Evaluation Study on the Implementation of the Centrally Sponsored Scheme', Programme for Juvenile Justice in Bihar, Delhi, Karnataka, Maharashtra, Manipur, Orissa, Tamil Nadu, Uttar Pradesh and West Bengal. Hereinafter the CRY Report.
[897] This was observed in 98 per cent of institutions studied by the CRY Report.
[898] Observed through Children's Legal Centre staff visits between 2004 and 2009.
[899] National Organization for Prevention of Child Abuse and Neglect, 'Children and Adolescents in Belize', 2004, 27, 28.
[900] Human Rights Watch, 'A Threat to Society?', 2006, 28.
[901] Human Rights Watch, 'Adults Before Their Time', 2008, 49.

In Viet Nam, children who were held for "social rehabilitation" in the Dong Dau Social Protection Centre also reported facing abuse, including the use of corporal punishment and physical abuse, with disciplinary "beatings" extremely common.[902]

4.4.4 Right to education

Many children held in administrative detention on "welfare" grounds are unable to realise their right to education, in contravention of international human rights law.[903] Many of the institutions discussed in this chapter are held out by their respective States as "educational facilities". Despite the ostensible aim of "rehabilitation" or "education", reports indicate that children in administrative detention facilities for welfare purposes receive little or no education services. In Azerbaijan, for example, children at the Mardekan Special School receive poor standards of education and educational outcomes for the children there are reportedly limited,[904] while in Viet Nam, children detained at the Dong Dau Social Rehabilitation Centre denied that they had received "recreation, education, training or rehabilitation activities or facilities".[905]

In Libya, girls were reportedly actively denied access to education in that they were only allowed to read books about religion or to engage in vocational activities, such as sewing.[906]

4.4.5 Right to highest attainable standard of health

Under international human rights law, children have the right to the highest attainable standard of physical and mental health.[907] Adequate health care remains, however, an issue for children in administrative detention. In some states there is no form of medical care for children in administrative detention. For instance, in Viet Nam, children detained at the Dong Dau Social Rehabilitation Centre did not receive any medical care during their detention.[908] In other States, such as Mongolia, medical services are available, but the care provided is so basic that it is doubtful that they would reach a standard that would fulfil the child's right to the "highest" attainable standard of health.

4.4.6 Monitoring by States[909]

Monitoring of institutions in which children are administratively detained is vital to ensure that the rights and interests of the children in the home are protected. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted as a particular concern that staff at non-penal institutions such as "care institutions" are able to perpetrate abuses against children due to "insufficient monitoring".[910]

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[902] Human Rights Watch, 'Children of the Dust', 2006, 43, 44.
[903] Article 28(1) of CRC; Article 13 of ICESCR. See also Article 77(1) and (2) of the Standard Minimum Rules on the Treatment of Prisoners.
[904] Hamilton, C., 'Azerbaijan: The Position of Children in Conflict with the Law', 2006, 29, 30.
[905] Human Rights Watch, 'Children of the Dust', 2006, 42.
[906] Human Rights Watch, 'A Threat to Society?', 2006, 29-30.
[907] Article 24(1) of CRC; Article 12 of ICESCR.
[908] Human Rights Watch, 'Children of the Dust', 2006, 42.
[909] Article 3(3) of CRC.
[910] United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General (2000), UN GAOR A/55/290, para. 11.

In Tajikistan, the commissions on child rights are responsible for monitoring institutions in which children are administratively detained, including at the Special School. Under their regulations, they have the "right" to visit institutions "in order to check the conditions of living, care, education and training of the child".[911] The closed institutions, in which children can be administratively detained, also have complaints mechanism procedures, through which children, and others, can raise concerns over treatment and abuse. In 2009, both the Special School and Reception Centre for Children in Tajikistan, as well as the Special Vocational School and Boy's Penal Colony, developed and adopted child protection procedures in order to implement the terms of the Child Protection Policy and Procedure for Closed Institutions, which was signed by the Deputy Prime Minister in 2008. These procedures[912] require the appointment of a senior member of staff as a child protection officer to take responsibility for implementing the national Child Protection Policy, and to ensure that the correct procedure is followed in the event that a child discloses abuse.[913] Where abuse is investigated and found to have occurred, the child protection officer must refer the case either to the Ministry of Education in the case of the Special School,[914] or to the prosecutor's office in the case of the Reception Centre.[915]

In practice, the implementation of monitoring regulations, as well as effective training for those involved in monitoring activities is essential for protecting children's access to their rights when in administrative detention. For example, in India, although child welfare committees are tasked with inspecting children's homes, they do not necessarily perform this function in practice.[916] According to a United Nations Children's Fund study from 2006, only one member of a child welfare committee was in attendance during a visit to a children's home. This was a local teacher who was "quite unaware of the ramifications of the Act or the Rules, or [the] importance in protecting the rights of children".[917] In this case, the lack of capacity of the monitoring body clearly calls into question its ability to effectively ensure the protection and promotion of the rights of the children in question.

4.5. Conclusion

Surprisingly little attention is paid in State treaty reports to the issue of welfare detention. While the numbers of children subject to such detention are relatively small, these children are particularly vulnerable. They are largely invisible children, with fragile families and virtually no social networks in the community. They are also quite frequently children of single parents, where one parent has died or has migrated for economic reasons, of parents living in poverty or alcoholic and drug dependent parents. Such parents have little by way of social resources and are generally unable to do much to help their children once detained, with many failing to maintain family contact.

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[911] Regulation 12 of the Regulations on the Commissions on Child Rights, 2008.
[912] Child Protection Procedures for the Republican Special School for Children and Teenagers who need Special Education, 2009. Hereinafter the Procedures for the Republican Special School.
[913] Ibid., Section 3; Sections 4, 5 of Child Protection Procedures for the Republican Temporary Isolation Centre for Children and Teenagers, 2009. Hereinafter the Procedures for the Republican Temporary Isolation Centre.
[914] Section 4.2 of Procedures for the Republican Special School.
[915] Section 5.13(f) of Procedures for the Republican Temporary Isolation Centre.
[916] United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', August 2006, p. 55, 78, 79.
[917] Ibid., p. 98.

Such children are sometimes detained for long periods of time, in inadequate conditions, which are likely to have a long term impact on their physical and mental health, their education and even their growth. Very few of these children will receive legal support or assistance to ensure that their detention is in accordance with domestic law and procedures, and for the shortest appropriate period of time. Equally, very few will receive adequate support to enable them to resettle within the family or community once they are released, placing these children at significant risk.

The institutions in which they are placed are unlikely to have minimum quality standards or to be monitored. For instance, although most of the ex-Soviet Union States that continue to utilise administrative detention for children with welfare needs have regulations governing the monitoring of the various forms of detention and of the children themselves, in practice there is virtually no monitoring.

The Committee on the Rights of the Child has recommended that children in need of care and protection should not be administratively detained. [918] States using such administrative detention for welfare reasons need to consider whether their child protection system could be developed to provide foster care or small family type homes for this group of children and to phase out completely the use of administrative detention.

[918] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 8; Guideline 56 of Riyadh Guidelines.

5. Administrative detention on health grounds

This section examines the use of administrative detention in relation to children who are suffering from psychiatric mental health disabilities or, more controversially, when a child has intellectual mental disabilities or drug or alcohol problems. Most States also permit administrative detention of children who are suffering from infectious diseases, although this latter issue falls outside the scope of this working paper.

Nearly all States have domestic legislation which permits the use of administrative detention of children on health grounds, though the remit of that power varies considerably from State to State. There is an absence of agreement on terminology to be used in describing different forms of mental health and mental disability. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[919] notes that the term 'mental disability' encompasses a wide range of profoundly different conditions and, importantly, two sets of conditions: psychiatric disabilities and intellectual disabilities, which are distinct in their causes and effect. Psychiatric disabilities include major mental illnesses and psychiatric disorders, for example, schizophrenia and bipolar disorder as well as more minor mental ill health and disorders, often called psychosocial problems, i.e. mild anxiety disorders. Intellectual disabilities include limitations caused by, among others, Down's syndrome and other chromosomal abnormalities, brain damage before, during or after birth, and malnutrition during early childhood. Disability refers to a range of impairments, activity limitations, and participation restrictions, whether permanent or transitory. The Convention on the Rights of Disabled Persons with Disabilities has defined disability as "an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[920] This section uses the same terminology and definitions.

One in four persons will suffer from a mental disorder at some stage in his or her life.[921] While the figure for children suffering from mental disorders appears to be less than that of adults, it is still high. European research on the mental health of children in developed States indicates that 1 in 10 children aged 11 to 15 will experience depression, anxiety, behaviour problems and hyperactivity.[922] While children in developing States may not display such high levels of mental health problems, it is nevertheless recognised that the level of psychosocial problems for children

[919] Commission on Human Rights, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, U.N. Doc. E/CN.4/2005/51, para. 20. Having taken extensive advice, the Special Rapporteur decided to adopt the generic term 'mental disability', see para. 19 of the above-mentioned report.
[920] Preamble, (e) of the Convention on the Rights of Persons with Disabilities, adopted by a General Assembly resolution, 24 January 2007, UN GAOR A/RES/61/106.
[921] Commission on Human Rights, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, U.N. Doc. E/CN.4/2005/51, para. 6.
[922] See 'Changing Adolescence Programme Briefing Paper, Time Trends in Adolescent Well-being update December 2009', Nuffield Foundation, 2009.

in both developed and developing States rose in the mid- to late-twentieth century. This rise is regarded as both "surprising and troubling."[923]

Evidence shows that boys are more likely to have mental health disabilities[924] than girls,[925] and are more likely to be the subject of administrative detention, through involuntary admission, commitment or confinement to psychiatric hospitals, units or mental disability homes. Teenagers are more likely to be administratively detained than younger children and are more likely to have experienced severe conflict with their parents,[926] making release and reintegration more problematic.

Despite the high incidence of psychiatric mental health problems, more than 40 per cent of States have no mental health policy and over 30 per cent have no mental health programme. Over 90 per cent of States have no mental health policy that relates specifically to children and adolescents.[927] In short, mental health is among the most grossly neglected elements of the right to health.[928]

It is extremely difficult to ascertain or even to estimate how many children are held in administrative detention for psychiatric disabilities. Only half of countries in a 2008 survey by the WHO of the 53 States in the European region had a national database of child and adolescent mental health information.[929] However, the number is likely to be significant taking into account that virtually all States permit children to be detained for reasons of psychiatric mental health.

5.1. Context and circumstances

Children may be placed in administrative detention on health grounds for a variety of reasons. Many States permit the detention of children with psychiatric disabilities, those with intellectual disabilities and those who use drugs or alcohol.

5.1.1 Children with psychiatric disabilities

Most States permit the administrative detention of children with mental illness where the child's behaviour poses a serious risk of harm to the community and/or to the child him or herself. The

[923] 'Towards causal explanations of Time Trends in psychosocial disorders of youth', in Rutter, M. and Smith, D. J. (eds), *Psychosocial disorders in young people: Time Trends and their causes*, Chichester, Wiley, 1995.
[924] These should be regarded as psychiatric disabilities as opposed to intellectual disabilities. See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N.Doc. E/CN.4/2005/51.
[925] See United Kingdom Office for National Statistics, Mental Health: <www.statistics.gov.uk>; Centers for Disease Control and Prevention: <www.cdc.gov> [accessed 29 January 2011].
[926] Felkins, et al., 'Voluntary or involuntary status of 50 adolescent in-patients', *Hospital and Community Psychiatry*, 42, 1062, 1063, 1991.
[927] World Health Organization, 'World Health Report 2001 - Mental Health: New Understanding, New Hope', 2001, p. 3.
[928] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N.Doc. E/CN.4/2005/51, para. 6.
[929] World Health Organization Europe, 'European Strategy for child and adolescent health and development: From Resolution to Action 2005–2008'.

principles for the protection of persons with mental illness and the improvement of mental health care [930] (MI Principles) limit the circumstances in which a child may be administratively detained (generally referred to as involuntary commitment or confinement). It provides that a person with a psychiatric diagnosis of 'mental illness' should only be detained if he or she presents a "serious likelihood of immediate or imminent harm" to themselves or others.[931] Involuntary commitment may also be allowable, under limited circumstances, where necessary to prevent the "serious deterioration" of a person's mental condition, but only when there are "no less intrusive or restrictive means available" to meet the same objective.[932]

While psychiatric detention is generally used for benevolent purposes to protect the child or the community, there are also instances of misdiagnosis, over diagnosis and an exclusive focus on the medical model of disability, which lead to over-institutionalisation and unnecessary commitment of children.[933] A lack of community care facilities and family support services also leads to institutionalisation.[934] Amnesty International reporting on conditions in Romania in 2004 noted that it was apparent that many of the people placed in psychiatric wards and hospitals throughout the country did not actually require psychiatric treatment. They were placed in the hospital on non-medical grounds, apparently solely because they could not be provided with appropriate support and services to assist them and/or their families in the community.[935] Similarly, a psychiatric hospital in Turkey estimated that of 500 patients (including adults and children) at the facility, only 10 per cent would need to be confined as in-patients if community-based services were available.[936]

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[930] Principles for the protection of persons with mental illness and the improvement of mental health care, adopted by General Assembly Resolution 46/119 of 17 December 1991, UN GAOR Supp. (No. 49), Annex in 188–92, U.N. Doc. A/46/49. Hereinafter the MI Principles.

[931] Ibid., Principle 16(1)(a).

[932] Ibid., Principle 16 (1)(b). This principle appears to be in conflict with the Office of the High Commissioner for Human Rights, Dignity and Justice Detainees Week, Information Note No. 4, 'Persons with Disabilities': <www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_4.pdf> [accessed 29 January 2011], which states that detention for reasons of care, treatment or safety of the person or the community cannot be used to justify deprivation of liberty. The status of such a statement is not clear, but in practice virtually all States permit some form of detention for these purposes.

[933] United Nations, Study on Violence, Chapter 5, 'Violence against Children in Care and Justice Institutions', 2006: <www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf> [accessed 29 January 2011]. See also Finn, P., 'In Russia Psychiatry is Again a Tool Against Dissent', *Washington Post*, 30 September 2006.

[934] For instance, Argentina boasts progressive federal mental health legislation, which establishes guidelines for the implementation of mental health reform. The Programa de Asistencia Primaria en Salud Mental ley 25.421 (Program for Mental Health Services in Primary Care, Law 25.421), enacted in 2001, in the Autonomous City of Buenos Aires, the Ley Básica de Salud, No. 153 (Basic Health Law 153) requires that the city government implement progressive deinstitutionalization. In 2000, in compliance with Law 153, Ley de Salud Mental de la Ciudad de Buenos Aires, No. 448 (Mental Health Law of the City of Buenos Aires, Law 448) was passed. Law 448 guarantees the right to mental health, and calls for deinstitutionalization and the rehabilitation and social reinsertion of institutionalized persons. However, despite this legislation, outside the city limits of Buenos Aires, the lack of facilities and mental health services for children continues to lead to an over-placement and institutionalisation of children in adult psychiatric facilities.

[935] Amnesty International, Romania, Memorandum to the Government Concerning Inpatient Psychiatric Treatment, 2004: <www.amnesty.org/en/library/info/EUR39/003/2004> [accessed 29 January 2011].

[936] Mental Disability Rights International ,'Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centres of Turkey', 2005, Washington, D.C.

Despite condemnation by international bodies[937] of the use of involuntary commitment to a psychiatric unit as a means of stifling political dissent,[938] this practice was prevalent in the Soviet bloc until the dissolution of the Soviet Union in 1991, as well as in countries influenced by the Soviets, such as Bulgaria and Romania, particularly under President Nicolae Ceaucescu. The European Court of Human Rights has stated specifically that the European Convention on Human Rights does not permit the detention of a person simply because "his views or behaviour deviate from the norms prevailing in a particular society."[939] Involuntary commitment as a tool against dissent and prohibited faith groups remains, however, an issue in China, where conditions continue to parallel those of the Soviet Union in the 1970s and 1980s.[940] There is no evidence on the numbers of children detained but no reason to suppose that adolescent children are exempted from this form of detention.

5.1.2 Children with intellectual disabilities

In some States, and especially the CEE/CIS States, children with intellectual or learning disabilities may also find themselves placed long term in mental health institutions or, in some cases deprived of their liberty "not for having committed a crime or for having violated the law, but for having a disability."[941]

In 2002, an estimated 317,000 children with disabilities in the region lived in residential institutions.[942] The vast majority of the children were placed in institutions with the consent of their parents. There are many reasons why such children are placed in institutions. Stigmatisation, discrimination, misdiagnosis, over-diagnosis and an exclusive focus on the medical model of disability are all issues that lead to the overuse of institutionalisation in these countries. So too is the lack of community based support services for children and families and community mental health services, and the lack of viable alternatives for children. In the Sudan, for example, children with psychosocial disabilities are reported to "often end up in arbitrary detention since there are hardly any specialised institutions to accommodate their protection needs".[943] The same practice was evident until recently in Tajikistan, where girls displaying "difficult" behaviour, as a result of sexual abuse, were administratively detained. [944]

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[937] World Psychiatric Association, Statement and Viewpoints on the Rights and Legal Safeguards of the Mentally III, adopted by the WPA General Assembly in Athens, 17 October 1989.

[938] See 'Psychiatric Terror: How Soviet Psychiatry is Used to Suppress Dissent', Sidney Bloch and Peter Reddaway, Basic Books, New York, 1977, 280–33.

[939] *Winterwerp v. The Netherlands*, 33 European Court of Human Rights, Series A (1979) (cf) at 16.

[940] Human Rights Watch and Geneva Initiative on Psychiatry ,'Dangerous Minds: Political Psychiatry in China Today and its Origins in the Mao Era', 2002, p. 34–36.

[941] OHCHR, Dignity and Justice for Detainees Week, Information Note No. 4 Persons with Disabilities.

[942] UNICEF Report. 'Innocenti Insight, Children and Disability in Transition in CEE/CIS and Baltic States', 2005, p. ix. The numbers of children in such institutions are considerable. In 2003 for instance, 2,848 children with mental health disabilities were living in institutions in Romania. Open Society Institute (2005) Rights of People with Intellectual Disabilities - Access to Education and Employment in Romania.

[943] Tenth Periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: 'Arbitrary arrest and detention committed by national security , military and police', OHCHR, 28 November 2008.

[944] Administrative detention of girls has now ceased and regulations that permitted such detention have been repealed. Girls who have been sexually abused or trafficked can now be referred to the Girls Support Centre which provides a therapeutic setting in which to address emotional and mental health issues. This is discussed in further detail at Section 4.

While some of the care homes for intellectually disabled children are of good quality, are open and part of the community, others are isolated, closed to the outside world, keep children locked into the premises and admit children for the entirety of their childhood. Reports on Kyrgyzstan, Romania, Kosovo and Serbia all contain evidence that, while placed ostensibly for welfare reasons, these intellectually disabled children are, in practice, being administratively detained, as they are not free to leave.[945]

Children who lack the capacity to consent to their placement and children who agree to be placed in an institution (non-protesting children) and do not attempt to leave, can be regarded as deprived of their liberty if, in fact, they would be prevented or stopped from leaving should they try to do so.[946] In determining whether there has been a deprivation of liberty, the starting point, according to the European Court of Human Rights, is the concrete situation of the individual concerned. The issue is not whether the unit or institution in which the child is kept is locked or unlocked, but whether a person could simply leave if they chose to do so.[947] The distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity, and not one of nature or substance.[948] Account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question. The Court has also made it very clear that "the right to liberty is too important for a person to lose the benefit of Convention protection for the single reason that he gave himself up to be taken into detention."[949]

The European Court of Human Rights held in the case of *Winterwerp v. The Netherlands*, that where a person is voluntarily admitted (i.e. a child or a child's parent agrees to the admission) into a psychiatric unit or disability home, from which a child is not free to leave at will (or does not have the capacity to leave), then, in order to ensure that the placement does not result in arbitrary detention, any detention must be in accordance with a procedure prescribed by law, which requires the existence in domestic law of adequate legal protections and fair and proper procedures.[950] Thus, any admission of a child to an institution from which he or she is not free simply to leave at will should be subject to formal procedures. These should include formalised admission procedures indicating who can propose admission, for what reasons, and on the basis of what kind of medical and other assessments and conclusions. The exact purpose of the admission and the limits in terms of time, treatment or care must be attached to that admission. The need for a person to be deprived of their liberty should also be the subject of a continuing clinical assessment and a person should be appointed who can make objections and applications on the child's behalf.[951]

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[945] 'Mental Health Law of the Kyrgyz Republic and its Implementation', Mental Disability Advocacy Centre, April 2004; Mental Disability Rights International: 'Serbia's Segregation and Abuse of Children with Disabilities', 2007; 'Human Rights of People with Mental Disabilities in Kosovo', 2002; 'Romania's Segregation and Abuse of Infants and Children with Disabilities', 2006.

[946] See WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, Chapter 2, 'Deliberation No. 7 on Issues relating to psychiatric detention', para. 58. The WG is of the view that holding mentally disabled persons against their will, in conditions preventing them from leaving may, in principle, amount to deprivation of liberty (para. 51).

[947] *H and L v. United Kingdom*, 2004, para. 89.

[948] Ibid. See also *Guzzard v. Italy*, 1980, para. 92.

[949] *H and L v. United Kingdom*, 2004, para. 91.

[950] See *Winterwerp v. The Netherlands*, 33 European Court of Human Rights, Series A (1979) at p. 19, 20, § 45, and *Amuur v. France*, 1996, p. 851, 852, § 53.

[951] *H and L v. United Kingdom*, 2004, para. 120.

5.1.3 Children who use drugs and alcohol

Administrative detention for the purpose of compulsory drug dependence treatment is used in many countries,[952] including Cambodia (where around one quarter of the 2,382 detainees in the drug detention centres are under 18, and over 100 are under 15),[953] Viet Nam, and Thailand.[954] The best reported instance of this practice is in China. Persons suspected of drug use in China are subject to administrative, not criminal, penalties. Under the 2008 Anti-Drug Law of China, a person suspected of drug use faces a minimum two-year sentence in a drug detention centre, operated by the public security bureau. Upon release the person can be given an additional three years of ill-defined 'community rehabilitation'. Both the sentence and the additional community rehabilitation can be imposed by an administrative body, without trial or judicial oversight.[955]

According to a new report from Human Rights Watch on abuses within drug detention centres, up to half a million people are confined in approximately 700 centres in China at any given time.[956] Disaggregated data on children detained in these centres is rarely published by the Chinese authorities, and is difficult to confirm.[957] However, the Chinese State party report on implementation of the CRC in 2005, highlighted that "besides working to prevent drug consumption by children, the Government has also taken action to redeem and reform child addicts, applying a combination of compulsory and voluntary detoxification methods."[958] The Anti-Drug Law 2008 also allows for the detention of individuals (over the age of 16) in compulsory drug detention centers; and increases the minimum sentence to a compulsory drug detention centre from 6 to 12 months to 2 to 3 years.[959] This suggests that it is highly likely that children have been subject to administrative detention in the coercive drug rehabilitation camps, and that for those 16 and over this practice will continue.

In Viet Nam, children who are identified as drug users can also be subject to administrative detention in rehabilitation centres.[960] The People's Committee may place children aged 12 to 18

[952] Short term police detention is used in England, Germany and Italy, while longer detention in police remand homes can be found in Estonia, Lithuania, Romania and Hungary. See 'Service Provision for Detainees with Problematic Drug and Alcohol Use in Police Detention: A Study of Selected Countries of the European Union', (HEUNI report 54), Morag MacDonald et al., 2008.

[953] Human Rights Watch, 'Skin on the Cable - the Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia', January 2010, p. 14.

[954] Open Society Institute, 'Human rights abuses in the name of drug treatment: Reports from the field' , 2009. Pearshouse, R., 'Patients, not criminals? An assessment of Thailand's compulsory drug dependence treatment system', *HIV/AIDS Policy and Law Review*, 2009, 14:1, 2009.

[955] Human Rights Watch, 'Where Darkness Knows No Limits', January 2010. The 2008 Anti-Drug Law abolished the former sentence of 're-education through labour' (RTL) for drug users, but expanded police power to detain individuals, without a reasonable suspicion of drug use and increased the minimum sentence to a compulsory drug detention centre from 6 to 12 months to 2 to 3 years.

[956] Human Rights Watch, 'Where Darkness Knows No Limits', January 2010**Error! Hyperlink reference not valid.**. Camp details of known and confirmed centres are also listed in the Laogai Foundation Handbook Loaogai Foundation, Laogai Handbook 2007-2008, Appendices.

[957] Amnesty International United Kingdom's China team confirmed this in a telephone conversation on 23 June 2009.

[958] See U.N. Doc. CRC/C/83/Add.9, 15 July 2005, para. 359.

[959] Human Rights Watch, 'Where Darkness Knows No Limits', January 2010.

[960] Article 29 of Law on Drug Prevention and Fight, (No. 23/2000/QH10 of December 9, 2000).

in mandatory institutionalised detoxification[961] if the juvenile has undergone family and community-based detoxification but remains addicted or has received repeated education at communes, wards or district towns but remains addicted or if the juvenile has no permanent accommodation.[962] The length of administrative detention can last from one to two years.[963]

5.2. Legal framework

Rights of a child must be respected and a number of human rights instruments provide guidance in this area. The right to liberty and security of person must be taken into account, and administrative detention must always be lawful and not be arbitrary. The European Commission, among other bodies, sets out guidelines on human rights that are applicable to administrative detention based on health grounds.

5.2.1 Right to liberty and security of person

Under international human rights law, persons with disabilities are entitled to enjoy their rights to liberty and security on an equal basis with others,[964] and can be lawfully deprived of their liberty only for the reasons, and in accordance with the procedures, that are applicable to other persons in the jurisdiction.[965]

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention (For details of provisions, see Introduction.).

General Comment No. 8 of the Human Rights Committee emphasises that Article 9 ICCPR is applicable to all types of deprivation of liberty, including all forms of administrative detention. While part of Article 9(2) and 9(3) are only applicable to persons against whom criminal charges are brought, "the rest, and in particular the important guarantee…i.e. the right to control by the court of the legality of the detention, applies to all persons deprived of their liberty by arrest of detention."

[961] Article 24 of the Regulations on the organisation and operation of treatment facilities under the Ordinance on Handling Administrative Violations and the regime applicable to minors, and people in voluntary treatment facilities. See also ibid., Decree 135/2004/ND-CP, June 10 2004.
[962] Ibid., Article 24(1) Decree 135/2004/ND-CP.
[963] Ibid., Article 24(2) Decree 135/2004/ND-CP; Article 26 of Ordinance on Handling of Administrative Violations (Viet Nam) No. 44/2002/PL-UBTVQH10, 2 July 2002.
[964] Article 23(1) of the CRC states that 'a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community, while Article 23(2) recognises 'the right of the disabled child to special care and [States Parties] shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child'.
[965] For an overview of the protections against arbitrary detention under international human rights law as they apply to psychiatric commitment, see 'The Role of International Human Rights in National Mental Health Legislation', Rosenthal E & Sundram C, Department of Mental Health and Substance Dependence, World Health Organization, 2004, p. 61–67: <www.who.int/mental_health/policy/international_hr_in_national_mhlegislation.pdf> [accessed 29 January 2011].

Article 37 of the CRC, also limits the use of administrative detention, and adds additional restrictions on the use of administrative detention (See Introduction.).

The right to liberty and security of the person is mirrored in regional human rights instruments, including Article 5 of the Arab Charter, Article 6 of the Banjul Charter, Article 7 of the American Convention, Article 1 of the American Declaration on the Rights and Duties of Man and Article 5 of the European Convention. Further rights and duties can also be found in the Body of Principles.

In addition, the Convention on the Rights of Persons with Disabilities (CRPD) specifies that States parties must guarantee, "on an equal basis with others" that people with disabilities "[e]njoy the right to liberty and security of the person."[966] It creates no exceptions to this general rule. The Convention states clearly that deprivation of liberty based on the existence of a disability is contrary to international human rights law: it is intrinsically discriminatory, and is therefore unlawful.[967] Any decision to administratively detain a child on health grounds must, therefore, meet the conditions set out in the CRC and the ICCPR: it must be in conformity with the law and must not be illegal or arbitrary.

The United Nations Declaration on the Rights of Disabled Persons;[968] the United Nations Declaration on the Rights of Mentally Retarded Persons[969]; and the MI Principles are also all relevant. Although these documents are not binding on States, they nevertheless set clear standards and procedures for the use of detention on the basis of mental disability. There are, however, no specific procedural instruments relating exclusively to children. Rather, they too, are entitled to the protection of instruments applying to all persons.

Persons with mental and physical disabilities are also protected by regional Conventions, in particular, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities[970] and the European Convention. [971]

[966] Article 14 of CRPD.
[967] Article 14 of the Convention on the Rights of Persons with Disabilities discussed in OHCHR, Dignity and Justice for Detainees Week , Information Note No. 4 Persons with Disabilities. In this note, OHCHR appear to extend the concept of unlawfulness, stating that detention would also be unlawful where additional grounds—such as the need for care, treatment and the safety of the person or the community—are used to justify deprivation of liberty.
[968] The Declaration on the Rights of Disabled Persons was adopted by a General Assembly resolution 9 December 1975, UN GAOR A/RES/3447.
[969] The Declaration on the Rights of Mentally Retarded Persons was adopted by a General Assembly resolution 20 December 1971, UN GAOR A/RES/2856.
[970] The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was adopted at the twenty-ninth regular session of the General Assembly of the Organisation of American States, AG/RES. 1608, 7 June 1999, and entered into force 14 September 2001. It has been ratified by Costa Rica, Mexico, Argentina, Uruguay and Panama. Article 7 of the Convention guarantees: the right not to be arbitrarily deprived of one's liberty (Art. 7.3); the right 'to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings' (Art. 7.5) by 'a judge or other officer authorized by law to exercise judicial power' (Art. 7.6); 'the right to counsel' (Art. 8.2); 'the right to an appeal' (Art. 8.2); and 'effective recourse for the violation of fundamental rights' (Art. 25).
[971] Articles 5, 14 of European Convention.

5.2.2 Administrative detention must be lawful

Any detention on health grounds must be "in conformity with the law". In other words, a child may only be administratively detained on health grounds when the domestic law permits such detention, and any such detention must be ordered in accordance with domestic procedures.[972] When there are no provisions or specific procedures for administrative detention on health grounds in domestic law, such detention will not be "in conformity with the law" and will, therefore, constitute unlawful detention in breach of Article 9(1) of the ICCPR and Article 37(b) of the CRC. An example of unlawful detention was noted by the Working Group on Arbitrary Detention in their mission to China,[973] who found that the State was unlawfully administratively detaining children suffering from psychiatric mental health problems. There was no legislation permitting such detention in some of the regions, but these regions were, nevertheless, ordering children to be placed in administrative detention.

5.2.3 Administrative detention must not be arbitrary

Where provisions permitting administrative detention are contained in domestic law, there is still a requirement that the administrative detention must not be arbitrary. The Human Rights Committee has stated that "'[a]rbitrariness' is not to be equated with 'against the law'", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[974] This means that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[975]

Determining whether the administrative detention of a child is necessary and proportionate will depend on the circumstances of the case, and the purpose of the detention. In the case of a child, administrative detention will only be reasonable and proportionate if is a measure of last resort (when all other options for appropriate community treatment and support have been explored) and for the shortest appropriate period of time.[976]

In making any order made for administrative detention of a child for health reasons, the best interests of the child should be the primary consideration[977] and the right of the child to have his or her views heard and taken into account also applies.[978] Detention should "not continue beyond the period for which the State can provide appropriate justification" and if it does then it will cease to meet the criteria for lawful administrative detention and will become unlawful and/or arbitrary, as stated in *A. v. Australia*.

5.2.4 Safeguards

To ensure that administrative detention on health grounds is lawful, States need to ensure that children are provided with all the necessary procedural safeguards and guarantees, including: the right to be informed promptly of the reasons for detention and the substance of the complaint against him or her; the right to be challenge the legality of the detention; and the right to

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[972] A lack of procedures may lead to the detention being considered arbitrary. See *H and L v. the United Kingdom*, 2004.
[973] WG on Arbitrary Detention: Addendum: Mission to China (2004), U.N. Doc. E/CN.4/2005/6/Add.4, para. 60–64.
[974] *A. W. Mukong v. Cameroon*, 1994, p. 181, para. 9.8
[975] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para. 9.2
[976] Article 37(b) of CRC.
[977] Article 3 of CRC.
[978] Article 12 of CRC.

protection against *incommunicado* detention, including the right to be kept at officially recognised places of detention, and the right to maintain contact with the family through correspondence and visits. The right to access legal counsel and other appropriate assistance should also be respected.

In addition, Article 25 of the CRC requires that the child's case should be reviewed at regular intervals, not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release.

5.2.5 European Convention

The European Court of Human Rights, in particular, has developed an extensive body of case law on the protection of individuals with disabilities or health issues against arbitrary detention. While this body of case law is relevant only to the 47 countries that have ratified the European Convention, it provides useful guidance that assists in understanding the requirements of Article 9 of the ICCPR. Article 5(1) (e) of the European Convention permits deprivation of liberty in accordance with procedures established by law where a "person is of unsound mind."[979] However, the European Court of Human Rights has held that in order for the detention of a person with a mental health problem to be regarded as lawful, three conditions must be satisfied:

a) except in emergency cases, a true mental disorder must be established before a competent authority on the basis of objective medical expertise;
b) the mental disorder must be of a kind or degree warranting compulsory confinement; and
c) the validity of continued confinement depends upon the persistence of such a disorder.[980]

5.3. State laws, policies and practices

Domestic laws, standards and principles provide guidance to States when considering administrative detention of children. Above all, a child's right to legal representation and a review of detention or placement must be respected.

5.3.1 Legal standards of decision-making

The MI Principles provide that the decision to administratively detain a child should only be made in accordance with the law and only if a qualified mental health practitioner authorised by law for that purpose determines that the person has a mental illness.[981] In the majority of States, this requirement is implemented and the power to administratively detain, where it exists, lies with psychiatrists and doctors.

[979] The term 'unsound mind' is 'not one that can be given a definitive interpretation' but one 'whose meaning is continually evolving as research in psychiatry progresses, and increasing flexibility in treatment is developing and societies attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more widespread', Winterwerp Case v. The Netherlands, 24 October 1979, Series A, No. 33, p.16, para. 37.

[980] European Court of Human Rights, Case of *X. v. the United Kingdom*, Judgment of 5 November 1981, Series A, No. 46, p. 18, para. 40; *Winterwerp v. the Netherlands*, 2 EHRR 387, 1979.

[981] Principle 2 of MI Principles. See also *X. v. United Kingdom* judgment of 5 November 1981, Series A, No. 46, p. 18 para 40 (European Court of Human Rights); *Winterwerp v. The Netherlands*, 1979, para. 37.

The MI Principles also require that in cases where:

a) a person is involuntarily committed, because his or her mental illness is severe, and
b) his or her judgment is impaired, and
c) a failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition, a second mental health practitioner should be consulted.[982]

The World Psychiatric Association Declaration on Ethical Standards[983] requires that when diagnosing whether a person is mentally ill, psychiatrists should apply internationally accepted medical standards and medical science. Difficulty in adapting to moral, social, political or other values should not be considered a mental illness. After initial diagnosis and involuntary commitment, certified psychiatric doctors should regularly assess the child's mental health. The child should immediately be released if his or her mental health does not require further treatment or stay in the institution.[984]

There is some evidence that not all States set the threshold for involuntary commitment to psychiatric units at the level required both by international law and the Working Group on Arbitrary Detention. Some permit administrative detention of children for psychiatric disability to occur when arguably the child's condition is not of a kind or degree warranting compulsory confinement. For example, Argentine law permits the administrative detention of anyone who could affect "public tranquillity" as well as "the demented" who it is feared "will harm themselves or others".[985] While Romania permits a broad array of public authorities to request psychiatric detention, including representatives of "local public administration services…the police, gendarmerie…or the fire brigade".[986]

In relation to the involuntary commitment of children who are considered to be drug misusers or alcoholics, the Working Group on Arbitrary Detention has recommended that "conditions of the admission against his/her will and the forcible holding of people […] for detoxification shall be meticulously provided by law […] that law shall prescribe effective safeguards against arbitrariness."[987] Those safeguards include admission based on medical assessment and a clear demonstration, just as with psychiatric mental health admissions, that it is necessary for the safety of the child or the community. While the domestic law in China clearly permits the administrative detention of drug misusers,[988] reports have highlighted that "the decision to put a drug user in a detox or RTL centre was not based upon any medical assessment or criteria."[989]

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[982] Principle 16(1)(b) of MI Principles.
[983] World Psychiatric Association Statement and Viewpoints on the Rights and Legal Safeguards of the Mentally Ill, adopted by the World Psychiatric Association General Assembly in Athens, 17 October 1989.
[984] Ibid.
[985] Article 482 of Argentine Civil Code.
[986] Law 487, Law on Mental Health and Protection of People with Mental Disorders, Chapter V, Section 2, Art. 47(1).
[987] WG on Arbitrary Detention: Addendum: Mission to China (2004), U.N. Doc. E/CN.4/2005/6/Add.4, Recommendations, para. 78(d).
[988] Ibid., para. 40.
[989] Human Rights Watch, 'An Unbreakable Cycle - Drug Dependency Treatment, Mandatory Confinement, and HIV/AIDS in China's Guangxi Province', December 2008, p. 21. See Biddulph, 'Legal Reform and Administrative Detention Powers in China', Cambridge University Press, 2007, Chapter 5(3).

5.3.2 Right to a review of detention or placement

Article 9 of the ICCPR, the MI Principles and the Working Group on Arbitrary Detention all require that any detention for reasons of mental health, whether for psychiatric or intellectual disability, should be subject to review, either by a competent review body set up for that purpose or by a court. [990] The MI Principles state that involuntary commitment should only be for a short period, for observation and preliminary treatment pending a review. Such a review should take place no more than 72 hours after the child has been detained.[991]

In *X. v. United Kingdom*,[992] the European Court of Human Rights concluded that, in cases of mentally ill persons who are involuntarily committed, the review should be wider than a simple procedure of *habeas corpus*.[993] Taking into account the "very nature of his [a person with a mental disorder] affliction" the European Court also stated that all mental patients who are accepted indefinitely in a hospital have the right to judicial review before a tribunal in order to determine whether their detention is legal. Individuals also have the right to appeal a commitment decision and to review of the lawfulness of such commitment at reasonable intervals.[994] It is up to the authorities to ensure that the child's case is reviewed regularly and not up to the child to apply for such a review.[995] The review should be a genuine adversarial procedure during which the child and the legal representative are given the opportunity to challenge the report of the psychiatrist.[996]

Many States fail to implement the right to review for either psychiatric or intellectually mentally disabled detained children, or for children detained for drug or alcohol use. In China, reports show that there is a lack of any effective judicial review procedure in relation to a decision to detain a child in a coercive drug rehabilitation camp.[997] The State does not undertake periodic reviews of those administratively detained in the coercive drug rehabilitation centres, leaving many detained children to be held indefinitely and uncertain as to when they may be released.[998] In addition, the Working Group on Arbitrary Detention in their mission to China found that there

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[990] See Office of the High Commissioner for Human Rights, United Nations Human Rights Committee, General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982; U.N. Doc. E/CN.4/2004/3, para. 87; Principle 17(1) of MI Principles.

[991] Principles 16, 17, 18 of MI Principles.

[992] *X. v. United Kingdom*, Application 6998/75, Series A No. 55, 5 E.H.R.R. 192 (1982) (ECHR).

[993] The mental health legislation in the United Kingdom had to be amended and established 'Mental Health Review Tribunals', which constituted courts for the purposes of Article 5(4), provided that it has the power to order discharge. Consequently, the Government amended the mental health legislation and established the above mentioned tribunals which evaluate the legality of the permanent detention of mental patients and discharge patients when the tribunals consider appropriate. According to this law, the review bodies or tribunals, will hear the patient once after 6 months of detention and once within 12 months.

[994] Council of Europe in Recommendation (2004)10, Article 25; *Winterwerp v. Netherlands*, 2; European Court of Human Rights 387, at 60 (1979). See also MI Principles (Principle 17); European Court of Human Rights, *Megyeri v. Germany*, Series A No. 237-A, Application No. 13770/88, 15 E.H.R.R. 584 (1993).

[995] European Court of Human Rights, *Erkalo v. the Netherlands*, judgment of 2 September 1998, Reports 1998-VI, p. 2479, para. 59.

[996] WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 58. Psychiatric detention shall not be used to jeopardize someone's freedom of expression nor to punish, deter or discredit him on account of his political, ideological, or religious views, convictions or activity.

[997] Human Rights Watch, 'An Unbreakable Cycle Drug Dependency Treatment, Mandatory Confinement, and HIV/AIDS in China's Guangxi Province', December 2008, p.3.

[998] Ibid.

are no genuine avenues available for a child to challenge a decision on involuntary commitment for psychiatric detention before an outside and independent body.[999]

There are many examples of failure to include the right to review in domestic law. In Turkey, the Patients' Rights Directive of 1998[1000] does not contain a right to a review, nor a right to challenge or appeal an involuntary commitment order.[1001] Similarly, in Argentina, there is no right to an independent or impartial review of an involuntary psychiatric commitment.

This right to a review by a court or competent authority does not, as a general rule, extend to children placed with parental consent (who are treated as voluntary patients) or who consent to such a placement (non-protesting patients). Although in some Western States, such placements are regularly reviewed as required by Article 25 of the CRC, and a child could in theory make an application contesting the parental consent to placement. This study did not find any States that required an automatic review by an independent, competent body or court where a child had been voluntarily placed. A significant proportion of voluntarily placed children do not have psychiatric mental disabilities which require them to be detained, and could function independently in the community with a level of support. The lack of review or determination on whether the initial placement is appropriate leads to this group of children suffering long term containment in what must be regarded as arbitrary detention.[1002]

5.3.3 Right to legal representation

International law and standards require that a patient should be provided with legal assistance and representation even where the child or parents cannot afford to pay.[1003] Domestic law should contain a procedure for appointment of a lawyer and make it clear that the lawyer will be provided free of charge where the child or parent is not able to pay. In order for legal representation to be effective, a child must be provided with an interpreter, if necessary,[1004] the right to request and produce evidence at the hearing and the right to an independent mental health report and/or any other relevant reports or admissible evidence.[1005] The legal representative should be given access to copies of the patient's records, reports and other documents relied upon to support the hospital's application for involuntary commitment, unless such information is demonstrated to be likely to cause the individual serious harm if he or she were to see it.[1006] The child should also have the right to attend, to participate and to be heard in

[999] WG on Arbitrary Detention: Addendum: Mission to China (2004), U.N. Doc. E/CN.4/2005/6/Add.4, para. 62.
[1000] Directive 23420 became effective on August 1, 1998, when it was published in the Official Gazette on the WHO International Digest of Health Legislation website: <www3.who.int/idhlrils/results.cfm?language=english&type=ByVolume&intDigestVolume=50&strTopicCode=XIA#Turk> [accessed 29 January 2011].
[1001] Ibid. The Directive includes a number of potentially important rights, such as a right to refuse treatment, but it creates no mechanism for its implementation. The patient has a right to refuse treatment so long as his or her choices are 'medically viable'..Presumably, a mental health care worker would decide whether a choice is viable, effectively undercutting any actual independent ability to refuse treatment the patient might have.
[1002] See *H and L v. United Kingdom*, Application No 45508/99 5, October 2004; Study on Violence, Chapter 5, Violence against Children in Care and Justice Institutions, United Nations, 2006: <www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf> [accessed 29 January 2011].
[1003] Principle 18(1) of MI Principles.
[1004] Ibid., Principle 18(2).
[1005] Ibid., Princple 18(3).
[1006] Ibid., Principle 18(4).

any court hearing regarding him or herself.[1007] In addition, the child has the right to a written decision by the court articulating the reasons specifically for the court's decision whether or not to grant the application for civil commitment.[1008]

Most of the States that fail to provide the right to review of the decision to place a child in administrative detention also fail to provide a right to legal representation, the right to present evidence, to cross-examine witnesses or to appeal to a higher court.[1009] However, in addition, even those who provide a right of challenge, frequently do not provide children with the right to free representation.[1010]

5.4. Child rights at risk

When administrative detention is used based on health reasons, child rights are often at risk when international instruments are used as guidelines for detention. In addition, conditions children face while detained often fall short of international human rights standards.

5.4.1 Conditions of detention

The international instruments all provide that children with mental disabilities shall enjoy all the rights and fundamental freedoms contained in human rights Conventions,[1011] including the right under Article 23 of the CRC to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. The duty on the State to ensure this right requires special vigilance when children are placed in psychiatric units, hospitals and disability institutions as they are particularly powerless.[1012] Despite this, the conditions of care experienced by many children are extremely poor and have a significant impact on their long term welfare and well-being. There have been numerous accounts of human rights abuses, including rape and sexual abuse by other users or staff, being kept in cribs and cots or tied to beds for long periods of time.[1013] Lack of staff and the low levels of training, combined with a lack of financial resources, isolation from the community and the lack of interest of many parents, all combine to produce conditions which do little to ensure that children are protected and their best interests promoted and safeguarded. In some cases, there is a failure to provide adequate care, but in others, the treatment provided itself fails to respect rights. In an investigation into conditions in psychiatric institutions in Turkey, it was found that children as young as nine were subjected to electroconvulsive treatment (ECT), or 'shock' treatment, without the use of muscle relaxants or anaesthesia. Such treatment is extremely painful,

[1007] Ibid., Princple 18(5).
[1008] Ibid., Principle 18 (8).
[1009] Ibid., Supra note 11, Principle 11 34.
[1010] Most developed States have some form of legal aid system providing free legal assistance and representation in cases where the client has inadequate financial means to pay a lawyer. However, in the majority of States this is only provided in criminal cases. Further, even where legislation does provide for free legal aid in health cases, the provision is often not organised effectively or demand is too great to be met.
[1011] See Principles 1, 3, 5 of MI Principles; Article 37 of CRC.
[1012] See *Herczegfalvy v. Austria*, European Court of Human Rights, judgment of 24 September 1994, para. 82.
[1013] See Mental Health Disability Rights International, Human Rights in Peru, 2004; Mental Disability Centre, 'Cage Beds: Inhuman and Degrading Treatment in Four EU Accession Countries', 2003; Amnesty International, 'Romania: Memorandum to the Government Concerning Inpatient Psychiatric Treatment', 2003.

frightening and dangerous, and is likely to amount to inhuman treatment when used on children in this manner.[1014]

Electric shocks are also used as an 'aversive treatment'[1015] to control children's behaviour in some States,[1016] including in the United States. In others, drugs are used, not for medical treatment, but to control children's behaviour and make them more 'compliant'. This may have other implications, including increasing their vulnerability to abuse. For example, as the United Nations Study on Violence showed, when children with disabilities are heavily medicated by staff in institutions and hospitals (often as a way of coping with staff shortages), they may be more susceptible and less able to defend themselves against physical violence or sexual assault.[1017]

Filthy conditions, contagious diseases, lack of medical care and rehabilitation, and a failure to provide oversight, renders placement in some institutions life-threatening. Children with disabilities in Serbia have been found tied to beds or never allowed to leave a crib, some for years at a time, as well as being subjected to extremely dangerous and painful treatment.[1018].

Appalling conditions for children have also been noted in virtually all Eastern European States, including Romania and Kosovo.[1019] In 2008, NGOs in Romania reported grave concerns in relation to children committed to psychiatric institutions, with cases cited of alleged malnutrition, lack of adequate clothing, medication or treatment, lack of trained staff, abusive application of patient restraint measures and isolation from the rest of the community. Children were reported as being left in beds or cribs with no form of stimulation and often little daylight. Such children, inevitably, show significant signs of emotional disturbance.[1020]

[1014] Mental Disability Rights International, 'Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centres of Turkey', 2005, Washington D.C.

[1015] This is a technique used to cause a person to dislike the practice in which they are engaging.

[1016] Israel, M., 'Use of Skin-Shock as a Supplementary Aversive at the Judge Rotenberg Centre' (JRC, 2002. Paper presented at the 2002 Meeting of the Association for Behaviour Analysis: <www.judgerc.org/writeup3.html> [accessed 29 January 2011]. See also Mental Disability Rights International, 'Behind Closed Doors', 2005, Washington D.C., which highlights the use of ECT in Turkey; Human Rights Watch, 'Skin on the Cable: The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia, January 2010. See also Baldwin, S. and Oxlad, M., 'Multiple Case Sampling of ECT Administration with 217 minors: Review and meta-analysis', *Journal of Mental Health*, 1996. ECT was used in Australia, France, the United Kingdom and other European States. The majority of States have stopped using ECT on children. Baldwin and Oxlad estimate that 3,500 United States children received ECT in 1996.

[1017] Study on Violence, Chapter 5, 'Violence against Children in Care and Justice Institutions', United Nations, 2006, p. 188: <www.unicef.org/violencestudy/5.%20World%20Report%20on% 20Violence%20against %20Children.pdf> [accessed 29 January 2011].

[1018] Mental Disability Rights International, 'Torture not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities', 2007: <www.mdri.org/PDFs/reports/Serbia-rep-english.pdf> [accessed 29 January 2011].

[1019] See Mental Disability Rights International, 'Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities', 2006, and 'Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo', 2002.

[1020] Mental Disability Rights International: 'Hidden Suffering', 2006.

Similar conditions exist in most of the ex-Soviet Union States.[1021] For instance, in Kyrgyzstan, as in a number of other ex-CIS/CEE States, children in psychiatric hospitals are victims of physical restraints, with children sometimes restrained in their beds for several days at time, due to the insufficient number of staff to supervise patients appropriately.[1022] Some children are confined to a bed all day while others are locked in a bare room. The lack of contact between the institution and the community, combined with no effective independent oversight of institutions, low levels of staff training and no complaint procedures, leaves children highly vulnerable to abuse.[1023]

Conditions in drug detention facilities can also fall far short of medical and human rights standards. As noted by the United Nations Special Rapporteur on the right to health, "[c]onditions in compulsory [drug] treatment centres often present additional health risks owing to exposure to infectious diseases and lack of qualified staff able to address emergencies or provide medically managed drug treatment."[1024]

Poor conditions in mental health institutions are also apparent in Central America.[1025] In Mexico, for example, a report documented children in a psychiatric facility left lying on the floor in urine and faeces and self-harm was common. Therapy was minimal and children were left without education or activities.[1026] Conditions for children are also extremely poor in Africa[1027] and in India.[1028]

A recent report from Human Rights Watch raises further concerns about the treatment given to children. The Report documented serious abuse of children in compulsory drug treatment centres in Cambodia. The abuse included the administration of electrical shocks, beatings, and forced labour as well as forced donation of blood.[1029] According to the Cambodian Government "[i]n most cases no assessment of participants' physical or mental health is undertaken on admission to the centre." The motivation is not treatment, but the removal of "undesirables" from the

[1021] See Mental Disability Advocacy Center (Budapest), 'Mental Health Law of the Kyrgyz Republic and its Implementation', 2004; Mental Disability Rights International, Children in Russia's Institutions: Human Rights and Opportunities for Reform 1999; Mental Disability Advocacy Centre, 'Cage Beds Report', 2003 (Report on Hungary, Czech Republic, Slovakia and Slovenia); Mental Disability Advocacy Center (Budapest), 'Mental Health Law of the Kyrgyz Republic and its Implementation', 2004.
[1022] See Mental Disability Advocacy Center (Budapest), 'Mental Health Law of the Kyrgyz Republic and its Implementation', 2004.
[1023] From Alternative NGO report to the United Nations Committee on the Rights of the Child in relation to the examination of the Second periodic report by the Kyrgyz Republic on the implementation of the Convention on the Rights of the Child, April 2004.
[1024] United Nations General Assembly, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, sixty-fourth session, 10 August 2009, U.N. Doc. A/64/272, para 89.
[1025] See, for instance, report on Nicaragua contained in Perlin, 'International Human Rights and Comparative Mental Disability Law: the Universal Factors', *Syracuse Journal of International Law and Commerce*, 2007, 34:2; Levav & Gonzalez, 'Rights of Persons with Mental Illness in Central America, *Acta Psychiatric Scandinavica*, 2000, 101, 93-96.
[1026] Mental Disability Rights International, 'Human Rights and Mental Health', Mexico, 2000.
[1027] See Alem, 'Human rights and psychiatric care in Africa with particular reference to the Ethiopian situation', *Acta Psychiatric Scandinavica*, 2000, 101, 93-86.
[1028] Ganju, 'The mental health system in India, history, current system and prospects', *International Journal of Law and Psychiatry*, 2000, 23: 3-4, 393-402.
[1029] Human Rights Watch, 'Skin on the Cable', January 2010.

street.[1030] Similar abuses have been documented by Human Rights Watch in Chinese facilities.[1031] Overcrowding, understaffing and poorly trained or un-trained staff all contribute to "create a culture of tolerance for harmful conditions and a high threshold for reporting and reacting to problems."[1032]

5.4.2 Monitoring by States

The MI Principles[1033] protect a broad array of rights within institutions, "including unjustified medication, abuse by other patients, staff or others",[1034] and require the establishment of monitoring and inspection of facilities to ensure compliance with the Principles.

Some States have developed monitoring and inspection mechanisms for psychiatric units, hospitals and institutions, which focus on conditions for patients. However, there remain a significant number of States, particularly developing States that have no independent mechanism to monitor human rights in institutions and no plans to create such a mechanism.[1035] Such mechanisms are essential if the right to be treated with humanity and respect is to be effectively realised. It is not enough, though, simply to pass legislation that provides for monitoring of health detention facilities. The monitoring bodies need adequate human and financial resources, as well as training, to undertake their role effectively. They also need the legal power to challenge and address unlawful behaviour and poor practice.

In Argentina, legislation[1036] guarantees the right to appropriate medical treatment. Judges are required to verify that treatment is appropriate and that it is actually carried out.[1037] The law also requires that the Advisor for Minors and the Incapacitated verify the nature of the detainee's mental health condition, the medical treatment provided and the conditions of care.[1038] However, due to lack of implementation, these oversight mechanisms have failed to prevent violation of rights. Reports indicate that there have been deaths in institutions, detention of children in isolation cells, physical and sexual abuse, lack of medical care, dangerous physical conditions, lack of rehabilitation, misuse of medications and overcrowding that have not been investigated.[1039]

[1030] Ibid.
[1031] Human Rights Watch, 'Where darkness knows no limits', January 2010.
[1032] Department of Mental Health and Substance Dependence, World Health Organization, The Role of International Human Rights in National Mental Health Legislation, 2004, p. 67: <www.who.int/mentalhealth/policy/internationalhrinnationalmhlegislation.pdf>, <www.safmh.org.za/pdfs/THE%20ROLE%20OF%20INTERNATIONAL%20HUMAN%20RIGHTS%20IN%20NATIONAL%20MENTAL%20HEALTH%20LEGISLATION.pdf> [accessed 29 January 2011].
[1033] See also Havana Rules.
[1034] Principle 8(2) of MI Principles.
[1035] For instance, see Mental Disability Rights International: 'Hidden Suffering', 2006.
[1036] Ley de Internación y Egresos en Establecimientos de Salud Mental, Ley 22.914 [Law of Hospitalization and Discharges in Mental Health Establishments, Law 22.914] (1983). (Hereinafter Law 22.914.).
[1037] Article 10 of Law 22.914.
[1038] Ibid., Article 12.
[1039] Mental Disability Rights International, 'Ruined Lives: Segregation from Society in Argentina's Psychiatric Asylums', 2007: <www.mdri.org/mdri-reports-publications.html> [accessed 29 January 2011].

5.5. Conclusion

Despite increasing international attention, the amount of accurate information on the human rights status of persons with mental illness is extremely limited. As the United Nations Special Rapporteur on disability has pointed out, persons with mental illness are seriously marginalised. There is little knowledge about how many there are, where they are, and under what conditions they live. Nor are there any figures for how many children are administratively detained.

For children with mental disabilities, in particular, the development of human rights protections may be even more significant than for people with other disabilities. Many children with mental disabilities are routinely confined against their will in institutions and deprived of their freedom and dignity.[1040] Children can be administratively detained or administratively placed with little or no ability to leave a hospital or institution as a result of their disabilities and mental health. Ensuring that children are not unlawfully deprived of their liberty or arbitrarily detained in such circumstances can be challenging. Children are detained or placed for a variety of reasons, the majority of which relate to lack of social and economic support for families, rather than a child refusing to agree to medical treatment or presenting a danger to him or herself or the public.

In some countries, the widespread stigmatisation of children with disabilities, in conjunction with the lack of support available to parents, can result in disabled children being over-represented amongst institutionalised children.[1041] Generally, States do not provide adequate protections to 'non-protesting' children: children who agree or whose parents agree that they should enter an institution or psychiatric unit as a voluntary patient. In practice, the placements are long-term and the child has no opportunity to leave the institution: he or she will have nowhere to go and no means of financial or social support. Few children will have their placement reviewed and if they survive, most will be placed automatically in an adult mental health facility, even though their disability is mild and they could function with support in the community. These children have just as much right to an independent review of their placement as do involuntarily committed patients,[1042] and, in order to prevent the detention being arbitrary, domestic law should include such a provision.

Legislative reform has largely focused on amending the criteria for admission of children to institutions and the development of community based services to enable children to remain with their families or with foster families,[1043] but this has had little impact on children already institutionalised. In addition, in some States, legislative reforms have not been fully or adequately implemented. Administrative detention and placement could be reduced significantly by the development of community support mechanisms for disabled children and their families,

[1040] Perlin, Michael, 'International Human Rights Law and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent', *Israel Law Review*, 39:3, 2006, p. 69.
[1041] Study on Violence, Chapter 5, 'Violence against Children in Care and Justice Institutions', United Nations, 2006: **Error! Hyperlink reference not valid.**> [accessed 29 January 2011]. In Jamaica, for instance, 65 per cent of children with developmental or physical disabilities live in homes run exclusively for children with disabilities. Keating P et al. (2003). Review of Children's Homes and Places of Safety in Jamaica. Kingston, Jamaica, Ministry of Health.
[1042] See *H and L v. United Kingdom*, Application No 45508/99, 5 October 1999 (European Court of Human Rights).
[1043] This is particularly the case in the ex-CIS/CEE States.

as well as community based mental health programmes. For the small minority whose mental health poses a threat, either to themselves or to the public, and who require treatment that can only be provided by detention, domestic law should provide that any such treatment should be therapeutic in nature and time limited. Children should be provided with safeguards, which should include not only a right of review of the decision by a specialist and competent tribunal or body or a court within a very short period of time, but also periodic reviews of the need for treatment or detention.

The absence of legal and medical safeguards relating to detention for drug dependence treatment is a further cause for concern. The ethical standards relating to treatment of mental health and medical conditions (i.e. the MI Principles) need to be strictly applied to drug dependence treatment.[1044] The requirement that a doctor should obtain informed consent before providing treatment to a patient applies just as much to a child as to an adult, bearing in mind their evolving capacities and capacity to provide, or withhold, such consent.[1045] Where a child is not able to consent, permission to treat should be obtained from a parent, once again on the basis of informed consent.

The Committee on the Rights of the Child has raised a general concern about the use of closed institutions for the treatment of drug dependence in children and has recommended that States develop non-institutional forms of treatment.[1046] Such treatment must, according to the Committee, be evidence-based.[1047] The absence of focused, voluntary treatment options and harm reduction services for children who use drugs in many countries is, therefore, a related cause for concern.[1048] Moreover, age restrictions, lack of confidentiality, requirements of parental consent, non-identification with older users, and abusive policing practices can drive young people in need of treatment away from services that do exist.[1049] All States need to develop guidelines for drug treatment services that ensure access for children, thus reducing the need for detention in drug treatment centres.

[1044] See Guggenbuhl, L., et al., 'Adequacy in drug abuse treatment and care in Europe (ADAT), Part I: Ethical aspects in the treatment and care of drug addicts', Zurich: Addiction Research Institute, 2000. Principles for the protection of persons with mental illness and the improvement of mental health care, United Nations General Assembly, Res 46/119, December 17, 1981; see also WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, paras. 47-58.

[1045] See Committee on the Rights of the Child General Comment no 12, The Right of the Child to be Heard, Fifty-first session, June 2009, para 102 'children above [that] age have an entitlement to give consent without the requirement for any individual professional assessment of capacity after consultation with an independent and competent expert. However, the Committee strongly recommends that States parties ensure that, where a younger child can demonstrate capacity to express an informed view on her or his treatment, this view is given due weight'. See also *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL).

[1046] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Brunei Darussalam, October 2003, U.N. Doc. CRC/C/15/Add.219, para. 54.

[1047] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Sweden (2009), U.N. Doc. CRC/C/SWE/CO/4, para. 49.

[1048] For an overview of harm reduction policies and practices worldwide see International Harm Reduction Association, 'Global State of harm Reduction 2008: Mapping the response to drug-related HIV and hepatitis C epidemics' (2008): <www.ihra.net> [accessed 29 January 2011].

[1049] See, for instance, 'Young people and injecting drug use in selected countries of Central and Eastern Europe', Eurasian Harm Reduction Network, 2009

Domestic law also needs to address the issue of parental consent to administrative detention or placement of children. Such consent should not remove the need for any placement to be reviewed on a regular basis, as required by Article 25 of the CRC.

6. Case study: Police administrative detention of children in Burundi

Introduction
Children in Burundi who are suspected of having committed a criminal offence may be detained by police, before they are charged, for up to 14 days.[1050] In practice, children are being detained for months, and sometimes for years, before appearing before a court. Children are also denied important safeguards while held for protracted periods in police detention, including the right to have the legality of their detention judicially reviewed, access to lawyers, communication with family members and access to health care. This places children in a very vulnerable position and illustrates the impact that extended pre-charge, or police administrative, detention can have on the rights and well-being of children. In particular, it can expose children to human rights abuses, including prolonged illegal and possibly arbitrary detention, as well as cruel, inhuman and degrading treatment or punishment.

Context
Burundi has a recent history of civil conflict, characterised by violence and gross human rights abuses, perpetrated both by government forces and rebel groups. Since independence in 1961, tensions between the dominant Tutsi minority and the Hutu majority have escalated. In 1993, the assassination of President Melchoir Ndadaye, a Hutu, sparked a 12-year conflict in which an estimated 300,000 people, mostly civilians, were killed. A power-sharing government was established in 2001, following a long series of talks mediated by South Africa.

In 2005, the National Council for the Defence of Democracy/Forces for the Defence of Democracy (*Le Conseil national pour la défense de la democratie (CNDD)/Forces pour la défense de la democratie (FDD)*) won parliamentary and local administrative elections. Pierre Nkurunziza, leader of a large Hutu rebel group, ran unopposed in the presidential election. Shortly after, the United Nations Operation in Burundi (ONUB) began the process of disarming soldiers and former rebels. Troops working under ONUB left in 2006 and the United Nations mission transitioned into a post-conflict civilian operation. A cease-fire agreement was signed between the new government and remaining Hutu rebel group, the National Forces of Liberation (*Forces Nationales de Libération, (FNL)*) in 2008.

Years of civil conflict had a very damaging impact on the economy and have led to chronic poverty in Burundi, which is one of the world's poorest countries, with a per capita income of $110 per annum.[1051] The war has also had a devastating impact on children. During hostilities, children were recruited and used by all parties to the conflict.[1052] The conflict left many children

[1050] Article 60 of Loi No. 1/015 du 20 juillet 1999 portant reforme du code de procedure penale (Penal Procedure Code).
[1051] World Bank, 'Burundi at a Glance', 2007: <http://devdata.worldbank.org/AAG/bdi_aag.pdf> [accessed 29 January 2011].
[1052] Coalition to Stop the Use of Child Soldiers, 'Child Soldiers Global Report', 2008, p. 77.

"abandoned, orphaned, disabled and traumatised."[1053] According to the United Nations Children's Fund, there are estimated to be around 600,000 children in Burundi who are orphans.[1054] A study published in 2007, involving interviews with all children detained in Burundi's central prison, Mpimba, found a potential correlation between the risk of children coming into conflict with the law and their status as orphans.[1055]

Many of the child detainees interviewed had come from rural parts of Burundi and had travelled to the cities (particularly to Bujumbura) to find work as domestic workers, including as cooks and baby-sitters. Most of the child domestic workers that were interviewed had been arrested and detained following allegations by their employers.

According to the Mpimba study, nearly 40 per cent of the detained children had been charged or convicted of theft, while around one quarter had been charged or convicted of rape and another quarter had been charged or convicted of having participated in an armed group.[1056]

The criminal justice system in Burundi is extremely under-resourced and there are often major delays in processing suspects through the system. Due to the lack of alternatives, children will be held in detention from the time they are arrested until they are tried, which can be years later.

Methodology

In order to examine police administrative detention in Burundi, a researcher conducted a field visit to Burundi in August and September 2009. The researcher visited several detention facilities in Burundi in which children were being held in pre-charge detention. Visits were carried out with an interpreter and a social worker from a local children's rights organisation (Terre des Hommes), and staff from the detention facilities/juvenile justice professionals were not present at these interviews. The researcher made observations on the conditions of the detention facilities, carried out interviews with child detainees and, where possible, with police officers, prosecutors and magistrates in each area visited.

In Burundi's central prison, Mpimba, focus group interviews were carried out with 10 boys (5 in each group) and 13 girls (5 in one group and 8 in another) who were detained at the time of the visit.[1057] Visits were also made to four police lock-ups: two in the capital, Bujumbura; one in Burundi's second largest city, Gitega; and one in a rural province in the north of the country, Cibitoke. One-to-one interviews were conducted with all children detained in these Police lock-ups at the time of the visit (four girls and nine boys, in total).[1058] Due to time constraints, and to the lack of information contained in registers in some facilities, the information presented in this

[1053] Consortium for Street Children, 'A Civil Society Forum for Francophone Africa on Promoting and Protecting the Rights of Street Children', 2–5 June 2004.
[1054] United Nations Children's Fund, 'Burundi Statistics', 2007: <www.unicef.org/infobycountry/burundi_statistics.html> [accessed 29 January 2011].
[1055] Human Rights Watch, 'Paying the Price: Violations of the Rights of Children in Detention in Burundi', 2007 , p. 9.
[1056] Human Rights Watch, 'Paying the Price', 2007, p. 9.
[1057] Table 4 below provides information on all children who took part in the focus group interviews at Mpimba. The children's names have not been recorded to preserve their anonymity.
[1058] Table 5 below provides information on all children who took part in interviews at police lock-ups. The children's names have not been recorded to preserve their anonymity.

case study is self-reported, and has not been cross-checked with information recorded by police or other juvenile justice professionals.[1059]

During interviews carried out for the purpose of this study, a significant number of children in detention reported to be either orphans, or had only one living parent. Of the 13 children detained in police lock-ups visited, 6 reported to be orphans and 3 reported to be from one-parent families. Most of the children had, prior to their arrest, been employed as domestic workers, suggesting that child domestic workers are particularly vulnerable to coming into conflict with the law.[1060] Three of the four girls detained at the police lock-ups visited reported that they had been working as prostitutes.[1061]

In addition, interviews were carried out with staff from the Ministry of Justice, the ONUB and local human rights organisations, including the Burundian Association for the Defence of Prisoner's Rights and Terre des Hommes.

International standards on pre-charge detention

The CRC contains special provisions that apply to children. According to the CRC, a child should only be deprived of his or her liberty as a matter of last resort and for the shortest appropriate period of time.

The domestic law of virtually all States permits the detention of children by police officers for a limited time where a child is either caught committing an offence, or is suspected of having committed an offence, to enable an investigation to occur. International law recognises the use of pre-charge police detention, provided that the safeguards contained in Article 9 of the ICCPR and Article 37 of the CRC are assured to any child who is so detained. These include the right of any detained child to be "brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody…"[1062]

The obligation to bring a detained suspect "promptly" before a judge has been further defined by the Human Rights Committee. According to the Committee, this provision "requires that in criminal cases any person arrested or detained has to be brought 'promptly' before a judge or other officer authorised by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in view of the Committee, delays must not exceed a few days."[1063]

[1059] In order to obtain the informed consent of interview participants, and to minimise harm caused to children being interviewed, children were provided verbally with detailed information on the objectives and nature of the study and the purpose of the interview. To ensure that their participation was not coerced, they were also advised that providing answers was not mandatory and that they could refuse, at any point, to participate in the interview. Also, children were assured that they would not be identified in any report produced as a result of the information they gave. All children were interviewed in the presence of a social worker from Terre des Hommes.

[1060] See also, ibid.

[1061] Two of these girls had moved to Bujumbura from rural areas to find work and the other girl was an orphan.

[1062] Article 9(3) of ICCPR; Article 37(d) of CRC. See also Article 10(2)(b) of ICCPR; Rule 10.2 of Beijing Rules, which provides that, where a child is arrested, *'[a] judge or other competent official or body shall, without delay, consider the issue of release*.'

[1063] Human Rights Committee, General Comment No. 8 (1982), para. 2.

The Committee on the Rights of the Child takes an even more restrictive view and recommends that "[e]very child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours."[1064]

The international safeguards also require that every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance.[1065] The United Nations Basic Principles on the Role of Lawyers provides that access should be given to a lawyer within 48 hours of an arrest. [1066] However, the United Nations Special Rapporteur on torture has recommended that detainees must be given access to a lawyer within 24 hours of an arrest.[1067]

States must also ensure that detainees are held only in officially recognised places of detention and that a register of detainees is kept,[1068] containing the names of persons detained, as well as the names of persons responsible for their detention. This information should be kept in registers readily available and accessible to those concerned, including relatives and friends.[1069] The family of any detained child should be immediately notified of a child's detention, and should be permitted to communicate with them.[1070]

In addition, Article 40 of the CRC provides that States must "recognise 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 the human rights and 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". Conditions of detention in police facilities must meet set international standards,[1071] and torture or other cruel, inhuman or degrading treatment or punishment is forbidden.[1072]

Domestic legal framework and procedure for pre-charge detention

There is no specialised juvenile justice system in Burundi, and all children above the minimum age of criminal responsibility (15 years) are treated as adults in the criminal justice system. This is contrary to the CRC, which requires that States must "seek to promote the establishment of laws, procedures, authorities and institutions" specifically applicable to children in conflict with the law.[1073] According to the Code of Criminal Procedure,[1074] judicial police officers have the

[1064] Committee on the Rights of the Child, General Comment No. 10 (2007), U.N. Doc. CRC/C/GC/10, para. 83. Emphasis added by authors.
[1065] Article 37(d) of CRC; Article 14 of ICCPR
[1066] Principle 7 of United Nations Basic Principles on the Role of Lawyers.
[1067] Commission on Human Rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2002), U.N. Doc. A/57/173, para. 18.
[1068] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rule 7 of Standard Minimum Rules for the Treatment of Prisoners.
[1069] Human Rights Committee, General Comment No. 20 (1992), para. 11.
[1070] Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance; Rules 37, 92 of Standard Minimum Rules on the Treatment of Prisoners.
[1071] Including those set out in the Havana Rules. See 'Length of time in pre-charge detention', below.
[1072] Article 7 of ICCPR; Articles 2, 16 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 37(a) of CRC.
[1073] Article 40(3) of CRC.

power to hold a child in police custody before they are charged with a criminal offence under Article 59. Article 60 states that a judicial police officer may detain a child in their custody for 7 days and this can be extended to 14 days, on the authorisation of the prosecutor. Once the police investigation has been completed, or when the legal time limit expires for pre-charge detention, the accused must be referred to the public prosecutor or released, according to Article 64. The prosecutor has the power to order release of a child held in police custody, under Article 60.

Once the detainee and his or her file have been referred to the prosecutor, the prosecutor may hold the child suspect for up to 48 hours before bringing him or her before the court under Article 73. The Court (*chambre du conseil*) must then confirm the charges and review the legality of the detention under Article 74. Under Article 75, the detention may be renewed by the *chambre de conseil* for up to 12 months and must be reviewed every month.

The provisions contained in Burundi's Code of Criminal Procedure which permit pre-charge police detention for a period of up to 14 days without being brought before a judge far exceeds the time limit prescribed in international law. The Committee against Torture has expressed concern that a person may be held in police detention for as long as 14 days as this "is not in keeping with generally accepted international norms."[1075] The Government is currently preparing a revised Code of Criminal Procedure, but in the latest draft code, the maximum length of pre-charge (police) detention has been retained at 7 to 14 days.

The Code of Criminal Procedure does not explicitly accord important safeguards to children held in police custody. The Code does not provide the detainee with the right to access a lawyer when arrested, and does not explicitly provide detainees with the rights to notify and communicate with family members or to have access to medical personnel. The Committee against Torture has also expressed concern at the lack of safeguards provided to persons held in pre-charge detention and recommended that the Code of Criminal Procedure relating to police custody be amended "to ensure the effective prevention of violations of the physical and mental integrity of persons held in police custody, including by guaranteeing their right to habeas corpus, the right to inform a close relation and the right to consult a lawyer and physician of their choice or an independent physician during the first hours of police custody, as well as access to legal aid for the most disadvantaged persons".[1076]

When in police detention, children are held in police lock-ups or holding cells. There are around 100 lock-ups/holding cells throughout Burundi. When children are transferred to prosecutors, they will generally be held in 1 of the 11 central prisons, located in 10 of Burundi's 17 provinces. For provinces without central prisons, children will normally be transferred from the local police holding cell to the police lock-up in the province's capital.

Length of time in pre-charge detention

Evidence indicates that police detention of children is not limited to 7 or 14 days in practice, but extends well beyond the 14-day time limit set out in the Code of Criminal Procedure currently in force, exposing children to prolonged unlawful administrative detention. Unfortunately, figures

[1074] Penal Procedure Code.
[1075] Committee against Torture, Concluding Observations: Burundi (2007), U.N. Doc. CAT/C/BDI/CO/1, para. 9.
[1076] Ibid.

on the number of children in pre-charge police detention and the length of time spent in pre-charge detention is neither collected nor monitored. However, interviewees from the Burundian Association for the Defence of Prisoner's Rights reported that, in their experience, it is not uncommon for children to be held in police detention for two to three weeks, and at times, children may be held for up to three months in police lock-ups. This was supported by an interviewee from the United Nations Integrated Office in Burundi (BINUB), who estimated that around 85 per cent of pre-charge police detention in Burundi is illegal, as detainees do not appear before a magistrate before the prescribed time limit expires.

Of the 23 children that took part in the focus groups in Mpimba prison, 4 reported that they had spent over 7 days in police detention, and 13 children had spent over 14 days in a police lock-up before being sent to Mpimba. Six of these children had spent between one and two months in a police lock-up. Several children had been detained for two years or more without any recollection of ever having appeared before a magistrate. According to a BINUB official, on average, children spend two years in pre-trial detention before appearing before a magistrate.[1077]

Similar findings were reported following a study of children in detention in 2007, which found that "[m]ost of the children we spoke to had been held in police custody for months before being charged."[1078] The Committee against Torture has also expressed concern that "there have been several hundred cases of illegal detention owing to the fact that persons were held in police custody longer than the period authorized by law" and that "failure to observe the 14-day limit on police custody" and the "unlawful detention of minors" are among the "[t]he principle violations of prisoners' human rights."[1079]

There appear to be a number of reasons that explain why children are being held in pre-charge police detention for protracted periods of time. Reasons generally relate to the real lack of resources in the criminal justice system and the resulting lack of capacity of professionals to carry out thorough and timely criminal investigations and process children through the system quickly. Also, there is a lack of alternatives for children who have been charged with an offence, other than pre-charge detention.

1. Lack of alternatives to detention

There are currently no alternatives to custody for children who are in conflict with the law. In the absence of community-based measures, such as periodic reporting to a probation service, children are detained from the time they are charged until their trial. Also, there is no legal power for police or prosecutors to divert children out of the criminal justice system, through, for example, a 'warnings' system or a community-based diversion scheme. In this context, placing children in pre-charge detention may be considered the only option available for all children who are suspected of having committed an offence.

[1077] Interview with a BINUB representative.
[1078] Human Rights Watch, 'Paying the Price', 2007, p. 22.
[1079] Committee against Torture, Concluding Observations: Burundi (2007), U.N. Doc. CAT/C/BDI/CO/1, para. 14.

2. Lack of material resources

Many judicial police officers lack even the most basic equipment, such as a copy of the Criminal Code and Criminal Procedure Code, paper for files, cameras, pencils and notebooks.[1080] In addition, they lack vehicles, which impedes their ability to interview witnesses. Police officers have heavy workloads, which impairs their ability to carry out investigations and process cases through the system in a thorough and timely manner. The prosecutors who were interviewed also reported that they had very heavy workloads and insufficient resources to carry out their work.

The lack of vehicles has also resulted in children spending longer time than necessary in police detention. Prosecutors must wait for a vehicle to become available before the child is transported to a central prison. According to the prosecutor in Gitega, children, and especially children who are initially detained in a rural area, can spend up to four weeks in detention before being transferred to the prosecutor, as there are problems accessing vehicles to transport the children.[1081] Legal requirements appear to be of less weight than the need to wait for vehicles.

3. Lack of magistrates

The lack of availability of magistrates and a lack of organisation in the judicial system also contributes to delay. Under the Code of Criminal Procedure, the *chambre du conseil* must confirm charges within 48 hours of the suspect being referred to the prosecutor. However, in practice, the shortage of magistrates in Burundi leads to significant delays in bringing children before a court to be charged. In practice, although this is not a legal requirement, three magistrates are required to sit in order to constitute a *chambre du conseil*. Where this practice is continued, the shortage of magistrates contributes to further delay before children are brought before a court. One interviewee from the Ministry of Justice reported that, on a visit to Cibitoke in May 2009, a representative discovered that no *chambre du conseil* panel had convened for eight months. According to the interviewee from BINUB, even when a prosecutor makes the decision not to charge a child, this must be confirmed by a court. Children can wait as long as three months before the prosecutor's decision not to proceed with charges is reviewed by a court. In the meantime, the child will be kept in police detention.

4. Lack of capacity

Police officers generally, and especially in rural areas, are poorly trained with little knowledge of the legal standards applicable to pre-charge detention, or international standards relating to the treatment of children in conflict with the law. There is also a lack of knowledge and skills in carrying out investigations (collecting evidence, interviewing witnesses, etc.), which leads to delay.[1082] Some police officers have been appointed without any experience or training as part of the power-sharing peace agreement. Many magistrates and prosecutors also lack training. Indeed, some magistrates have no legal background, do not have assistants to inform them of the relevant law and may not be aware of provisions on pre-charge police detention contained in the Code of Criminal Procedure.

[1080] The interviewee from the Burundian Association for the Defence of Prisoner's Rights stated that on one occasion, a police officer contacted him requesting paper, as he did not have the resources to purchase paper for printing and files.
[1081] Interview with prosecutor in Gitega.
[1082] Interview with ONUB representative.

This lack of training and awareness of juvenile justice principles and standards may hamper positive developments in the juvenile justice system and contribute to a culture of maintaining the status quo and simply continuing what has always been done.

5. Relationship between police officers and prosecutors
Evidence indicates that there is a lack of cooperation between police officers and prosecutors. Police officers fall under the authority of the Ministry of Public Security, while prosecutors fall under the authority of the Ministry of Justice. It would appear that police officers do not always accept the authority of prosecutors and there is a lack of effective communication between the police and the prosecutors in some provinces.[1083] This makes it difficult for prosecutors to monitor and enforce police compliance with criminal justice legislation, including maximum time limits for police detention.

6. Insufficient monitoring of pre-charge detention
The period of time children spend in pre-charge detention is not regularly reviewed by prosecutors or magistrates. Most of the children interviewed for this study had not received any visits from either prosecutors or magistrates during the time they had spent in pre-charge police detention, and it appears that, even in the capital, Bujumbura, prosecutors or magistrates do not regularly visit or monitor places of detention. The lack of staff is a contributory factor to this, as is the difficulty in physically reaching all the police lock-ups, a particular problem in rural areas. In addition, in some provinces, the police do not always notify the prosecutor when an arrest has been made. Not all detainees are registered at the time of initial detention and this also creates problems in monitoring and enforcing time limits on police detention.

7. Lack of legal representation
Most children in Burundi who come into conflict with the law will not be provided with legal assistance or representation. There are several NGOs providing legal representation to children, but these organisations appear to be under-resourced and unable to provide wide coverage. Children are largely unaware of the legal limits on police detention and, without legal representation, they will not have the means to challenge their detention when it exceeds the statutory time limits.

8. Impact of corruption
Several juvenile justice professionals interviewed for the purposes of this study alleged that some members of the police force ask detainees for money and, where this is not provided, may deliberately delay investigations.

Child rights at risk: The inherent dignity of children
The Committee against Torture has found that the lack of safeguards for children in pre-charge detention means that "the physical and mental integrity of persons held in police custody" cannot be effectively protected.[1084] It is clearly contrary to children's best interests for children to be placed in pre-charge detention for long periods of time, without access to judicial review mechanisms, family members, lawyers and medical professionals. There is evidence that children who have been held in police detention for protracted periods of time have been

[1083] Interview with BINUB representative.
[1084] Committee against Torture, Concluding Observations: Burundi (2007), U.N. Doc. CAT/C/BDI/CO/1, para. 9.

exposed to ill treatment at the hands of police officers and to deplorable physical conditions that fail to ensure the inherent dignity of the child.

1. Ill-treatment

Torture and cruel, inhuman or degrading treatment or punishment is a violation of international law.[1085] During interviews with children detained in Mpimba prison, several children reported that they had been exposed to police violence and ill treatment which may amount to a violation of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. Seven out of 23 children who participated in the focus group interviews at Mpimba reported that they had been beaten by police officers while in police detention, in most cases in an attempt to force a confession. One boy reported being beaten so badly by a police officer that he was temporarily blinded. Another reported being hit on the face multiple times by a police officer, and that this had left a visible scar next to his eye. One girl reported that she had been so badly beaten while in police detention that she was unable to sit or lie on her back for several days without experiencing considerable pain.

2. Conditions in detention facilities

According to Article 37(c) of the CRC, "[e]very 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," and in particular that children in detention should be separated from adults. The United Nations Standard Minimum Rules for the Treatment of Prisoners contains provisions which require States, under Rules 9 to 19, to provide detention facilities that are clean, adequately ventilated, contain sufficient floor space for the number of persons detained, have adequate access to natural light, are hygienic, with access to shower and toilet facilities, and an individual bed and bedding. Authorities are also obliged to provide detainees with food of nutritional value and wholesome quality "at the usual hours" under Rule 20. Authorities must also provide opportunities for detainees to exercise and receive medical care, under Rules 21 and 22, respectively.

Visits made to police lock-ups for this study found that police cells in which children were held, with adults, were small and crowded, with children claiming that they have to sleep in turn, due to lack of space.[1086] In Gitega, 50 detainees were held together in a single small cell measuring 6 square metres. In Cibitoke, the two police cells visited were dark, ill-ventilated and tiny, one cell measuring 5 metres by 3 metres and the other not much larger. One cell held 30 detainees, while the other held 26, although a child detainee reported that the number of persons detained had risen to 40 on occasion. There was a lack of natural light in most cells and children did not get the opportunity to go outside or to exercise regularly. Neither mattresses, blankets nor mosquito nets were provided, which made sleeping very difficult and put the children's health at risk.[1087]

[1085] Article 37(a) of CRC; Article 7 of ICCPR; Article 2 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[1086] At the time of the visit to one of the police cells in Bujumbura, for instance, 11 female detainees, including 3 girls were being held in a cell that measured 5m x 2m.

[1087] This could amount to a violation of a child's right to health, contained in Article 24 of the CRC.

Facilities were unsanitary and some children claimed that detainees were forced to use the cell as a toilet, as they were not permitted out of the cell to use the toilet during the night.[1088] Children also complained of a lack of soap for washing, while in the police lock-up in Gitega, detainees reported having no access to water for washing.

There is no obligation in domestic law or guidelines on the part of the police to provide food to detainees, and children have to rely on visiting family members to provide them with food. If children are orphans, or do not have family members living nearby, they may go for days without receiving any food, [1089] resulting in malnourishment, leaving some children very weak and at times unable to stand properly due to a lack of food.[1090]

Some children received no visitors for the entire time they were in police detention and the police make no attempt to facilitate family contact.[1091] Children reported feeling very distressed, discouraged and helpless as they were denied information about their cases and about how long they would be required to remain in detention.[1092]

Clearly, the conditions in police detention facilities in Burundi do not meet international standards and are very damaging to the health and well-being of child detainees. The Committee against Torture has also found that the conditions of detention in Burundi, including in police holding cells, "amount to inhuman and degrading treatment", in contravention of international law.[1093]

Conclusion

The length of time many children spend in pre-charge detention, and the conditions of that detention, are of grave concern and would appear to amount to unlawful detention in contravention of international law. That the failings of the system are mainly due to a lack of resources can in no way excuse the extended periods of detention or the poor material conditions. A lack of alternatives and lack of capacity on the part of juvenile justice professionals contributes to a situation in which the perception is that placing child suspects in detention is the only viable option. Such detention may expose vulnerable children to human rights abuses, including torture and cruel, degrading or inhuman treatment or punishment.

[1088] A child detainee in Cibitoke reported that the police cell in which he was detained was at times not unlocked by a police officer until 9 a.m., forcing detainees to use the cell floor as a toilet.

[1089] Two children interviewed in Bujumbura reported that they had not eaten anything besides a mixture of flour and water for an entire week.

[1090] This may constitute a violation of the right of a child to survival and development (Article 6 of CRC); an adequate standard of living (Article 27 of CRC); and the right to the highest attainable standard of health (Article 24 of CRC).

[1091] According to Article 37(c) of the CRC, all children deprived of their liberty have the right to maintain contact with their family, through correspondence and visits.

[1092] This is a violation of Article 40(2)(a)(ii) of the CRC, which requires states to ensure that children are 'informed promptly and directly of the charges against him or her'.

[1093] Committee against Torture, Concluding Observations: Burundi (2007), U.N. Doc. CAT/C/BDI/CO/1, para.17.

Table 4: Children interviewed at Mpimba Central Prison

Sex, age	Length of time in police custody	Length of time in Mpimba	Appeared before magistrate?	Home province
M, 18	1 week	9 months	Yes – charged by Court	Bujumbura
M, 16	2 weeks	10 months	No	Bujumbura
M, 16	2 weeks, 5 days	4 months	Yes – charged by Court	Gitega
M, 17	3.5 weeks	2.5 years	No	Ngozi
M, 18	1.5 months	4 years	Yes – charged by Court but has not yet had trial	Kayanza
M, 17	4 days	2 months	Yes	Rural Bujumbura
M, 17	11 days in first cell, 8 days in second cell	2.5 years	Has been tried and sentenced	Muranza
M, 16	1 month	1 year, 1 month	Yes	Kayanza
M, 19	10 days	3 years, 7 months	Has been tried and sentenced	Bujumbura
M, 18	17 days	1 month	Yes	Muranza
F, 15	uncertain	5 months	No	Rural Buj
F, 17	1 month	2 years	No	Kirundo
F, 17	1 month, 2 weeks	5 months	No	Gitega
F, 17	1 month, 2 weeks	9 days	No	Muramvya
F, 17	2.5 months	9 months	No	Ngozi
F, 15	1 week	1 year, 8 months	Yes	Muranza
F, 15	2 weeks	1 year, 8 months	Yes	Ngozi
F, 16	16 days	11 months, 3 weeks	No	Ngozi
F, 15	1 day	4 months	Yes – charged	Rural Buj
F, 17	1 month	1 year, 8 months	No	Muranza
F, 17	18 days	2 years	No	Karusi
F, 17	2 weeks	2 years, 4 months	Yes – charged but awaiting sentencing	Ngozi
F, 16	3 weeks	1.5 years	Yes – charged but awaiting sentencing	Gitega

Note: Age is at the time of the interview. All interviewees were under the age of 18 at the time of their arrest. As noted in the discussion on methodology above, the information contained in this table is self-reported.

Table 5: Children interviewed in police lock-ups

Sex, age	Police cell	Length of time in cell	Offence and circumstances
F, 16	Bujumbura 1	3 days	Arrested for prostitution – moved from rural province to Bujumbura to find work as a baby-sitter, but she could not find a job that provided her with the means to live, so she became a prostitute
F, 17	Bujumbura 1	3 days	Arrested for prostitution – orphan, but had been living with a woman who agreed to help her.
F, 16	Bujumbura 1	3 days	Arrested for prostitution – from a rural province and moved to Bujumbura to find work as a baby-sitter for her sister. Currently lives with her sister.
M, 14	Gitega	1 day	Arrested for assault on employer (was working as a live-in domestic worker). His family lives in a rural province.
M, 14	Gitega	4 days	Arrested for theft. Working as a cattle herder, armed men forced him to the city and tried to sell his employer's cows. Police arrested him for theft.
M, 16	Cibetoke 1	1 month (2 weeks in rural cell and 2 weeks in provincial cell)	Arrested for theft. Orphan from Bujumbura – moved to Cibetoke as friend promised him a job, but friend disappeared and he had no money, so stole 12,000 Burundi francs and a telephone.
M, 17	Cibetoke 1	15 days	Arrested for rape. Orphan who was working as a farm hand and employer accused him of raping his three-year-old daughter.
M, 16	Cibetoke 2	11 days	Arrested for rape. Working as a live-in cook, and his employer accused him of raping his two-year-old child. Has no father and mother unwell. Had not been paid by employer as had not spent a full month working there.
M, 15	Cibetoke 2	3.5 months (1 month spent in a cell in a rural area)	Arrested for rape. Orphan working as a brick maker. Was working with two other boys who were co-accused. The two boys confessed and said that the detainee did not commit the offence – he was not with them. One JPO wanted to release him but another would not allow this. He was sent to the cell in Cibetoke. Appeared before magistrate who refused to release him, as further investigations needed to be carried out.
F, 17	Bujumbura 2	4 days	Arrested for theft. Working as a live-in domestic worker and her employer accused her and a boy worker of stealing 10,000 Burundian francs. From a rural province, but came to Bujumbura to look for work. Does not have a father and her mother lives in a rural area.
M, 17	Bujumbura 2	6 days	Arrested for theft. Working as a domestic worker in Bujumbura. The employer told the boy to go to the market and to not take the house key – the key was left hidden at employer's house. The boy's friend took the key and stole items from the employer's house. The boy fled as he was afraid of his employer (a police commissioner). He was arrested a couple of years later. Originally from a rural province, but came to Bujumbura about five years to find work. Father is dead and mother has mental health problems.
M, 16	Bujumbura 2	1 month (including 2 weeks in another cell in Bujumbura)	Arrested for selling stolen items. His friend asked him to sell some items and he would give him share of proceeds. Items were stolen and the boy was arrested. Orphan who grew up in an orphanage.
M, 17	Bujumbura 2	2 weeks (most of time spent in cell in rural Bujumbura)	Arrested for theft. He was an orphan who was working as a domestic worker in Bujumbura. His parents died when he was young and his sisters took care of him. His sisters live in rural Bujumbura. Arrested for theft from employer, but he reported that his friend stole money and employer took him to the police.

Note: As mentioned in the discussion on methodology above, the information contained in this table is self-reported.

7. Case study: Administrative detention of children living and working on the streets in Guatemala

Introduction

This case study focuses on police administrative detention of children in Guatemala. In particular, it examines the relationship between the National Civil Police and one of the most vulnerable groups of children – those living and working on the street.[1094] Within this focus, the case study looks specifically at short-term police administrative detention of children, a practice that becomes unlawful through the maltreatment of children, or through detention beyond legal time-limits. Additionally, the case study touches upon illegal detention and abduction by those outside the National Civil Police, including the army and private security guards.

Context

The recent history of Guatemala is dominated by a bitterly violent 36 year conflict, which officially ended in 1996, with the 'Agreement on a Firm and Lasting Peace' signed between the Government and *Unidad Revolucionaria Nacional Guatemalteca*.[1095] The United Nations-sponsored Commission for Historical Clarification, which was set up in 1994 under the Accord of Oslo[1096], estimated that over 200,000 people were killed or disappeared during the conflict.[1097] Of the 42,275 victims the Commission registered, 83 per cent were Mayan and 17 per cent Ladino.[1098] In addition to the hundreds of thousands who lost their lives in the conflict, between 500,000 and 1,500,000 people are estimated to have been displaced during the most intense period of fighting – between 1981 and 1983.[1099] Following its investigations into the violence of the period of armed confrontation, the Commission determined that "agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people which lived in the four regions analysed."[1100]

[1094] It is essential to note from the outset that the type of administrative detention described in this case study does not only affect children living and working on the streets. However, the case study focuses specifically on the situation for such children, who may be considered particularly vulnerable to administrative detention (See Section 3.) and are perceived to lack a support network of individuals, particularly adults, who will 'miss them' or ask after their whereabouts if they are detained. It should also be noted that there are reports of Guatemalan armed forces involvement in matters of citizen security, where the lack of training about children's rights had led to improper treatment of children and adolescents.

[1095] The United Nations Verification Mission in Guatemala (MINUGUA), Background: <www.un.org/Depts/dpko/dpko/co_mission/minuguabackgr.html> [accessed 29 January 2011].

[1096] Report of the Commission for Historical Clarification, Introduction, 1999*:* <http://shr.aaas.org/guatemala/ceh/report/english/intro.html> [accessed 29 January 2011].

[1097] Ibid., 'Conclusions'.

[1098] The term 'Ladino' is a Spanish term meaning someone of 'mixed' Amerindian-Spanish ethnicity. CIA World Factbook, Guatemala: <www.cia.gov/library/publications/the-world-factbook/geos/gt.html> [accessed 29 January 2011].

[1099] Report of the Commission for Historical Clarification, 'Conclusions', 1999.

[1100] Ibid.

The situation for children in Guatemala has been both complex and dangerous. Despite continuing problems with violence[1101] and impunity, the Guatemalan Government has taken some significant steps towards the implementation of children's human rights. Prior to the 2007 Law on Adoptions (*Ley de Adopciones*), children in Guatemala were particularly prone to international adoption without appropriate safeguards in a practice which led to "cases of coercion and bribery of young, often poor, rural women" as well as falsified birth certificates and even cases in which children were stolen from parents.[1102] In addition, children in Guatemala face a significant threat of violence with up to 7 in 10 facing abuse,[1103] either within the home or outside it, at some point during their childhood.

However, the Government has taken legislative steps to address the situation for children in Guatemala, adopting the Law for the Protection of Children and Adolescents (*Ley de Protección Integral de la Niñez y Adolescencia*) in 2003[1104] and the Law on Adoptions in 2007.[1105]

Children living and working on the streets

This case study focuses on the administrative detention of children living and working on the streets in Guatemala by the National Civil Police. In some countries, children living and working on the streets are prone to being detained by State police and held in police lock-ups for days, months and even years.[1106] However, the research for this case study, which included observations and interviews conducted in Guatemala,[1107] revealed that a greater problem in Guatemala was the treatment of children living and working on the streets during short term police administrative detention.

Recent estimates place the number of children living and working on the streets in Guatemala at between 1,500 and 5,000,[1108] however, it is extremely difficult to know exactly how many children live, work and/or sleep on the streets as the population is transient and constantly changing. The reasons why children live and/or work on the streets vary, although many have faced domestic violence and abuse from their parents or relatives.[1109] No matter why or how they

[1101] Guatemala remains one of the countries in Latin America with high rates of violence, including having one of the highest murder rates in the world. In 2008, there were 6,292 homicides reported of which 591 victims were children. Over 10 per cent of the total number of victims appeared to have been tortured. See U.N. Doc. A/HRC/11/2/Add.7, paras. 7-11.

[1102] McCreery Bunkers, Kelley, 'International adoption and child protection in Guatemala: A Case of the Tail Wagging the Dog', *International Social Work*, 2009, 52, 649-660.

[1103] Interview with Claudia Rivera, Director of Casa Alianza Guatemala: <www.casa-alianza.org.uk/northsouth/CasaWeb.nsf/CasaNews/Claudia_Rivera?OpenDocument> [accessed 29 January 2011].

[1104] Law for the Protection of Children and Adolescents 2003, Decree 27-2003 (Unofficial translation by author). Also see U.N.Doc. CRC/C/OPSC/GTM/1, para. 12.

[1105] Law on Adoptions, Decree 77-2007, 11 December 2007 (Unofficial translation by author).

[1106] See, for instance, Section 3.

[1107] Between 24 August and 4 September 2009, the author visited Guatemala to meet with a number of actors involved in the administrative detention of street children. At each interview, the author explained the study and obtained informed consent to use the information gathered in the interview for this report. In some cases, anonymity or semi-anonymity was requested and, therefore, no complete list of interviews is included in this case study. Hereinafter, the visit will be referred to as the author's visit, 2009.

[1108] Consortium for Street Children, NGO Shadow Report for the United Nations Committee on the Rights of the Child, fifty-fourth session: Guatemala, 2009, p. 3.

[1109] Casa Alianza, 'Why are there so many Street Children in Guatemala?': <www.casa-alianza.org.uk/northsouth/CasaWeb.nsf/3/Guatemala_Number_Children?OpenDocument> [accessed 29 January 2011].

end up living and working on the streets, children who live and work there do not escape the abuse, violence[1110] or exploitation they may have fled. Many children living and working on the streets are at risk of violence at the hands of others living on the streets, as well as gangs,[1111] private security guards[1112] or even the police.

Social violence towards children living and working on the streets has many forms and can include violence and abuse from both State and non-State actors. In 1999, the Inter-American Court on Human Rights, found that Guatemala was liable for the death of five children living and working on the streets (*Villagrán Morales et al.* case (the "street children" case)). The Court found that "[i]n Guatemala, at the time the events occurred, there was a common pattern of illegal acts perpetrated by State security agents against 'street children'; this practice included threats, arrests, cruel, inhuman and degrading treatment and homicides as a measure to counter juvenile delinquency and vagrancy."[1113]

Since *Villagrán Morales et al v. Guatemala*, there have been some positive developments in the treatment of children living and working on the streets.[1114] For example, the Law for the Protection of Children and Adolescents[1115] was enacted in 2003, as well as the development of specialist police units and the availability of judicial officers 24 hours a day. While there have been some improvements, children living and working on the streets continue to be at risk of harm.

Legal framework

1. International standards on administrative detention

Administrative detention is the deprivation of liberty on the authority of an executive, administrative body or organ, rather than as a result of a judicial decision (See Introduction.). Police administrative detention describes the period of time between the detention of a child by a law enforcement officer with power to arrest and that child being brought before a court. Virtually all States, and Guatemala is no exception, specify a maximum time period of police administrative detention in their domestic law.[1116] Police administrative detention beyond this specified period of time is considered unlawful detention as it is not in accordance with domestic law. Police administrative detention, both lawful and unlawful, can be differentiated from illegal detention, which operates entirely outside of the law.

International human rights instruments stipulate that any deprivation of liberty must follow certain safeguards. Under Article 9 (1) of the ICCPR, deprivation of liberty may occur if carried out according to procedures established in domestic law. Article 9 (3) provides that once arrested or detained, individuals must be brought before a judge or other competent body to determine the

[1110] Consortium for Street Children, NGO Shadow Report for the United Nations Committee on the Rights of the Child, fifty-fourth session: Guatemala, 2009, p. 3.
[1111] Author's visit, 2009, discussions with NGOs.
[1112] Ibid.
[1113] *Villagran-Morales et al. v. Guatemala*, 1999, para. 79.
[1114] Author's visit, 2009, opinion expressed by NGOs.
[1115] Law for the Protection of Children and Adolescents 2003, Decree 27-2003 (Unofficial translation by author).
[1116] In Guatemala, any child who is arrested during the commission of a crime must be brought before a judge within six hours of the detention.

legitimacy of the detention. Article 37(b) of the CRC provides that in the case of children, any detention should be used only as a "last resort" and for the shortest appropriate "period of time". In addition, the deprivation of liberty must not be "arbitrary", which, according to the Human Rights Council, is a broad concept that includes "elements of inappropriateness, injustice and lack of predictability".[1117]

2. International standards on police actions towards children

Police actions in general are guided by the ICCPR[1118], the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[1119] the United Nations Code of Conduct for Law Enforcement Officials[1120] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Police actions with respect to children are outlined further in the CRC, the Beijing Rules, the Riyadh Guidelines, the Havana Rules and the Vienna Guidelines.[1121] Guatemala has ratified or acceded to all covenants and conventions listed above, and is, therefore, bound to uphold their terms (For details, see Appendix 7.).

General human rights standards also apply to the police as agents of the State. This extends, for example, to the prohibition on torture or cruel, inhuman or degrading treatment or punishment,[1122] which is also reflected in Article 4 of the United Nations Code of Conduct for Law Enforcement Officials.

Article 9 of the ICCPR provides further instruction specifically related to police arrest and detention and the United Nations Code of Conduct for Law Enforcement Officials, though non-binding, provides clear guidance on the appropriate actions of law enforcement officials, which it defines as "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention".[1123] Article 1 of the United Nations Code of Conduct requires that "[l]aw enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession." The Code of Conduct goes on to state, in Article 2, that "in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." This language is also reflected in Article 10 of the ICCPR and Article 37 of the CRC, which provide that children who are deprived of their liberty must be treated with respect for the inherent dignity of the human person.

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. This is reiterated in Principle 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which states that "[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before

[1117] *Hugo van Alphen v. Netherlands*, 1990, para. 5.8; *A.W. Mukong v. Cameroon*, 1994, para 9.8.
[1118] Guatemala acceded 5 May 1992.
[1119] Guatemala acceded 5 January 1990.
[1120] The United Nations Code of Conduct for Law Enforcement Officials was adopted 17 December 1979.
[1121] Vienna Guidelines.
[1122] Article 7 of ICCPR; Articles 1, 16 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 37(a) of CRC.
[1123] Commentary to Article 1 of United Nations Code of Conduct for Law Enforcement Officials.

resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."

Police interactions with children are further regulated by the CRC, Beijing Rules and Vienna Guidelines. As with all actions relating to children, the best interests of the child shall be a primary consideration, under Article 3 of the CRC.[1124] The Beijing Rules closely guide police actions when arresting children. Under Rule 10 of the Beijing Rules, children's parents must be notified immediately of their apprehension and under Rule 10.2, "[a] judge or other competent official or body shall, without delay, consider the issue of release." Furthermore, under Rule 10.3, "[c]ontacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case."[1125]

3. Regional framework for child rights

The regional human rights framework for Latin America centres on the Organisation of American States (OAS). The two human rights monitoring bodies for the OAS are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Regional human rights standards are set out in the American Declaration of the Rights and Duties of Man and the American Convention. The Inter-American Commission on Human Rights hears complaints or petitions regarding a State's violation of either of these instruments. The Inter-American Court of Human Rights adjudicates cases as to whether a State has violated its regional obligations and also issues advisory opinions on compliance. Only States parties or the Inter-American Commission on Human Rights can file cases for adjudication before the Inter-American Court of Human Rights.

The major relevant principles of the American Declaration on the Rights and Duties of Man are that "[e]very human being has the right to life, liberty and the security of his person" (Article 1), the principle of non-discrimination (Article 2), and Article 25, which protects people from deprivation of liberty except "in the cases and according to the procedures established by pre-existing law". Several of these rights are also contained within the American Convention, which includes the principle against discrimination in Article 1 and the right to liberty in Article 7, and also protects the rights of the child in Article 19 and provides a specific "right to humane treatment" in Article 5. The Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention to Prevent and Punish Torture, both of which have been signed and ratified by Guatemala, are also relevant to this case study.[1126]

[1124] Article 3 of CRC.

[1125] See also commentary to Rule 10.3 instructing that 'the term "avoid harm" should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm'.

[1126] Organization of American States, Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará 9 June 1994 at the twenty-fourth regular session of the General Assembly; Inter-American Convention to Prevent and Punish Torture, Treaty Series, No. 67, adopted at Cartagena de Indias, Colombia, 9 December 1985 at the fifteenth regular session of the General Assembly.

4. National laws

Guatemala was one of the first countries to sign and ratify the CRC[1127] and has, in recent years, responded to criticism from the Committee on the Rights of the Child and the Inter-American Court on Human Rights by amending and updating its legislation and practice relating to children. The primary source of change is the Law on the Integral Protection of Children and Adolescents,[1128] which was adopted in 2003 and which sought to address the previous disparities between the Minors' Code[1129] and the CRC.[1130] The law explicitly provides protection for the fundamental rights of children, including the right to life: "the state is obliged to ensure their survival, safety and development. Children and adolescents are entitled to protection, care and support"[1131] that is necessary for their physical, mental, social and spiritual development and welfare.

Section VII of the Law on the Integral Protection of Children and Adolescents provides for the protection of children from abuse, including "any form of negligence, discrimination, marginalization, exploitation, violence, cruelty and oppression, punishable by law, either by act or omission of their fundamental rights."[1132] Under Article 54, the State has an obligation to take measures to protect children from all forms of abuse. Further, Article 76(a) provides that the State must "ensure that public and private institutions that serve children, and adolescents to whom their rights are threatened or violated, they will be respected and restored, especially their right to life, security, cultural identity, customs, traditions and language, and they provide comprehensive treatment and dignity". The Law on the Integral Protection of Children and Adolescents covers the role of the National Civil Police with respect to children, requiring that the special unit for children and adolescents (*Sección Especializada de Niñez y Adolescencia)* act as the advisory body within the police on the rights and duties of children and that it develop training programmes and counselling on the rights and duties of children, in accordance with domestic and international law. Although the specific unit was initially created as a department, in 2009, it became a section, which is significantly lower in the hierarchy. In August 2009, the Section had five permanent staff members in the Guatemala City headquarters.

Children in conflict with the law have the same rights as adults, with additional safeguards protecting their rights. The Law on the Integral Protection of Children and Adolescents sets the minimum age of criminal responsibility at 13, with the possibility of additional liability and

[1127] See Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Guatemala, Consideration of Reports submitted by States Parties to the Convention on the Rights of the Child Under Article 44, 29 March 2000, U.N. Doc. CRC/C/65/Add.10, para. 1.
[1128] Law for the Protection of Children and Adolescents 2003, Decree 27-2003. Note: under Article 2, a child (niño) is aged 0 to 12, and an adolescent (adolescente) is aged 13 to 17 (Unofficial translation by author).
[1129] Minors' Code 1979, Human Rights Brief, 9:1, beginning at p. 20, 2001, '…unlike the CRC, the Minors' Code aims to protect society from street children by reprimanding their antisocial behaviour rather than addressing the social reality that causes these children to live on the streets' (Unofficial translation by author).
[1130] Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Guatemala (2000), U.N. Doc. CRC/C/65/Add.10; Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: Fourth periodic reports of States parties due in 2006: Guatemala, 25 April 2008, U.N. Doc. CRC/C/GTM/3-4.
[1131] Article 9 of Law on the Integral Protection of Children and Adolescents (Unofficial translation by authors).
[1132] Ibid., Article 53.

greater sanctions at the age of 15.[1133] Furthermore, according to Article 195 of the Law on the Integral Protection of Children, any child who is arrested *en flagrancia* (during the commission of a crime) must be brought before a judge within six hours of the detention. In no case should the arrested child be taken to a barracks, police station or adult detention centre and anyone who takes a teenager to any of these places is considered to have committed an 'abuse of authority', which is a criminal offence.

The Guatemalan Constitution[1134] also bears on the duties of the State towards children as part of society in general, under Article 2, whereby "it is the duty of the State to guarantee to the inhabitants of the Republic life, liberty, justice, security, peace, and the integral development of the person." It also sets out in Article 6 the circumstances under which individuals can be deprived of their liberty, reiterating that individuals can only be arrested or detained with a court warrant or if they are caught during the commission of a crime or fleeing from the police: "Prisoners will have to be made available to the competent judicial authority within a time limit not exceeding six hours and cannot be subject to any other authority."

Administrative detention in Guatemala

1. Police interactions with children living and working on the streets

Under the Criminal Code[1135] and the Law on Integral Protection of Children and Adolescents, it is not a crime in Guatemala to be a child living and working on the streets. When talking to the police, it is clear that this is the official line, and the spirit in which they receive their training. In an interview, the sub-director of operations at the National Civil Police stated that "[c]hildren's rights are extremely important and children are the future of the country. All of the police have received training on working with children and in protecting them."[1136] However, children living and working on the streets are at greater risk of being forced to commit crimes such as petty theft, property crimes and drug related crimes.[1137] They are also reportedly at risk of being coerced into committing crimes by organised criminal gangs or armed security guards.[1138] Thus, even though the 'status crime' of being a child living and working on the streets does not exist in Guatemala, children who are living or working on the streets can be particularly vulnerable to being stopped by the police. This is due to the common perception and risk that they may, in some way, be involved in criminal activity.

According to NGOs focused on children living and working on the streets, and the children living and working on the streets who were interviewed during the research for this case study,

[1133] Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child : Fourth periodic reports of States parties due in 2006: Guatemala (2008), U.N. Doc. CRC/C/GTM/3-4, para. 49. For instance, children in conflict with the law who are 15 years or older can be required to reimburse material damage, whereas those who are 12 to 14 years cannot, rather, their parents may be called upon to reimburse material damage. Article 271 Law for the Protection of Children and Adolescents 2003 (Unofficial translation by authors).
[1134] Constitution of Guatemala, 31 May 1985, as amended by Legislative Decree No. 18-93 of 17 November 1993 (Unofficial translation by authors).
[1135] Criminal Code (Codigo Penal De Guatemala), Decree No. 17-73, 27 July 1973 (Unofficial translation by authors).
[1136] Author's visit, 2009, interview with Comisario J. L. Otzin Diaz.
[1137] Ibid., 2009, discussions with NGOs.
[1138] Ibid.

interactions with the police are common and vary considerably in their nature. For some, the police seem genuinely interested in the well-being and conditions of the child living and working on the streets. In the worst instances, the police are said to detain, threaten, beat and even kill children living and working on the streets.[1139] According to one organisation working to protect the rights of children, aggression and insults are common, and the National Civil Police will often stop a patrol car and arrest young children in areas in which children living and working on the streets are said to congregate. With the increase in legal protection for children, the police are said to have become more discrete and more determined to hide any violations of children's rights. One NGO focused on children living and working on the streets, who was interviewed for this case study, reported recent allegations of police abuse on two children living and working on the streets. These assaults reportedly took place at night, allegedly in order to reduce visibility and the possibility of being caught.[1140]

2. Police detention of children living and working on the streets

The Havana Rules define in Article 11 deprivation of liberty as "any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority". This means that a child is deprived of his or her liberty when he or she is placed under arrest by the police and told he or she may not leave. Under this definition, a police car, an abandoned parking lot or any other location from which the child may not leave at will is a place of detention and therefore will constitute police administrative detention. In Guatemala, it is permissible for the police to "detain" children for up to six hours while bringing them to a judge.[1141] Any maltreatment of children during this time would, however, make the detention unlawful under international law.[1142]

Under the Law on Integral Protection of Children and Adolescents, when a child is taken into custody of any sort, whether arrested for a criminal offence or found in need of care and protection, he or she must be brought to a judge as soon as possible, and within six hours.[1143] There seems to be a consensus among those working directly with children living and working on the streets, the police and those in government bodies that this does, generally, happen, particularly in cities. Outside court hours of approximately 8 a.m. to 4 p.m., children are taken to the local justices of the peace, who are qualified as general judges, available on call 365 days a year, 24 hours a day. Police officers who were interviewed were all aware that it is expressly forbidden for children to be held in police stations before they see a judge.[1144] Indeed, it is more

[1139] Ibid., discussions with anonymous NGOs working with human rights issues and with children living and working on the streets and on the human rights in Guatemala City; see, also Centro para la Accion Legal en Derechos Humanos, Ejecuciones Extrajudiciales de personas Estigmatizadas, 2007: <http://caldh.org/ejecuciones.swf> [accessed 29 January 2011].

[1140] As reported by Viva Juntos por la Niñez, an NGO working with children living and working on the streets in Guatemala City.

[1141] Article 209 Law on Integral Protection of Children and Adolescents.

[1142] See Introduction for discussion of arbitrariness under international law.

[1143] Article 209 Law on Integral Protection of Children and Adolescents. However, social workers can place children in emergency shelters without taking them to a judge. For instance, in Quetzaltenango, children can arrive in a shelter for children who have been deported from Mexico and will be held in the shelter at least overnight, before going to a judge the following day. Author's visit, 2009, discussions and observations with staff and children at the Nuestras Raices home.

[1144] Author's visit, 2009, interviews with police officers, 3 September.

common for children to be held in a court building while waiting for the judge to arrive, and while waiting for cases before them to finish.

Those from civil society and the police officials who were interviewed during research for this case study[1145] expressed some concerns that children who wait in court buildings before seeing a judge were held in inappropriate conditions and could face long waits, as judges preferred to deal with other cases before them. However, those working in larger cities rejected the idea that children would be better off held in police stations instead of courts.

It is clear that some police officers are aware of their duties to bring children to a judge rather than taking them to a police station. This was reflected in the statements made both by those working within the special children and adolescents unit, and by police officers attending a training session provided by that unit. However, it should be noted that it was not possible to meet with general members of the police corps outside of the context of the specialist training. All police officers were adamant that the procedure was to present a child immediately to a competent judge. One officer from Suchitepéquez explained that even early in the morning, the child would be brought to the court to wait for the judge and "if it is three in the morning, we will look after adolescents' best interests and find the quickest means to find a relative and take the person to where the adolescent is." Even in the rural areas, according to another police officer, "there is always someone on duty at the court who will be able to take the initial statement."[1146]

(a) Maltreatment of children during police administrative detention

Despite developments in legislation and some improved treatment of children living and working on the streets by the police since the time of the *Villagrán-Morales et al.* case, there are persistent reports that children living and working on the streets are mistreated after they are arrested and detained. According to one NGO,[1147] children have, historically, been arrested and detained for many hours in police vehicles and these practices are still followed by the National Civil Police, as well as by the municipal police and private security guards or civilians (who do not have the authority to detain and would, therefore, be acting illegally). During the time of detention, it has been reported that the child is sometimes arrested, placed in a police car, and then intimidated, threatened, beaten or assaulted and then taken back to the place of arrest or left far from his or her home on the streets and, therefore, not taken to a judge or court at all.[1148] While the arrest and detention is lawful, the treatment of the child during this time could render the period of administrative detention unlawful. It was reported by one human rights organisation that they had known of children who had been taken to a vacant parking lot or building and asked for money or beaten before being released.[1149]

One of the reasons provided by NGOs for the use of administrative arrest and detention by the police was to intimidate children to prevent crimes.[1150] However, it should be noted that while

[1145] Ibid., interviews with six police officers – five in a focus group discussion and one individually – and representatives from NGOs working with children.
[1146] Ibid., interview with police officer, 3 September.
[1147] Ibid., interview with Casa Alianza, a recently disbanded NGO in Guatemala, 26 August.
[1148] Ibid., interviews with Viva Juntos por la Niñez and Casa Alianza.
[1149] Ibid., interview with an NGO interested in human rights.
[1150] Ibid., reported by Viva Juntos por la Niñez.

children complain to street educators and people they trust about the problems, they are reluctant to go through the formal complaints procedure.[1151] During the course of this research, it was difficult to speak directly with children living and working on the streets about this problem.[1152] However, it was possible to ask a total of six children who were living and working on the streets of Guatemala City for their stories. These children were found by the NGO *Viva Juntos por la Niñez* who had a rapport with the children and were present during interviews to ensure that the children were not distressed. The children were not permitted to sniff drugs while being interviewed or in the presence of the NGO staff, as is their protocol, but it appeared that many of them were under the influence of drugs and the information should be considered in this light.[1153] All but the youngest child interviewed for this study (who was just 13) explained that they had been harmed by the police, through verbal intimidation or by physical abuse. One of the children explained that he had been beaten, hit, threatened with death and told that when the police see him and his friends they will be hurt. Another child, aged 16, said that he had been to jail several times after seeing a judge and that he had also been arrested and driven around the streets in a police car for hours without going to see a judge.[1154] It should be noted that any time one of the children mentioned going to a formal place of detention, such as a state reformatory facility, he or she had always been to see a judge.[1155]

A representative from the Solicitor General's Office for Childhood[1156] also addressed the issue of police picking up children, stating that if police officers do arrest and detain children living and working on the streets for brief periods of time, it is usually because they want to "raise awareness" among the children, rather than to threaten or intimidate them, although it was admitted that there are cases of police officers who would do this sort of thing to "abuse or violate their rights". In this context, however, police officers are said to be very aware that a complaint could be made against them.

(b) Police administrative detention exceeding national time-limits

The research for this case study suggests that in the majority of cases, children who are accused of being in conflict with the law are brought directly to a judge or courtroom within a short period of time. However, those with direct knowledge of the situation for children living and working on the streets alleged, during the in-country research, that there were incidents of detention by the National Civil Police occurring for up to eight hours.[1157] If this were the case, the detention would become illegal after the six-hour time limit.

[1151] Ibid.

[1152] Author's visit, 2009. It was possible to speak with six children directly, although each one of them was clutching a bottle of alcohol rub (paint thinner) and appeared to be under the influence of drugs.

[1153] The researcher used experience in working with vulnerable children and children under the influence to request informed consent and made sure the children were aware all comments would be treated anonymously. However, it should be noted that this information could have been biased.

[1154] See also Sarah Thomas de Benitez, State of the World's Street Children: Violence, Consortium for Street Children, 2007: <www.juvenilejusticepanel.org/resource/items/C/S/CSCStateWorldStreetChildrenViolence 07_EN.pdf>, p. 34 [accessed 29 January 2011].

[1155] Author's visit, 2009, information gathered during interviews with children conducted on the same day in the same location as short individual meetings, 4 September.

[1156] Author's visit, 2009.

[1157] Ibid., interviews with Viva Juntos por la Niñez and Casa Alianza.

In another case, a group working directly with children living and working on the streets[1158] reported that a street child had called one of their cell phones alleging that the police patrol[1159] had arrested him. Although not a great deal of information is available about this unconfirmed incident, this child was allegedly detained from 7 p.m. to 3 a.m. in a small room in the courthouse. Although, by taking the child to the courthouse, the intention of the police officer who had arrested the child may have been to send the child and the rest of the group to a judge, unfortunately, this did not happen.[1160]

(c) Illegal detention

Where detention occurs that is outside of the law, either by state actors acting outside the law or by non-state actors, this is illegal detention. As indicated above, this can occur, for example, when State actors such as the National Civil Police hold children in police cells, which is not permissible under domestic law. In Quetzaltenango, for example, one 17 year old girl stated that she had herself been to a police station and seen children of 11 or 12 years of age there.[1161] The girl and her friends reported that people from more remote locations often say that children can be arrested and held for three or four days before going to a court or being released when their family complains.[1162]

In Guatemala, and particularly in rural areas, limited resources and difficult terrain contribute to circumstances in which children's cases are more difficult to process than in urban areas. For example, there were more allegations of children being held in police lock-ups in rural areas while transportation was arranged for them to see a judge or even while their parents were asked to pay a fine (which could also be characterised as a bribe) for their release.[1163] For example, an allegation was made that one girl had been arrested and held for one week while the police asked her mother to pay a "fine" for her release; and that a 17-year-old shoeshine boy was also held in the police station for almost one week while police decided whether or not to let him go.[1164] The existence of this type of detention is strongly disputed by the police. Every police officer interviewed for this case study stated categorically that they never take children to the police station, although it should be noted that these were all police officers with specific training in children's rights.

In addition to the detention of children living and working on the streets by the National Civil Police, there is also a serious problem in Guatemala with illegal abduction by non-State actors including gangs, criminal groups and private armed security guards. This is different to unlawful

[1158] Ibid., information was reported by Viva Juntos por la Niñez.
[1159] The child also said that the armed forces had arrested him, although it is not clear what the involvement of the armed forces was in this case. The armed forces would not have authority to arrest a child.
[1160] Author's visit 2009, information was reported by Viva Juntos por la Niñez.
[1161] Ibid., interview with members of the Children's Parliament (Parlamento de la Niñez y Adolescencia), 3 September.
[1162] Ibid.
[1163] Author's visit, 2009, interview 26 August. One judge suggested that she had heard reports of such actions, although was unable to assert proof that this occurred.
[1164] Author's visit, 2009, interview with members of the Children's Parliament, 3 September.

administrative detention because it does not carry any guise of administrative authority – it is completely outside of the law and entirely illegal.[1165]

The Solicitor General's Office for Childhood and several other official bodies recognised that the illegal detention of children, and adults, was a serious problem and that despite its best efforts, it is extremely difficult for the police to combat these private groups because of a lack of resources and the complexity of the cases.[1166] One of the children living and working on the streets interviewed for this case study gave an account of when he and some friends were taken in a car by security guards and forced to do exercises in a vacant lot. They had hot chili put in their mouths and were made to walk on their knees. After three hours, the National Civil Police drove past the scene and forced the security guards to let them go.[1167]

Signs of progress in the treatment of children living and working on the streets

It should be noted that the police directorate itself is taking measures to address the problems within the National Civil Police. The special unit (*Sección Especializada de Niñez y Adolescencia*), which was established in early 2008, has five designated staff members (all police officers). It also has representatives in a total of 22 sectoral offices, who have each received training and advice on the human rights of children. According to the head of the unit, Director General Jose Ortiz Toledo, the unit teaches values and helps officers to know the needs of the children they come across.

According to *Casa Alianza* and several other NGOs working to protect the rights of children, following the adoption of the Law on the Integral Protection of Children and Adolescents, the National Civil Police became more aware of the rights of children. To this end, the child and adolescent human rights ombudsman reported receiving phone calls from police officers asking for advice regarding the treatment of children, in order to ensure that the rights of children are respected.[1168]

One of the major catalysts of this change was the establishment and appointment of justices of the peace in all regions. This has meant that police are able to present children to judges without delay and without the need for lengthy periods of police administrative detention. Police officers who were interviewed for this case study also indicated that they and their colleagues were mindful that violations of procedure could lead to punishment.[1169]

One police officer from Suchitepéquez agreed that mistakes had been made in the past in police stations but insisted that training had been given to raise police awareness that they cannot keep children in police stations. Another officer admitted that police interactions with children living and working on the streets in one of the most dangerous zones in the country, Zona 1, may have,

[1165] Under both international and domestic legislation, the State has a duty to act to preserve the right to life and dignity and liberty and should seek to prevent and punish non-State actors involved in such illegal detention.
[1166] Author's visit, 2009, interview with Ninette Guevara, formerly of the Solicitor General's Office for Childhood, 25 August.
[1167] Ibid., interview with children living and working on the streets, 4 September.
[1168] Ibid., interview with Nidia Aguilar, Child and Adolescent Section of the Human Rights Ombudsman (Procuraduría de los Derechos Humanos), 26 August.
[1169] Ibid., interviews with police officers.

in the past, been inappropriate and that children could have been detained, beaten and harmed, but explained, again, that this should not happen anymore.

Extrajudicial killings and enforced disappearances

One of the most disturbing reports is the use of administrative detention of children living and working on the streets by the police and others, including the armed forces, pursuant to extrajudicial killing or disappearances.[1170] According to the summary of stakeholders' reports submitted to the Universal Periodic Review,[1171] the Human Rights Prosecutor reported 395 violent deaths of children in 2006 and 417 cases in 2007[1172] while stating that "the circumstances surrounding the deaths suggest that some are part of the so-called 'social cleansing' process"[1173] The summary of stakeholders' reports also included an assertion by *Casa Alianza* that "there is circumstantial evidence to suggest the involvement of members of the security forces in extrajudicial killings of Guatemalan children and young persons"[1174] and by the Office of the High Commissioner for Human Rights that "'social cleansing' was being practised, sometimes under the direct or indirect responsibility of State officials."[1175] According to the summary of United Nations information, "the OHCHR office in Guatemala noted the existence of organized groups carrying out such acts, often with the support of the local authorities and help from private security agencies. In 2006, the High Commissioner also stated that the upsurge in mob lynching in the interior of the country was particularly alarming. Committee against Torture in 2006 also raised concerns about allegations of, *inter alia*, "social cleansing" and the killings of children as well as the "lynching of individuals".[1176]

These detentions and subsequent killings or disappearances take, broadly, three forms – detention by vigilante, civilian gangs; detention by the police; or detention by armed forces.[1177] It is important to note that, of these groups, only the police are permitted to detain children and, therefore, all other actors are acting illegally. Furthermore, police administrative detention very quickly becomes illegal and arbitrary detention once it is clear that the true purpose is to engage in enforced disappearance or extra-judicial killing.

1. Prosecution and impunity

One of the greatest problems facing victims of human rights violations and crimes in Guatemala is the overwhelming impunity enjoyed by perpetrators. The conviction rate for murder is in the

[1170] See Centro para la Accion Legal en Derechos Humanos, Ejecuciones Extrajudiciales de personas Estigmatizadas, 2007: <http://caldh.org/ejecuciones.swf> [accessed 29 January 2011].
[1171] United Nations Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1 - Guatemala, 2 April 2008,U.N. Doc. A/HRC/WG.6/2/GTM/3.
[1172] Ibid., para. 13.
[1173] Ibid., para. 14.
[1174] Ibid., at para. 14. The term 'security forces' is taken to include the armed forces.
[1175] Human Rights Council, Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Guatemala (2008), U.N. Doc. A/HRC/WG.6/2/GTM/2, paras. 12, 13.
[1176] Ibid.
[1177] Centro para la Accion Legal en Derechos Humanos, Ejecuciones Extrajudiciales de Personas Estigmatizadas, 2007.

single digits.[1178] The reasons for this are the lack of resources among police and investigators, but also corruption and intimidation in order to prevent adequate investigation and prosecution.[1179] The effect of this is that those who are the victims of crimes and human rights violations are far less likely to make a complaint and, if they do, are rarely going to be successful in seeking and accessing justice or recompense. Impunity significantly undermines the implementation and impact of laws. For example, if a child alleges that he or she has been a victim of a rights violation at the hands of the police, that child may take this complaint to the solicitor general's office (*Procuraduría General de la Nación*) who will investigate the claim. This office is, however, limited by resources and its powers to compel the cooperation of others has not, up until now, been an effective mechanism to protect the rights of children living and working on the streets.

In an effort to challenge the present culture of impunity, particularly in relation to violations of human rights committed by illegal security forces,[1180] the International Commission Against Impunity in Guatemala, sponsored by the United Nations, was established in 2006. As the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, in 2006 stated, "Guatemala faces a choice: realize the vision of the Peace Accords or fall back on the brutal tactics of the past. On the one hand, Guatemala can choose to implement a working system of criminal justice based on human rights. On the other hand, Guatemala can resort to militarized justice, the execution of suspects by the police, and impunity for vigilante justice." [1181]

Continued impunity for violations of the law will continue to undermine the implementation of the significant legislative child rights reforms.

Conclusion

The use of extended police administrative detention in Guatemala has largely been addressed by the Government through legislative reform and training. However, this case study suggests that mistreatment of children during police administrative detention is a serious problem faced, in particular, by children living and working on the streets. Despite the legislative and policy reform efforts that have encouraged police to bring children to a judge within six hours, the treatment of the children during that time remains problematic and potentially unlawful. While the introduction of new legislation and the around-the-clock availability of judges means that children no longer need be held in police stations, this significant positive step is undermined if children are, instead, mistreated in transit to the court or are not taken there at all. It is essential that the technical capacity of law enforcement and the justice sector is increased to encourage the promotion and protection of children's rights and to reduce the culture of impunity to ensure the prosecution of State actors, and others, who improperly administratively detain children.

[1178] Human Rights Council, Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Guatemala (21–25 August 2006) (2007), U.N. Doc. A/HRC/4/20/Add.2, para. 42.
[1179] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, U.N. Doc. A/HRC/4/20/Add.2 (2006), paras. 43–52.
[1180] Clandestine criminal organisations involved in serious crimes, including mass murders. For more information, see International Commission Against Impunity in Guatemala, Executive Summary, 'Two Years of Work: A Commitment to Justice', 2009, p. 5.
[1181] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, U.N. Doc. A/HRC/4/20/Add.2 (2006), Summary.

The potential for violence and abuse that accompanies detention is serious and extremely damaging to the children involved and contrary to international human rights standards and norms. The increase in police training and awareness of child rights along with the efforts of NGOs working to promote the rights of children has served to reduce the impact and incidence of police administrative detention. However, it is clear that this must be accompanied by a marked reduction in the culture of violence that stalks children living and working on the streets and indeed much of society in Guatemala. Rather than being supported by the police, children living and working on the streets are wary of them, fearful of the results of what might happen if the interaction leads to a confrontation, abuse or even death.

8. Case study: Administrative detention of children in need of care and protection in India

Introduction

Children in need of care and protection in India are at risk of being placed in administrative detention as a result of a deeply entrenched reliance on institutionalisation. While some children will be placed in institutions that operate like hostels or boarding schools for the poor, many children in need of care and protection may be placed in institutions that they cannot leave at will and, in some situations, they may even be physically locked in a room Despite legislation requiring that children in need of care and protection are to be held in separate facilities from children in conflict with the law, in practice, in some areas, these two groups of children are placed together in custodial settings. These children are vulnerable to abuse and neglect and may be denied access to family members and the community, which can expose them to the risk of human rights violations.

The Juvenile Justice (Care and Protection) Act 2000[1182] provides that children in need of care and protection must come before a child welfare committee, which makes the decision on whether to place individual children in an institution. Child welfare committees, although granted "magisterial powers" are in fact administrative bodies established by State governments, under the Ministry of Women and Child Development. Where children in need of care and protection are placed by child welfare committees in facilities that they are unable to leave at will, they will be administratively detained.

This case study acknowledges the great differences between homes and shelters across India, and takes for granted that those placing children in these institutions, and working with minors in them, may well be motivated by a genuine desire to provide assistance and support. However, in some institutions, the "residents" suffer such a severe curtailment of liberty that "institutionalisation" can become synonymous with detention.

Context

In 2007, India had an estimated 446 million children below 18 years of age.[1183] It has the largest population in the world of children living and working on the streets, with an estimated 18 million children on urban streets.[1184] It is also believed to have the largest population of child labourers, child victims of trafficking and children sexually exploited in prostitution. There are no official figures published on children in need of care and protection.[1185] The number of destitute children is believed to stand at 44 million, of whom 12.44 million are orphans, many of

[1182] Juvenile Justice (Care & Protection) Act 2000, Act No. 56 of 2000 (hereafter JJ(C&P) Act 2000).
[1183] United Nations Children's Fund, India Statistics, 2007: <www.unicef.org/infobycountry/india_statistics.html#57> [accessed 29 January 2011].
[1184] Butterflies Programme with Street and Working Children, 'Situation of Street and Working Children in Delhi', (undated): <www.butterflieschildrights.org/working.php> [accessed 29 January 2011].
[1185] Kumari, Ved, *The Juvenile Justice System in India*, Oxford University Press, 2004, p. 13.

them in institutional care.[1186] However, there is also no reliable database of children in institutions, or of the institutions themselves, and little monitoring of whether minimum standards and uniformity are maintained in the running of institutions. To give a sense of size, the State of Karnataka alone had 3,500 children living in 62 institutions in 2003[1187] and as of January 2008, the State of Maharashtra had 584 institutions.[1188] These are just two of India's 28 states and 7 union territories. It is likely that across the country there are several hundred thousand children living in institutional settings, for both juvenile justice and care and protection purposes.[1189]

Methodology

For the purposes of this case study, a researcher conducted a field visit to India in March and April 2009, working closely with the United Nations Children's Fund office in New Delhi and a co-researcher also based in New Delhi. As part of the research, visits were conducted to several homes for children: Jawaharlal Nehru Yeroda Children's Home in Pune; Mundwa Girls Home in Pune; Udayan Care Children's Home in New Delhi; and a Boy's Children's Home in Karnataka. In the homes, informal interviews were conducted with the staff and children present, using an interpreter. In addition, interviews were carried out with staff from United Nations Children's Fund offices in Delhi and Mumbai; child welfare committee members in Mumbai and Pune; and relevant local organizations, including the Family Service Centre in Mumbai; Pratidhi (an NGO for victims of crime) in Delhi; and HAQ Child Rights Centre, Delhi.

Legal framework

1. International legal standards

As noted above, children in need of care and protection in India may be placed in institutions which place such heavy restrictions on a child's freedom of movement so as to amount, in effect, to administrative detention. Administrative detention on welfare grounds is not, of itself, unlawful in international law. For children without parental care, international law permits the placement of these children in "suitable institutions", but only where this is necessary and where the alternatives of a foster placement, *kafalah* in Islamic law, or adoption are unavailable.[1190]

The placement of children in an institution on welfare grounds may, however, breach international law where doing so amounts to the deprivation of a child's liberty and this deprivation of liberty is illegal or arbitrary. According to international human rights law, every individual has the right to liberty and security of person.[1191] Administrative detention violates international human rights law where it is not carried out "in accordance with such procedures as

[1186] For instance, institutions solely for children in conflict with the law host about 40,000 children. Ministry of Women and Child Development, Child Protection in the 11th Five Year Plan (2007-2011), cited in National Commission for the Protection of Child Rights Subcommittee, 'Review of Operations of Observation and Children's Homes, November 2007 to March 2008', 2008, p. 5: <www.ncpcr.gov.in> [accessed 29 January 2011]. Hereinafter NCPCR, 2008.
[1187] NCPCR, 2008, p. 9.
[1188] Ibid., p. 75.
[1189] Ibid., p. 9.
[1190] Article 20(3) of CRC.
[1191] Article 9 of ICCPR; Article 37(b) of CRC.

are established by law"[1192] or where it is considered arbitrary. Whether or not detention is considered arbitrary will depend on the circumstances of the case. The Human Rights Committee, which monitors States' implementation of human rights contained in the ICCPR, has found that "'[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[1193] The Committee also adds that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought"[1194] otherwise it will be considered to be arbitrary and therefore, unlawful in international law.

In addition, any deprivation of liberty will be unlawful in international law where certain safeguards are not provided to detained persons, including judicial review of the decision to place a person in detention.[1195]

In the case of children, States are encouraged to minimise both the incidence of detention and the duration of any deprivation of liberty so that it is used only as "a last resort" and for the "shortest appropriate period of time."[1196] Also, in any decision concerning a child, including the decision to place a child in need of care and protection in an institution, the child's best interests must be a primary consideration.[1197]

2. Domestic legal framework

Unlike many other countries, children in need of care and protection in India are dealt with within the "juvenile justice" system. The Juvenile Justice Act of 1986 (1986 Act) introduced the basis for a national uniform juvenile justice system addressing the care, protection and treatment of "neglected" and "delinquent" juveniles and replacing the various children's acts in force in different States. The Juvenile Justice (Care & Protection) Act 2000 (2000 Act) was intended to be more child-friendly, with greater emphasis on non-institutional services, participation with civil society, voluntary organizations and the monitoring of quality of services. It provided an opening to intervene on a much larger scale and at a national level in gate keeping to prevent institutionalisation and to provide alternatives for children in India.[1198]

Under the 1986 Act, children were classified as delinquent juveniles or neglected juveniles, but the separation was only partial as, pending inquiry, both categories of children were kept in observation homes together. Those accused of committing serious crimes were kept with children "whose only crime was that they were neglected children as per the Act."[1199] The new 2000 Act formally outlined the complete separation of the two categories: children in need of

[1192] Article 9(1) of ICCPR. See also Article 37(b) of the CRC, which provides: 'The arrest, detention or imprisonment of a child shall be in conformity with the law…'
[1193] *Hugo van Alphen v. Netherlands*, 1990, para. 5.8; *A. W. Mukong v. Cameroon*, 1994, para. 9.8.
[1194] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para. 9.2.
[1195] Article 9(4) of ICCPR.
[1196] Article 37(b) of CRC; Rule 17 of Havana Rules.
[1197] Article 3 of CRC.
[1198] CRY Report, 2004, p. 1. The CRY Report studied a total of 159 institutions, both government and NGO, in nine states.
[1199] Arvind Narrain, 'The Juvenile Justice Act 2002 - A Critique, for Alternative Law Forum', (undated): <www.altlawforum.org/grassroots-democracy/juvenile-justice/a-critique-of-the-juvenile-justice-act-2002/> [accessed 29 January 2011].

care and protection and children in conflict with the law, establishing a five-tier system of homes which can be established by a State government or by a government-certified voluntary organization:

- Observation home – for the temporary (up to a maximum of four months) reception of a child in conflict with the law during his/her trial;[1200]
- Special home – for the reception and rehabilitation of children in conflict with the law after trial and conviction;[1201] and
- Children's home – for the reception of a child in need of care and protection during the inquiry procedures and subsequently for their care, treatment, education, training, development and rehabilitation.[1202]

It is only in two further types of homes that these two groups of children may be combined, namely:

- Shelter homes to serve as drop-in centres for children in need of urgent support, in moments of crisis, acting hence as a crisis intervention centre;[1203]
- After-care organization to take care of children in need of care and protection and children in conflict with the law after they have left both children's homes and special homes.[1204]

The 2000 Act, which is more rehabilitative than punitive compared to its predecessor,[1205] also provides for reintegration with the family and placement with adoptive or foster parents as alternatives to institutionalisation. Subsequent amendments to the 2000 Act in 2006[1206] and Juvenile Justice (Care and Protection of Children) Rules 2007[1207] have attempted to further strengthen the 2000 Act and install a child-centric rehabilitation and family restoration focused system. Part XII of 2007 Rules, for example, clearly outlines that "institutionalisation…shall be a step of the last resort after reasonable enquiry and that too for the minimum possible duration." The amended 2000 Act[1208] also obligates the State to establish a child welfare committee and juvenile justice board in every district within a period of one year from the date of commencement of the Act. The 2000 Act also requires that a district protection unit be established in each district.

(a) Child welfare committees

The 2000 Act mandates the establishment of child welfare committees in every district, specifying the criteria for membership and their roles.[1209] It is these committees that decide whether or not to commit a child in need of care and protection to a Home. The child welfare

[1200] Section 8 of JJ(C&P) Act 2000.
[1201] Section 9 of JJ(C&P) Act 2000.
[1202] Section 34 of JJ(C&P) Act 2000.
[1203] Section 37 of JJ(C&P) Act 2000.
[1204] Section 44 of JJ(C&P) Act 2000.
[1205] Aangan, 'Changing Spaces, Understanding the effectiveness of children's institutions – The Child's Perspective', 2006: <www.aanganindia.com/Aangan_ChangingSpaces.pdf> [accessed 29 January 2011].
[1206] Juvenile Justice (Care and Protection of Children) Amendment Act 2006, No. 33 of 2006.
[1207] Juvenile Justice (Care and Protection of Children) Rules 2007, 26 October 2007. These are Model Rules and as yet very few states have ratified them.
[1208] Section 62A of JJ(C&P) Act 2000.
[1209] Sections 29-39 of JJ(C&P) Act 2000.

committee is comprised of five members, and functions as a bench of magistrates with judicial powers to manage cases of children in need of care and protection, to ensure adequate care, protection, treatment, development and rehabilitation. Anyone can produce a child before the child welfare committee[1210] and children are mostly brought before the committee by the police and NGOs, and through Childline, a national child protection service that offers a helpline for children in need of care and protection. The members of the child welfare committee, and in some homes the probation officer, interview the child, make relevant enquiries regarding the family, arrange for the collection of information about his/her family and arrange a home visit in order to assess whether the child is in need.

As outlined above, being committed to an institution may not amount to detention in itself, depending on the institution, but will do so if the regime of the home results in the child's liberty being significantly curtailed. This "potential" detention is ordered by child welfare committees which, although granted magisterial powers, are administrative bodies established by State governments, under the Ministry of Women and Child Development (which took charge of child protection programmes transferred from the Ministry of Social Justice and Empowerment), and do not constitute a court. Often, they do not work as a bench of magistrates collectively deciding upon the future of the child's welfare,[1211] but rather are split up into smaller two-person committees, despite the 2000 Act clearly specifying that each committee should consist of a chair and four members.[1212] In some instances, individual members of the child welfare committee or persons external to the committee act individually and single-handedly as the committee.[1213]

(b) Which children can be admitted to the institutions?

The 2000 Act outlines that "the committee shall have the powers to restore any child in need of care and protection to his parent, guardian, fit person or fit institution… and give them suitable directions."[1214] The 2000 Act broadened the category of children in need of care and protection to include the following categories: children who are begging; sexually exploited children; neglected or abandoned children; abused children and those living or working on the streets; victims of armed conflict, natural calamity or civil commotion; and children who are found to be vulnerable and likely become involved in drug abuse.[1215]

Gap between law and practice and how this results in the administrative detention

Nearly a decade since the enactment of the Juvenile Justice (Care &Protection) Act 2000, a large gap between law and practice continues to exist, and "the custodial nature" of the system remains entrenched.[1216] While the 2000 Act is central government legislation, its implementation lies

[1210] Section 32 of JJ(C&P) Act 2000.
[1211] Interview with Arlene Manoharan, Coordinator of the Centre for Child and the Law of the National Law School of India University, Bangalore, Karnataka, 7 April 2009.
[1212] Section 29 of JJ(C&P) Act 2000.
[1213] Interview with Dr. R. P. Dwiredi, Director of the Institute of Ghandian Studies and member of the Juvenile Justice Board (JJB) of Varanasi, Uttar Pradesh, 4 April 2009.
[1214] Section 39(3) of JJ(C&P) Act 2000.
[1215] It has been argued that the definition of children in need of care and protection is "so wide that it can possibly include the whole of the child population of India". See Kumari, V., op. cit.
[1216] Arvind Narayan, 'Introduction to Juvenile Justice Act 2000', Empowerment of Children and Human Rights Organisation (ECHO) Centre for Juvenile Justice: <www.echoindia.org/virtuallib.html> [accessed

with the State governments, which have powers to make rules; establish juvenile justice boards and child welfare committees; establish homes; set up special juvenile police units; and develop rehabilitation and social integration programmes.

Objectives have not been met due to incomplete, inconsistent and inadequate implementation and "pervasive cultural and systemic factors inhibiting the necessary transformation".[1217] In practice, and despite laws establishing alternative measures to avoid detention of children, in India the system for dealing with children in need of care and protection relies extensively on institutionalisation, and institutional care is still the main recourse for 'protecting' children.[1218]

1. Holding children in need of care and protection with children in conflict with the law

Research conducted for this case study found that a number of groups of children may be placed in observation homes rather than being recognised as children in need of care and protection, including:[1219]

- children being accused of community violence;
- children found begging;
- child labourers;
- children with disabilities;
- children living with HIV/AIDS;
- migrant children, especially from Bangladesh who are taken into custody in observations on the grounds of contravention to the 'Foreigners' Act';
- child victims of trafficking; and
- child victims of crimes for "safe custody", such as girl victims of rape or kidnapping.

One of the key reasons why there is a risk that children in need of care and protection can end up administratively detained is that they can end up in secure observation homes with children in conflict with the law. While the 2000 Act clearly differentiates between observation homes (for children subject to pre-trial detention); special homes (for children convicted of an offence); and children's homes (for children in need of protection), in the past "in most places only one home [was] usually established for housing all categories of children",[1220] many homes are still certified under one or more of these categories. Fresh notifications have renamed existing homes "without any substantive change in their operations and functioning"[1221] and this has resulted in the continued mixing of children in conflict with law with that of children in need of care and protection, thereby undermining the distinction envisaged by the 2000 Act.[1222]

Failure to differentiate and the combination of different groups of children in one home can lead to all the children being treated in the same manner and potentially be detained in a closed

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29 January 2011].

[1217] NCPCR, 2008, p. 66.

[1218] Some superintendents of institutions believe that *more* not fewer children should be admitted into children's homes, including those with parents. See United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', 2006, p. 11, 69.

[1219] Kumari, V., op. cit., p. 155.

[1220] Ibid.

[1221] Ibid., p. 300.

[1222] United Nations Children's Fund, 'Assessment of Implementation of Juvenile Justice System in West Bengal', (unpublished, undated), p. 18.

institution. Adolescents who have committed serious offences may be accommodated together with children, often much younger, in need of care and protection. In a sample of children examined in one study, 20 per cent of the homes had children in conflict with the law and children in need of care and protection living together.[1223] There is no judicial or periodic review of this latter group of children in practice.

2. Restriction of liberty within homes

Colloquially, many children's homes have become known as *bacchon ka jail* (the jail for children), with a child's fears confirmed when they are placed in a closed institution from which they cannot come and go as they please.[1224] In observation homes which also function as children's homes, uniformed police personnel are present "after hours" on the premises. This is "a gross violation of the provisions of the JJ [Juvenile Justice] Acts".[1225]

The use of corporal punishment, detention in isolation, and denial of food as disciplinary measures all reflect a staff attitude towards children that is often punitive, focusing on "correctional" measures rather than promoting and safeguarding the child's welfare. Some staff believe that greater security in the home will prevent children from running away, but children perceive measures such as high fences[1226] and the presence of security guards as further enhancing the prison-like atmosphere of the home.[1227] High levels of absconding from a home can reflect negatively upon staff service records, which can result in disproportionate restrictions being placed on the children's liberty by staff. There are also cases of direct violation of the 2000 Act, with children in need of care and protection being locked up[1228] and even handcuffed.[1229]

In a Child Relief and You (CRY) study evaluating the homes,[1230] superintendents in only 2 of the 9 States studied reported that children had not tried to escape. At the national level, 55 per cent of superintendents reported that children in their care had tried to escape.[1231] One of the homes in Pune, visited as part of the research for this case study, functioned as both a children's home and observation hom, and, in response to a recent spate of escapes, had resorted to keeping up to 20 children, including both children in need of care and protection and juveniles in conflict with the law (who had not been before a juvenile justice board) under lock and key.[1232] Children also

[1223] CRY Report, 2004.
[1224] Aangan, op. cit.
[1225] NCPCR, 2008, p. 24.
[1226] 'Abuse Electric fences at city's juvenile homes – "the electric wires, meant to prevent the occupants from fleeing, could result in grievous injuries"', *The Times of India*, 2 January 2008.
[1227] Ibid.
[1228] In the Aangan study (Aangan, op.cit.) 65 per cent of the children in need of care and protection (CNCP) interviewed mentioned that children do run away, or at least attempt to do so. While 65 per cent of staff said that immediate intervention in the case of a child who had attempted to run away was counselling, 38 per cent of CNCP claimed that usually staff would beat them.
[1229] CRY Report, 2004, p. XI.
[1230] Ibid.
[1231] In at least two institutions, locking up was listed as one of the punishments for a child who tried to escape. See CRY Report, 2004, p. VI, 35.
[1232] Visit to Jawharlal Nehru Yeroda Children's Home, Pune, 3 April 2009

feared that any attempt to leave would result in home authorities becoming more authoritative and taking away whatever little freedom they had.[1233]

3. Gatekeeping and monitoring

It is likely that some children in need of care and protection are being placed in inappropriate institutions and are facing administrative detention due to inadequate decision-making by child welfare committees. The members of these committees come from a variety of different backgrounds, including social work and teaching professions. It is not mandatory for any of the members to have a legal background. In rural areas, there are far fewer expert members on the child welfare committee. As a result, such members have little authority or influence over superintendents and institutions. Child welfare committees are sometimes inadequately informed about their roles and functions, or fail to carry out the functions assigned to them, including the inspection of children's homes.[1234] In a 2006 United Nations Children's Fund study, only one member of a visited child welfare committee was in attendance – a local teacher who was "quite unaware of the ramifications of the Act or the Rules, or [the] importance in protecting the rights of children. She has no knowledge of alternative to Institutional options or rehabilitation support required for children."[1235]

Furthermore, there is little external review of the work and the decisions made by child welfare committees. Some produce monthly reports, which might detail the number of sittings, number and type of cases, cases pending and other issues such as training and exit policies,[1236] but it is unclear who reviews these and whether the reports contain much more than statistics. The National Commission for the Protection of Children's Rights recently recommended the establishment of a "judicial oversight mechanism" for the operation of child welfare committees. The appointment of a senior officer from the Legal Services Authority is recommended, who will report to the Chief Justice of the High Court on a monthly basis, as well as "special child welfare commissioners" appointed by the High Court, to report to the Chief Justice on procedural and operational gaps and issues.[1237]

Other weaknesses in child welfare committees as decision making bodies, relate to their capacity and coverage. Under the 2006 amendment to the law,[1238] every district in the country must have a child welfare committee and a juvenile justice board within one year from the notification of the new Act. Thus, currently, all 611 districts should have a functioning child welfare committee and juvenile justice board. However, the Indian Government admits that many States and union territories in the country have not established these bodies, and in many other States the numbers existing are inadequate to deal with the number of children brought before them.[1239] In many

[1233] United Nations Children's Fund, 'Assessment of Implementation of Juvenile Justice System in West Bengal', (unpublished, undated), p. 69.
[1234] United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', 2006, p. 55, 78, 79.
[1235] Ibid., p. 98.
[1236] Interview with Santosh V. Shinde, Member of Child Welfare Committee, Mumbai, 3 April 2009.
[1237] NCPCR, 'Key recommendations and guidelines for reform in the juvenile justice system', April 2009, para 50: <www.ncpcr.gov.in/Reports/Report_on_Key_Recommendations_&_Guidelines_for_Reform_in_the_Juvenile_Justice_System.pdf> [accessed 29 January 2011].
[1238] Section 4 of JJ(C&P) Act 2000.
[1239] HAQ Centre for Child Rights, 'Still Out of Focus: Status of India's Children 2008', 12 February 2009.

districts child welfare committees have yet to be established, while in others child welfare committees were established and were closed after a short period of time.[1240] In the district of Pune there are 185 homes[1241] as of April 2009, and in the last 10 months it had only been possible for a child welfare committee member to visit 20 to 25 of these homes.[1242]

Administrative support, including physical space and adequate resources for the functioning of child welfare committees and juvenile justice boards are often in short supply, hampering effective functioning.[1243] In 25 out of 30 child welfare committees in Maharashtra, for example, basic resources to enable the committee to function were lacking.[1244] Before any decision is made, a proper assessment of the child is required. However, for those carrying out the enquiry (the social worker or probation officer) there are often no funds to personally go and carry out home verification – especially for children from other States – and no standardised system for assessing family care. Problems faced also include lack of co-operation from institutions, and a low preference for non-institutional services. Children can remain in homes for long periods while a decision is made as to their future.

4. Length of detention

A child appearing before a child welfare committee, can be placed in a home for a period of up to four months while an enquiry is carried out.[1245] However, due to the acute shortage of staff, difficulties such as children being unable to provide an address and other problems in carrying out this enquiry and preparing a home enquiry report, delays often occur, and many children spend considerably longer than four months in a home.[1246] This is especially the case in relation to children with special needs, and immigrant children, the majority of who can end up staying in homes for many years and often until at least the age of 18.[1247] A disabled child's stay in a home can also be lengthened, often due to the failure of rehabilitation interventions, along with a societal rejection of disabled children. There can also be great difficulties in tracing families, as well as delays in court-release for children who are victims of trafficking or who are apprehended under the Foreigners' Act 1946.[1248]

However, even when an enquiry is carried out successfully, children can often be in a home until they reach adulthood. While some child welfare committees consciously avoid committing a

[1240] Interview with Ms. Ranjana Guar, Social Action and Research Centre (SARC), Varanasi, Uttar Pradesh, and Interview with Dr. R. P. Dwivedi. Director of the Institute of Gandhian Studies and member of the Juvenile Justice Board (JJB) of Varanasi, Uttar Pradesh on 4 April 2009. In the CRY Report, in nearly one in four districts child welfare committees were not functional (See CRY Report, p. XI.).
[1241] Six out of seven of which are Government homes and three are Observation homes combined with Children's Homes. Meeting the Chairperson of the Pune Child Welfare Committee, Ms. Vijaya Satpal, 3 April 2009.
[1242] Meeting the Chairperson of the Pune Child Welfare Committee, Ms. Vijaya Satpal, 3 April 2009.
[1243] CRY Report, 2004, p. XI.
[1244] As an example of the work load, Mumbai CWC (one of oldest child welfare committees) handles 60 per cent of cases in whole State of Marahstra, which can be 60-80 cases a day. It has 1 chair and 4 members and sits 4 times a week. – Interview with Santosh V. Shinde, Member of Child Welfare Committee, Mumbai, 3 April 2009.
[1245] Section 33(2) of JJ (C&P) Act 2000.
[1246] Interview with Raj Mangal Prasad, Vice-President of Pratidhi, 8 April 2009: <http://pratidhi.org/> [accessed 29 January 2011].
[1247] United Nations Children's Fund, 'Assessment of Implementation of Juvenile Justice System in West Bengal', (unpublished, undated), p. 69, 74.
[1248] Ibid.

child for more than a year in a children's home so that annual reviews may occur, most children are 'committed' to care until they reach 18.[1249] Furthermore, even where a yearly review is expected, many child welfare committees simply do not have the capacity to conduct one. In the absence of any centralised data information system, or even a single file on the child providing a comprehensive picture of the child's status,[1250] keeping track of when reviews are due is very difficult.[1251]

Child rights at risk: Conditions in detention

Conditions in children's homes vary considerably across the country, with some homes offering a significantly better level of care and support than others. To bring other homes up to this standard there have been attempts to insist that homes are licensed.[1252] Article 37 of the CRC states that "[e]very 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," but sadly, in many homes, "overcrowding, violence and abuse is the reality of most custodial institutions."[1253] Physical abuse, and occasionally sexual abuse, of children is reported,[1254] carried out both by staff and by older children to the younger children.[1255] Reports have also focused on inadequacies of the physical living conditions in homes, frequently finding instances of: overcrowding and poor physical infrastructure with, for example, dilapidated buildings; dirty, damp rooms; dormitory style rooms; open toilets; no working taps and doors; and no mattresses.[1256] In response to the extreme lack of hygiene and inadequate medical facilities in one Delhi home, arguably resulting in several preventable deaths of young children from conditions such as diarrhoea, dehydration and pneumonia, a recent High Court judgment called for a complete overhaul of conditions within the home. The judgment highlighted the extent to which the infants and children admitted to various children's homes or care homes had been failed.[1257]

1. Right to an adequate standard of living

There is often insufficient support of children's emotional needs in homes. Institutional care continues to be provided at a basic level, providing food, clothing and shelter,[1258] but with low staff-child interaction. This is frequently due to: an inadequate understanding of children's needs; limited opportunity for community contact; little opportunity for play and leisure activities;[1259] and a lack of specialists like counsellors or psychiatrists to work intensively with

[1249] Interview with Vikhram Dutt, Advisor and Consultant for Udayan Care, New Delhi, 31 March 2009.
[1250] NCPCR, 2008, p. 47.
[1251] Interview with Vikhram Dutt, 31 March 2009.
[1252] See above for further discussion of this.
[1253] HAQ Centre for Child Rights, Still Out of Focus: Status of India's Children 2008, 2008, p. 168.
[1254] See, for instance, The Indian Express, 'HC slams Govt on minors' abuse at shelters', 17 January 2007.
[1255] 'Lost innocence! Children living like 'animals' in a Delhi boy's home, finds National Commission for Protection of Child Rights', *Hindustan Times*, 23 December 2008.
[1256] See, for instance, the CRY Report. This may constitute a violation of the right of a child to an adequate standard of living (Article 27 of CRC) and the right to the highest attainable standard of health (Article 24 of CRC).
[1257] *Harsh Virmani and Ors v. Government of N.C.T of Delhi and Ors* – W.P(C) 6988/2007, order 19.02.2009.
[1258] Aangan, op. cit.
[1259] This may constitute a violation of the right to rest and leisure, to engage in play and recreational activities (Article 31 of CRC).

children and their families.[1260] No individualised attention is given to children based on each child's needs, strengths and weaknesses; they simply "live" in the institutions, with limited access to doctors, teachers, or even basic caring adult relationships.[1261] The 2008 case before the Delhi High Court,[1262] mentioned above, addressed the issue of the "dismal number of caretakers, and the 'harsh' nature of their employment". Staff are paid a token amount and are expected to live in the home 24 hours a day.[1263] Children have limited access to aid and information[1264] and limited interaction with the community, with little scope for public interface except at school.[1265] Table 6 below outlines some of the problems acknowledged by the children themselves in these institutions.

Table 6: Problems faced by the children in institutions

Problems faced by children in the institutions	Number of responses
Physical safety and security	34
Separation anxiety	85
Interpersonal relationship	49
Problems with other children	60
Feeling of powerlessness	43
Learning disorders	39
Isolation from the community	44
Disability	9
Drug Addiction	12
Violence	13
Sexual Abuse	18
Physical Abuse	26

Source: CRY Report, p. 26. These responses are based on information available from 176 Focussed Group Discussions (FGD) conducted with children in 151 institutions. Date from one FGD is presented as one response.

2. Accreditation of homes and monitoring[1266]

The potential for mistreatment within institutions is further exacerbated by the large number of institutions which are unregistered across the country. The interface of these institutions "with the procedural and oversight facets of the formal JJ system is either on an *ad hoc* basis or non-existent".[1267] The Juvenile Justice Amendment Act of 2006[1268] mandated that all child care institutions be registered within six months of their enactment (i.e. by February 2007).[1269] This has not happened, although in Delhi, for example, between 20 and 50 homes have been

[1260] United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', 2006, p. 75.
[1261] Possibly violating the right to an adequate standard of living (Article 27 of CRC); the right to the highest attainable standard of health (Article 24 of CRC); and the right to education (Article 28 of CRC), among others.
[1262] *Harsh Virmani and Ors v. Government of N.C.T of Delhi and Ors* – W.P(C) 6988/2007, order 19.02.2009.
[1263] 'For city's needy, it's home alone, care gone', *Express Newsline*, 23 January 2008.
[1264] NCPCR, 2008, p. 28, 29.
[1265] United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', 2006, p. 10.
[1266] 'States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision', Article 3(3) of CRC.
[1267] NCPCR, 'Key recommendations and guidelines for reform in the juvenile justice system', April 2009, para. 28.
[1268] Juvenile Justice (Care and Protection of Children) Amendment Act 2006, No. 33 of 2006.
[1269] Section 43.3 of JJ(C&P) Act 2000.

licensed.[1270] Many homes have applications for accreditation pending and, in small number of cases, licenses have been removed from homes that failed to meet the required standards.[1271] Many homes remain registered under the provisions of the Orphanages and Charitable Homes Act 1960, the Societies Registration Act 1856 or the Indian Trusts Act 1982 instead. Without all institutions being licensed, there is no standardisation of care, and little or no accountability.[1272] Arguably, government homes, in spite of their limitations, seem to have higher accountability and transparency compared to the NGO homes.[1273]

Conclusion: A violation of international human rights law?

Depriving children in need of care and protection of their liberty through the imposition of unduly restrictive regimes in the homes in which they are placed, may violate their right to liberty and expose them to the risk of further rights violations.

While "filling a gaping legislative lacuna",[1274] arguably the 2000 Act is inadequate to deal with the number of children in need of care and protection. The number of children in institutions is "alarming"[1275] and while the focus remains predominantly on how they are treated in homes, rather than why they are there in the first place, the number shows no signs of significantly diminishing. It is the very extent to which institutions are relied upon, with little monitoring of conditions and treatment, that can result in children being administratively detained within them. At present, the distinction between children in conflict with the law and children in need of care and protection is still largely illusory, despite the separation of categories in law, and this allows for what has been described as the "criminalisation" of poverty.[1276]

Arguably, the criminalisation of children in need of care and protection should be addressed by amending the legislation and by transferring the care and protection of such children to social welfare agencies, whether governmental or non-governmental, whose personnel are social workers trained to work with and support families and children, rather than personnel whose main task is correction.[1277] In addition, viable community based alternatives to detention need to be developed. Failures in gatekeeping result in children entering institutions who are not in fact orphans, but simply destitute. Contrary to popular perception, most of the children roaming the

[1270] Estimates were given of between 20 to 50 licensed homes and 60 to 90 'underground' or with application pending in Delhi from interviews with M. M. Vidyarthi, Secretary General, Samarth - Reaching the Unreached (See <www.samarthindia.org> [accessed 29 January 2011].), Delhi, 31 March 2009; Raaj Mangal Prasad, Vice President, Pratidhi for Crime Victims, Delhi, 8 April 2009.

[1271] Homes are assessed based on parameters outlined in JJA (See s. 34(2) – these are further elaborated in the 2007 Rules.) – i.e. presence of management committee for children, community involvement, outside schools, etc. to combat isolation. See, for instance, 'Court cancels orphanage licence – 'the license of an orphanage, Bal Vihar, in Uttam Nagaar… was cancelled on Monday…and an inquiry into the discrepancy of their records was ordered', *The Times of India*, 29 July 2008.

[1272] NCPCR, 2008, p. 21.

[1273] United Nations Children's Fund, 'Evaluation Report on the Status of the Implementation of the Juvenile Justice Act 2000 in Tamil Nadu', 2006, p. 108.

[1274] F. Ferrara and V. Ferrara, 'The Children's Prison: Street Children and India's Juvenile Justice System', October 2005:<www.careshareindia.org/OHome/OHEnglish.pdf> [accessed 29 January 2011].

[1275] Childline India Foundation, *CHILD Protection & Rights*: <www.childlineindia.org.in/cr_Childrelated Resources_3.htm> [accessed 29 January 2011].

[1276] United Nations Children's Fund, 'Assessment of Implementation of Juvenile Justice System in West Bengal', (unpublished, undated), p. 16.

[1277] Ferrara, F. and Ferrara, V., op. cit.

streets of India's cities and villages have a family to which they could, in principle, return. Some studies estimate that as many as 90 per cent could live with parents or relatives if they so wished,[1278] but this will be dependent on the provision of financial assistance and a commitment to moving away from a reliance on institutionalisation.

[1278] NCPCR, 2008.

9. Case study: Use of administrative detention in the 'war on terror': Children detained at Guantánamo Bay

Introduction

Years after the 11 September 2001 terrorist attacks on the United States and the subsequent declaration of a "global war on terror" by the United States Government, individual terror suspects continue to be held in detention. Hundreds of people captured during armed conflicts in Afghanistan, Pakistan and Iraq, and in locations "far from any battlefield", such as Thailand, Bosnia and Gambia,[1279] have been held in administrative detention, many without any foreseeable prospect of being either charged or tried in the criminal justice system or released. The detention facility at Guantánamo Bay can be used to demonstrate the issues that arise when States use largely unchecked executive powers in countering terrorism.

Since it opened in January 2002, nearly 800 detainees, of more than 50 nationalities, have been held in the detention facility at Guantánamo Bay Naval Base.[1280] On 22 January 2009, seven years after it was opened, President Barack Obama signed executive orders directing the closure of the Guantánamo Bay detention facilities within a year and the immediate case-by-case review of detainees still held at the facility.[1281] However, as of March 2010, 183 detainees were still held at Guantánamo Bay.[1282]

The vast majority of these detainees have not been charged with an offence, but have been held in administrative detention, based on the executive determination that they are "unlawful enemy combatants". The number of children currently detained at Guantánamo Bay is unknown. However, it has been reported that there have been at least 17 people held in detention who were under the age of 18 years at the time they were taken into custody.[1283] There is evidence that suggests that children as young as 14 years,[1284] and possibly as young as 10 and 12[1285] have been transported to and detained at Guantánamo Bay.

[1279] Human Rights First, 'Guantánamo Bay': <www.humanrightsfirst.org/us_law/etn/det_fac/guantanamo.aspx> [accessed 29 January 2011].

[1280] Amnesty International, 'Facts and Figures. US Illegal Detentions', 2008, AMR 51/147/2008: <www.amnestyusa.org/document.php?id=ENGAMR511472008> [accessed 29 January 2011].

[1281] Guantanamo Bay Detainees: <www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm>.

[1282] Amnesty International USA, 'Judge orders Mohammed Jawad's release from Guantánamo; administration still mulling trial', 31 July 2009: <www.amnesty.org/en/library/asset/AMR51/088/2009/en/835237ff-11d3-4755-ab0d-7efeae2e1a7a/amr510882009eng.pdf>. See also <www.spiegel.de/politik/ausland>; Presidential Memorandum-Closure of detention facilities at Guantanamo Naval Base, The White House, 4 November 2008; 'Obama admits delay in Guantanamo', *BBC News*, 18 November 2009: <www.bbc.co.uk>. See also 'U.S. sends 2 Uighur detainees to Switzerland', *Reuters*, 24 March 2010: <www.reuters.com/article/idUSTRE62N38020100324>; 'No Terror Evidence Against Some Detainees', *New York Times*, 28 May 2010: <www.nytimes.com/2010/05/29/us/politics/29gitmo.html?ref=guantanamobaynavalbasecuba> [websites accessed 29 January 2011].

[1283] Amnesty International, 'Justice at last or more of the same? Detentions and Trials after Hamdan v. Rumsfeld', 17 September 2006: <www.amnesty.org/en/library/info/AMR51/146/2006> [accessed 29 January 2011].

[1284] Severin Carrell, 'The Children of Guantanamo Bay', *The Independent*, 28 May 2006: <www.independent.co.uk/news/world/americas/the-children-of-guantanamo-bay-480059.html> [accessed 29 January 2011].

The United States legitimises the use of administrative detention as a response to terrorist threats through the conceptualisation of counter-terror initiatives as a "war" on terror, with its legal basis in the law of armed conflict. Prior to 11 September 2001, those accused of terrorist attacks have been charged with criminal offences and tried in the United States domestic courts.[1286]

Context

The "war on terror" officially began on 14 September 2001, when Congress passed legislation, S.J.Res. 23,[1287] authorising the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons..." This was signed into law by the president on 18 September 2001.

The Government asserts that the United States "war" against Al-Qaida and other transnational groups legitimates its capture of terrorism suspects anywhere in the world until the cessation of hostilities. On 17 September 2001 President George W. Bush signed a memorandum authorising the Central Intelligence Agency (CIA) to set up detention facilities outside the United States, in order to detain "enemy combatants",[1288] An enemy combatant was defined in a subsequent Secretary of Defense Memorandum as "[a]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or who has directly supported hostilities in aid of enemy armed forces."[1289]

On 13 November 2001, President Bush signed the Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,[1290] authorising the military to hold non-United States citizens for an indefinite time without charge. While the United States Government has referenced international humanitarian law to seek to justify the detention of "enemy combatants", there is no legal category or concept in international humanitarian law of an "enemy combatant".

[1285] Wilson, R.J, 'Children in Armed Conflict: The Detention of Children at Guantanamo Bay, and the Trial for War Crimes by Military Commission of Omar Khadr, a Child', (2006), American University, Washington College of Law Legal Studies Research Paper No. 2009-13, 27 March 2009, p. 5.

[1286] For example, the United States criminally prosecuted the terrorists who bombed the World Trade Center in 1993, the Murrah Federal Building in Oklahoma City in 1995, and the U.S embassies in Kenya and Tanzania in 1998: see Hakimi, Monica, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide', *Case Western Reserve Journal of International Law*, 40:3, 2009, 593.

[1287] SJ. Res 23: Authorization for Use of Military Force, Joint Resolution, 107th Congress, 18 September 2001.

[1288] Amnesty International, 'Timeline. End Illegal US Detention', AI Index 51/148/2008, 2008: <www.amnesty.org/en/library/asset/AMR51/148/2008/en/d620ceca-cde2-11dd-b0c5-1f8db3691f48/amr5114 82008en.html> [accessed 29 January 2011].

[1289] Deputy Secretary of Defense, 'Memorandum for Secretaries of Military Departments', Chairman of the Joint Chiefs of Staff, Undersecretary for Defense Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at US Navy Base Guantanamo Bay, Cuba, 14 July 2006: <www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> [CSRT Procedures] [accessed 29 January 2011].

[1290] Executive Order dated 13 November 2001, 66 Fed. Reg. 57833, 16 November 2001: <http://news.findlaw.com/cnn/docs/terrorism/bushtribunalord111301.html> [accessed 29 January 2011].

The United States Government argues that the purpose of administratively detaining enemy combatants is not to punish these individuals, but to incapacitate them, contain the security threat that they pose and to prevent any future attacks from occurring. This, it is argued, cannot be done through the criminal courts. As stated by the United States Government in a response to a United Nations Human Rights Commission Special Rapporteur inquiry in 2005, "[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States."[1291]

However, according to a report submitted to the United Nations Commission on Human Rights by five United Nations Special Rapporteurs, evidence indicates that one of the key purposes for detaining persons at Guantánamo Bay is "not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda network."[1292]

Detention of "enemy combatants": International legal framework

As noted, while there is no legal category in international law of "enemy combatant", the detention of children involved in hostilities who are "captured" may be permissible, in certain circumstances, in international humanitarian law. Also, according to international human rights law, the detention of children on security grounds is permissible in limited circumstances, however, not where the detention amounts to a breach of a child's right to liberty and security of person, contained in Article 9 of the ICCPR and Article 37(b) of the CRC.

1. International humanitarian law

International humanitarian law, principally contained in the Four Geneva Conventions of 1949 and Two Additional Protocols of 1977, applies in the context of cases of declared war or armed conflict arising between two or more "High Contracting Parties".[1293]

According to international humanitarian law, States are permitted to detain persons, in certain circumstances, who have been "captured" in the course of armed conflict. Where a child involved in hostilities in international armed conflict is "captured" by a State, the child may become a prisoner of war (POW).[1294] Where such children fall into this legal category, they will be entitled to the range of protections afforded to adults POWs under the Third Geneva Convention (GC III). They also enjoy a number of special protections.[1295] A child will be considered a POW where he or she belongs to one of the following categories and has "fallen into the power of the enemy": members of armed forces, militias or volunteer corps of a party to

[1291] Commission on Human Rights, Situation of Detainees at Guantánamo Bay, (2006), U.N. Doc. E/CN.4/2006/120, para. 19.
[1292] Ibid., para. 23.
[1293] Article 2 of all four Geneva Conventions, International Committee of the Red Cross, 21 April to 12 August 1949.
[1294] Article 77(3) of International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Hereinafter Additional Protocol I.
[1295] Article 77 of Additional Protocol I.

the conflict; organised resistance movements belonging to a party to the conflict;[1296] members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power; persons who accompany the armed forces without being members thereof; members of crews; inhabitants of a non-occupied territory, who "take up arms" spontaneously to resist invading forces (as long as they carry arms openly and respect the laws and customs of war); and persons in occupied territories, who had formerly been part of the armed forces of the occupied country.[1297]

According to Article 21 of GC III, a "detaining power" is permitted to intern POWs and may "impose on them obligations of not leaving beyond certain limits, the camp where they are interned" or, if the camp is fenced in, of "not going outside its perimeter". POWs may not be held in close confinement except where necessary to safeguard their health, only for the time that this is necessary.[1298] POWs must be "released and repatriated without delay after the cessation of active hostilities".[1299] Where a POW is arrested for the purposes of bringing charges against the prisoner, judicial investigations relating to the prisoner "shall be conducted as rapidly as circumstances permit" and the prisoner's trial must take place as soon as possible.[1300] Also, a POW must not be detained while awaiting trial, unless a member of the forces of the detaining power would be confined if charged with a similar offence or it is "essential to do so in the interests of national security".[1301]

International humanitarian law also allows a party to an international conflict to detain ('intern') civilians "if the security of the Detaining Power makes it absolutely necessary".[1302] In order to intern civilians lawfully, a State "must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security".[1303]

While it has been noted that the global "war on terror" does not, for the purposes of applicability of international humanitarian law, constitute "armed conflict",[1304] some of the children detained at Guantánamo Bay had been captured in the course of combat operations, for example, in Afghanistan, and international humanitarian law may be applicable in these instances. However, it has been argued, for example, by the Chairperson of the Working Group on Arbitrary Detention and the Special Rapporteur on the independence of lawyers and judges that these combat operations (i.e. between the United States Government and Al-Qaida) do not constitute armed conflict between two High Contracting Parties to the Third or Fourth Geneva

[1296] According GC III, to fall into this category, the resistance movement must also fulfil the following criteria: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
[1297] Article 4 of GC III.
[1298] Ibid., Article 21.
[1299] Ibid., Article 118.
[1300] Ibid., Article 103.
[1301] Ibid.
[1302] Article 42 of Fourth Geneva Convention 1949. Hereinafter GC IV.
[1303] International Committee of the Red Cross, Commentary on article 42 of the IV Geneva Convention, (undated): <www.icrc.org/ihl.nsf/COM/375-590053?OpenDocument> [accessed 29 January 2011].
[1304] See Commission on Human Rights, Situation of Detainees at Guantánamo Bay, (2006), U.N. Doc. E/CN.4/2006/120, para. 20.

Conventions, as Al-Qaida is not a party to the Geneva Conventions.[1305] It can be argued, therefore, that international humanitarian law does not apply to, and cannot be used as a legal basis or justification for the detention of persons in Guantánamo Bay. However, international human rights law will continue to apply.

2. International human rights law

It is now well established that international human rights law, including the CRC, continues to apply during international and internal armed conflict.[1306] It would follow, therefore, that Article 9 of the ICCPR, which provides the right to liberty and security of person, applies to the detention of persons at Guantánamo Bay.[1307] According to the International Court of Justice, "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[1308] This principle of *lex specialis* has been interpreted to mean that the branch of law with the more "detailed and adapted" rule will apply to the situation.[1309]

In the context of detentions made during armed conflict, it can be argued that international human rights law continues to apply.[1310] Article 2(1) of the CRC provides that "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction…" and the CRC does not contain any provisions which allow States to derogate from the human rights standards contained in the Convention during times of conflict or emergency. Also, the Committee on the Rights of the Child has commented that the CRC continues to apply during times of armed conflict or occupation.[1311] According to a report

[1305] Ibid., para. 14.

[1306] The applicability of certain human rights instruments to situations of armed conflict was recognised as early as 1969, in which it was stated in a report of the United Nations Secretary-General that: 'The Universal Declaration of Human Rights does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict. It sets forth rights and freedoms which it proclaims as belonging to 'everyone', to 'all'…The Declaration proclaims that 'the universal and effective recognition and observance' of the rights and freedoms shall be secured'. In 1970, a General Assembly Resolution also proclaimed the applicability of international human rights in situations of armed conflict (Basic Principles for the Protection of Civilian Population in Armed Conflicts, G.A Res. 2675 (XXV) (1970).) Since then, it has become fairly widely accepted that some international human rights conventions apply to situations of armed conflict: see the International Court of Justice, 'Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons' (1996), ICJ Reports 1996 (I), para. 25. See also, Pejic, Jelena, 'Procedural principles and safeguards for internment / administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, 87:858, June 2005. See also; 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', ICJ Reports 1996(I), p. 240, para. 25.

[1307] International human rights provisions continue to apply unless a State has expressly derogated from a right in accordance with Article 4 of the ICCPR (although there are some rights that States are not permitted to derogate from). The United States Government has not made such a derogation from the ICCPR provisions. See Introduction and Section 1 (on security administrative detention), for more detail on international standards governing derogation.

[1308] 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', ICJ Reports 1996(I), p. 240, para. 25.

[1309] Geneva Academy of International Humanitarian Law and Human Rights Law, 'Rule of Law and Armed Conflicts Project, Interaction Between Humanitarian Law and Human Rights in Armed Conflicts', (undated): <www.adh-geneva.ch/RULAC/print.php?page=13> [accessed 29 January 2011].

[1310] See Pejic, J., op. cit.

[1311] Committee on the Rights of the Child, General Day of Discussion on Children in Armed Conflict, Second Session (28 September-9 October 1992), 19 October 1992, U.N. Doc. CRC/C/10, paras. 61 et seq. See also Hammarberg T. Keynote speech: 'Children as a Zone of Peace - What Needs to be Done' in Aldrich and van Baarda (eds.) 'Conference on the Rights of Children in Armed Conflict', 1994.

submitted to the United Nations Commission on Human Rights by five United Nations Special Rapporteurs, the detention of terror suspects at Guantánamo Bay is "governed by human rights law, and specifically Articles 9 and 14 of ICCPR";[1312] the right to liberty and security of person and the right to a fair trial by a competent, independent and impartial tribunal.

The United States Government has denied that international human rights law applies to Guantánamo detainees, and further asserts that Guantanamo detainees are outside the territory of the United States and, therefore, the ICCPR (including Article 9) does not apply.[1313] However, the prevailing view among experts is that international human rights law applies beyond State territorial borders to areas over which a State exercises control and in instances in which they have authority over persons.[1314] Article 2 of the ICCPR States that the provisions of the ICCPR apply to "all individuals within is territory and subject to its jurisdiction".

According to international human rights law, administrative detention of children for security purposes is not, of itself, unlawful, and may be permitted in limited circumstances. However, where the detention amounts to a violation of a child's right to liberty and security of person, contained in Article 9 of the ICCPR and Article 37(b) of the CRC, it will be unlawful. According to these provisions, administrative detention will be unlawful where it is not carried out "in accordance with such procedures as are established by law".[1315] It will also be unlawful where it is considered to be arbitrary. Whether or not detention is considered arbitrary will depend on the circumstances of the case. The Human Rights Committee has found that "'[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." The Human Rights Committee also adds that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought",[1316] otherwise it will be considered to be arbitrary and therefore, unlawful in international law.

The International Commission of Jurists' Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (2004) (Berlin Declaration)[1317] provides that "counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination"[1318] and, in relation to the deprivation to liberty in combating terrorism "[a]dministrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular supervision."[1319]

[1312] Commission on Human Rights, Situation of Detainees at Guantánamo Bay, (2006), U.N. Doc. E/CN.4/2006/120, para. 26.
[1313] United States Department of State, Second and Third Periodic Report of the United States of America to the Human Rights Committee, Human Rights Committee: Third Periodic Report, United States of America, 28 November 2005, U.N. Doc. CCPR/C/USA/3, para. 130.
[1314] See, for instance, Human Rights Committee General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13.
[1315] Article 9(1) of ICCPR. See also Article 37(b) of the CRC, which provides: 'The arrest, detention or imprisonment of a child shall be in conformity with the law…'.
[1316] *Danyal Shafiq v. Australia*, para. 7.2; *A. v. Australia*, 1997, para 9.2.
[1317] International Commission of Jurists, Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration), adopted 28 August 2004. Hereinafter the Berlin Declaration.
[1318] Principle 1 of Berlin Declaration.
[1319] Principle 6 of Berlin Declaration.

In addition, in international law, there is a presumption against detaining children, as children may only be detained "as a last resort" and only "for the shortest appropriate period of time".[1320]

Children deprived of their liberty also have the right to a variety of safeguards, including the right:[1321]

- To be informed promptly of the reasons for detention and the substance of the complaint against him or her;
- To challenge the legality of the detention;
- To protection against *incommunicado* detention, including the right to be kept at officially recognised places of detention, and the right to maintain contact with the family through correspondence and visits;
- To access legal counsel and other appropriate assistance;
- To have the detention reviewed at regular intervals, not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release. [1322]

Domestic legal framework

Guantánamo Bay Naval Base is an area in Cuba and is under the jurisdiction of the United States Government pursuant to a lease agreement, which was arrived at under the Cuban-United States Treaty of 1903. Cuban law does not apply to Guantánamo Bay, yet the base is not formally part of the United States. As noted above, a memorandum signed by President Bush on 17 September authorised the CIA to set up detention facilities at Guantánamo Bay, in order to detain "enemy combatants".[1323]

While the law permitted the detention of "enemy combatants" in Guantánamo Bay on the ground that it was necessary to contain the threat to security that detainees were found to pose, according to the report submitted to the United Nations Human Rights Commission by five United Nations Special Rapporteurs, there is evidence to indicate that persons detained at Guantánamo Bay were held in order for authorities to gather intelligence on the Al-Qaida network.[1324] Holding child detainees on this basis is a violation of their right to liberty in international law, set out above, as found by the five United Nations experts in their report.[1325]

This, coupled with a lack of safeguards provided to detainees, as detailed below, has resulted in the indefinite detention of children in the absence of evidence that they pose a security threat to United States forces. For example, following a *habeas corpus* petition filed in 2009 by Mohammed Jawad (who was originally detained in 2002), the Department of Defense acknowledged on 24 July 2009 that it lacked the necessary evidence to justify holding Jawad as an "enemy combatant".

[1320] Article 37(b) of CRC.
[1321] See Safeguards subsection in the Introduction of this working paper.
[1322] Article 25 of CRC; WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 58.
[1323] Amnesty International, 'Timeline. End Illegal US Detention', 2008.
[1324] Commission on Human Rights, Situation of Detainees a Guantanamo Bay (2006), U.N. Doc. E/CN.4/2006/120, para. 23.
[1325] Ibid., para. 20.

1. Review of the legality of detention

Initially, the 2001 military order prohibited any detainee held under it from seeking any remedy in any proceeding in any United States, foreign or international court. Detainees were denied the right to challenge the lawfulness of their detention and their right to legal assistance for several years.[1326] In June 2004, two United States Supreme Court cases, *Rasul v. Bush*[1327] and *Hamdi v. Rumsfeld*,[1328] ruled that the United States Federal Court has jurisdiction to hear *habeas corpus* petitions from Guantánamo detainees from both foreign and United States nationals.

Following this judgment, the United States Government legislatively overruled the Supreme Court decisions by passing the Detainee Treatment Act 2005. Section 1005(e) of the Act stripped United States federal courts of *habeas corpus* jurisdiction over Guantánamo detainees. It provided that "no court, justice, or judge shall have jurisdiction to hear or consider: *(*1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba […]"[1329] The Act introduced specialised review mechanisms, which were charged with reviewing the lawfulness of detention of Guantánamo detainees. Combatant status review tribunals [1330] (composed of three United States Armed Forces officers), and administrative review boards[1331] (which also consists of three officers of the United States Armed Forces) were established for this purpose.

In accordance with these provisions, upon arrival at Guantánamo Bay, a detainee would receive a combatant status review tribunal review, in which it was established whether or not the detainee was an "enemy combatant". Where the combatant status review tribunal decided that the detainee was an "enemy combatant", the detainee would receive a yearly periodic review by an administrative review board which determined whether the detainee continued to pose a security threat to the United States. The administrative review board had the power to recommend release, transfer or continued detention of each detainee. This recommendation was passed to the designated civilian officer (the Secretary of Defense), who made the decision on whether the detainee would be released, transferred or continue to be detained.

Neither the combatant status review tribunal nor the administrative review board could be regarded as an independent or impartial body of a judicial nature as required by Article 14 of the ICCPR. The composition of combatant status review tribunals and administrative review boards lacked independence from the executive branch of government and the army. Further, the boards

[1326] Contrary to the requirements of Article 9 of the ICCPR.
[1327] *Shafiq Rasul, et al. v. Bush*, United States Supreme Court, 28 June 2004.
[1328] *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, 542 U. S. (2004), United States Supreme Court, 28 June 2004.
[1329] Section 1005(e), Detainee Treatment Act, 30 December 2005: <www.pegc.us/detainee_act_2005.html> [accessed 29 January 2011].
[1330] United States Department of Defense, Order Establishing Combatant Status Review Tribunals, 7 July 2004: <www.defenselink.mil/news/Jul2004/d20040707review.pdf> [accessed 29 January 2011].
[1331] United States Department of Defense, Order Re. Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, 11 May 2004: <www.defenselink.mil/news/May2004/d20040518gtmoreview.odf> [accessed 29 January 2011].

could only recommend a particular course of action and could not order release. In addition, the procedural rules governing the combatant status review tribunals and administrative review boards did not provide detainees with the right to legal assistance and representation and "the restrictions on detainees" right to be present at hearings in their case and on their access to the information and evidence on which the allegation that they are unlawful belligerents was based undermined the legality and legitimacy of the process.[1332] There appeared to be a lack of review of the individual detainee's potential security threat, as under the combatant status review tribunal procedures, detention was permitted if a suspect "was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners", rather than where the individual posed a security threat to the United States Government in addition to their alleged "support" of Taliban or Al-Qaida forces.

The United States Supreme Court has since ruled, in *Boumediene v. Bush* (12 June 2008),[1333] that the detainees held in Guantánamo as "enemy combatants" have the right to challenge the lawfulness of their detention in a United States court. The majority found that the constitutionally guaranteed right of *habeas corpus* review applied to the Guantánamo detainees and that, if Congress intended to suspend the right, an adequate substitute must offer the detainee a meaningful opportunity to demonstrate that he is held pursuant to an erroneous application or interpretation of relevant law, and the reviewing decision-maker must have some ability to correct errors, to assess the sufficiency of the government's evidence, and to consider relevant exculpating evidence.[1334] The Supreme Court found that the petitioners had met their burden of establishing that the Detainee Treatment Act of 2005 failed to provide an adequate substitute for *habeas corpus*.

In January 2009, President Obama issued an executive order,[1335] the Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities. The order held that "[t]he individuals currently detained at Guantánamo have the constitutional privilege of the writ of *habeas corpus*. Most of those individuals have filed petitions for a writ of *habeas corpus* in Federal court challenging the lawfulness of their detention."[1336]

2. Trial by military commissions

Prior to the executive order issued by President Obama in January 2009, when Guantánamo detainees were charged, they were tried not by a United States criminal court, but by a military commission, created *ad hoc* for Guantánamo Bay detainees.[1337]

[1332] Commission on Human Rights, Situation of Detainees a Guantánamo Bay (2006), U.N. Doc. E/CN.4/2006/120, para. 28.

[1333] *Boumediene v. Bush*, 553 U. S. (2008), United States Supreme Court, 12 June 2008: <www.supremecourtus.gov/opinions/07pdf/06-1195.pdf> [accessed 29 January 2011].

[1334] Thus meeting the requirements of Article 9 of the ICCPR.

[1335] White House, Executive Order 13492, Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009.

[1336] Ibid., para. (c): <www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/> [accessed 29 January 2011].

[1337] The legal regime imposed on detainees at Guantánamo is regulated by the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001. This military order has been complemented by several subsequent military commissions' orders.

Military commissions were initially established by the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism in November 2001, and were composed of judges who, according to the order, should be commissioned officers of the armed forces and appointed by the "appointing authority", which is under the responsibility of the Department of Defense, and ultimately the president. Clearly, judges were under the full control of the executive, which violates the Article 14 ICCPR requirement of an independent judiciary.[1338]

A landmark decision of the United States Supreme Court, *Hamdan v. Rumsfeld*[1339], in 2006, found that the military commissions as constituted under the 2001 military order were unlawful, as they had not been expressly authorised by Congress, and violated international law (in particular the four Geneva Conventions and their common Article 3) and United States military law. As a result of this decision, on 17 October 2006, President Bush signed into law the Military Commissions Act 2006.*[1340]* The Act did not abolish the military commissions, but rather authorised the president to establish a revised system of military commissions to try Guantánamo detainees. The revised military commissions continued to be constituted by judges appointed by the executive branch (the Secretary of Defense), in violation of Article 14 ICCPR.

Child rights at risk

Available information on the treatment of Guantánamo detainees, including children, indicates that they have been exposed to a range of human rights abuses, including exposure to treatment that may amount to torture or cruel, inhuman or degrading treatment or punishment.

1. Torture and cruel, inhuman or degrading treatment

The use of torture and other cruel, inhuman and degrading treatment is prohibited in international law.[1341] This prohibition is non-derogable and continues to apply during times of armed conflict or other emergency "threatening the life of the nation".[1342]

Reports have indicated that torture and other cruel, inhuman and degrading treatment of Guantánamo detainees, including children, has been widespread. [1343] From 2001, a series of Department of Defense memoranda, while not officially abrogating from the prohibition of

[1338] Commission on Human Rights, Situation of Detainees a Guantanamo Bay (2006), U.N. Doc. E/CN.4/2006/120, para. 32.

[1339] *Hamdan. v. Rumsfeld, Secretary of Defense, et al.*, No. 05–184, United States Supreme Court, 29 June 2006: <www.supremecourtus.gov/opinions/05pdf/05-184.pdf> [accessed 29 January 2011].

[1340] Military Commissions Act of 2006: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ366.109.pdf> [accessed 29 January 2011].

[1341] Article 37(a) of CRC; Article 7 of ICCPR.

[1342] Article 4(2), Article 7 of ICCPR; Common Article 3 of Geneva Conventions.

[1343] See for example, the reports by the Centre for Constitutional Rights, 'Current Conditions of Confinement at Guantánamo, cit.; Guantánamo Six Years Later', 2008: <http://ccrjustice.org/files/GuantanamoSixYearsLater.pdf> [accessed 29 January 2011]; Amnesty International: 'Justice at last or more of the same?', 2006, AMR 51/146/2006; 'United States of America, Uploaded briefing to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights, 2006, AMR 51/111/2006; 'International Protection for Guantánamo's Victims', 2008, AMR 51/095/2008; 'United States of America, Guantánamo – an icon of lawlessness', 2005, AMR 51/002/2005; 'USA: Guantánamo: Lives torn apart', 2006, AMR 51/007/2006. See also International Committee of the Red Cross, 'ICRC Report on Fourteen "High Value" Detainees in CIA Custody', 14 February 2007.

torture, sought to narrow the definition of torture to exclude certain "counter-resistance techniques". [1344] On 2 December 2002, the Secretary of Defense authorised the following interrogation techniques:

- "The use of stress positions (like standing) for a maximum of four hours;
- Detention in isolation up to 30 days;
- The detainee may have a hood placed over his head during transportation and questioning;
- Deprivation of light and auditory stimuli;
- Removal of all comfort items;
- Forced grooming (shaving of facial hair, etc);
- Removal of clothing;
- Interrogation for up to 20 hours;
- Using detainees' individual phobias (such as fear of dogs) to induce stress."[1345]

After this memo was rescinded on 15 January 2005, the Secretary of Defense, on 16 April 2005, authorised the following techniques:

- B. Incentive/Removal of Incentive, i.e. comfort items.
- S. Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli.
- U. Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell).
- V. Sleep Adjustment; Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day). This technique is not sleep deprivation.
- X. Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.[1346]

There is evidence to suggest that child detainees have been exposed to interrogations which have involved treatment set out in these memoranda. A lawyer acting for Omar Khadr, a Canadian citizen who has been detained at Guantánamo Bay since July 2002[1347] when he was 15, gives the following account: "Omar Khadr's torture began almost as soon as he was taken to Bagram Air

[1344] United States Department of Justice, Memorandum for Alberto R. Gonzales, 1 August 2002, p.46: <www.washingtonpost.com/wp-rv/nation/documents/dojinterrogationmemo20020801.pdf> [accessed 29 January 2011]; Secretary of Defense, Memorandum for the commander, US Southern command of 16 April 2005 on 'Counter Resistance Techniques in the War on Terror'.

[1345] Jerald Phifer to Commander of Joint Task Force 170, Memorandum of 11 October 2002, Request for Approval of Counter-resistance Techniques, which was attached to William J. Haynes II to Secretary of Defense, memorandum of 27 November 2002, Counter-resistance Techniques, and approved by Secretary Rumsfeld on 2 December 2002: <www.washingtonpost.com/wpsrv/ nation/documents/dodmemos.pdf> [accessed 29 January 2011].

1346 Secretary of Defense, Memorandum for the Commander, US Southern command of 16 April 2005 on 'Counter Resistance Techniques in the War on Terror'.

[1347] Omar Khadr entered into a plea deal with United States Secretary of State in October 2010. Under the plea deal, Khadr pleaded guilty to murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy, two counts of providing material support for terrorism and spying in the United States, and will serve an eight-year sentence, the first year of which will be served in Guantánamo Bay. See CNN, 'Youngest Guantánamo Detainee Pleads Guilty', 26 October 2010: <http://edition.cnn.com/2010/US/10/25/khadr.plea/> [accessed 29 January 2011].

Force Base in Afghanistan after his capture, in July of 2002. Although badly wounded during his capture, Omar's interrogation began even as he lay in recovery, days after his arrival at the hospital with nearly mortal wounds. He was carried on a cot to an interrogation room and denied pain medication until he cooperated. Weeks later, he was forced to carry heavy buckets of water up and down the halls at Bagram, solely to aggravate his slowly healing body, and he was hung from the door sill by wrist shackles for hours as a disciplinary measure for talking in his cell."[1348] He was also reportedly exposed to extended periods of isolation, loud noise and day-long interrogation sessions with threats of physical mistreatment.[1349]

Mohamad Jawad, who was aged 16 or 17 (although his family claimed that he was much younger) when he was arrested in December 2002 and subsequently detained in Guantánamo Bay Naval Base, spent seven years in detention, much of this time in solitary confinement.[1350] At the proceedings before the military commission, he described how he was coercively interrogated for hours on end in sealed rooms, sometimes after being woken up from sleep at 2 a.m. or 3 a.m., subjected to bright lights for 24 hours, threatened that he would spend his whole life in Guantánamo, and falsely promised that he would be able to get out. He also mentioned that he was moved from different camps and different cells and said that he could not remember how long he was in a particular camp.[1351]

According to the report by the five United Nations Special Rapporteurs, some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation are likely to cause severe suffering, and may amount to torture.[1352]

(a) Prolonged solitary confinement

As noted above, both Omar Khadr and Mohamad Jawad have reported that they were exposed to extended periods of solitary confinement in Guantánamo Bay. Solitary confinement has been defined by the ICRC as the "confinement of a detainee and the partial (where the restriction is nevertheless severe) or complete denial of contact with other detainees and/or the outside world."[1353] Prolonged solitary confinement alone can amount to torture; the Human Rights Committee has found that prolonged solitary confinement of the detained person may "amount to acts prohibited by Article 7 [ICCPR]".[1354] The United Nations Committee on the Rights of the Child has furthermore recommended that solitary confinement should not be used against children.[1355] In addition, Principle 7 of the United Nations Basic Principles for the Treatment of

[1348] Wilson, R. J., 'Children in Armed Conflict: The Detention of Children at Guantanamo Bay, and the Trial for War Crimes by Military Commission of Omar Khadr, a Child', (2006), in American University, Washington College of Law Legal Studies Research Paper No. 2009-13, 27 March 2009, p. 4.
[1349] Ibid., p. 5.
[1350] Human Rights First, 'The case of Mohammed Jawad, Afghanistan': <www.humanrightsfirst.org/us_law/detainees/cases/jawad.htm> [accessed 29 January 2011].
[1351] Ibid.
[1352] Commission on Human Rights, Situation of Detainees at Guantánamo Bay, (2006), U.N. Doc. E/CN.4/2006/120, para. 52.
[1353] ICRC, 'Report on Fourteen "High Value" Detainees in CIA Custody', 2007, p. 38, footnote 8: <www.nybooks.com/icrc-report.pdf> [accessed 29 January 2011].
[1354] Human Rights Committee, General Comment No. 20, Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7), 1992, para 6.
[1355] Human Rights Committee, Concluding Observations: Denmark (2005), U.N. Doc. CRC/C/15/Add.273,

Prisoners states that "[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged."[1356]

According to the Center for Constitutional Rights, solitary confinement is the norm for the majority of detainees at Guantánamo,[1357] with approximately two thirds of the internees who are currently detained placed in conditions of extreme isolation.[1358] Although the military has often referred to such facilities as "single-occupancy" cells,[1359] prisoners are confined to "small steel and concrete cells for at least 20 hours a day", with "virtually no human contact or mental stimulation" and attempts to communicate with other detainees can result in the loss of such "privilege" items as toothpaste, toothbrush, soap and blankets, in violent attacks by the Immediate Reaction Force,[1360] or in 24-hour solitary confinement.

(b) Force feeding

It is reported that detainees are force-fed when undertaking hunger strikes.[1361] According to the Center for Constitutional Rights, the first hunger strike began at Guantánamo as early as February 2002, sparked by individual acts of physical or religious abuse or as a protest against conditions at Guantánamo Bay. As a response to the hunger strikes, in December 2005, "restraint chairs" were introduced to force feed detainees. According to the Center for Constitutional Rights "[p]risoners subjected to the process describe a tortuous experience, where men are strapped into the chairs – marketed by their manufacturer as a 'padded cell on wheels' – and restrained at the legs, arms, shoulders, and head. A tube described by the men as the thickness of a finger is forcibly inserted up their noses and down into their stomachs and as much as 1.5 litres of formula is pumped through the tube. In the case of hunger strikers, this amount can be more than their stomachs can comfortably hold and the effect can be an uncomfortable, sometimes painful bout of nausea, vomiting, bloating, diarrhoea, and shortness of breath. […] No sedatives or anaesthesia are given during the procedure. The tubes are generally inserted and withdrawn twice a day, and the same tubes, covered in blood and stomach bile, are reportedly used from one patient to another without adequate sanitization."[1362]

The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, stated in December 2005 that if the allegations about

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para. 58a.

[1356] Principle 7 of Basic Principles for the Treatment of Prisoners.

[1357] Centre for Constitutional Rights, 'Current Conditions of Confinement at Guantanamo. Still in Violation of the Law', 23 February 2009: <http://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf> [accessed 29 January 2011].

[1358] CCR, 'Current Conditions of Confinement at Guantánamo', 23 February 2009, p. 4.

[1359] Glaberson, William, 'Detainees' Mental Health is Latest Legal Battle', *New York Times*, 26 April 2008; Fox, Ben, 'GTMO's Camp 6: extra privacy or harsh isolation?', *Associated Press*, 4 February 2007.

[1360] The immediate reaction force is a military team which task is to react to alleged "disciplinary infractions" committed by detainees, and which often result in extremely harsh punishments such as 24–hour solitary confinement and other abuses. See CCR, 'Current Conditions of Confinement at Guantánamo', cit., p. 3.

[1361] See CCR, 'Current Conditions of Confinement at Guantánamo', 23 February 2009, p. 11ff; Amnesty International, 'USA: Guantánamo: Lives torn apart', 2006, p. 2–4.

[1362] CCR, 'Current Conditions of Confinement at Guantánamo', 23 February 2009, p. 11ff.

force-feeding were true, this would amount to cruel treatment.[1363] The same conclusion has been reached by Amnesty International.[1364]

Conclusion

According to the report by the five United Nations Special Rapporteurs, child detainees at Guantánamo Bay have been detained unlawfully.[1365] The lack of safeguards for children in detention in Guantánamo Bay, and in particular, the lack of procedures for reviewing the legality of detentions by an independent judicial body, has resulted in the violation of a series of children's rights. In addition, the failure to provide special protection to child detainees including the lack of specialised tribunals to hear their cases, together with the conditions of detention has exposed children to human rights abuses, including arbitrary prolonged detention and torture and cruel, inhuman or degrading treatment.

[1363] 'UN concern at Guantánamo feeding', *BBC News*, 30 December 2005: <http://news.bbc.co.uk/2/hi/americas/4569626.stm> [accessed 29 January 2011].
[1364] Amnesty International, 'USA: Guantánamo: Lives torn apart', 2006, p. 4.
[1365] Commission on Human Rights, Situation of Detainees at Guantánamo Bay, (2006), U.N. Doc. E/CN.4/2006/120, para. 20.

10. Case study: Immigration detention in the United Kingdom

Introduction

In 2009, approximately 1,000 children were placed in immigration detention in the United Kingdom.[1366] NGO reports and government statistics show that the length of detention has varied considerably from 7 days to 268 days,[1367] and between October 2008 and April 2009 the average period of detention for the families supported by one NGO was over 6 weeks.[1368]

Three detention facilities (called immigration removal centres) have been used to detain children in the United Kingdom. The largest, Yarl's Wood in Bedford, holds 405 people,[1369] with 121 bed spaces for families, and has been the main centre used for detaining families. Tinsley House, near Gatwick Airport, detains up to 150 people at any one time; and Dungavel House, in South Lanarkshire, has the capacity to hold 148 single males, 14 single females and eight families.[1370] Families with children can also be detained under Immigration Act[1371] powers at short term holding facilities, which can be residential or non-residential.[1372]

The Joint Commission on Human Rights, a Committee of members from the United Kingdom Parliament responsible for examining human rights issues in the United Kingdom, stated in March 2007 that "the detention of children for the purpose of immigration control is incompatible with children's right to liberty and is in breach of the UK's international human rights obligations." It went on to note that children should not be detained and alternatives should be developed for ensuring compliance with immigration control where this is considered

[1366] United Kingdom House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System, First Report of Session 2009–2010', 29 November 2009, para. 4.

[1367] For instance, on 29 December 2007, 35 children were detained – 5 had been in detention for longer than two months. See United Kingdom Home Office, 'Asylum Statistics: 4th Quarter 2007 United Kingdom'. In the most recent 'snapshot' data provided by the United Kingdom Home Office, almost one third of children detained had been held for longer than 28 days. See United Kingdom Home Office, 'Control of Immigration: Quarterly Statistical Summary, United Kingdom, April – June 2009'.

[1368] The Children's Society and Bail for Immigration Detainees, 'An evaluative report on the Millbank Alternative to Detention Pilot', May 2009: <www.biduk.org/library/A2D%20Report.pdf> [accessed 29 January 2011].

[1369] Planning permission was given in March 2009 to double the centre's capacity from 405 places to nearly 900. See E. Dugan, 'Inside Yarl's Wood: Britain's shame over child detainees', *The Independent*, 26 April 2009: <www.independent.co.uk/news/uk/home-news/inside-yarls-wood-britains-shame-over-child-detainees-1674380.html> [accessed 29 January 2011].

[1370] For further information on immigration removal centres, see United Kingdom Border Agency website: <www.ukba.homeoffice.gov.uk/aboutus/organisation/immigrationremovalcentres/> [accessed 29 January 2011].

[1371] Immigration Act 1971, C 77, 28 October 1971.

[1372] There are some 30 non-residential short term holding facilities (STHFs), mostly at ports and reporting centres, where anyone, including children, can be held, although depending on staff and conditions some may decide not to hold families. Of the four residential STHFs (Colnbrook, Manchester Airport, Port of Dover and Harwich) only the last two admit families with children, but this is understood to happen very rarely. Use of STHFs is supposed to be limited to five days or seven days if removal directions are imminent. See Bail for Immigration Detainees, Obstacles to accountability: challenging the immigration detention of families, June 2007, p. 24: < www.biduk.org/pdf/children/BIDFamilyHandbookFINAL.pdf> [accessed 29 January 2011].

necessary.[1373] In 2009, the House of Commons Home Affairs Committee (a parliamentary committee) echoed these concerns and called on the United Kingdom Border Agency to "make every effort to reduce the need to detain small children for sustained periods of time."[1374]

In May 2010, the new Conservative –Liberal Democrat coalition government announced that it would end the detention of children for immigration purposes.[1375] Children are now no longer detained in Dungavel and the Government announced the immediate closure of the family unit of Yarl's Wood in December 2010. However, it plans to continue holding children in immigration detention where necessary at least until May 2011. Furthermore, many NGOs have voiced concerns that planned "alternative" to detention will simply be detention but by another name.[1376]

Context of immigration detention

The Labour government, which was in power from 1997 until the 10 May 2010, increasingly viewed detention as an important mechanism for delivering their policy objectives in relation to asylum and immigration,[1377] with detention used:

- To effect removal;
- Initially to establish a person's identity or basis of claim; or
- Where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

Immigration has been a controversial political issue since the late 1990s. In the past decade, the United Kingdom, together with other European countries, has responded to concerns about the number of asylum applications, the peak in the United Kingdom being in 2002, when the United Kingdom received around 85,000 applicants,[1378] by making significant changes to its asylum policy and practice. Motivated by a desire to reduce costs, deter future applications and restore public faith in the asylum system, the United Kingdom Labour Government introduced a series of changes. These focused on reducing applications for asylum through the introduction of stricter controls on entry, and on making the asylum process both "fairer, faster and firmer". These changes were set out in the 2002 White Paper, Secure Borders, Safe Haven: Integration with Diversity in Modern Britain,[1379] and resulted in the tightening of external border controls,

[1373] United Kingdom Joint Committee on Human Rights, 'The Treatment of Asylum Seekers Tenth Report of Session 2006-07', Volume II, Oral and written evidence, House of Lords Paper 81-II/ HC 60-II.Published on 30 March 2007.

[1374] House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System, First Report of Session 2009 – 2010', 29 November 2009, para. 19.

[1375] Conservative–Liberal Democrat coalition negotiations agreements, 11 May 2010: <www.libdems.org.uk> [accessed 29 January 2011].

[1376] See, for instance, Travis, Alan, 'Plans to end detention of children in immigration removal centres delayed', *The Guardian*, 8 November 2010>; McVeigh, Karen, 'Charities accuse Nick Clegg of 'rebranding detention' over children of asylum seekers', *The Guardian*, <www.guardian.co.uk/uk/2010/dec/16/charities-accuse-nick-clegg-of-rebranding-detention> [websites accessed 29 January 2011].

[1377] See the Ministerial Statement by Des Brown MP of 16 September 2004 on fast track asylum and detention policy: <www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/12814.htm> [accessed 29 January 2011].

[1378] Asylum Statistics: United Kingdom 2002: <www.homeoffice.gov.uk/rds/pdfs2/hosb803.pdf> [accessed 29 January 2011].

[1379] United Kingdom Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain'. Cm 5387, London: Home Office, 2002: <www.official-documents.co.uk> [accessed 29 January 2011].

stricter penalties for those who arrived in the United Kingdom without proper documentation and the introduction of "fast track" or accelerated procedures for determining applications that were judged to be "manifestly unfounded" or from countries that were designated as being generally safe. Rather than decreasing the use of immigration detention, the fast track system, by increasing the emphasis on removal, has resulted in an overall increase in the use of detention, and a significant increase in the number and capacity of detention facilities. In May 2008, the government announced its intention to increase its detention capacity by a further 60 per cent.[1380]

The powers to administratively detain those subject to immigration control have always been firmly within the control of the executive. Asylum seekers can be detained by the immigration authorities at two points: while a decision is made on whether to grant asylum; or, following an unsuccessful claim, when their removal from the country is anticipated. Unlike in criminal cases, at present "there are no automatic, independent controls on the use of detention powers by the courts when administrative detention occurs" and there are no clear time limits on how long a child can be administratively detained.[1381]

1. Children with their families

The arrest and detention of most children in the United Kingdom has taken place under powers to detain the "family members" of a person whom the immigration authorities consider can be removed from the United Kingdom, such as an asylum seeker who has not met the criteria for refugee status or has previously failed to leave the United Kingdom when required to do so. Until 2001, children were only detained for limited periods of time immediately before the government planned to remove them, with their families, from the United Kingdom. However, in October of that year, new Immigration Service instructions were issued. These once again permitted the detention of families, including children, immediately prior to removal, but for longer periods than were previously allowed.[1382] In practice, the detention of children and families often occurs where removal is planned but is neither imminent nor practical. This has resulted in some children experiencing several episodes of detention before they are either removed from the country or a decision is made to allow the family to stay.[1383]

2. Separated children

It was, and continues to be, government policy that unaccompanied or separated children must only ever be detained in exceptional circumstances and then only normally overnight, with appropriate care, while alternative arrangements for their safety and care are met.[1384] However,

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[1380] Bail for Immigration Detainees, 'Out of sight, out of mind: Experiences of immigration detention in the UK', July 2009, p. 6: <www.biduk.org> [accessed 29 January 2011].

[1381] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control: A report following the Children's Commissioner for England's visit to Yarl's Wood Immigration Removal Centre', 2009, p. 13.

[1382] See Burnham, E., 'Challenging Immigration Detention: A best practice guide', Bail for Immigration Detainees/ILPA/Law Society, 2003, p. 60, for full explanation of change in policy to allow for longer periods of detention of children than immediately prior to removal. This change of policy was reiterated in the 2002 White Paper.

[1383] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 2009, p. 8: <www.11million.org.uk> [accessed 29 January 2011].

[1384] United Kingdom Border Agency, Enforcement Instructions and Guidance, (undated), Chapter 55.5.3 and 55.9.3: <www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55?view=Binary>. Authority to detain - special cases: <www.ukba.gov.uk> [websites accessed 29 January 2011].

as part of the asylum process, the United Kingdom Border Agency will often dispute the age of asylum seekers claiming to be children but who they consider very strongly to look significantly over 18.[1385] These individuals may be treated as adults for immigration purposes, and can find themselves going through the adult asylum process.[1386] Where separated children are put through the adult asylum process, they are exposed to the possibility of administrative detention while their asylum application is being processed.

Unlike children who are detained with their parents or carers, no special provision is made for these age-disputed children if they are deemed to be adults. They may be held together with adults in settings without any child protection procedures. None of the safeguards and procedures that have been put in place to prevent the unnecessary or prolonged detention of children applies to this group. This is a matter of considerable concern, particularly in the light of the fact that of 165 age disputed cases dealt with at Oakington by the Refugee Council in 2005, 89 (53.9 per cent) were found to be children when a lawful assessment was undertaken by social services. In another period over 72 per cent were determined to be children.[1387] In 2008, the Refugee Council's Children's Panel worked with 59 age-disputed young people in detention, nearly one quarter of who were found to be children,[1388] and recent Home Office statistics for 2009 have recorded between six and nine age-disputed children being placed in detention with adults every three months.[1389]

Legal framework

1. International legal standards

Administrative detention for immigration purposes is not, of itself, unlawful in international law. However, it will be unlawful where it amounts to a breach of a child's right to liberty and security of person, contained in Article 9 of the ICCPR and Article 37(b) of the CRC. According to these provisions, administrative detention will be unlawful where it is not carried out "in accordance with such procedures as are established by law".[1390] It will also be unlawful where it is considered to be arbitrary. Whether or not detention is considered arbitrary will depend on the circumstances of the case. The Human Rights Committee states that "'[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." The Human Rights Committee also adds that the detention must be "'necessary in all the circumstances of the case

[1385] United Kingdom Border Agency Asylum Process Guidance, 'Assessing Age': <www.ukba.homeoffice.gov.uk> [accessed 29 January 2011].
[1386] See Save the Children, 'No place for the child: Children in UK immigration detention: Impacts, alternatives and safeguards', February 2005, p. 5. In a three-month period at the end of 2008, of a sample of 20 children who had been classified by the United Kingdom Border Agency as adult on a visual assessment, 10 were found by the London Children's Panel of the Refugee Council to be children. People whose case is fast-tracked are normally detained while the initial application process is carried out.
[1387] Refugee Children's Consortium submission to Joint Committee on Human Rights Enquiry into Children's Rights, February 2009.
[1388] Bail for Immigration Detainees, 'Out of sight, out of mind', July 2009, p. 28.
[1389] Medical Justice, 'Detained cases where UKBA age assessment as an adult is disputed by applicant, with numbers subsequently released by category', (undated).
[1390] Article 9(1) of ICCPR. See also Article 37(b) of CRC, which provides: 'The arrest, detention or imprisonment of a child shall be in conformity with the law…'

and proportionate to the ends being sought", otherwise it will be considered to be arbitrary and therefore, unlawful in international law.

In order to ensure that the administrative detention of children for immigration purposes is necessary in all of the circumstances, proportionate and appropriate, consideration must be given to "less invasive means of achieving the same ends", such as the imposition of reporting requirements, sureties or other conditions which would take account of the particular circumstances of the individual concerned.[1391]

In addition to these provisions in international law, additional human rights standards apply specifically to children. According to Article 37(b) of the CRC, any deprivation of a child's liberty must be a last resort and for the shortest appropriate period of time. Also, in making the decision on whether or not to place a child in administrative detention, the best interests of the child should be a primary consideration, under Article 3 of the Convention.

According to the Committee on the Rights of the Child, refugee or asylum-seeking children who are not accompanied by a parent or carer should not be placed in administrative detention by States. All efforts, including acceleration of relevant processes, should be made to enable unaccompanied or separated children to be released immediately and placed in other forms of appropriate accommodation.[1392] All possible alternatives, including unconditional release, must be reviewed prior to a final determination of a full deprivation of liberty.

The United Kingdom Government is also bound by the provisions of the European Convention.[1393] To comply with Article 5 of the European Convention detention must be for the purposes of "preventing unauthorised entry into the country" or "with a view to deportation or extradition". It must be limited to the express purpose provided for by domestic law, otherwise it will be regarded as contravening Convention Rights.

Children who are placed in administrative detention are also entitled to a number of safeguards in international law, including the right:[1394]

- To be informed promptly of the reasons for detention and the substance of the complaint against him or her;
- To challenge the legality of the detention;
- To protection against incommunicado detention, including the right to be kept at officially recognised places of detention, and the right to maintain contact with the family through correspondence and visits;
- To access legal counsel and other appropriate assistance;
- To have the detention reviewed at regular intervals, not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release.

[1391] *C. v. Australia*, 2002, para 8.2.
[1392] Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, (2005), U.N. Doc. CRC/GC/2005/6, para. 61.
[1393] European Convention.
[1394] See the Safeguards subsection in the Introduction of this working paper.

2. Domestic legal framework

In the United Kingdom, the powers of immigration detention are contained in the following legislation:

- The 1971 Immigration Act[1395] and the United Kingdom Borders Act 2007,[1396] which set out the main detention powers, including the power to detain a person who is subject to deportation action[1397], and applies to "port" cases; illegal entrants, "administrative removal" and deportation cases; and
- The Nationality, Immigration and Asylum Act 2002,[1398] which governs who can authorise detention.

The Labour Government policy gave wide discretion to immigration officers and those acting for the Home Secretary to use these statutory powers available to detain children in families pending removal, with the basis for detention set out in legislation and in the United Kingdom Border Agency Enforcement Instructions and Guidance.[1399] It is not necessary to go before a court to authorise the detention of children. It is only necessary that the detention is in accordance with domestic[1400] and European law, and with the stated policy.[1401]

3. Is immigration detention being used as a last resort?

The United Kingdom Border Agency Enforcement Instructions and Guidance contain a non-exhaustive list of factors that Agency officials are supposed to take into account in deciding whether or not to detain. These include:

- What is the likelihood of the person being removed and, if they are likely to be removed, after what timescale?

[1395] Immigration Act 1971, C 77, 28 October 1971, para. 16 (2) of Schedule 2, (as amended by section 10(7) of the Immigration and Asylum Act 1999). 'A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given'. See also Schedule 3, para. 2.

[1396] Section 36 of Borders Act 2007, Chapter 30, 30 October 2007. See <www.gardencourtchambers.co.uk/imageUpload/File/Deportation_of_Foreign_Nationals_Factsheet(1).pdf> for a detailed overview of which foreign nationals may, in principle, be detained [accessed 29 January 2011].

[1397] Immigration Act 1971, C 77, 28 October 1971, para. 2 of Schedule 3.

[1398] Section 62 introduced a free-standing power for the Secretary of State (i.e. an official acting on his behalf) to authorise detention (where he has the power to set removal directions) in cases where previously only the immigration service could detain.

[1399] See: <www.ukba.homeoffice.gov.uk/policyandlaw/guidance/> [accessed 29 January 2011].

[1400] Detention may only be used for the statutory immigration purpose (i.e. 'pending' examination, an immigration decision, removal, deportation); it cannot be used for any other purpose (*R. v. Governor of Durham Prison, Ex parte Singh* [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (England and Wales), 13 December 1983). If the real reasons are not the statutory purpose (or are no longer the statutory purpose, see *R. v. Secretary of State for the Home Department (Respondent) ex parte Khadir (FC) (Appellant)*, United Kingdom: High Court (England and Wales) 39, 16 June 2005, para. 32); or there is no real prospect of carrying out the immigration action (See *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97 Hong Kong, 1997 *and Khadir*, paras. 4, 32-33.), the detention will be unlawful. However, the detention does not have to be necessary in order to carry out the statutory purpose, it must be simply be effected for the statutory purpose (*R. v. Secretary of State for the Home Department Ex Parte Saadi (FC) and Others* [2002] UKHL 41**,** United Kingdom: House of Lords, 31 October 2002, para. 24).

[1401] It was held in *Nadarajah v. Secretary of State for the Home Department*, [2003] EWCA Civ 840, United Kingdom: Court of Appeal (England and Wales), 19 June 2003, that if the Secretary of State for the Home Department holds a policy, it should be followed. If it is not, this amounts to an error in law.

- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws? (i.e. entry in breach of a deportation order, attempted or actual clandestine entry)
- Is there a previous history of complying with the requirements of immigration control? (i.e. by applying for a visa, further leave, etc.)
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?
- Is there a risk of offending or harm to the public (this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?[1402]

Section 55 of the Borders, Citizenship and Immigration Act 2009, requires that immigration officers and the Home Secretary must make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children.[1403] The Enforcement Instructions and Guidance outlines that where it is proposed to detain any child under the age of 18 with his or her parents or guardians, the caseworker must actively search for any information relevant to the requirement to have regard to the need to safeguard and promote the child's welfare. This may include information from the children's services department of a local authority and a primary care trust. However, no "exceptional circumstances" are necessary to order a family's detention.[1404] Instead they mainly relate to assessing the risk of absconding and imminence of removal and families may be detained in line with the general detention criteria.

Furthermore, it is provided in the Enforcement Instructions and Guidance that each case must be considered on its individual merits, and in cases other than those where deportation criteria are met,[1405] there should be a presumption in favour of temporary admission or release.[1406]

[1402] United Kingdom Border Agency, *Enforcement Instructions and Guidance*, (undated), Chapter 55.3.1.
[1403] This section came into force on 2 November 2009.
[1404] This contrasts with the position of, for instance, victims of torture who have 'independent evidence' of the torture for whom detention should be only in 'exceptional circumstances'. See para. 55.10 of the United Kingdom Border Agency Enforcement Instructions and Guidance, (undated), although, in practice, victims of torture are still regularly detained, some even with independent evidence. See Bail for Immigration Detainees, 'Obstacles to accountability', June 2007, p. 8.
[1405] Due to 'the clear imperative to protect the public from harm', See Chapter 55.1.2 of United Kingdom Border Agency Enforcement Instructions and Guidance, (undated), although there is no presumption that if in deportation process an individual should be detained - see *R (on the application of) Sedrati v. Secretary of State for the Home*

Detention should only be used as a matter of last resort where there are no alternatives for ensuring compliance with immigration proceedings, including removal directions, and where there are strong grounds for believing that a person will not comply with conditions of temporary admission or release. There has been little research into the likelihood of families with children absconding, which supports the increasing resort to detention by the Immigration Service. "*Prima facie*,...families with their children attending school, are less likely to abscond than any other category" [1407] and "there is no evidence that families with children systematically disappear."[1408] Just as detention which is disproportionate (for example, where the effect upon the individual is disproportionate to the immigration interest in detention) may be unlawful,[1409] so too will be detention which is carried out on the basis of an inadequate/manifestly erroneous assessment of the facts relating to an individual.[1410] Arguably, this is the case when a family is assessed to be likely to abscond when there is no evidence to support this. This may lead not only to the detention being regarded as arbitrary, and therefore unlawful in international law.

The government's position is that no special statutory or policy framework is needed to protect children because each individual family's care is dealt with fairly and by rigorous review and that "alternatives to detention will have been considered in all such cases and assessed as being inappropriate."[1411] However, concern has been expressed about "the failure of the Home Office to develop alternatives to detention".[1412] In November 2007, the Home Office began a pilot scheme at Millbank Induction Centre in Kent, to persuade families who were at the end of the asylum process to return home voluntarily. The scheme, which ran for ten months, accommodated families that had been refused asylum in a hostel where an independent charity, Migrant Helpline, would work with them for a short length of time to help them consider how best to return to their home countries. It differed from conventional detention centres in that the families were free to come and go. However, "the government made it clear from the outset that it was not interested in the impact of the pilot on the minors involved; it was concerned with cost and with the number of families leaving the UK."[1413] There were insufficient efforts to build the

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Department, EWHC Admin 418, United Kingdom: High Court (England and Wales), 2001. If it would not be possible to remove or deport the person from the United Kingdom then the detention would be unlawful.

[1406] See United Kingdom Border Agency, Enforcement Instructions and Guidance, (undated), Chapter 55.3.

[1407] Council of Europe: Commissioner for Human Rights, Report by Mr Alavaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom 4–12 November 2004, 8 June 2005, CommDH(2005)6, para. 58.

[1408] House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System', 29 November 2009, para. 3.

[1409] *R v. Governor of Brockhill Prison, Ex Parte Evans* (No 2) [2001] 2 AC 19 United Kingdom: House of Lords, 2001 p. 38C-E; *R. (on the application of) Amirthanathan v. Secretary of State for the Home Department* [2003] EWHC 1107, United Kingdom: High Court (Administrative Court) (England and Wales), 2003, paras 50, 51, 56, 60.

[1410] *R. (Mohamed) v. Secretary of State for the Home Department* [2002] EWHC 1530, United Kingdom: High Court (England and Wales), 2002.

[1411] Simon Barnett, letter to Bail for Immigration Detainees, 6 February 2004. Reference on p. 9 of Bail for Immigration Detainees, 'Obstacles to accountability', June 2007. This decision-making process has been questioned, both in individual instances and on a policy level. For instance, the case of *Konan, R. (on the application of) v. Secretary of State for Home Department*, [2004] EWHC 22, United Kingdom: Court of Appeal (England and Wales) Administrative Court, 21 January 2004, in relation to the detention of mother and child, solely on the grounds that there were imminently removable and had inadequate family ties in the United Kingdom, see para. 25.

[1412] United Kingdom Joint Committee on Human Rights report. Volume I, Report and formal minutes, House of Lords Paper 81-I/HC 60-I, 2007, paras. 328, 329.

[1413] See The Children's Society and Bail for Immigration Detainees, 'An evaluative report on the Millbank Alternative to Detention Pilot', May 2009: <www.biduk.org/library/A2D%20Report.pdf> [accessed

trust of those involved and the project was considered a failure.[1414] The subsequent establishment of a pilot scheme in Glasgow which promises an 'alternative to detention' is a welcome development, but in light of the failing of the Millbank pilot in Kent and criticisms already levelled against the Glasgow scheme's "robustness and experimental design", concerns remain.[1415] In addition, it can be argued that alternatives to detention can only be meaningful if they are part of an asylum process that is not focussed upon detention, where ongoing and consistent contact is maintained with families and sufficient information is provided throughout their asylum application and, if appropriate, to prepare for removal. Reporting, supervised accommodation, community supervision and incentivised compliance all reduce the need to detain families with children for the purposes of immigration control,[1416] but must be an integral part of the asylum process.

4. Is immigration detention for the shortest appropriate period of time?

Currently there is no statutory limit on the length of time that anyone, including a child, can be detained under immigration powers. The Commissioner for Human Rights of the Council of Europe has urged the United Kingdom to introduce a maximum time limit for immigration detention into domestic law, as "it is of particular concern that current UK legislation provides for no maximum time of administrative detention under Immigration Act powers."[1417] Evidence from other countries suggests that statutory limits on the length of time for which children can be detained are both appropriate and workable.[1418]

The Labour Government emphasised that the majority of children were only detained for a short period of time (a matter of a few days) and that those detained for longer periods of time were very much the exception.[1419] However, a recent government report found that the average length of time spent by children in immigration detention was 15.58 days.[1420] A recent report by the NGO, Medical Justice, which examined 141 cases of children in immigration detention in the UK between 2004 and 2010, found that these children had spent a mean average of 26 days in detention.[1421] Also, within this average there were many more "extreme examples".[1422] For instance, of 450 children held at Yarl's Wood between May and October 2007, which included a

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29 January 2011].

[1414] Ibid.

[1415] See United Kingdom House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System', 29 November 2009, para. 8.

[1416] See Amnesty International, 'Irregular migrants and asylum-seekers: Alternatives to immigration detention', April 2009: <www.amnesty.org> [accessed 29 January 2011].

[1417] Council of Europe Commissioner for Human Rights, Memorandum by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visits to the United Kingdom on 5-8 February and 31 March-2 April 2008, Comm DH(2008)23 , Strasbourg, 18 September 2008 .The United Nations Working Group on Arbitrary Detention identified 'the desirability to set up a maximum period of detention by law which must in no case by unlimited or excessive in length'. See Human Rights Council, WG on Arbitrary Detention, 10 January 2008, U.N. Doc. A/HRC/7/4.

[1418] In Sweden, for instance, children under 18 may not be detained for longer than 72 hours or, if there are exceptional grounds for doing so, a further 72 hours.

[1419] Save the Children, 'No place for the child', February 2005, p. 54, 55.

[1420] United Kingdom House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System', 29 November 2009, para. 6.

[1421] Medical Justice, 'State-sponsored cruelty: children in immigration detention', September 2010, <http://www.medicaljustice.org.uk/content/view/1420/89/> [accessed 29 January 2011].

[1422] Ibid.

period of chicken pox quarantine, 83 were held for more than 28 days. On 30 June 2009, 10 of the 35 children in detention had been held for between 29 days and 61 days.[1423] The study by Medical Justice found that one child had spent 166 days in detention, over numerous separate periods, before her third birthday.[1424]

The United Kingdom courts have held that detention can only be for the period reasonably necessary for the machinery of deportation or removal to be carried out,[1425] and that a detainee may only be held pending removal for a period that is "reasonable in all the circumstances". If it becomes apparent that deportation will not be carried out within that reasonable period, the detainee must be released.[1426] United Kingdom Border Agency policy also asserts that detention can only be lawful "where there is a realistic prospect of removal within a reasonable period".[1427] In light of this, it can be argued that, as the purpose of detaining families is to facilitate removal, then travel documents and removal directions should all be arranged prior to detention. Also any "barriers to removal", such as outstanding applications, appeals or representations should have been completed. If this is the case then removal will be possible and detention, if deemed appropriate, should not exceed a couple of days.[1428] If removal cannot be effected during that time, then a family should not be detained and alternative mechanisms used to maintain contact and ensure compliance.

However, a recent report by the Children's Commissioner for England found that, in the case of some families, the required checks had either not been made or were not made sufficiently well, "thereby increasing the risk of prolonged detention".[1429] A further report by the Children's Commissioner in 2010 found evidence that families have been detained for several weeks or months due to the family making final attempts to appeal against their removal (which can result in their obtaining the right to remain). The same report argued that "legal processes could and should be completed outside of a detention environment," and that "where removal had not been

[1423] Control of Immigration, 'Quarterly Statistical Summary, United Kingdom', April–June 2009: <www.homeoffice.gov.uk/rds/pdfs09/immiq209.pdf> [accessed 29 January 2011].
[1424] Medical Justice, 'State-sponsored cruelty', September 2010.
[1425] *R. v. Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (Administrative Court) (England and Wales), 13 December 1983.
[1426] *R(I) v. Secretary of State for the Home Department* [2002] EWCA Civ 888, United Kingdom: Court of Appeal (Civil Division) (England and Wales), 28 June 2002.
[1427] United Kingdom Border Agency Enforcement Instructions and Guidance, (undated), Chapter 55.2.
[1428] See *Shayan Baram Saadi, Zhenar Fazi Maged, Dilshad Hassan Osman & Rizgan Mohammed v. Secretary of State for the Home Department (Appeal)*, [2001] EWCA Civ 1512, United Kingdom: Court of Appeal (England and Wales), 19 October 2001, which outlined that short-term detention of asylum seekers if permissible, even absent any risk of their absconding, if it 'will enable a speedy determination of his or her application for leave to enter'. Furthermore, even lengthy detention might not per se offend against that right, as outlined in *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, where the case was deemed to involve considerations of an 'extremely serious and weighty nature'. However, families are unlikely to fall into this category, and if children are detained only as a measure of last resort, there is little reason for detention to continue beyond a maximum period of seven days. If, for whatever reason, removal cannot be effected during that time, the family should be released from detention and alternative mechanisms re-established for maintaining contact and ensuring compliance. See Information from Save the Children, 'No place for the child', February 2005, p. 55.
[1429] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 19 February 2010.

effected within 48 hours, a judge should review whether continued detention is lawful and appropriate."[1430]

5. Adequate safeguards?

(a) Time and nature of reviews

While families may be initially detained in accordance with the law,[1431] it is common for detention to become unlawful because it has continued longer than is reasonable for the statutory purpose. This is most common in removal cases, where, for example, due to problems in the person's country of origin, or administrative delays in obtaining travel documents, detention can continue for many months during which time the Immigration Service has got no closer to actually removing the person.[1432] Under Article 25 CRC detention needs to be subject to regular review which would ensure that if removal is not in fact imminent, the child is released.

Reviews should also be conducted in order to assess the impact of detention on the child. Section 55 of the Borders, Citizenship and Immigration Act 2009, imposes a duty on the United Kingdom Border Agency, when discharging its functions, to have regard to regard to the need to safeguard and promote the welfare of the child while in the United Kingdom.

In the United Kingdom, the initial detention must be authorised by the Chief Information Officer/Higher Executive Officer or an Inspector.[1433] In all cases of children detained solely under Immigration Act powers, continued detention must as a minimum be reviewed again at days 7, 10, 14 and every 7 days thereafter (up to 28 days) "to ensure detention remains lawful and proportionate",[1434] and in line with stated detention policy. Reviews should consider the human rights implications of the case and have regard to the need to safeguard and promote the welfare of children. In practice, though, only the lawfulness of the detention is considered. Further, there is currently "not even the pretence of disclosing the outcome of the reviews that must take place at, for example, 7 or 14 days of detention".[1435]

After 28 days of detention, Ministerial authorisation needs to be given for further detention. The processes for reviewing detention have been criticised for being "centralised administrative

[1430] Ibid., p. 49.
[1431] Burnham, E., op. cit.
[1432] Ibid. In the case of *R (on the application of S & Others) v. Secretary of State for the Home Department* [2007] EWHC 1654, United Kingdom: High Court (Administrative Court) (England and Wales), the initial detention of the claimants (young mother with two small children) was lawful while they went through the "detained fast track" procedure at Oakington. However, their detention for a further three and a half months after the asylum claim had been refused was unlawful. This was because, on the facts of the case, it was clear the family was unlikely to abscond, and it should have been clear that removal was not going to be effected within a short time. To reduce the possibility of this occurring and of the detention becoming unlawful, it was held that the decision to detain must be reviewed on a regular basis, to assess whether it remains justified given any changing circumstances in the case. Reviews should include grounds for detention, timescale, proposals for progressing the case, prospects of removal and compassionate circumstances.
[1433] United Kingdom Border Agency Enforcement Instructions and Guidance, (undated), Chapter 55.
[1434] Ibid., Chapter 55.9.3
[1435] Bail for Immigration Detainees, 'Obstacles to accountability', June 2007.

procedures" which are not independent.[1436] Organisations involved in such cases allege that the review process that leads to ministerial authorisation is conducted without sight of the full file,[1437] and the information presented to the minister often does not include either welfare-related issues or an analysis of why detention is deemed "necessary".[1438] Since the introduction of this requirement,[1439] authorisation has very rarely been refused,[1440] which "raises questions about… its safeguarding value".[1441] The lack of transparency in the process by which ministers authorise the continuing detention of children beyond 28 days, has given rise to concerns among stakeholders that ministerial authorisations are based on immigration-related criteria alone. The outcomes of the ministerial review are not communicated to families or their legal representatives. As a result, outcomes are not subject to scrutiny, except through legal proceedings that almost inevitably take place well after the event.[1442]

Box 6: No place for a child

In *No Place for a Child,* more than half of the families studied (14 out of 25 cases) were detained for longer than 28 days and it can only be assumed that their continuing detention was authorised by the minister in each case. Nine of these families were subsequently granted Temporary Admission. Several of these cases raised significant concerns about how the decision to continue detaining the family had been made, given the available evidence about the facts of the case.
Source: Save the Children, 'No place for the child: Children in UK immigration detention: Impacts, alternatives and safeguards', February 2005, p. 58.

In Yarl's Wood, welfare assessments are requested by the United Kingdom Border Agency at 14 days to inform the review process (earlier reviews are undertaken without the benefit of such a report). They are carried out by a social worker, based on interviews with parents and children as well as consultation with staff in the unit, and submitted at 21 days. The assessments are specific and focus on the welfare of the child.[1443] There is no routine formal baseline welfare assessment after entry to the centre and children who leave before 14 days will not have a welfare assessment unless there is a clear, identified risk or need. This is problematic particularly where there may be cases of special needs or where children's welfare could be at risk due to the impact of detention. Seven days is a more appropriate period within which to carry out an initial welfare assessment.[1444]

[1436] Joint Chief Inspectors, 'Safeguarding Children: The second joint Chief Inspectors' Report on Arrangements to Safeguard Children', 10 June 2005, para. 7.29.
[1437] Bail for Immigration Detainees, 'Obstacles to accountability', June 2007, p. 26.
[1438] Ibid., p. 27.
[1439] Formally announced on 16 December 2003. See United Kingdom Home Office Press Release, Stat 054/2003, 16 December 2003: <www.ind.homeoffice.gov.uk/ind/en/home/news/archive/2003/december/government_ welcomes.html> [accessed 29 January 2011].
[1440] For instance, Detention Services Policy Unit to Bail for Immigration Detainees,7 October 2004: 'Ministerial authorisation of the detention of a family beyond 28 days has never been refused'. Liam Byrne in evidence to Joint Committee on Human Rights, February 2007, in response to question 528: "To date I have not refused any request for extended detention."
[1441] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 19 February 2010.
[1442] Bail for Immigration Detainees, 'Obstacles to accountability', June 2007, p. 26
[1443] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 2009, p. 45.
[1444] Ibid.

At the time of writing it could be argued that the process of reviewing a child's detention lacked clarity and did not give sufficient attention to a child's welfare or to the impact detention has on them. The Parliamentary Joint Committee on Human Rights, in a review on the treatment of asylum-seekers in the United Kingdom in 2007, stated that "We are concerned that the current process of detention does not consider the welfare of the child, meaning that children and their needs are invisible throughout the process – at the point a decision to detain is made; at the point of arrest and detention; whilst in detention; and during the removal process. We are particularly concerned that the detention of children can – and sometimes does – continue for lengthy periods with no automatic review of the decision. Where the case is reviewed (for example by an immigration judge or by the Ministers after 28 days), assessments of the welfare of the child who is detained are not taken into account. It is difficult to understand what the purpose of welfare assessments are if they are not taken into account by Immigration Service staff and immigration judges." [1445]

A recent report on children detained at Yarl's Wood Immigration Removal Centre echoed this sentiment, and found that there were instances where "there was evidence that continued detention was detrimental to their welfare."[1446]

An independent process of review needs to be put in place in the United Kingdom, which would take into account all aspects of the decision to detain, related not solely to the possible or anticipated immigration related outcomes, but the welfare outcomes for the child arising from his or her continuing detention.[1447]

(b) Right to challenge detention

Currently, immigration detention can be challenged through bail application. To do this, most detainees apply to the immigration courts (known as the First Tier Tribunal, Asylum and Immigration) for bail. Their application for bail is decided at a legal hearing in front of an immigration judge. The burden is on the government to demonstrate to the judge why detention continues to be necessary.[1448] The judge then decides whether a detainee would abscond if released and whether bail should be refused or granted. If bail is granted, the judge usually attaches conditions to the terms of release which require the detainee to live at a certain address, to report regularly to the immigration authorities, to be electronically tagged, or to have sureties who put down money, which could be lost if the detainee runs away. If the judge refuses bail, the detainee is able to apply again every 28 days or sooner if they can make fresh arguments about why they should be released.

[1445]United Kingdom Joint Committee on Human Rights (JCHR) evidence session, 21 February 2007; see United Kingdom House of Lords/ House of Commons, Joint Committee on Human Rights, The Treatment of Asylum Seekers Tenth Report of Session 2006-07, Volume II, Oral and written evidence, HL Paper 81-II/ HC 60-II, published on 30 March 2007: <www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm, para 255 and 258> [accessed 29 January 2011].

[1446] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 19 February 2010.

[1447] Save the Children, 'No place for the child', February 2005, p. 60.

[1448] London Detainee Support Group, 'Detained Lives; The Real Cost of Indefinite Immigration Detention', January 2009: <www.detainedlives.org/wp-content/uploads/detainedlives.pdf> [accessed 29 January 2011].

Although the Immigration and Asylum Act 1999 introduced automatic bail reviews for immigration detainees after 8 days and 36 days, these were never implemented and were subsequently repealed in 2002. Bail is an important legal safeguard for ensuring that children are not detained for prolonged periods, not only because of the hearing itself, but because an application for bail effectively triggers a review of the detention decision.[1449]

However, many detainees have to make their own bail applications and represent themselves at their bail hearings because they are unable to access legal help. With the onus on the detainee to know what bail is, to know how to apply for bail, to know what evidence needs to be gathered and to go ahead and make an application, a bail hearing is not an accessible safeguard to end detention.[1450] This is especially the case for the many people who do not speak English, who may be traumatised from experiences in their home countries and who are without the help of a lawyer.

It is also possible to make an application for *habeas corpus*, or for judicial review to the High Court where, respectively, it is alleged that the detention is unlawful or the underlying administrative decision, such as the refusal of leave to enter, is challenged.[1451] The restrictions on accessing legal assistance for these courses of action remain the same. The process by which a child can be deprived of his or her liberty by the Immigration Service without automatically being given an opportunity to challenge the decision, was criticised by Mr. Gils-Robles, the former Council of Europe Commissioner for Human Rights, in his report published in August 2005,[1452] where he concluded that the Immigration Service should seek the authorisation of a judge before the decision to detain is made, with a periodic, judicial review of the continuing justification for detention. This recommendation has yet to be acted upon.

(c) Right to legal assistance

Legal safeguards are a vital mechanism for ensuring that the detention of children is lawful and that children are not detained arbitrarily.[1453] However, studies have found that a shortage of quality legal advice means that detention can be unnecessarily prolonged.[1454]

Detained families have no automatic entitlement to legal representation in detention and Her Majesty's Inspectorate of Prisons (which provides independent scrutiny of the conditions for and

[1449] Save the Children, 'No place for the child', February 2005, p. 63.
[1450] Bail for Immigration Detainees Briefing Paper on 'Access to Immigration Bail', March 2009: <www.biduk.org/library/Briefing%20paper%20on%20access%20to%20bail%20February%2009.pdf> [accessed 29 January 2011].
[1451] Burnham, E., op. cit.
[1452] Council of Europe: Commissioner for Human Rights, Report by Mr Alavaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom 4 - 12 November 2004, 8 June 2005, CommDH(2005) 6, para. 60.
[1453] See *Sunday Times v. The United Kingdom*, 6538/74, Council of Europe: European Court of Human Rights, 29 March 1979. The ECHR in Amuur v. France, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996 made it clear that 'national law authorising deprivation of liberty, especially of a foreign asylum seekers – must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness'.
[1454] Bail for Immigration Detainees, 'Out of sight, out of mind', July 2009, p. 41.

treatment of prisoners and other detainees) has expressed concern that detainees are not easily able to obtain competent independent legal advice to explain their situation or represent them[1455].

In some cases, a lack of information about the asylum process itself, combined with inadequate or non-existent legal advice and representation, can mean that issues that were relevant to the asylum decision do not come to light or are not fully considered when the decision is made to detain the family. In particular, families with children are often unable to access quality legal advice and representation at an early stage in the decision-making process.[1456] The impacts of incompetent or unscrupulous legal advice and representation are particularly damaging for separated children whose age is disputed and who are often unable to access formal independent age assessment procedures.[1457]

Many detainees are unable to access legal representation from a legal aid lawyer and can not afford to pay a fee-charging lawyer. Immigration detainees held in certain parts of the country may also struggle to find legal aid lawyers nearby: a particular problem for immigration detainees held in remote prisons. Although the government has, since December 2005, funded 30 minutes of free legal advice for people held in detention centres, "many detainees are unaware of the scheme."[1458] Furthermore, government plans to introduce exclusive contracts for legal aid lawyers working in detention centres may only further restrict detainees' choices when accessing legal help.[1459] Legal aid for bail application is only granted in cases which pass a merits test. The test is supposed to be applied flexibly but reports have found that it is routinely applied incorrectly in bail cases, and detainees are not advised of their right to appeal their lawyer's decision not to grant legal aid.[1460]

Child rights at risk

1. Conditions of detention

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty set out detailed standards on the conditions of detention. In particular, children must be placed in facilities that "meet all the requirements of health and human dignity."[1461] It has been acknowledged that the conditions of detention in Yarl's Wood have improved, with, for example, a "new, purpose-built school" and "genuine attempts to improve the living areas…with more pictures, murals and paintings, fewer locked doors, an improved reception area [and] new, less institutional staff uniforms".[1462] However, the centre "remains essentially a prison".[1463]

[1455] Her Majesty's Chief Inspector of Prisons, Report of an unannounced inspection of Yarl's Wood Immigration Removal Centre 4–8 February 2008, August 2008.
[1456] Save the Children, 'No place for the child', February 2005, p. 28.
[1457] Ibid., p. 62.
[1458] Bail for Immigration Detainees, Briefing Paper on 'Access to Immigration Bail', March 2009: <www.biduk.org/library/Briefing%20paper%20on%20access%20to%20bail%20February%2009.pdf> [accessed 29 January 2011]. Between August 2007 and July 2008, 74.3 per cent of people at Yarl's Wood and Harmondsworth who attended Bail for Immigration Detainees workshops and filled in an evaluation questionnaire had not been to see the free legal advisor.
[1459] Ibid.
[1460] Bail for Immigration Detainees, 'Out of sight, out of mind', July 2009.
[1461] Rule 31 of Havana Rules.
[1462] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 19 February 2010.

The 2009 inspection of Tinsley House Immigration Removal Centre at Gatwick "reiterated previously expressed concerns at the plight of the small number of children and women held in this largely male establishment, and found both that conditions had generally deteriorated and "the arrangements for children and single women were now wholly unacceptable." Children continued to be detained for more than 72 hours, and there had been little progress in developing appropriate child protection; childcare; or education arrangements.[1464]

Where the conditions of detention and the effect of detention on the physical and mental health of the detainees are sufficiently adverse,[1465] this may result in a number of human rights violations, including the right to survival and development,[1466] the right to health,[1467] and the right to education.[1468] It may also constitute a breach of the prohibition against torture or cruel, inhuman or degrading treatment or punishment, in violation of international law, if the deterioration is significant.[1469] Breaches of the prohibition on torture and cruel, inhuman or degrading treatment or punishment[1470] and the right of detained children to be treated with humanity and respect for human dignity[1471] are likely to lead to the detention being regarded as unlawful. In the recent case of *Muskhadzhiyeva v. Belgium*,[1472] the European Court of Human Rights held that detaining four extremely vulnerable children in a closed, adult, detention centre, while awaiting deportation, was ill-suited to the children's needs, and constituted a violation of the children's Article 3 ECHR right not to be subjected to inhuman or degrading treatment or punishment.

2. Right to health

According to international human rights law, children have the right to the highest attainable standard of physical and mental health.[1473] Evidence indicates that placing children in detention facilities for immigration purposes in the United Kingdom, may result in a violation of their right to health. There is a growing body of evidence, including from the Royal Medical Colleges,[1474]

[1463] United Kingdom House of Commons, Home Affairs Committee, 'The Detention of Children in the Immigration System', para. 11.

[1464] Her Majesty's Chief Inspector of Prisons, 'Report of an unannounced inspection of Tinsley House Immigration Removal Centre', October 2009: <www.justice.gov.uk/inspectorates/hmi-prisons/docs/Tinsley_House_2009_rps.pdf> [accessed 29 January 2011].

[1465] *Muskhadzhiyeva and Others v. Belgium*, 2010.

[1466] Article 6(2) of CRC.

[1467] Article 24 of CRC.

[1468] Article 28 of CRC.

[1469] *Bensaid v. The United Kingdom*, Appl. No. 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001.

[1470] Article 7 of ICCPR; Article 37(1) of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly., 10 December 1984, A/RES/39/46.

[1471] Article 10 of ICCPR; Article 37(c) of CRC.

[1472] *Muskhadzhiyeva and Others v. Belgium*, 2010.

[1473] Article 24(1) of CRC; Article 12 of ICESCR.

[1474] A briefing from the Royal College of General Practitioners, Royal College of Paediatrics and Child Health, Royal College of Psychiatrists and the UK Faculty of Public Health, 'Intercollegiate Briefing Paper: Significant Harm - the effects of administrative detention on the health of children, young people and their families' 2009, described the significant harms to the physical and mental health of children and argued that such detention is unacceptable and should cease without delay: <www.rcpch.ac.uk/Media/News> [accessed 29 January 2011].

that documents the "profound and negative impact"[1475] of detention on children, including impairment of their physical and mental health. The recent study by Medical Justice found that, of 141 children in immigration detention from 2004 – 2010, 74 had suffered psychological harm as a result. Also, 92 children were found to have physical health conditions that were either caused or exacerbated by the detention. These children experienced a range of symptoms, including fever, vomiting, abdominal pains, diarrhoea, musculoskeletal pain, and coughing up blood.[1476]

In February 2009, a family was awarded £150,000 compensation after the government admitted that the family's detention had been unlawful and had left one of the children suffering from post-traumatic stress disorder.[1477] A report produced by a team of paediatricians and a clinical psychologist in late 2009, after they examined 24 detained children, also found that the British system of immigration detention, although periods of detention are often relatively brief, is nevertheless potentially harmful to the mental and physical well-being of children. The report in turn highlighted a number of serious child protection concerns and raised the fact that social and educational needs were not being adequately met[1478] and children have been reported to suffer depression, weight loss and bedwetting.[1479]

An audit of health records at Yarl's Wood found outcomes to be below the standard expected of the National Health Service.[1480] A child's physical and mental health rarely appears to inform a decision to detain a child with a serious illness such as sickle cell anaemia, or, where it is evident that a child's condition has deteriorated in detention. Preventative healthcare arrangements prior to removal, for example, immunisations and the provision of malaria prophylaxis were found "to be so inadequate as to endanger children's health".[1481]

Conclusion

The timing of the case study and hence much of the information in it is reflective of the policies and practices adopted by the previous administration. It is important to note, however, that the new Conservative--Liberal Democrat coalition government has called for an end to detention of children for immigration purposes. While the changing landscape towards a more child sensitive response to immigration is lauded, the Government has yet to fulfil its commitment to removing all children from immigration detention.

Detention for immigration purposes has been the major form of administrative detention in the United Kingdom. Its use for children and families has been roundly criticised by the

[1475] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 19 February 2010.
[1476] Medical Justice, 'State-sponsored cruelty: children in immigration detention', September 2010.
[1477] Verkaik, R., 'Asylum detainees win record payout', *The Independent*, 13 February 2009: <www.independent.co.uk/news/uk/home-news/asylum-detainees-win-record-payout-1608207.html> [accessed 29 January 2011].
[1478] Lorek, A. et al., 'The mental and physical health difficulties of children held within a British immigration detention centre: A pilot study', *Child Abuse and Neglect*, 2009, 33,p. 573–575.
[1479] McVeigh, K., 'Ministers under fire for locking up immigration children', *The Guardian*, 30 August 2009.
[1480] Children's Commissioner for England, '11 Million, The Arrest and Detention of Children Subject to Immigration Control', 2009.
[1481] Ibid.

Parliamentary Human Rights Committee, United Kingdom NGOs, the children's commissioners in the United Kingdom, the Royal Medical Colleges and the European Commissioner for Human Rights. In a significant number of cases, the right of children to liberty and security of the person, and freedom from arbitrary detention contained in Article 9 of the ICCPR and Article 37 of the CRC have been violated. Detention centres do not afford children the protection and care that they need, nor do they ensure that the safeguards and limitations contained in international law are upheld.

Evidence from a multitude of sources shows that such detention is not in the best interests of children and likely amounts to violations of their rights to health, survival and development and education. Where the conditions and impact of the detention are particularly detrimental to children, this could also amount to a breach of their right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The absence of statutory accountability for detention of children with their families, flawed review processes, inadequate child protection policies and welfare assessments and numerous obstacles that inhibit detained families from accessing their legal rights, all significantly worsen the detrimental effects of detention. The government has sought to deflect criticism of its family detention policy by introducing changes, including welfare assessments and a requirement for ministerial authorisation for detention beyond 28 days. However, these policy changes have not introduced a real measure of accountability; and the pronouncements of ministers have not translated into action to ensure the protection of migrant children.[1482] The Independent Asylum Commission, which released its findings in 2008, recommended that "there should be a root and branch review of […] detention […] Detention should be time-limited, for clearly stated reasons, and subject to judicial oversight".[1483] Ideally, though, the detention of children for immigration purposes should not occur, as it can rarely, if ever, be said to be in the best interests of the child.

[1482] Bail for Immigration Detainees, 'Obstacles to accountability: challenging the immigration detention of families', June 2007, p. 5.
[1483] Independent Asylum Commission, 'Deserving Dignity: Third Report of Conclusions and Recommendations', July 2008.

11. Case study: Administrative detention of girls in the Middle East and North Africa regions

Context

Around the globe, social codes derived from societal or religious traditions hold many women and girls to restrictive standards of personal conduct and behaviour. Breaching these social mores can leave girls and women facing punishment under the legal system and rejection by society and their families. In States which have restrictive social laws for women, sexual activity by girls can threaten the honour of the family or community and can lead to threats of actual violence or even murder by those seeking to restore their honour.[1484] These consequences hold true whether the sexual activity is consensual or as a result of rape, sexual assault or exploitation. Girls in this situation are certainly in need of protection. However, under existing practices, "protection" can often take the form of administrative detention in State run "social rehabilitation" or "social welfare" homes.

The detention of girls for violating social codes of conduct has been reported in several Middle Eastern and North African countries, including Libya, Jordan, Saudi Arabia and Syria. More often than not, such detention is considered to be "protective", providing these girls with refuge from the physical and psychosocial dangers they might face if they were to continue to live within their families or communities. Becoming a victim of a sexual crime and committing a sexual 'crime' are often indistinguishable in their consequences.

This case study examines the law, policy and practice of several Middle Eastern and North African countries, in which this form of detention is reported to occur. It considers the depth of the problem, the purposes and nature of the detention, the conditions faced by girls who are detained in this way and the impact of this type of detention on the girls themselves. While governments may continue to engage in protective detention of girls for want of a suitable alternative, administrative detention perpetuates the social stereotypes and mores that led to the need to protect girls in the first place.

Two issues present a particular challenge to the implementation of the right to liberty and security contained in Article 9(1) of the ICCPR and Article 37(b) of the CRC. The first is the existence of discriminatory legislation, and the second is the failure to address in an appropriate manner the type of violence against women known as "honour crimes": crimes perpetrated against women who are perceived to have engaged in immoral behaviour that brings dishonour to the family or community.[1485] According to a Report of the Committee on Equal Opportunities for Women and Men of the Council of Europe, "[t]he concept of so-called 'honour crimes' is a complex issue but may be defined as a crime that is, or has been, justified or explained (or

[1484] See, for instance, Human Rights Watch, 'Honoring the Killers', 2004, 8.

[1485] This immoral behaviour can include 'anything from extra-marital sex to merely mixing with men from outside the family circle'. See Human Rights Council, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk : Addendum: Mission to Saudi Arabia (2009), U.N. Doc. A/HRC/11/6/Add.3, para. 48.

mitigated) by the perpetrator of that crime on the grounds that it was committed as a consequence of the need to defend or protect the honour of the family."[1486]

At their most extreme, "honour crimes" can take the form of "honour killings", which are often "carried out by husbands, fathers, brothers or uncles, sometimes on behalf of tribal councils…"[1487]

While these types of "crime" are global[1488] and by no means limited to the Middle East and North Africa, international attention has been directed towards the social and legal treatment of women in Arab States, particularly in the context of "honour crimes", which the Arab Development Report 2009 describes as "the most notorious form of violence against women in several Arab societies".[1489] It is important to note, however, that "honour crimes" are not a mandate of Islam, but rather derive from mixed customs;[1490] thus, to the extent that this case study considers "honour crimes", it is an exploration of a cultural, rather than a religious, phenomenon.[1491]

Legal framework

1. International standards on administrative detention

Administrative detention is the deprivation of liberty without a court or judicial order. The key element of 'administrative' detention is that the decision to detain is made by an executive, rather than a judicial body. In accordance with Article 9 of the ICCPR and Article 37 of the CRC, every individual has the right to liberty and security of person. In the case of children, States should minimise both the incidence of detention and the duration of any detention so that it is used only as "a last resort"and for the "shortest appropriate period of time" under Article 37(b) of the CRC and Rule 17 of the JDL Rules. For all individuals, deprivation of liberty must follow certain fundamental safeguards set out in international law, otherwise the legitimate restriction of their right to liberty becomes a violation of that right. First and foremost, the international standards are clear that individuals must be free from "arbitrary" detention and that, in order to avoid arbitrariness, detention must be in accordance with domestic law and with procedures established by law, under provisions of the CRC and the ICCPR. Once arrested or detained, individuals must be brought before a judge or other competent body to determine the legitimacy of the detention, under Article 9(1) of the ICCPR and Article 37(b) of the CRC. Under Article 25 of the CRC, the

[1486] Council of Europe Parliamentary Assembly Committee on Equal Opportunities for Women and Men, 'So-called "honour crimes"', 7 March 2003, 9720.
[1487] Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2001/49: Cultural practices in the family that are violent towards women (2002) , U.N. Doc. E/CN.4/2002/83, paras. 21, 22.
[1488] Ibid.
[1489] United Nations Development Programme, Arab Development Report: Challenges to Human Security in the Arab Countries, 2009.
[1490] Zuhur, S., 'Considerations of Honor Crimes, FGM, Kidnapping/Rape, and Early Marriage in Selected Arab Nations (Expert Paper)', 11 May 2009, EGM/GPLHP/2009/EP.11b, p. 5.
[1491] Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences: Cultural practices in the family that are violent towards women (2002), U.N. Doc. E/CN.4/2002/83. For more information about 'honour crimes' generally, see Zuhur, S., 'Gender, Sexuality and Criminal Laws in the Middle East and North Africa', Women for Women's Human Rights, 2005, 22–33.

detention of children for "purposes of care, protection or treatment of his or her physical or mental health" must also be reviewed on a regular basis.
Administrative detention that is carried out in accordance with a national law may nonetheless violate the prohibition on arbitrary detention contained in Article 9(1) ICCPR and Article 37(b) CRC. According to the Human Rights Council, arbitrariness is a broad concept that includes "elements of inappropriateness, injustice and lack of predictability".[1492] If a girl is to be detained for her own "protection", this detention should follow a lawful, non-arbitrary decision that can be reviewed by the courts. Otherwise, such detention is likely to breach international human rights standards.

2. International standards on the protection of the rights of girls
The international consensus against discrimination is borne out both in general human rights instruments and in instruments specifically targeting the issue. Each of the major human rights instruments applies equally to all persons without discrimination as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[1493]

Several instruments also protect the rights of women specifically. These include the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence Against Women, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol),[1494] the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women[1495] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[1496] Not only does international human rights law apply general principles of liberty equally to women as to men, it attempts to provide additional assurances against discrimination and violence against women in legal and social contexts.[1497]

While violence against girls is not explicitly referred to in the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women's General Recommendation No. 12 stresses the obligations of States to protect women against violence under Articles 2, 5, 11, 12 and 16.[1498] Governments

[1492] *Hugo van Alphen v. Netherlands*, 1990, para. 5.8; *A. W. Mukong v. Cameroon*, 1994.
[1493] See, for instance, Article 2 of ICCPR; Article 2 of ICESCR.
[1494] United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.
[1495] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para), 9 June 1994.
[1496] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003, entered into force 25 November 2005.
[1497] Although this case study focuses on the administrative detention girls, it is equally informed by the standards relating to both women and children.
[1498] United Nations Committee on the Elimination of Discrimination Against Women, General Recommendations Nos. 9, 10, 11, 12 and 13, adopted at the Eighth Session, 1989 (contained in U.N. Document A/44/38), Recommendation No. 12, 1989.

also have an obligation to protect girls, specifically, from abuse and neglect,[1499] and from violence,[1500] which, under the United Nations Declaration on the Elimination of Violence against Women, is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".[1501] This obligation extends not just to addressing the direct violence itself, but also the social, behavioural and legal causes of violence.[1502]

The rights of child victims and witnesses are also set out in the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.[1503] These dictate that children who are victims and witnesses must be given "special protection, assistance and support"[1504] and that "special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children."[1505]

While there is no provision in international instruments relating specifically to the prohibition of "honour crimes", or other forms of violence against those who have been victims of sexual crimes, a State's responsibility towards these girls is governed by the international framework, which includes, for example, "the obligation to protect: the right to life, liberty and security of the person; the prohibition on torture or other cruel, inhuman, or degrading treatment or punishment; the prohibition on slavery; the right to freedom from gender-based discrimination; the right to privacy; the right to marry and found a family; the right to be free from sexual abuse and exploitation; the duty to modify customs that discriminate against women; and the right to an effective remedy".[1506]

The State obligation to protect the rights of girls also extends to a duty not to create laws and policies that perpetuate violence against girls: "Examples of such laws and policies include those that criminalize women's consensual sexual behaviour as a means to control women; policies on forced sterilization, forced pregnancy and forced abortion; policies on protective custody of women that effectively imprisons them; and other laws and policies, including policies on virginity testing and sanctioning forced marriages, that fail to recognize women's autonomy and agency and legitimize male control over women. States may also condone violence against

[1499] Article 19 of UDHR.
[1500] United Nations General Assembly, In-depth study on all forms of violence against women: Report of the Secretary-General (2006), U.N. Doc. A/61/122/Add.1, para. 2.
[1501] Article 1 Declaration on the Elimination of Violence against Women, United Nations General Assembly, 20 December 1993, U.N. Doc. A/RES/48/104.
[1502] United Nations General Assembly, In-depth study on all forms of violence against women: Report of the Secretary-General (2006), U.N. Doc. A/61/122/Add.1, para. 2, 39.
[1503] United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, adopted by the Economic and Social Council 22 July 2005.
[1504] Ibid., Preamble.
[1505] Ibid.
[1506] Centre of Islamic and Middle Eastern Law/International Centre for the Legal Protection of Human Rights Project on Strategies to Address Crimes of Honour, 'Selected International Human Rights Materials Addressing "Crimes of Honour"', 2003, p. 13: <www.soas.ac.uk/honourcrimes/resources/file55416.pdf?filename= Selected+International+Human+Rights+Materials+addressing+'Crimes+of+Honour'> [accessed 29 January 2011].

women through inadequate laws or through ineffective implementation of laws, effectively allowing perpetrators of violence against women impunity for their acts (see sect. VI)."[1507]

3. Regional laws

The regional human rights instruments for Middle Eastern and North Africa are the Arab Charter and the Banjul Charter. Article 2 of the Arab Charter enshrines the prohibition of discrimination, whereby "each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds [of] … sex… and without any discrimination between men and women." The Banjul Charter and its Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[1508] are also relevant in this regard. The Charter itself prohibits discrimination[1509] and prescribes equality,[1510] while the Protocol enshrines, among other things, the right to protection from harmful practices and violence.[1511]

Administrative detention of girls

1. National laws

In several States, public interaction between men and women is highly restricted. Women and girls who engage in immoral behaviour can be subject to societal and government-led "policing". In Saudi Arabia, this takes the shape of the Commission for the Promotion of Virtue and the Prevention of Vice, which is an authorised law enforcement agency responsible for maintaining morality in public places. In particular, the Commission for the Promotion of Virtue and the Prevention of Vice is responsible for monitoring the legal and illegal mingling of men and women, also known as *khelwa*.[1512] Such offences can be prosecuted through the formal legal system, but can also lead to extended detention for the purposes of 'guidance' on the orders of the Ministry of Social Affairs. According to a Human Rights Watch report, "Saudi Arabian law gives the Ministry of Social Affairs broad powers to continue to detain children and young women even after they are found innocent or have served their sentences."[1513] Specifically, indefinite detention is permitted if the child "remains in need of additional guidance and care".[1514]

In Libya, the Law against Sexual Offences 1973 provides for the admission of girls to social rehabilitation facilities if they have been sexually active in any way – including if they have been

[1507] United Nations General Assembly, In-depth study on all forms of violence against women : Report of the Secretary-General (2006), U.N. Doc. A/61/122/Add.1, para. 140.
[1508] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003, *entered into force* 25 November 2005. (Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa).
[1509] Articles 2, 18, 28 of African Charter on Human and Peoples' Rights.
[1510] Ibid., Articles 3, 13, 15, 19, 22.
[1511] See Articles 3, 4 and 5 in particular of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
[1512] Human Rights Council, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk : Addendum: Mission to Saudi Arabia (2009), U.N. Doc. A/HRC/11/6/Add.3, para. 48.
[1513] Human Rights Watch, 'Adults Before Their Time', 2008, 38.
[1514] Ibid.

assaulted or raped.[1515] Under these *zina* laws (laws governing extra-marital sex), it is not necessary for a girl to be convicted of such a "crime", before she can be brought to a social rehabilitation home under the order of the prosecutor.[1516]

The penal codes in many Arab States continue to provide exemptions for those who commit "honour crimes" against female family members.[1517] Even in Lebanon[1518] and Jordan, for example, where efforts at reform have been made, penal codes still contain provisions to the effect that an extenuating justification can be invoked by anyone who commits a crime in a fit of rage, as a result of an unrightful and dangerous act carried out by the victim.[1519]

In July 2009, Syria amended its Penal Code so that, rather than being exempted from prosecution for murder, a male who "catches his wife, sister, mother or daughter by surprise, engaging in an illegitimate sexual act and kills or injures them unintentionally must serve a minimum of two years in prison".[1520] This reform has been criticised because rather than removing the defence, it merely reduces it: a murderer can serve a custodial sentence of only two years if "provoked" by the "immoral" activities of the girl or woman in question.

2. Social protection homes

In Bahrain,[1521] the primary social protection home for women and girls is the Dar Al Aman Shelter, the mandate of which is to "provide temporary accommodation to victims of domestic violence."[1522] The shelter has space for a maximum of 120 girls and women, though there are frequently far fewer residents there.[1523] Although the shelter is primarily for adult women, there was one girl aged 17 in the home in May 2009 and former residents indicated that several girls had been housed at the shelter since it opened in 2006.[1524] According to its regulations, women can stay at Dar Al Aman for up to two months but their stay can be reviewed and a further three months allowed.

[1515] Human Rights Watch, 'A Threat to Society?', 2006, 2.
[1516] Ibid.
[1517] Zuhur, S., 'Considerations of Honor Crimes, FGM, Kidnapping/Rape, and Early Marriage in Selected Arab Nations (Expert Paper)', 11 May 2009, EGM/GPLHP/2009/EP.11b, p. 2.
[1518] For instance, Lebanon, Article 562 of Penal Code, (as described in Ouis, P. and Myhrman, T., 'Gender-Based Sexual Violence Against Teenagers in the Middle-East', Save the Children, 2006, 26).
[1519] Article 98 of Jordan Penal Code (as cited in 'Jordan 'honor killings' cover for other crimes', *Associated Free Press*, 2 September 2008: <http://afp.google.com/article/ALeqM5h5r-5iGd2uDl-WbAAy3HgXUigyYA> [accessed 29 January 2011].).
[1520] Human Rights Watch, 'Syria: No Exceptions for Honour Killings', 28 July 2009: <www.hrw.org/en/news/2009/07/28/syria-no-exceptions-honor-killings> [accessed 29 January 2011].
[1521] The author visited Bahrain for four days in May 2009, with the support of UNICEF and UNDP as well as the General Organisation for Youth and Sport, a government ministry. The Government of Bahrain and representatives, as well as the United Nations bodies, were extremely helpful and forthcoming during the visit. Hereinafter the author's visit, May 2009.
[1522] 'Al Balooshi Inaugurates Dar Al Aman Care Centre', *Bahrain News Agency*, 23 November 2006: <http://english.bna.bh/?ID=52864> [accessed 29 January 2011].
[1523] Author's visit, May 2009. There were only nine people there, including one juvenile. Former residents also indicated that there were rarely more than 20 women there.
[1524] Ibid., meeting with Marian Khalfan, Director of Community Service Police, 12 May 2009 who discussed these facts and also explained that two other social protection homes exist – Dar Al Fatiah for boys and Dar Al Karama for those found living or working on the streets.

Social protection centres elsewhere across the Middle East, which are often mixed between girls and adult women, include: the Jweideh Women's Correctional and Rehabilitation Centre and Wifaq Centre in Jordan; the Social Welfare Home for Women in Tajoura and the Benghazi Home for Juvenile Girls in Libya ; the Mekkah Girls' and Young Women's Welfare Institution and Riyadh Girls' and Young Women's Welfare Institution in Saudi Arabia; and the Institution for Delinquent Girls and Institution for Social Education in Damascus, Syria.

In many cases, the social centres perform the dual functions of "rehabilitating" women and girls charged with social behavioural offences, or who are considered at risk of committing such offences, and of "protecting" girls who are victims of domestic violence, who have been raped or assaulted, or who are at risk of becoming a victim of "honour crimes".[1525]

3. Admission to social protection homes

If admission to social protection homes is ordered by a court or judge, then it is not administrative. However, if admission is a result of a decision by a social welfare body, the police, or other executive body, then the decision is administrative in nature.

Referrals to the Dar Al Aman shelter in Bahrain can be made by women's support centres, the police or child protection centre or by the prosecutor's office. The shelter itself is owned and operated by the Ministry of Social Development. According to the Director of the Child Protection Centre in Bahrain, when a child is suspected of being a victim of abuse or neglect, the child will be referred to the Child Protection Centre, either from law enforcement officials or from schools and other non-governmental sources. A child who arrives at the Child Protection Centre will be assessed by a medical team and by social workers before the social workers make a recommendation as to placement. As removing children from their families is not common in Bahrain[1526], due, in part, to cultural attitudes, at-risk girls tend to be placed with relatives. Only a judge can determine whether a child can be permanently removed from his or her family and sent to an orphanage or foster home.

However, children in need of immediate protection and care do not have the time to progress through this system. Several individuals within the social welfare and child protection system have indicated that there is currently no temporary shelter for the period between when a child first comes to the attention of the Child Protection Centre and when he or she goes to an orphanage or other permanent placement.[1527] That means that if a girl is sexually assaulted or at risk of harm, she is sent to Dar Al Aman (boys as well can either go to Dar Al Aman or to Dar Al Fatiah). No judicial order is required to refer a child to Dar Al Aman because the shelter falls under the Ministry of Social Development; the decision can be taken by the prosecutor's office.

[1525] Notably, the lack of an alternative placement for girls who require protection does not mean that this form of detention is truly 'a last resort'.

[1526] Author's visit, May 2009, meeting with Sh. Khalifa, from the Ministry of the Interior, 13 May 2009. Sh. Khalifa explained that there is currently no law specifically against abusing a child but rather this issue is dealt with through the law on assault, however, the Government of Bahrain is currently drafting a new Children's Law to deal with this issue.

[1527] Ibid., discussed by Dr. Bushra Al-Sayed, Director of the Child Protection Centre and Sh. Noora Al-Khalifa, of the Ministry of the Interior, who is in charge of juvenile cases and some cases of domestic violence.

Admission to the observation centres in Saudi Arabia seem to be most commonly ordered, or at least endorsed, by a judge, although many girls remain at the centres without a judicial order or for a long period of time before a court order is made.[1528] In Libya, detention at social rehabilitation homes is ordered by the prosecutor's office.[1529] As girls in this circumstance are considered to require "protection", a prosecutor's order is all that is required for detention.[1530]

In Jordan, no formal shelters for women at risk of harm from "honour crimes" exist; rather, they may be admitted, on the decision of an administrative body, to the Wifaq Centre for women at risk of violence,[1531] having previously been held at the Juweidah Correctional and Rehabilitation Centre.[1532]

4. Social protection homes as administrative detention

Reports indicate that many, if not most, of the girls in welfare centres are not admitted following a court sentence; some girls may attend centres voluntarily if they are fleeing immediate threat of harm, for example, if they have been raped or assaulted and fear punishment from their own families on the grounds of "honour".[1533] Others may be detained following a decision by an administrative body. In Libya , detention in "social rehabilitation" centres most commonly results from a decision by the office of the public prosecutor.[1534] In Saudi Arabia, the Ministry of Social Affairs has powers to "continue to detain children and young women even after they are found innocent"[1535] in its welfare homes.

Despite their varying titles, each of which evokes a sense of protection and support, these "homes" from which women and girls are not free to leave at will,[1536] are in fact, detention centres. State guardianship laws and the regulations of individual homes frequently prohibit girls from leaving of their own volition and provide that they can only be released "to the custody of a guardian".[1537] Under guardianship laws, a woman never reaches legal majority and a male adult, often her father or brother, will be designated her legal guardian. In Libya, girls may be released from protective custody in the Benghazi home only if their fathers are willing to accept them home,[1538] while in Saudi Arabia, girls may only be released into the custody of their legal guardians. This means that if no family member comes to collect a young girl, as may be the case due to the social stigma of being detained in an observation home, children and young women in Saudi Arabia can be detained indefinitely, even after a judge or prosecutor orders their

[1528] Human Rights Watch, 'Adults Before Their Time', 2008, 38–43.
[1529] Human Rights Watch, 'A Threat to Society?', 2006, 15.
[1530] According to Article 25 of Law No. 47 (1975) Law Regarding Prisons, cited in Human Rights Watch, 'A Threat to Society?', 2006, 15.
[1531] Human Rights Watch, 'Guests of the Governor', May 2008, 12–3.
[1532] Human Rights Watch, 'A Threat to Society?', 2006, p. 25, 26; The detention of women in shelters raises concerns for the girl child. Although the majority of detainees in shelters are likely to be women, many girls are detained through the same means.
[1533] Ibid., 1.
[1534] Ibid., 15.
[1535] Human Rights Watch, 'Adults Before Their Time', 2008, 38.
[1536] Article 1(b) of Havana Rules, which defines deprivation of liberty as meaning 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.
[1537] Human Rights Watch, 'Adults Before Their Time', 2008, 20.
[1538] Human Rights Watch, 'A Threat to Society?', 2006, 16.

release.[1539] As many of the women in these homes are there, at least in part, to protect them from their families, it could be potentially dangerous for a girl to be "collected" by a family member. In Bahrain, detention in Dar Al Aman for girls is intended to last only up to two months.[1540] However, it was reported that if, after a case review, it is decided that no other suitable accommodation can be found, this period can be extended beyond two months.

Girls detained in social protection homes do not have the possibility of challenging the legality of their detention. Neither is the placement of the child subject to a review on a regular basis. The failure to implement safeguards contained in international human rights instruments,[1541] for those who are administratively detained for welfare purposes, could be linked to the lack of recognition by the State that placement in a social protection home constitutes administrative detention.[1542] In the view of the State, the child's guardian could remove the child at any time, and thus the child is not detained[1543] but rather, is being afforded protection. However, the restrictions on free movement, as well as the inability of girls to leave at will, means that placement in these social protection homes effectively becomes a form of detention.

Child rights at risk

1. Conditions and treatment of children in social protection homes

The conditions of the social protection homes and the treatment of girls and women who are resident in these homes have been a regular source of concern. The Dar Al Aman Shelter in Bahrain has been the subject of considerable controversy, particularly in relation to the treatment of girls and women residing there. The shelter operates to a strict schedule that includes a curfew and restrictions on movement. The shelter is locked electronically and only staff members have electronic passes. Residents can only leave for specific events and often only when accompanied by a social worker from the facility.[1544] Although there may be some discussion as to whether the restrictions on movement and the inability to leave the shelter at will are sufficient to amount to administrative detention, the language of the residents is clear: they speak of "escape"[1545] and of being in a "prison".[1546] In other words, many residents did not see themselves as being able to leave at all. However, some women who had formerly been sheltered at Dar Al Aman indicated that it may have been possible for them to leave, but that, even though they desperately wanted to leave, and were given the opportunity to leave, they could not have done so, because of an utter lack of alternatives. Lack of safe alternative accommodation negates any "voluntariness" to the placement and continued residence, making it, instead, deprivation of liberty (See Subsection

[1539] Human Rights Watch, 'Adults Before Their Time', 2008, 39.
[1540] Author's visit, May 2009, interview the manager of Dar Al Aman in a meeting, 13 May 2009.
[1541] For instance, Article 9(4) of ICCPR; Article 37(d) of CRC. See the subsection on International standards on administrative detention, above, and the Introduction of this working paper for further discussion.
[1542] However, this does not necessarily mean that safeguards are in place for those detained for non-welfare related purposes.
[1543] See Human Rights Watch, 'A Threat to Society?', 2006, 1.
[1544] Author's visit, May 2009, discussions with former residents. If the resident was going to a women's counselling centre, she could go without a social worker, but if she was attending a court hearing, the social worker would often attend.
[1545] Ibid., discussions with former residents of Dar Al Aman.
[1546] Ibid.

2 below.). Allegations of ill treatment by former residents have also been published in the country's newspapers, leading to suggestions that a formal inquiry into the shelter be undertaken.

Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, was particularly concerned about the practice of protective custody in Jordan. First noting that "the only prison where the Special Rapporteur did not receive allegations of ill-treatment is Juweidah (Female) Correction and Rehabilitation Centre, he was satisfied with the commitment of the prison management to the well-being of the inmates". He went on to say that "[n]evertheless, the Special Rapporteur, after talking to women concerned, is highly critical of the current policy of taking females under the provisions of the Crime Prevention Law into 'protective' detention because they are at risk of becoming victims of an honour crime. According to the Special Rapporteur, depriving innocent women and girls of their liberty for as long as 14 years can only be qualified as inhuman treatment, and is highly discriminatory."[1547]

In Jordan, women and girls are also administratively detained in rehabilitation homes on the orders of the governors of the homes.[1548] Such orders are unlawful, because they fall outside of the scope of the Crime Prevention Law.[1549] They are, nonetheless, common. Governors may even cite the Crime Prevention Law when detaining women: "Governors have also invoked the Crime Prevention Law to detain women who have simply run away from home or eloped. While neither of these acts is defined as a crime under the Jordanian Penal Code, authorities have used them as grounds to detain women administratively as a matter of custom."[1550]

2. Lack of an alternative to detention

As detailed earlier, States have an obligation both to protect children from violence, and to address it once it has occurred, protecting the victims and witnesses from future physical or psychological harm.

Girls are deprived of their liberty in the Dar Al Aman Shelter largely due to a lack of a viable alternative. Those within the Bahraini juvenile justice system are unequivocal in confirming that girls who have been subject to violence, abuse or exploitation may not be held at juvenile detention centres without a court order.[1551] While this is to be commended, the lack of an effective child protection system, including appropriate residential placements for girls at risk of harm, results in girls who are victims being placed in administrative detention. Girls who have been victims of sexual abuse or who have engaged in consensual sexual relations can be taken to the Child Protection Centre, but the centre has no residential capacity. Where the situation is one of immediate emergency, and a child is at serious risk of harm, the only option is to place a girl in Dar Al Aman.

[1547] Human Rights Council: Addendum to the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Jordan, 5 January 2007, U.N. Doc. A/HRC/4/33/Add.3, para. 13.

[1548] Human Rights Watch, 'Guests of the Governor', 2008, 10.

[1549] Ibid.

[1550] Ibid., 15.

[1551] Author's visit, May 2009, visit to an interior juvenile correctional facility,11 May 2009, and meeting with the staff there who were clear that girls could not be held at juvenile detention facilities without a court order.

Conclusion

The United Nations Secretary General's in-depth Study on All Forms of Violence against Women is clear that "acts such as incarceration of women in mental hospitals or in prisons for not conforming to social and cultural expectations, restrictions placed on women, such as locking them up or enforcing their isolation and limiting interaction with others, have been documented anecdotally but remain largely invisible."[1552]

The Working Group on Arbitrary Detention has made it clear that "recourse to deprivation of liberty in order to protect victims should be reconsidered and, in any event, must be supervised by a judicial authority, and that such a measure must be used only as a last resort and when the victims themselves desire it."[1553]

[1552] United Nations General Assembly, In-depth study on all forms of violence against women: Report of the Secretary-General (2006), U.N. Doc. A/61/122/Add.1, para. 155.

[1553] Report of the WG on Arbitrary Detention, Civil and Political Rights, including the Questions of Torture and Detention (2002), U.N. Doc. E/CN.4/2003/8, para. 65.

12. Case study: Administrative detention of children in Tajikistan

Context

Tajikistan is a small nation, with a population of approximately 7.35 million,[1554] which became independent in 1991 after the collapse of the Soviet Union. From 1992 to 1997, the country experienced a devastating civil war in which 50,000 people were killed and over 500,000 displaced.[1555] Since the end of the war and the signing of peace accords in June 1997,[1556] Tajikistan has enjoyed relative political stability. It remains, however, the poorest of the Central Asian countries, with 66 per cent of children below the age of 18 living in poverty.[1557]

Family separation is a very real problem in Tajikistan, with large numbers of men and a significant number of women working abroad. Children of migrants tend to be left behind with family members, often single mothers or grandparents, or placed in institutions.[1558] In 2006, Tajikistan had 12,969 children in state residential care.[1559] It is estimated that only 10 per cent of children in residential care have no living parents.[1560] In addition to children living in residential care, approximately 5,000 children are estimated to live on the streets of the capital, Dushanbe.[1561]

Tajikistan still largely retains the Soviet Union era laws on child protection and juvenile justice. Institutionalisation remains the most common child protection measure, with very few community-based family support services available. Although Tajikistan began a de-institutionalisation programme in 2004 to reduce the number of children placed in institutions, the impact of the programme was negligible. [1562]

Most institutionalised children are placed in children's homes or boarding schools. These are open institutions, although children will often be educated on the premises and have little

[1554] CIA World Factbook: <www.cia.gov/library/publications/the-world-factbook/geos/ti.html> [accessed 29 January 2011]>

[1555] 'Country Profile: Tajikistan', *BBC News*: http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1296639.stm#facts> [accessed 29 January 2011].

[1556] Ibid.

[1557] Baschieri, A. and Falkingham, J., 'Child Poverty in Tajikistan', UNICEF, Dushanbe, January 2007, Section 2.1, p. 25. Levels of child poverty vary by age, with younger children being more likely to be poor than older children. For example, 69 per cent of children under the age of six are poor compared with 63 per cent of 11- to 14-year-olds and 61 per cent of 15- to 17-year olds.

[1558] See Hamilton, C., 'Legal Analysis of the Child Protection System in Tajikistan', UNICEF, September 2008: <www.childrenslegalcentre.com> [accessed 29 January 2011].

[1559] Data on Children in Central and Eastern Europe and the Commonwealth of Independent States: the Transmonee Database, 2007, p.46; See <www.unicef-irc.org> [accessed 29 January 2011]

[1560] United Nations Children's Fund Tajikistan, Annual Report 2007, internal document, p. 8.

[1561] Save the Children, 'What we do in Central Asia, 2007/08': <www.savethechildren.org.uk/en/docs/Central_Asia_CB_07.pdf> [accessed 29 January 2011].

[1562] United Nations Children's Fund CEE/CIS, Analysis of the progress and remaining challenges in Child Care System Reform, 24–26 November 2009: <www.unicef.org/ceecis/Regional_Analysis_Progress_of_the_Child_Care_System_Reform_ENG.pdf> [accessed 29 January 2011].

interaction with the community.[1563] Children can be placed in such homes by the local guardianship authority with the basis of placement being largely economic. Parents are required to show that they do not have the means to raise the child. There is no assessment of the child prior to placement, generally no meeting with the child and no consideration of whether such a placement would be in the child's best interests.[1564]

A small percentage of institutionalised children, however, are not placed in open institutions but are administratively detained in closed institutions by the Commission of Minors and its successor body, the Commission on the Rights of the Child. Such detention may be ordered or may occur in relation to three groups of children. First, children who are below the minimum age of criminal responsibility, but who are alleged to have committed criminal acts;[1565] second, children who are alleged to have been involved in anti-social behaviour, such as failing to attend school, failing to obey their parents or their teachers or staying out on the street; and third, children who are found without parental care. Children found without parental care may have run away from home, been abandoned, perhaps by a parent who has gone overseas to work, be working or living on the street or be without care due to the hospitalisation or death of a parent or because the parent has been arrested and detained or imprisoned.

Legal framework

1. International standards on juvenile justice, child protection and administrative detention

Article 3 of the UDHR, Article 9 of the ICCPR and Article 37 of the CRC are the key provisions in international human rights law that limit the use of administrative detention.[1566] These instruments require that no child shall be deprived of his or her liberty illegally or arbitrarily. Under Article 37(b) of the CRC, any decision to deprive a child of his or her liberty and place the child in administrative detention must be "in conformity with the law". The relevant law must have adequate clarity and regulate the procedure for the administrative detention,[1567] while the detention itself must be carried out by competent officials or persons authorised for that purpose.[1568] Where placing a child in administrative detention does not comply with domestic law or domestic procedures, this will render the detention unlawful.

Procedures set out in the law must also be complied with. Where, for instance, the regulations provide that a lawyer or prosecutor must be present before an order can be made for

[1563] See Hamilton, C., op. cit .
[1564] Ibid.
[1565] The age of criminal responsibility is set at 16 for the majority of crime, but at 14 for certain offences that are listed as 'Serious' offences in the Criminal Code. See Articles 23(1), 23(2) of Criminal Code. 'Serious' offences include, for example, homicide (Article 104), intentional major bodily injury (Article 110), kidnapping (Article 130), rape (Article 138), forcible act of sexual character (Article 139), terrorism (Article 179), theft of weapons, ammunition and explosives (Article 199), illegal trafficking of narcotics (Article 200), destruction of transport or ways of communication (Article 214), hooliganism under aggravating circumstances (Article 237, p.2 and 3), larceny (Article 244), robbery (Article 248), extortion (Article 250), robbery with extreme violence (Article 249) and intentional damaging destruction of property under aggravating circumstances (Article 255). Also see U.N.Doc. CRC/C/SR.653, para 2.
[1566] See Introduction of this working paper for a fuller discussion of the legal issues. See also Body of Principles, which sets out a comprehensive list of protections for persons who are subject to administrative detention.
[1567] *Bolanos v. Ecuador*, 1989; *Domukovsky v. Georgia*, 1998.
[1568] Principles 2, 4 of Body of Principles.

administrative detention, a lack of a lawyer will render the detention unlawful. Similarly, if the regulations require that there be a hearing at which the child must be present before a decision is reached on administrative detention, a failure to comply with this requirement will also render the detention unlawful.

Where administrative detention is carried out in accordance with domestic law, there is a further requirement that any administrative detention ordered must not be arbitrary. The Human Rights Committee has stated that"[a]rbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[1569]

This means that the detention must be "necessary in all the circumstances of the case and proportionate to the ends being sought".[1570]

Determining whether the administrative detention of a child is necessary and proportionate will depend upon the circumstances of the case, and the purpose of the detention. In the case of a child, administrative detention will only be necessary and proportionate if it is a measure of last resort (when all other options for care and protection have been considered) and for the shortest appropriate period of time, under Article 37(b) of the CRC. The CRC also provides, in Article 3, that in making any order for administrative detention of a child, the best interests of the child should be a primary consideration, , and the right of the child to have his or her own views heard and taken into account also apply, under Article 12. The Human Rights Committee, in interpreting Article 9(1) of the ICCPR, has provided that in order to avoid a characterisation of arbitrariness, detention should "not continue beyond the period for which the State can provide appropriate justification".[1571] If it does it will cease to meet the criteria for lawful administrative detention and will then become arbitrary and therefore unlawful.

To ensure that administrative detention for care and protection is lawful, States also need to ensure that children are provided with all the necessary procedural safeguards and guarantees contained in Article 9(4) of the ICCPR and Article 37(d) of the CRC.[1572] Where a child, including a child below the minimum age of criminal responsibility, is detained for allegedly having committed an act which does not amount to a criminal offence, Article 9(4) of the ICCPR and Article 37(d) of the CRC requires that the child be given a right to access legal counsel and other appropriate assistance, and a right to challenge the legality of the detention. In addition, Article 25 of the CRC requires that the child's case should be reviewed at regular intervals not by the detaining body, but by a competent, independent and impartial organ whose role should be to ascertain whether the grounds for detention continue to exist, and if they do not, to ensure the child's release.

[1569] *A. W. Mukong v. Cameroon*, 1994, p. 181, para. 9.8.
[1570] *Danyal Shafiq v. Australia*, 2006, para. 7.2; *A. v. Australia*, 1997, para. 9.2.
[1571] *A. v. Australia*, 1997, para 9.4; *C. v. Australia*, 2002, para. 8.2: *Danyal Shafiq v. Australia*, 2006, para. 7.2.
[1572] In its Day of General Discussion on Children without Parental Care, the United Nations Committee on the Rights of the Child recommended that 'States parties ensure that the decision to place the child in alternative care is taken by a competent authority and that it is based on the law and subject to judicial review to avoid arbitrary and discretionary placements'. The States parties should also ensure that the placement is regularly reviewed in accordance with Article 25 of the Convention (U.N. Doc. CRC/C/153, para. 655). See also the Commentary to Rule 3.2 of the Beijing Rules.

The CRC contains numerous other provisions relating to child protection.[1573] In particular, Article 19(2) instructs States to ensure that children are protected from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse" and to implement measures "to provide necessary support for the child … as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment". Article 20(1) of the CRC covers the rights of children deprived of their family environment and instructs that children deprived of their family environment "shall be entitled to special protection and assistance provided by the State". Under Article 20(3) of the CRC, alternative care in a "suitable placement" should only be used as a special protection measure "if necessary". Such placements must be subject to judicial review and should only be used as a "measure of last resort".[1574] The United Nations Guidelines for the Alternative Care of Children[1575] require States to prevent the need for alternative care through programming and services[1576] and that decisions regarding the use of alternative care should "take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings".[1577]

2. Domestic framework

The Government of Tajikistan has recognised the need to reform the child protection system and has been taking steps to introduce changes in policy, law and practice. The government has established the National Commission on the Rights of the Child, which has responsibility for implementing the CRC.[1578] There has not yet, however, been a fundamental legislative overhaul, though amendments to the Family Code are currently being considered. There has, though, been visible change in local practice, which has resulted in a fall in the numbers of children being administratively detained. This has been due both to new regulations, passed in 2008, but perhaps more importantly, is due to changes in approach by both local and central government.

3. Local administrative structure

Until 2008, the Commission on Minors, an administrative body in each local government area, was the primary body with the power to administratively detain children. However, in 2008, the Commission on Minors was formally abolished and its "functions and powers [transferred] to the Commission on the Rights of the Child".[1579] Under the Commissions on Child Rights Regulations 2008, the local commissions are responsible for considering cases relating to children who have committed "socially hazardous" actions stipulated by the Criminal Code of the Republic of Tajikistan, while under the age of criminal responsibility, and children who have committed "anti-social actions".[1580] The Commission on the Rights of the Child can also

[1573] For example, Articles 3(2); 5, 6, 7, 8, 9, 10, 11, 12, 16, 18, 19, 20, 21, 25, 26, 27 of the CRC.
[1574] United Nations Committee on the Rights of the Child, Day of General Discussion on Children without Parental Care: Report on the Fortieth Session (Geneva, 12 to 30 September 2005) (2006), U.N. Doc. CRC/C/153, paras. 654, 655.
[1575] Human Rights Council, Guidelines for the Alternative Care of Children (2009), U.N. Doc. A/HRC/11/L.13.
[1576] Ibid., Section IV.
[1577] Guideline 56 of Guidelines for the Alternative Care of Children.
[1578] Regulation 1 of Regulations About Safeguarding Protection of the Rights of the Child, 1 August 2008, No 377.
[1579] Ibid.
[1580] Ibid., Regulation 10.d.

consider cases and apply "measures of influence" in relation to children "who have problems with education and behaviour",[1581] with the consent of the parent. None of these terms are defined in the regulations giving local commissions a wide discretion.

After considering a child's case, the Commission on the Rights of the Child may refer the child directly to residential care institutions, including the closed institutional facilities, which include the Special Vocational School and the Special School.[1582] In a case where it is proposed to send a child with educational or behavioural problems to one of the closed institutions, the regulations require that a parent and a child who is over the age of 10 must consent.[1583]

As yet, it has not been possible to establish a local Commission on the Rights of the Child in every area in Tajikistan, and in some localities, its predecessor body, the Commission on Minors, remains and continues to function. Where the old Commission on Minors still exists, it is unclear whether it applies the old or new regulations in undertaking its work. However, this is mitigated by the fact that there is little difference in legal terms between the two sets of regulations. Where the Commission on Minors[1584] continues to function, it has jurisdiction over cases of:

a) juveniles under 14, who have committed socially dangerous acts;
b) juveniles from 14 to 16 years old, who have committed socially dangerous acts which are not foreseen by article 10 of the Criminal Code of the republic of Tajikistan;
c) juveniles who commit other anti-social behaviour;
d) juveniles who deviate from school or work.[1585]

Under these regulations, the Commission on Minors has the authority to hear cases and to place children in the closed, educational institutions (the Special School and the Special Vocational School). The Commission may also extend the period of detention of a child, if additional time is "required" in order for the child to graduate from his educational programme.[1586] This means that a child can be held in a closed educational facility until he reaches the age of 14 in the case of the Special School, or 18 for the Special Vocational School,[1587] even if the child's sentence is completed prior to that time. The regional Commission on Minors may review the referrals by local and district level bodies to closed educational institutions.[1588]

Child rights departments

In addition to the reformed Child Rights Commission and the remaining Commission on Minors, the United Nations Children's Fund and the Government of Tajikistan have piloted several child rights departments, which combine some of the functions of the Commission on Minors and Guardianship Authorities to work within local government to "provide and protect the rights and interests of the child".[1589] The relationship between the Child Rights Commission and the child

[1581] Ibid., Regulation 10.e.
[1582] Ibid. Regulation 11.
[1583] Ibid., Regulation 10.e.
[1584] Members of local and district level Commissions on Minors included representatives of the police, prosecutor's office, schools and social protection agencies.
[1585] Regulation 17 of Regulations on the Commission on Minors, No. 178 of 1995.
[1586] Ibid., Regulation 24.
[1587] Or even older if the child takes longer to complete his educational programme.
[1588] Regulation 15 of the Regulations on the Commission on Minors, No. 178 of 1995.
[1589] Ch. 2, Article 1 of Regulation of Child Rights Department.

rights departments is evolving and, at the moment, the child rights departments prepare children's files for review. The departments refer complex cases, such as cases of children they believe should be detained, to the Commission on Child Rights or the Commission on Minors, who then make the decision on detention.

Service on Prevention of Delinquency among Minors and Youth (formerly known as the Inspection on Minors)

The Service on Prevention of Delinquency among Minors and Youth is the law enforcement body charged with police actions relating to children.[1590] Police officers[1591] in this service have the authority to identify and detain children who are found without family care and who need protection, as well as those who are in conflict with the law. This body is relatively new, its regulations having been approved in February 2009.[1592]

Within the Service, the Department of Prevention of Delinquency among Minors works with children under the age of 18. Police officers in the department carry out largely preventative work with children, identifying and working with those at risk of offending[1593] either by working within schools and the community, or by interacting with the children directly on the street, and issuing children with "preventive record cards" which contain details of offending and dangerous behaviour.[1594] In addition, police officers conduct "sweeps"[1595] on markets and areas where it is known children live and work on the streets, in order to gather up children who are without family care. Any children that they find without care are removed and taken to a temporary isolation centre.

Administrative detention

1. Temporary isolation centres for juveniles

There are currently two temporary isolation centres for juveniles, one in the capital, Dushanbe, and one in Khujand, in the north of the country. A further centre is planned for Khatlon. Up until 2005, the purpose of the temporary isolation centres was to deal with child neglect cases and control of juvenile delinquency.[1596] Since 2005, and the passing of the new regulations, the purpose of the centres is to provide temporary and emergency protection to children aged 3 to 18 in "exceptional circumstances". The centres also admit children who are minor offenders whose

[1590] See Regulation On 'Service on Prevention of delinquency among Minors and Youth' under the Ministry of Interior of the Republic of Tajikistan, No. 140, 25 February 2009.
[1591] Formerly known as Inspectors on Minors.
[1592] Instruction on organising the work of internal affairs divisions in charge of juveniles' affairs, approved by Decree No. 140 of 2009.
[1593] There is no clear definition in the regulations of who is deemed to be at risk of offending. However, it can include children who are not regular school attenders, or who are not enrolled in a school, children who have alcoholic or drug using parents, children who are regarded as having been involved in anti-social behaviour or who have committed a petty offence which has not been prosecuted.
[1594] Ch. 2 Regulation on 'Service on Prevention of Delinquency among Minors and Youth'; Instructions 2, 34 of Instruction on organising the work of internal affairs divisions in charge of juveniles' affairs, approved by Decree No. 140 of 2009.
[1595] Instruction 7.2.6 of Instructions on organising the work of internal affairs divisions in charge of juveniles' affairs, approved by Decree No. 140 of 2009.
[1596] Regulations on the Temporary Isolation Centres for Juveniles 2004 (un-numbered regulations).

cases are under investigation and takes measures in relation to both sets of children to reintegrate them within their family, to children's institutions or to educational institutions.[1597] Children who are admitted as minor offenders for investigation are kept separately from children who are in need of care and protection. In practice, it is very rare for the temporary isolation centres to receive offenders. Despite the fact that the temporary isolation centres house children who are primarily in need of care and protection, the centres remain under the authority of the Ministry of the Interior.

Children can be placed at a centre on a temporary or emergency basis if they:

a) Are abandoned or asked to leave the parental home or lost;
b) Are without parental care as a result of a parent's death or incapacity or due to a parent's temporary inability to care for them;
c) Are at risk of suffering significant harm if not immediately removed from the parents or guardians care;
d) Have committed a criminal act under the age of 14 and are beyond the control of the parents;
e) Have run away from a residential care/orphan home, educational, training or other institution;
f) Are to be sent to a special educational school for children and teenagers in need of special upbringing conditions:
g) Are to be sent to special vocational establishments;
h) Are to be sent to medical educational establishments;
i) Personally request help from the centre or are brought to the centre by citizens.[1598]

The regulations require that admission to the centres should be on the basis of a resolution from the Commission of Minors except in relation to a child who presents him or herself for admission, in which case the chairperson of the centre can sign a resolution permitting admission. While a few children are taken to the centres by neighbours or by family members, most of the children are admitted following "raids" by police officers on markets and other places where children congregate.[1599] As the majority of admissions are unplanned, it is not possible to obtain a resolution before admission. The resolution will be obtained some days later. The child is not present when a resolution is made and is not legally represented. There is no right to a hearing before an independent and impartial body to challenge the resolution. Indeed, the child is unlikely to be informed that a resolution has been obtained.

Children can be detained at a temporary isolation centre for a period of up to 30 days.[1600] Although the reform in 2005 ensured that the regime of the centres is now focused on family reintegration, with staff undertaking assessments of children and producing care plans, placement in the centre nevertheless still amounts to administrative detention. At the end of this period, some children will be returned to their biological or extended families. If this is not

[1597] Regulations on Temporary Children's Centres, No. 774 of 2005, Reg.1.1 and 1.2. The English version of the regulations refer to the temporary children's centres. The Russian version kept the name of the centre as the temporary isolation centres.
[1598] Regulation 15 of Regulations on Temporary Children's Centres, No. 774 of 2005.
[1599] Ibid., Regulation 17.2.
[1600] Ibid., Regulation 19.

possible or suitable, an alternative placement will be found. For younger children (those under the age of 10) this will be placement in a children's home. Older children are more difficult to place. They may not find a children's home willing to accept them, and will face further administrative placement in the closed Special School or Special Vocational School.[1601]

According to official data from the former director of the a temporary isolation centre, the centre admitted a total of 233 children in the first nine months of 2007, 19 more than the same period in 2006. Of these, 217 were returned to their families, with the rest sent either to the Special School (1 child) and Special Vocational School (3 children) or to boarding schools. During the nine months in which the data were gathered, the director reported that seven of the children were kept beyond the initial 30-day time frame "because of lack of funds and failure to arrange papers on time in order to send them to different settlements".[1602]

Prior to 2005, under the previous regime, children were locked in a room at all times, and could not leave the room without a warder accompanying them. The new regulations of the temporary children's centres provide that a child may not be deprived of his or her liberty. However, the regulations define deprivation of liberty as a situation where a child is placed in a locked room within a centre from which he is not permitted to leave at will.[1603] While children are not now locked into rooms and can move freely within the centre, they are not able to leave a locked centre at will.

Such detention raises a common dilemma. It can, with reason, be argued that the welfare of the child is central to the centres' regime, and that, in some cases, it is in the child's best interests to remain at a centre rather than to be placed at immediate risk of living on the streets or in a neglectful and sometimes abusive family. However, it can be counter-argued that there is little evidence that children would run away from open facilities that meet their needs,[1604] and, therefore, little reason to keep the children in a locked facility for such a length of time. Part of the reason for the continued use of administrative detention at a centre is the lack of an alternative. The centres could very easily be replaced by the provision of emergency beds in a number of the open children's homes or by developing foster care and placement of children in need of emergency protection in the community. This would, however, require a coherent reform of the entire child protection system, which Tajikistan has still to develop.

2. Detention at the Special School

The Special School, which is under the control of the Ministry of Education, was established for juvenile delinquents who have committed serious public crimes or deliberately violated public order.[1605] The stated purpose of the Special School is to provide re-education based on proper

[1601] United Nations Children's Fund, Questionnaire Response, Tajikistan, 2009, 9.
[1602] Colonel H. Sh. Rahimov, head of the Temporary Isolation Centre, 'On implemented activities by Juvenile Temporal Isolation Centre of the MoI of the Republic of Tajikistan', 2007, 4.
[1603] Regulation 2.4 of Regulations on Temporary Children's Centres, No. 774 of 2005.
[1604] There was little evidence from children's homes that children absconded when research was undertaken for the 'Analysis of the Child Protection System in Tajikistan UNICEF', 2008.
[1605] See preamble, Regulation of the Republican Special School for Children and Teenagers who need Special Education. The Regulations which also cover the Special Vocational School are made up according to the approved Regulation of the Ministry of Education of the Republic of Tajikistan (dated 27 March 2002, No. 134) and the

pedagogical approaches,[1606] and to prevent bad behaviour. The Regulation of the Special School for Children and Teenagers who need Special Education (the Special School regulations)[1607] provides that children placed at the Special School are not allowed to leave the territory of the school without special permission of the administration. The regulations permit boys aged 11 to 14 and, up until 2009, girls[1608] aged 11 to 16 to be admitted to the Special School.

The Special School regulations provide that the Commission of Minors may place a child at the Special School and, so too, may parents or guardians and the temporary isolation centre. The District Commissions on the Rights of the Child (the successor body to the Commission of Minors) continue to operate in a similar way under very similar Regulations. Under its regulations, the Commission on the Rights of the Child can consider complaints and applications from parents, lawful representatives, bodies and establishments of the child protection system and other bodies whose activity is associated with the protection of the rights and lawful interests of the child[1609] relating to children who have committed "socially hazardous" acts (i.e. criminal acts while under the age of criminal responsibility) or "antisocial actions", and children who have educational and behavioural problems.[1610] The terms 'socially hazardous', 'anti-social' and 'problems with education and behaviour' are not defined in the regulations, but evidence from children's files indicated that this includes not attending school, not being enrolled in a school, or being rude and disrespectful to parents and/or teachers.[1611]

Before being considered by the commission, a referral should be examined by the Department on the Rights of the Child[1612], although it is unclear what the department is expected to do or to contribute as a result of that examination. Once the case has been considered at a preliminary stage the chairman of the commission may decide whether to hold a hearing. If a hearing is to be held, it must take place within five days and the materials for consideration must be sent to the child and the parents and defence counsel.[1613] The Commission on the Rights of the Child has the power to compel the child, the parents, and any other relevant person, to appear before the commission if they fail to attend.[1614]

Having reviewed the materials and heard the explanation of the child, parents, victims, witnesses and defence counsel and other relevant persons, the commission has a range of options, which

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Regulation of General Educational School, approved by the Government of the Republic of Tajikistan (Dated 12 October 1995, para 626) referred to as the Special School or Special Vocational School Regulations.

[1606] Ibid., preamble.

[1607] Ibid., Regulation 1.2.

[1608] All administrative detention of girls ceased after May 2009. All girls at risk of placement in administrative detention in the Special School are now referred to the Girls Support Centre, an open therapeutic centre for abused and exploited girls.

[1609] Regulation 15 of About Safeguarding and Protecting the Rights of the Child, August 1, 2008, No 377.

[1610] Ibid., Regulation 10.

[1611] The Children's Legal Centre, a United Kingdom NGO working in Tajikistan, examined the files of every child detained in the Special School in 2006/7. The information is taken from this review. Information was also received from the Children's Rights Centre, a Tajik NGO based in Dushanbe, which provides legal representation to children at the Special School.

[1612] Ibid., Regulation 16

[1613] Ibid., Regulation 16. The time period of five days can be extended if the child and parents are not present, as a case cannot, according to the regulations, be considered in their absence

[1614] Ibid., Regulation 18.

include administrative detention of the child in the Special School or the Special Vocational School. If a decision is made to place the child in either of these closed institutions, the child can be placed for up to three years, and kept a further year in order to finish his education. If a child "failed" to correct his behaviour during this period of time, he could, under the old regulations, be referred for a further period of administrative detention in the Special Vocational School, until the age of 18. It was possible, therefore, under the old regulations, to spend up to seven years in administrative detention for truancy or other anti-social behaviour. That provision is no longer contained in the new regulations, but nevertheless, the periods for which a child can be detained are long and cannot be regarded as for 'the shortest appropriate period of time', as required by Article 37(b) of the CRC.

Neither the old nor the new regulations contain any provisions relating to the necessity for the Commission on the Rights of the Child to make findings of fact before ordering administrative detention. Neither is there anything in the regulations relating to the burden of proof or standard of proof to be applied when determining whether the child has committed socially dangerous acts or 'anti-social' behaviour. Nor do the regulations refer to the right to legal representation or require that a child be provided with free legal representation. The regulations permit a child to appeal the decision of the commission, within a period of 10 days, to a higher commission and then to a court.[1615] However, there is no evidence that children are informed of this right, nor that any such appeals have ever been made.

While the 2008 Regulations, and indeed the earlier regulations, appear to implement the safeguards contained in Article 9(4) of the ICCPR and Article 37(b) of the CRC safeguards, in practice, it would appear that procedures set down in the old regulations were not always followed in the past, and the majority of children were placed unlawfully and not in accordance with domestic law.[1616] There is as yet, no firm evidence on practices by the new Commission on the Rights of the Child, but it is likely that at least some of the failures of the old Commission of Minors will be repeated. The vast majority of children interviewed at the Special School during the last five years, were not present at Commission of Minors meetings that made the decision to administratively detain them, and were not informed that such meetings were to take place, nor of the accusations against them.[1617] Children were not represented and their views on the allegations not presented. Further, there was no fact finding by the commission before a decision to place was made. Also, in the case of some children, the principal of the Special School admitted the children at the request of the parents or the police, and then sought authorisation from the Commission on Minors (as it was then). In some cases, children were admitted under the age of 11 and kept in detention for more than three years. In addition, children placed at the Special School were not in conflict with the law for having "committed serious public crimes or deliberately violated public order", as required by the Special School regulations, but rather were the children of poor, and often single-headed households or

[1615] Ibid., Regulation 22.
[1616] Research carried out by the Children's Legal Centre, UK and the Children's Rights Centre, Dushanbe. Reports: <www.childrenslegalcentre.com> [accessed 29 January 2011].
[1617] Ibid. Children were interviewed over a period of four years. All children who were due to leave the school were interviewed by the Children's Legal Centre UK or the Children's Rights Centre, Dushanbe, as part of the reintegration process. Children were also offered legal representation by the Children's Rights Centre when in the Special School and on leaving. The files of all these children, and of those who entered the school during a two year period, were reviewed.

reconstituted families and in need of care and protection. The detention of many of these children must inevitably be regarded as arbitrary.

In 2008, the government took a decisive step towards reducing the number of children subject to administrative detention in the Special School. It introduced a new regime, which focused on child protection and family reintegration of the children already detained in the centres. At the same time, the new Commission on the Rights of the Child took a more professional approach to assessment and consideration of children's cases, with referral to the Special School becoming rarer. The government passed a decree in 2009[1618] prohibiting any further administrative detention of girls, who are now referred instead to the open, therapeutic Girls' Support Centre and, at the same time, it supported the expansion of the Juvenile Justice Alternatives Project which works with petty offenders and children at risk of offending to address offending behaviour and keep children in their families. As a result of these actions, the numbers of children detained at the Special School has dropped from around 105 at the beginning of 2009 to around 45 in May 2010.

3. The Special Vocational School

Boys who are aged between 14 to 18 years and who are "juvenile delinquents" may be administratively detained at the Special Vocational School to "put them in the right way".[1619] The purpose of the Special Vocational School is to improve, re-educate and create better conditions for children. Children are not free to leave at will. Children can be admitted on the same terms as to the Special School.

As with the Special School, when files of the children detained at the Special Vocational School were examined by researchers,[1620] the majority of the children were unlawfully placed: children were under age; were taken to the School by the police, friend or relatives, and their placement "rubber stamped" by the Commission of Minors.[1621] Deprivation of liberty is not a measure of last resort and neither is it used for the shortest appropriate period of time, as required by Article 37(b) of the CRC. Further, the safeguards provided by Article 9 of the ICCPR and Article 37(d) of the CRC, are rarely implemented. None of the children present at the school in 2006, for instance, had any recollection of having appeared before the Commission of Minors and none knew that they had a right to challenge the placement in court.

[1618] Decree of the Council of the Ministry of Education 2009, No. 16/25, 31 October 2009.

[1619] Regulation on the Special Professional School of the Republic of Tajikistan dated 12 October 1995 No 626, to be found within the Regulation of the Republican Special School for children and teenagers who need special education. See para. 1.

[1620] See Hamilton, Carolyn, 'Children who are in Conflict with the Law: Report of the Expert Group', UNICEF Tajikistan, 2006, para. 10.8. Further examination of the files was undertaken by the Children's Legal Centre at the request of the Ministry of Labour and Social Protection. As a result of the concerns, a process of family reintegration was put in place by the Ministry of Labour and Social Protection. Responsibility for the Special Vocational School was passed to the Ministry of Education in 2007.

[1621] Ibid., paras. 11.00–11.6; Children's Legal Centre and UNICEF, 'Special Vocational School: Options and Recommendations for Change', 2005. In a number of cases, the criteria for placement were not met, and the files contained no evidence as to why the child was placed. In the case of one child, the only document in the file was the child's identity document.

In addition, none of the children were legally represented when the decision was made on placement.[1622] Although the prosecutor's office and the Commission of Minors (now the Commission on the Rights of the Child) have the right to monitor the Special Vocational School, little if any monitoring appears to take place. There is also no regular review of children's cases as required by Article 25 of the CRC, and children once placed at the Special Vocational Schools are largely forgotten by anybody outside the institution. The conditions in the Special Vocational School remain poor and in breach of the requirement in Article 37(c) of the CRC that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person. The conditions also breach many of the provisions of the Havana Rules relating to environment and regime, including that children are subject to a poor diet, harsh discipline and a lack of stimulation.[1623] Conditions overall must be regarded as detrimental to children's health and welfare.[1624] Until recently, little attempt was made to ensure children were kept in contact with their families[1625] and no form of social work was undertaken with the families to assist children to reintegrate when released.[1626] When the child leaves he is likely to be without any form of family or social support network or employment.[1627] Numbers of children detained have again reduced, from 47 in 2005 down to a figure of under 20 in May 2010.[1628]

4. Alternatives

Tajikistan, like many developing States, has few alternatives to detention. However, alternative sentencing and diversion projects in five pilot areas accept referrals of children aged 10 to 18. A 2008 evaluation of the pilot Juvenile Justice Alternatives Projects (JJAPs) in Tajikistan demonstrated a tremendous impact on the lives of those children who were referred. The study found that:

- Over 250 children had participated in the JJAPs in Dushanbe and Sughd Oblast.
- There was an average drop in arrest rates of children of 42 per cent from 2006 to end of 2007 in the recorded rate of juvenile offending in the districts of Dushanbe where the JJAPs are operating. In the same period, the rate of juvenile offending countrywide in the country rose by 3 per cent.[1629]
- Only six of children who participated in the JJAP programmes (less than 3 per cent) were known to have re-offended over a period of two years after completion of the programme.[1630]

The very low rate of re-offending and the approval of the police, the prosecutors and the local Commission on the Rights of the Child for the projects have all contributed to a willingness to refer children to the JJAPs rather than place the child in administrative detention.

[1622] Hamilton, C., op. cit. Author's notes on interviews with children at the Special Vocational School.
[1623] See Section IV of Havana Rules.
[1624] See Hamilton, C., op. cit., paras. 9.6–9.9.
[1625] Rules 59–62 of Havana Rules.
[1626] Rules 79, 80 of Havana Rules.
[1627] See Hamilton, C., op. cit.
[1628] Figures provided by the Children's Rights Centre, Dushanbe.
[1629] Arrest rates, Ministry of Internal Affairs.
[1630] Children's Legal Centre, Promoting children's rights in the juvenile justice system in the Republic of Tajikistan: Evaluation of the Juvenile Justice Alternatives Projects, 2008. Reoffending rates are based on known cases of reoffending and rely on information gathered by the steering committees and from the pre-trial detention centre and Juvenile Colony in Dushanbe.

Conclusion

The system of administrative detention of children who are under the age of criminal responsibility or who are deemed to be 'anti-social' in Tajikistan has, until recently, been inadequately regulated and has resulted, at times, in arbitrary and therefore unlawful detention.

Although a country of very limited resources, and without an effective child protection system, Tajikistan has significantly reduced its use of administrative detention. The drop in the numbers of children detained, and the introduction of more child focused regimes at the temporary children's centres and the Special School, has been due to a combination of factors, the most important of which have been political will, research and the presentation of empirical evidence, public awareness raising, training and the introduction of alternatives to detention over a period of six years. There are still, however, approximately 60 children in administrative detention in the Special School and Special Vocational School, with more than 200 children a year administratively detained at the temporary children's centre for up to 30 days.

Although the National Commission on the Rights of the Child has taken a number of steps to reduce administrative detention, this reduction has occurred mainly through changes in practice. Substantial policy change has been lacking, as has a fundamental legal review of child protection. As a result, administrative detention still continues. In addition, many of the alternatives to detention, including the Girls Support Centre and the JJAPs are run by NGOs. While these are supported by the government, they are not as yet funded by them. The government needs to embed these alternatives in policy and legislation and to establish an effective child protection system in order to reduce the use of administrative detention.

13. Conclusion and recommendations

This study illustrates that children are subject to administrative detention for a wide variety of reasons, including for the control of immigration; as a security measure in relation to captured children used by armed forces or groups or enemy combatants; as a preventive anti-terrorism measure, to treat or sometimes to contain children who are suffering mental or physical health problems; to provide care and protection to certain groups of children, including children without parental care or children living and working on the streets; as a measure for children who commit criminal acts while under the age of criminal responsibility or who misuse drugs or alcohol; and as a means of containing children who are regarded as anti-social or whose behaviour is out of control. Administrative detention is also widely used by the police to permit them to investigate an alleged crime before a decision is made whether or not to charge a child with a criminal offence.

While international law permits the use of lawful administrative detention in certain limited circumstances, subject to safeguards set out in the CRC, the ICCPR and a range of other international and regional instruments, the use of administrative detention in relation to children remains highly problematic. Examples of State practice contained in this study indicate that children are routinely exposed to illegal and, in some instances, arbitrary administrative detention, contrary to Article 37(b) of the CRC and Article 9(1) of the ICCPR. There is little evidence that when an executive body is deciding whether to impose an order for administrative detention, the safeguards provided to children by the CRC and ICCPR are implemented.

Evidence from this working paper indicates that children may be placed in detention without a hearing, and in some instances without being informed or invited to be present at a hearing, and without the legal assistance or representation to which they are entitled. Many children are not informed of their right to appeal the decision to place them in administrative detention or are not provided with such a right. Evidence was provided to the working paper that some children remain in administrative detention for years, without any effective judicial review of the initial executive decision to place them in detention. In addition, in many States, the conditions of detention may give rise to other human rights violations, in failing to protect children from torture and cruel, inhuman or degrading treatment or punishment,[1631] and denying them their right to education, health and a range of other rights.

Unlike judicial detention, the use of administrative detention is largely unmonitored with virtually no oversight by the courts or independent monitoring bodies. The lack of data on children subject to administrative detention, the lack of judicial intervention in the decision to detain, and the lack of monitoring all lead to the "invisibility" of this group of children. This working paper confirms the view of the Special Rapporteur on the independence of judges and

[1631] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, p. 85.

lawyers that the use of administrative detention can be highly contentious, and should be used only in exceptional circumstances.[1632] Unlike judicial decision-making, which provides a means of "containing any authoritarian excesses and ensuring the supremacy of the law under all circumstances",[1633] administrative detention poses a considerable risk that the child will be denied the safeguards to which they are entitled and the guarantees of independence, impartiality and transparency that characterise the decision-making of a judicial body. Despite this, States appear to be increasing their use of administrative detention in certain contexts, and there is concern that some States are using administrative detention in circumstances that are not exceptional.

The working paper has found that administrative detention of children is widespread, with virtually every State using some form of administrative detention. The number of children subject to administrative detention is, however, impossible to calculate, due to the lack of available data on the topic, but it is likely to affect millions of children, with a recent report estimating that one million children are held in immigration detention alone.[1634] Few States collect or collate statistics on the use of different forms administrative detention. Those that are able to provide some form of statistical data rarely provide the full range of information, with most failing to record the reasons for such detention or the length of detention of each child. Information on the number of children subject to administrative detention has therefore been obtained for this study largely through State reports to United Nations treaty bodies, from United Nations missions, from expert reports and from NGO reports. The lack of data on the use of administrative detention is accompanied by a general lack of external monitoring of its use, not only by the courts, but also by any inspection body independent of the executive body that imposed the administrative detention. The lack of statistics, the lack of judicial oversight and the lack of legal representation for children, combined with the lack of external inspection, all contribute to a conclusion that the rights of children subject to administrative detention are not being adequately protected.

It has been notable in research undertaken for this working paper, that many of the children who are subject to administrative detention are either without parental care or have been the subject of inadequate parental care when they enter administrative detention. This may be as a result of a child being an unaccompanied asylum seeker, as a result of conflict, displacement or migration, parental death, abandonment, neglect or estrangement from the family. Many of the children administratively detained, even if they have family, have infrequent contact with their family. This may be for a number of reasons, including distance of the detention centre from the family's home, family breakdown, illness or contact having been withheld due to abuse of the child. The lack of a family to represent the child and to ensure that his or her best interests are considered and given weight by the executive body considering whether to administratively detain the child heightens the child's invisibility in the system. This leaves the child at increased risk of unlawful or arbitrary detention, particularly in States with less developed legal systems or with little by

[1632] See United Nations Commission on Human Rights, 'Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile' (1964), U.N. Doc. E/CN.4/826, Rev.1, paras. 738–787.
[1633] United Nations Commission on Human Rights, Civil and Political Rights, including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (2003), U.N.Doc. E/CN.4/2004/60, para. 29.
[1634] International Detention Coalition, Media Release, 'Universal Children's Day - Countries must stop the detention of children', 20 November 2009.

way of monitoring mechanisms. At present, few States provide a child who is at risk of being placed in administrative detention, or who has been placed in administrative detention, with a guardian, befriender or other similar person to assist the child to make his or her voice heard and views known, or to represent the best interests of the child. Without such a person, or a legal representative who remains the representative of the child once he or she is placed in administrative detention, it is unlikely that the child will be able to exercise the right to challenge the legality of the detention or the lack of a review.

Given the findings of this study, and the wide-ranging failure to ensure the safeguards provided to children who face administrative detention are available, it is perhaps surprising that administrative detention of children receives so little international attention. The use of administrative detention by a State rarely features in State reports to the Committee on the Rights of the Child or in the Committee's concluding observations to those reports. The search of United Nations treaty body documents carried out for this working paper evidenced that, in general, administrative detention is not "on the radar" of human rights monitoring bodies, except, perhaps for a few limited examples (for example, in the case of Israel or the United States).

As has been seen in this working paper, there are no detailed international standards applicable to administrative detention, and none that relate specifically to the administrative detention of children. Existing international legal provisions provide some guidance, but lack the level of detail required to protect children's rights. The existing instruments are either not intended to apply specifically to children (as is the case, for example, in relation to Article 9 of the ICCPR) or are intended to apply predominantly to detention within the criminal justice system (as is the case for Article 37 of the CRC). As a result, the legal basis on which States may place children in administrative detention, the time limits for the detention, and the safeguards that should be made available, are inadequate and there are no detailed provisions as to when States should permit its use. The lack of international standards on administrative detention generally, has been raised by the International Commission of Jurists, who have expressed concerns that "although states practice administrative detention, its definition in international law is not finalised and the various rights of persons held in administrative detention are not sufficiently guaranteed."[1635]

Children are uniquely vulnerable when subject to administrative detention. Due to their age, and in some cases, their lack of capacity, the different needs and rights of children and their general invisibility once administratively detained, the lack of child-specific standards on administrative detention is an even greater cause for concern. The lack of child-specific international standards may also, in part, explain the lack of monitoring by international bodies of the administrative detention of children.

New or enhanced international standards are needed to set out explicitly the very limited circumstances in which States may place children in administrative detention, to regulate the procedure for such detentions and define, with sufficient specificity, the safeguards that should be provided to all child administrative detainees.

[1635] Leila Zerrougui, 'Administrative Detention and Respect of Basic Rights', *Just Law: ICJ Newsletter*, January 2008, 3.

Recommendations

As noted above, there is an absence of international standards and guidance on the use of administrative detention, and particularly its use in relation to children. Without such standards, unlawful and arbitrary administrative detention contrary to the CRC is likely to continue in many States across the world. This study would recommend that an additional set of rules be drafted to sit alongside the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules) and the United Nations Guidelines on the Administration of Juvenile Justice, (Vienna Guidelines) setting out the legal basis for administrative detention, the procedures to be followed, the safeguards to be applied and the rights to be assured to children held in administrative detention.

This working paper would recommend that any new rules contain:

A presumption against the use of administrative detention of children

- A provision that administrative detention should only be ordered where it is necessary to safeguard a child who presents a serious likelihood of immediate or imminent harm to themselves or others.
- Where administrative detention is permitted in domestic law, the provisions detailing the circumstances in which administrative detention may be ordered should be contained in primary legislation rather than secondary legislation. Such legislation should also specify, in accordance with Article 37(b) CRC, that administrative detention should only be ordered as a matter of last resort and where there are no appropriate alternativesny place of administrative detention should operate a child-centered and therapeutic regime.
- A clear statement that any executive body with power to order that a child be subject to administrative detention shall, in reaching its decision, treat the child's bests interests as the primary consideration.
- A requirement that domestic legislation should set out clear procedures to be followed and the steps to be taken before an order for administrative detention can be made.
- A clear prohibition on placement in administrative detention without the opportunity for the child and his or her parent to make representations and to be heard by the decision-making body.
- Where a child does not have a parent present to represent him or her, or the child lacks capacity, a guardian should be appointed for the child to ensure that the child's views and wishes are made known to the executive body and that the child's best interests are represented and promoted. The same guardian should also represent the child's views and wishes, as well as his or her best interests, when the matter is reviewed by the court. A guardian should be either a person with an interest in the child or a professional guardian with experience of working with children.
- In making the decision to place a child in administrative detention, decision-making bodies should be required to consider all other alternatives to detention before making an administrative detention order. Any detention order should set out the reasons for not applying alternative measures.

- Legislation should set clear time limits for administrative detention, which, it is recommended, should be for no longer than 24 hours, before a judicial order must be obtained to continue the detention. Judicial review of detention should be automatic and should not be dependent on the child initiating an appeal against the administrative detention decision.
- All children should have access to free, quality legal advice, acting through their guardian if they do not have the capacity to instruct a lawyer. The court should not make an order to continue the detention unless the child is legally represented.
- No child should be detained in a prison, nor should he or she be detained together with adults.
- Judicial review of administrative detention should be automatically carried out at regular intervals (at least every seven days).

Conditions of detention

- Any place of administrative detention should operate a child-centered and therapeutic regime.
- All States should develop and implement minimum quality standards covering the conditions of detention and the care of children.
- All States should ensure that the right to education is implemented by establishing schools in all administrative detention settings.
- States should be required to develop and implement regular independent inspection and monitoring mechanisms. All detention centres should be regularly inspected to ensure that all children are legally detained and that conditions meet minimum quality standards.
- Child protection approaches should be at the core of the goals and functions of detention centres, and include the realisation of such rights as education, health care, recreation, consular assistance, guardian protection and legal representation, among others.

Appendix 1. International instruments and documents

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Appendix 7. Compilation of excerpts from United Nations treaty body and related documents

This annex contains excerpts collected from a review of United Nations treaty body and other documents, which was carried out in order to identify countries that employ different forms of administrative detention of children. This included State Party initial and periodic reports, alternative reports and concluding observations submitted to the United Nations Committee on the Rights of the Child, the United Nations Human Rights Committee and the United Nations Committee against Torture. This was done for all States that underwent review by these committees within the past 10 years (from 1999 – 2009).[1636] It also contains excerpts collected from a review of country visit reports by the United Nations Working Group on Arbitrary Detention and annual reports submitted to the United Nations Security Council by the Special Representative of the Secretary-General on Children and Armed Conflict.[1637] All excerpts are quotations, and have not been altered.

Country	Information
Afghanistan	30. In its recent report to the United Nations Committee on the Rights of the Child, the United States acknowledged that 10 children below the age of 18 were in administrative detention at Bagram Airbase. The report also indicated that the United States does not have a specific policy for dealing with juveniles arrested or detained as a result of the conflict. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Afghanistan (2008).
	12. Children have been captured, arrested and detained by Afghan law enforcement agencies and international military forces because of their alleged association with armed groups. There is evidence of children being ill-treated, detained for long periods of time by the National Directorate of Security and prevented access to legal assistance, in contravention of the provisions of the Afghan Juvenile Code and international standards on juvenile justice. In November 2007, a 17-year-old boy arrested by the National Directorate of Security in relation to the murder of the head of the Department of Women's Affairs by the Taliban in Kandahar was detained with no charge until August 2008 and was allegedly severely beaten and deprived of food and sleep. He was later transferred to National Directorate of Security detention in Kabul, tried and sentenced to 15 years of imprisonment in Pul-i-Charki adult prison. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict (2009).
Algeria	5. While noting the amendments made to the Code of Criminal Procedure, the Committee remains concerned about reports that the maximum period of remand in custody (up to 12 days) can, in practice, be extended repeatedly. The Committee further notes with concern that the law does not guarantee the right to counsel during the period of remand in custody, and that the right of a person in custody to have access to a doctor and to communicate with his or her family is not always respected (art. 2). Source: United Nations Committee against Torture, Concluding Observations: Algeria (2008).
	18. While noting the amendments made to the Code of Criminal Procedure, the Committee expresses its concern over the length of police custody (up to 12 days), which, in practice, can also be extended further. The Committee further notes with concern that the law does not guarantee the

[1636] Where States had undergone two reviews by one Committee during this time period, only documents relating to the most recent review were considered.

[1637] The authors would like to thank the Coalition to Stop the Use of Child Soldiers for providing collated material from the annual reports of the Special Representative of the Secretary-General on Children and Armed Conflict on the detention of former child soldiers.

	right to remain silent or the right to see a lawyer during the period in police custody and that the right of a person in custody to have access to a doctor, to communicate with his or her family and to be brought before a court within a reasonable time, is not always respected (Covenant, arts. 7 and 9). 77. Detention in custody can be extended for up to 12 days: (i) Article 51 of the Code of Criminal Procedure stipulates that custody may not exceed 48 hours; (ii) After examining the case file, the State prosecutor may give written authorization to extend custody by a further 48 hours; (iii) Exceptionally, such authorization may be granted by a substantiated decision without the person concerned being brought before the prosecutor (art. 65); (iv) The above periods of custody are doubled when a breach of State security is involved. With the written authorization of the State prosecutor, they may be extended for a maximum of 12 days for offences qualified as terrorist acts; (v) In view of the foregoing, the extension of custody for up to 12 days applies only to persons involved in terrorism; (vi) As regards the length of the period of custody, which has been criticized for being excessively long, it should be noted that the legislator's decision to allow it to be extended to a maximum of 12 days is based on the nature and form of the crime, which is outwardly violent and highly organized, in that it has complex and often transnational ramifications and relies on networks based abroad; (vii) In view of the specific nature of this type of crime, it would be difficult, if not impossible, for the judicial police to conduct the various investigative steps required to dismantle terrorist networks if they could not impose a longer period of custody than that stipulated for investigations into ordinary crimes; (viii) Lawmakers therefore prescribed a maximum of 12 days' custody so as to enable judicial police officers combating terrorism to trace the leaders of complex terrorist rings and dismantle networks operating in different regions of Algeria and abroad. Source: United Nations Human Rights Committee, Concluding Observations: Algeria (2007).
Angola	264. Girls account for a significant percentage of the population in hostels and camps for displaced persons and refugees and therefore warrant special attention, owing to their degree of vulnerability and the risk of sexual exploitation or slavery. In many cases, such girls have not been identified or registered so their families can be traced. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Angola (2004).
	Many of the children stayed much longer in the camps than the intended six-month period, languishing for over one year…political manipulation account for some of the delays. (p.7). Some child soldiers…have been moved to transit centres and await resettlement…The government has repeatedly set deadlines for the closure of the camps and announced in April 2003 that many were officially closed…(p.15). Source: Human Rights Watch, Alternative Report to the United Nations Committee on the Rights of the Child, Forgotten Fighters: Child Soldiers in Angola (2003).
Argentina	62. The Committee notes…that, under article 205 of the Code of Criminal Procedure, a child may be held in incommunicado detention for a maximum of 72 hours… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Argentina (2002).
	In the first place it is necessary to differentiate two types of institutions: penal institutions (*Institutos Penales*) and non-penal institutions (*Institutos Asistenciales*) where children in the care of the state are placed. The latter are inhabited by children who have suffered from abuse…or whose families experience terrible effects of extreme poverty. Placement in non-penal institutions is decided by judicial authority, though in some cases, children are placed by the administrative authority (National or corresponding Provincial Council of Minors) without the consent of the family, or least of all the child. Source: *Colectivo de ONG's de Infancia y Adolescencia*, Alternative Report to the United Nations Committee on the Rights of the Child, The Implementation of the rights of children and adolescents in Argentina: Current Scenario, Challenges and Recommendations (2002).
	7. The Committee recommends that the State party…in particular that it should:(…) (g) As promised by the delegation of the State party in the case of the province of Buenos Aires, guarantee that the holding of minors in police units will be transferred to special centres, and that

	a nationwide ban will be imposed on the detention of minors by police personnel on "welfare grounds"… Source: United Nations Committee against Torture, Concluding Observations: Argentina (2004).
	55. The situation is particularly serious in the Province of Mendoza. The Working Group was told that the police in the province detain street children and child beggars in the city centre and take them to the police stations…Preliminary investigations are carried out in the police stations and a judicial file is opened…The Judge intervenes only a posteriori. 56. In the opinion of the Working Group, the main problem is that…Children who have broken the law are detained, but so too are completely innocent children, for their own protection. The delegation heard of a case of a child arrested on suspicion of committing a crime and who was declared innocent by a judge; nevertheless, the child was sent to a detention centre for his own protection…All of the children interviewed at the Social and Educational Guidance Centre (COSE) in Mendoza stated that they had never been taken before a judge. Source: United Nations Working Group on Arbitrary Detention, Mission Report: Argentina (2003).
Australia	A 16- or 17-year-old can be questioned for no more than two hours at a time and a warrant allows for their detention for 48 hours and can be extended to seven days (p. 44). Source: Defence for Children International, Alternative Report to the UN Committee on the Rights of the Child, The Non-Government Report on the Implementation of the UN Convention on the Rights of the Child in Australia (2005).
	62. The Committee…remains concerned that children who are unlawfully in Australian territory are still automatically placed in administrative detention- of whatever form- until the situation is assessed. In particular…that: (a) Administrative detention is not always used as a measure of last resort and does not last for the shortest period of time; (b) Conditions of immigration detention have been very poor, with harmful consequences on children's mental and physical health and overall development… 64. The Committee recommends…In particular, the State party should: (a) Ensure that children are not automatically detained in the context of immigration… (b) Seek an assessment by a court or an independent tribunal within 48 hours of the detention of a child in the context of immigration of whether there is a real need to detain the child… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Australia (2005).
Austria	586. According to §61 FrG Aliens may be arrested and detained (pending deportation) if this is necessary to secure proceedings with a view to the issuance of a residence ban or expulsion until it can be enforced… 587. The authority must seek to keep custody pending deportation as short as possible. It is limited to two months but if it is not possible to ascertain the person's identity and nationality, it can be extended to a maximum total of six months… Source: United Nations Committee on the Rights of the Child, State Party Report: Austria (2004), Annex A: Survey regarding the number of minors in custody pending deportation.
Bahrain	6. The Committee expresses its concern at: (d) Reports of incommunicado detention of detained persons following the ratification of the Convention and prior to 2001, for extended periods, particularly during pre-trial investigations; (e) The inadequate access to external legal advice while in police custody, to medical assistance and to family members, thereby reducing the safeguards available to detainees… (i) Certain provisions of the draft law on counter-terrorism which, if adopted, would reduce safeguards against torture and could re-establish conditions that characterized past abuses under the State Security Law. These provisions include, inter alia, the broad and vague definition of terrorism and terrorist organizations and the transfer from the judiciary to the public prosecutor of authority to arrest and detain, in particular, to extend pre-trial detention... Source: United Nations Committee against Torture, Concluding Observations: Bahrain (2007).
Bangladesh	46. The Committee recommends that the State party… in line with article 25 of the Convention, conduct periodic reviews of the placement of children and ensure that institutionalization is used only as a measure of last resort… 49… the Committee is concerned that child victims of abuse and/or exploitation are placed in "safe custody", which may result in depriving them of their liberty for as long as 10 years. 77… the Committee is concerned at: (d) The extensive discretionary powers of the police, reportedly resulting in incarceration of street children and child prostitutes;

	Source: United Nations Committee on the Rights of the Child, Concluding Observations: Bangladesh (2003).
	203… children are susceptible to abuse. This is likely to be the fate of the street children who are detained by the police on the pretext of being a "vagrant". Children found homeless and taken by the police are often confined in vagrant homes and shelters. 383… Since *the Vagrancy Act, 1943* lays down no limit to the period of detention; children are detained arbitrarily for long periods of time until they are produced before the Magistrate. Moreover, *the Vagrancy Act 1943 is* devoid of any provision allowing legal representation on behalf of the arrested person. Consequently, a neglected and homeless child is also deprived of the right to defend him/herself in a legal system, which, under the best of conditions, tends to be unjust. Source: United Nations Committee on the Rights of the Child, State Party Report: Bangladesh (2008).
	2.10.1… There are allegations that homeless and street children are rounded up by the law enforcing agencies, often for a silly cause or without any causes. They are then kept with the adult criminals in jails without recourse to legal protection. The Vagrancy Act 1943 lays down no limit to the period of detention and so children are detained arbitrarily for long periods of time until they are produced before the Magistrate. Besides, the Vagrancy Act 1943 does not allow legal representation on behalf of the detained person. Thus if a child is detained or arrested, he or she cannot defend him/herself in a legal system, which, under no circumstances can be termed as a lawful event. Source: Bangladesh Shishu Adikhar Forum (BSAF), Alternative Report to the United Nations Committee on the Rights of the Child (UNCRC) on the implementation of UNCRC in Bangladesh (2001-2006).
	… In the case of Bangladesh, Section 54 of the Code of Criminal Procedure gives the police broad latitude for arrest without a warrant or magistrate's order, paving the way for abuse. Odhikar investigated Section 54 arrests in 2001 in three districts over a period of nine months and found that women and children were taken off the streets at random and sent to shelter homes and jails. Moreover, they found that the majority of those arrested under Section 54 were from very poor backgrounds and that many arrests occurred for illegitimate reasons, for example to extract bribes, to fulfil informal arrest quotas or to settle political scores. Similarly, the Prevention of the Suppression of the Women and Children Act (2000) allows the authorities to take women and children into 'safe custody' which, contrary to its objective, can expose them to violence, including sexual violence, at the hands of the police…(p. 9) … A person can also be held in detention through provisions such as the Special Power Act 1974, through which the police can propose to the district commissioner (executive officer) who is also the district magistrate (judicial officer), that any person shall be detained for a certain period of time (p. 9). Source: Coalition to Stop the use of Child Soldiers, Alternative Report to the United Nations Committee on the Rights of the Child, Child Recruitment in South Asian Conflicts: Bangladesh (2007).
Belgium	705. Furthermore, where foreigners are concerned, the Act of 15 December 1980…contains no specific provision on prohibiting the administrative detention of a foreign minor. 708. The detention may not exceed two months. Nevertheless, the law provides the possibility of extending the detention by periods of two months when the necessary steps for removing the foreigner have been undertaken, when they are pursued with all due diligence and when there is still a possibility of repatriation within a reasonable period. Source: United Nations Committee on the Rights of the Child, State Party Report: Belgium (2000).
	However, when one analyses what the legislation and the conditions in which the detention takes place in the closed centres, it appears that the detention is not used as a measure of last resort and that it is not as short term as possible. The detention of non accompanied minors in the closed centres must be considered as an illegal measure by the Belgian authorities that is an inhuman and degrading type of treatment according to article 3 of the Convention on human rights (p. 106). Source: Belgian NGOs, Alternative Report to the United Nations Committee on the Rights of the Child (2002).
Benin	75. The Committee is concerned at reports of inhumane conditions in the juvenile quarters and reports that children can be detained for a long period of time in police stations and detention centres before trial and that children in detention centres are not always separated from adults. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Benin (2006).
	103. The time limit for police custody is exceeded in many cases and it seems that nothing is yet being done to enforce the law and the convention. Source: United Nations Committee against Torture, Concluding Observations: Benin (2008).

	40. In its decision DCC 97-053 of 17 October 1997, in the case if Mr. Blaise Francisco, the court found that the week-long detention of individuals by the crime squad in the central police station in Cotonou without taking them before a judge within the legal time limit was arbitrary, wrongful and in breach of the Constitution (Recueil 1997, pp. 227-230). Source: United Nations Human Rights Committee, State Party Report: Benin (2004).
Bhutan	65. The Committee recommends that the State party: (a) Enhance efforts in negotiations in order to find peaceful and prompt solution for either the return or resettlement of people living in refugee camps, with particular attention to children and reunification with their families. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Bhutan (2008).
Bolivia	269. Seventy per cent of the children are permanently interned. Although there should be a judicial decision, and transfer to the care of third parties is prohibited, these provisions are not complied with. Only 15 per cent of the children were placed in institutions by judicial decision; in the remaining cases the decision was taken by the departmental social services. Source: United Nations Committee on the Rights of the Child, State Party Report: Bolivia (2004).
Botswana	8. In December 2007, the Intelligence and Security Services Bill was signed into law by President Mogae… The law enables people to be arrested without warrant in cases where the Director General suspects that the person to be arrested has committed or is about to commit an offence which is a threat to national security… There is no process to determine that the suspicion concerning the threat is 'reasonable'… Source: Ditshwanelo, The Botswana Centre for Human Rights, Alternative Report to the United Nations Human Rights Committee (2008).
Burkina Faso	440. No specific provision is made for police custody of minors. Ordinary law is applicable. Consequently, minors under the age of 13 who are presumed not to be responsible for their actions may be held under police custody even though the cells in police stations and gendarmeries are cramped and overcrowded. Detention conditions are harsh and the time limit for custody (72 hours) is often not respected. Source: United Nations Committee on the Rights of the Child, State Party Report: Burkina Faso (2002).
Burundi	14. The principal violations of prisoners' human rights are: (m) Failure to observe the 14-day limit on police custody… Source: United Nations Committee against Torture, State Party Report: Burundi (2007).
	29. …many children accused of association with FNL armed groups… had been detained in military camps from September to December 2006 Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Burundi (2007).
Cambodia	65. … the situation of children detained for extended periods without being charged and without access to a lawyer or to a court; and the reports of detained children allegedly being subjected to beatings and other ill-treatment. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Cambodia (2000).
	18. … few if any children at YRC are sentenced by a court: children are mostly arrested and brought to the centre by police, and length of detention is decided by and internal committee of the YRC. Source: NGO Committee on the Rights of the Child, Alternative Report to the United Nations Committee on the Rights of the Child, Cambodia (2000).
	12. The Committee is concerned at statements in the report that the laws relating to arrest and preventive and pre-trial detention are not strictly observed… It is especially concerned that the provisions of the Transitional Criminal Code (arts 10-22), under which the court must order immediate release when a person is arrested without warrant, are not always complied with by the police authorities. It is also concerned about reports of obstruction of the judicial process by the police. 15. The Committee is concerned at reports that children are detained in juvenile detention facilities for considerable periods without charge, and without access to a lawyer or to court. It is particularly concerned that these children are subjected to beatings and to ill-treatment. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Cambodia (2000).
	73. (a) Some competent authorities have violated the procedure by detaining or arresting the accused without warrant; (b) Some police fail to bring the accused before a prosecutor within 48 hours after the time of

	detention. This is the result of a lack of means and capacity of competent agents. 74. …the Royal Government has adopted a legal amendment permitting the police to delay the period and detain the suspect longer, with appropriate reason and with the approval of the prosecutor. Source: United Nations Committee against Torture, State Party Report: Cambodia (2003).
Cameroon	101. There exist special public bodies responsible for children under three years of age and institutions which aim to re-educate and re-socialise maladjusted children aged between 10 and 18. 103. This means long-term institutional placement or adoption, which are administrative and judicial measures. Institutional placement is provided for under two drafts decrees. The first deals with early childhood institutions, i.e. day-care centres, childcare facilities and occasional care centres, and the second focuses on institutions for maladjusted children or juvenile delinquents, namely re-education centres, home-workshops, reception and transit centres and accommodation centres. Source: United Nations Committee on the Rights of the Child, State Party Report: Cameroon (2001).
	2.3 The OMCT has been particularly concerned about street children in Douala since setting up the CO [Commandment Operationnel], a special unit created by the Head of State. Indeed, this unit is under the orders to arrest anyone, including children, suspected of involvement in organised crime, found in the street at night (Babette Stern "*L'armée Camerounaise, le bois des Singes et le cardinal*", Le Monde, 07 February 2001). Children who sometimes belong to criminal gangs are among the main victims of the CO. 6.2 … the time limit provided for custody is often not respected. Indeed, the United Nations Special Rapporteur against Torture realised that a large number of people interrogated in police stations had been arrested over three days before, and that they had not been deferred to the public prosecutor's department. Such was the case of Mayo Calvin, 16, and four of his friends, arrested by the police and kept in custody. They were detained for over 10 days "while investigations were carried out." (Cameroun Actualités, "*Détentions abusives*", 30 December 1997). The Special Rapporteur against Torture also reports that the large majority of detained people are not aware of the reasons for which they re kept in custody, let alone its potential duration. Scarcely any of them know their rights, such as the right to have a lawyer. …Because of the inefficiency of social services for children, local organisations often have to contact police stations to gather information on cases, and on the condition in which these people are kept (International Observatory of Prisons). 6.2.2 In Cameroon, the 18 October 1989 circular on preventive detention indicates the measures to be taken with regard to detained people…there is no legal framework giving temporal limits of preventive detention. As a consequence, people in detention may stay in prison for several weeks, and even several months. Indeed because slowness of the judicial system, preventive detentions often last for up to 2 years. Source: World Organisation Against Torture (OMCT), Alternative Report to the United Nations Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child by the Republic of Cameroon (2001).
	5(b) The period of police custody may, under the draft code of criminal procedure, be extended by 24 hours for every 50 kilometres of distance between the place of arrest and the place of custody; (c) The time limits on custody are reportedly not respected in practice…(f) There is no legal provision establishing the maximum duration of pre-trial detention… Source: United Nations Human Rights Committee, Concluding Observations: Cameroon (1999).
	19. The Committee is deeply concerned that a person held in administrative detention, under article 2 of Law No. 90/024 (19 December 1990), may have his detention extended indefinitely with the authorisation of the Provincial Governor or the Minister for Territorial Administration, and that such person has no remedy by way of appeal or application of *habeas corpus*. Source: United Nations Human Rights Committee, State Party Report: Cameroon (1999).
	13. The Committee regrets that it did not have before it the Code of Criminal Procedure. It notes, however, that Decree No. 45 (1995) and Decree No. 66 (1996) of the Armed Forces Provincial Ruling Council (AFPRC), extending period of detention up to 90 days and which remain in force, are neither compatible with the constitutional provisions governing arrest and detention (sections 19 (2) and (3) of the Constitution), not with the Covenant (art. 9). Source: United Nations Human Rights Committee, Concluding Observations: Cameroon (2004).
Chad	38. My Special Representative welcomed the engagement of the Government of Chad and the

	positive developments that are expected following her visit. As a result of the mission, Chad committed itself to crucial progress in the area of child protection. It agreed on a verification progress by United Nations teams in detention centres, training camps and military facilities. It also undertook to release as a matter of priority children associated with armed groups held in detention… Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Chad (2008).
China	302… "Boarding schools"… They provide education and assistance to "problem children" aged 12 to 17 years who have broken the law or committed a crime. Reform schools are different from juvenile correctional facilities in that they are part of the educational system rather than the justice system; reform school pupils do not have criminal records… All reform school pupils who require it undergo the nine-year programme of compulsory education and also receive moral and legal education and vocational and technical training… Source: United Nations Committee on the Rights of the Child, State Party Report: China (2005).
	7. In order to protect social order, safeguard public security….on 28 August 2005, the Seventeenth Meeting of the Standing Committee of the Tenth National People's Congress passed the Law of the People's Republic of China on Administrative Penalties for Public Security…For instance, Article 21 of the said law stipulates: "Persons who commit acts which offend against the administration of public order and who should be punished by administrative detention in accordance with this law shall not be so punished if one of the following situations obtains: (…) (b) If they have already reached age 16 but have not yet reached age 18 and this is their first offence against administration of public order… Source: United Nations Committee against Torture, State Party Report: China (2007).
	H.1) According to a preliminary report released by the International Committee of Lawyers for Tibet in June 2000, "children even as young as six years old may be detained for political offences, held in harsh conditions without charge or access to family, and suffer beatings, electric shocks, and psychological forms of torture"… there were also claims that in incidences of juvenile arrests, police often would not inform the family. Prison officials also would routinely not tell the children how long they would be detained. None of the children had been granted access to a lawyer at any stage, and only two out of the 19 children interviewed for the report attended brief court hearings…Tibetan children detained in prisons have been denied their rights to challenge the legality of their detention before an appropriate independent and impartial authority… In the majority of cases reported, children detained without trial are simply issued an administrative detention order and sent to "re-education through labour" camps to serve their term… The treatment of juvenile detainees in Tibet violates both Chinese law and international human rights treaties that China is legally compelled to observe… Yeshi Yarphel, 15 years old, was detained in late February 1999, accused of being a spy for the Tibetan exile government… he was released in late April 1999 after being detained for a total of two months without formal charges…In 1997, three Tibetan students… were arrested for pasting alleged publicity materials of the Tibetan exile government… The three implicated students…were interrogated and detained in the County Prison and released after one month… Tsering Choekyi was 14 years old when she was arrested for participating in a freedom demonstration on December 12, 1993. A former nun of Shugseb Nunnery, she served three years "re-education through labour" in Trisam Prison, Toelung. 4. Abolish all forms of administrative detention, including 're-education through labour,' under which children may be sentenced to labour camps for up to three years without judicial oversight. Source: International Campaign for Tibet, Alternative Report to the Committee on the Rights of the Child, Violations of the Convention on the Rights of the Child in Tibetan Autonomous Areas of China, Section H Special Protection Measures (2005).
	A… Tibetan children are detained arbitrarily, often without formal charges or a hearing of any kind, let alone the assistance of counsel. B. As the Tibet Information Network has explained, detention facilities in China fall into three categories: Re-education through labour centres for prisoners (Chinese laojiao) sentenced administratively by officials of the Bureau of Re-education Through Labour… The majority of detained Tibetan children are held in PSB detention centres or in the re-education through labour centre colloquially known as "Trisam". As the United Nations Working Group or Arbitrary Detention found in 1994, China's "re-education through labour" practices in Tibet constitute unlawful arbitrary detention. Moreover, "the lack of any sentence has meant that authorities can

	detain citizens for indefinite periods… Thus, "police, absent any judicial, administrative, or other official supervision, often exercise long-term authority over detainees, including most detained children"… In sum, China's preference for "punish[ing] children by administrative rather than judicial sentencing" leaves detained children, as the United Nations General Assembly has recognized, "particularly vulnerable to abuse, victimization and the violation of their rights". … the detention of Tibetan children is usually arbitrary, because it is done by executive, rather than judicial, action… Tibetan children are commonly detained for engaging in activity protected by the CRC as well as by other international instruments… Such detention violates both the children's right to freedom of expression and their right to freedom of assembly… Tibetan children are commonly detained without due process of law… None of the children we interviewed who had been detained for 'political' activities reported receiving access to counsel, relatives or guardians of any kind prior to 'sentencing'". For example, an eleven-year-old boy was incarcerated in a PSB detention centre for a full year, despite having "received no judicial hearing of any kind"… a 17-year-old boy was held for 18 months, even though he "was not charged, not permitted to contact a lawyer… and received no hearing"… Children apprehended for political activities are held at the discretion of non-judicial officials in severely substandard conditions and deprived of minimal needs, such as food, heat, clothing, adequate sanitation and hygiene items…"Upon transfer from a 'pre-sentencing' detention centre to a 're-education through labour' centre, some children, like adult prisoners, must perform hard labour."… Such forced labour violates the children's right "to be protected from… performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development". Source: Tibet Justice Centre, Alternative Report to the Committee on the Rights of the Child, Maltreatment by state actors: arbitrary detention in inhumane conditions, torture, and other cruel, inhuman, and degrading treatment and punishment (2005).
	…First, whatever their age, children who engage in activities that may be construed as political will almost certainly suffer prolonged administrative detention, imprisonment and forced labour, virtually to the same extent as adults. Second, children apprehended while seeking to flee into exile are usually detained for… about a month (but at times for longer)… Finally, Tibetan children may be detained by police, school teachers and other officials for brief periods for a variety of other (often trivial) activities, such as insubordination at school or requesting information about a detained relative… First, despite the law, in practice, detainees sentenced by administrative processes… often serve their 'sentences' at PSB detention centres, which are far more numerous and therefore likely to be located closer to the sites where Tibetan detainees are initially apprehended. This means that police, absent any judicial, administrative or other official supervision, often exercise long-term authority over detainees, including most detained children. .. We emphasise that 're-education through labour' is a form of 'administrative detention'. Chinese law officially authorizes these 'sentences handed down by quasi-judicial committees' for a period of up to three years, with the possibility of a one-year extension… Thus, both the nature of this detention (administrative 're-education through labour') and the manner of its imposition (discretionary judgments by non-judicial officials) are arbitrary and illegal under international law. .. Most children we interviewed were detained at PSB detention centres or at Truism (the most visible 're-education through labour' facility) rather than in prisons… Eight of the fifty-seven children we interviewed either participated in peaceful acts of political dissent or were thought to harbour nationalist sympathies. Without exception, these children, primarily young monks and nuns, were detained in egregious conditions and tortured… Children apprehended for political activities are held at the discretion of non-judicial officials in severely substandard conditions and deprived of minimal needs… And upon transfer from a 'pre-sentencing' detention centre to a prison or 're-education through labour' centre… Among those we interviewed, the average length of detention for children implicated in political activities appears to be about three years… Children reported detention at, among other places, police stations, prisons, army camps and even a private house… Finally, a few children with whom we spoke had been detained at school… several reported detention in a dark room for hours at a time… School detentions, like the more widespread instances of detention described above, represent flagrant violations of international human rights law… One reason for the persistence of these violations may be that the PRCs Criminal Procedure Law does not contain separate provisions governing the treatment of

	children, as the CRC requires… Source: Human Rights in China, Alternative Report to the United Nations Committee on the Rights of the Child, Implementation of the Convention on the Rights of the Child in the People's Republic of China (2005).
	45… Although administrative procedures fall outside the formal judicial process, they still involve a deprivation of liberty and must therefore meet the standards set forth in international legal provisions… Furthermore, each individual deprived of liberty must be given an opportunity to contest before a court the lawfulness of the detention… The PRCs three levels of correctional measures of reform – ranging from a loose system of community-based supervision to conventional penal measures, each with varied degrees of restriction on minors' personal liberty – fall short of these international standards: they are imposed without judicial oversight, there is very limited process of review, and there is no legal clarity of process… In non-penal correctional measure such as work study reform school and Custody and Education, the minor does not have legal representation, opportunity for legal defence, or appeal. 46… children are detained without due process of law, through decisions of administrative bureaus and local ministries of education with no due process of review, is a serious contravention of the Convention… 47. Custody and Education as Reform Through Labour for Children: In most cases, children are sent to custody and re-education programs by the public security bureaus, without legal protections… The only avenue of appeal is to the Public Security Bureau, the same agency that made the initial decision of confinement. The minor can file a complaint under the Law on Administrative Review, but will remain confined pending the outcome of the complaint… 48… most have reportedly been housed with adults since the administration of custody and re-education has been transferred to RTL facilities… In 1996, the placement of the custody and education program was transferred from juvenile reformatory to the administration of RTL… No judicial body-involvement; The Law on the Protection of Minors states it is a non-criminal penalty, but it is included in the Law on the Prevention of Juvenile Delinquency and the Criminal Law; No explicit regulations governing what "illegal" actions can lead to confinement, who has the authority to make the decision, and how length of incarceration is determined; Vagueness of "if necessary" language leads to arbitrary determination; No clarity as to what triggers this system versus criminal penalties; Conflicts with existing legal scheme. 49…The data available on only a few custody and education facilities indicates that at least 3,895 minors 288 were held in four of these facilities as of May 2000… As noted by the Working Group in Arbitrary Detention, that the PRC classifies RTL and custody and education as an administrative deprivation of liberty as opposed to judicial deprivation of liberty does not affect the PRCs obligation to ensure judicial control over it. Source: Tibet Justice Centre, Alternative Report to the Committee on the Rights of the Child, A Generation in Peril: The Lives of Tibetan Children Under Chinese Rule (2005).
	111. The Committee notes the effective abolition of the procedure… the introduction of certain aspects of fair trial in respect of other proceedings of administrative detention, including re-education through labour… 127. The Committee recommends that the State party consider abolishing all forms of administrative detention, in accordance with the relevant international standards. Source: United Nations Committee against Torture, Concluding Observations in relation to China and Hong Kong (2000).
	7. …For instance, Article 21 of the said law stipulates: "Persons who commit acts which offend against the administration of public order and who should be punished by administrative detention in accordance with this law shall not be so punished if one of the following situations obtains: (a) They have reached age 14 but have not yet reached age 16; (b) If they have already reached age 16 but have not yet reached age 18 and this is their first offence against administration of public order… 149… Article 9 of the Law on Administrative Penalty stipulates: "Administrative penalty involving restriction of freedom of person shall only be created by law". Article 16 stipulates: "The power of administrative penalty involving restriction of freedom of person shall only be exercised by the public security organs". Article 30 stipulates: "Where citizens, legal persons or other organizations violate administrative order and should be given administrative penalty according to the law, administrative organs must ascertain the facts; if the facts about the violations are not clear, no administrative penalty shall be imposed". Article 31 stipulates: "Before deciding to impose administrative penalties, administrative organs shall notify the parties of the

	facts, grounds and basis according to which the administrative penalties are to be decided on and shall notify the parties of the rights that they enjoy in accordance with the law". Article 32 stipulates: "The parties shall have the right to state their cases and to defend themselves. Administrative organs shall fully heed the opinions of the parties and shall re-examine the facts, grounds and evidence put forward by the parties…" Source: United Nations Committee against Torture, State Party Report, New measure and progress relating to the implementation of the Convention Article 2: China (2006).
	2 (a)… Those who refuse to give in to the pressure are sent to "brainwashing centres," detention centres, RTLs, drug rehabilitation centres, mental hospitals and jails, where they are subjected to unrelenting torture. vii. RTLs are administrative detention facilities, and "sentencing" to RTLs is done by police, by Party bosses of work units, or even by "residential committees". Source: The Conscience Foundation: The Falun Gong Human Rights Working Group, Alternative Report to the United Nations Committee against Torture (2008).
	Administrative detention was a major topic throughout the review process, with experts raising concern about the broad grounds for committing a person to such detention and the lack of judicial supervision over it…The Committee also requested information o the forced commitment of individuals to psychiatric institutions… Gaspar recommended that the length of time permitted for police custody be reduced, since torture is most likely to occur between the time of detention and formal arrest, when a charge is brought… Government representatives announced that starting in 1998, the National People's Congress had begun a process of examining laws and regulations governing RTL so they could be "amended and improved"… the Committee stated that "the system of administrative sanctions that permits extrajudicial custodial orders in respect of individuals that have not committed, or are not charged with, a violation of the law" was not in conformity with international standards… China should include some of CATs most crucial recommendations in their programs: in particular, that China eliminate all forms of administrative detention and that detainees enjoy unhampered access to lawyers (p. 26 – 7). Source: Human Rights in China, Alternative Report to the United Nations Committee against Torture: Impunity for Torturers Continues Despite Changes in the Law: Report on Implementation of the Convention Against Torture in the People's Republic of China (2000).
	According to Government policy, the local police may subject a drug user to between three and six months detention in a forced detoxification centre, and repeat offenders to re-education through labour centres (RELC) for one to three years. In each case, such detention is administrative and without trial or other semblance of due process… The United Nations Special Rapporteur on Torture has stated that the re-education through labour system in China "and similar methods of re-education in prisons, pre-trial detention centres, and other institutions… can also be considered as form of inhuman or degrading treatment or punishment, if not mental torture" and recommended that China abolish re-education through labour in administrative detention and similar forms of forced re-education practices in prisons, pre-trial detention centres, and psychiatric hospitals… According to Government policy, the term of detention in drug detoxification centres may be renewed but cannot exceed one year. There is no judicial input into the proceedings but detainees may challenge their sentences by applying to the court to have them over turned. However, Human Rights Watch's research suggests that in practice, few drug users are aware that they can challenge their sentences, and may be held indefinitely without official review of their sentences, leaving them uncertain as to when they may be released (p. 2). Source: Human Rights Watch, Alternative Report to the United Nations Committee against Torture, Coercive drug dependence treatment and potential cruel inhuman or degrading treatment or punishment (2000).
	The Working Group visited Beijing and the cities of Chengdu, capital of Sichuan Province, and Lhasa, capital of the Tibet Autonomous Region. The Working Group visited ten detention facilities included in a list previously submitted to the authorities. This list also included police stations, pre trial detention centres, prisons, re-education through labour camps and psychiatric hospitals… meet with and interview more than 70 detainees… including pre-trial detainees… minors and persons held in administrative detention in re-education through labour camps… The period of time for which criminal suspects can be held in police custody without judicial approval is too long, and the status of the public prosecutor does not meet international requirements. The Working Group doubts whether the status of the prosecutors as regulated by Chinese law fulfils

	the requirement toward the independence of an officer authorized by law to exercise judicial power within the meaning of article 9, paragraph 3, of the International Covenant on Civil and Political Rights (summary, p. 2). 39… China has known different forms of administrative detention, which have allowed people to be detained for long periods without charge or trial outside the criminal justice system… In 1996, the Law on Administrative Penalties was adopted and came into force; it regulates the system of administrative sanctions, including administrative detention. 40. Forms of administrative detention still in force include the following: Re-education through labour… "Custody and education" of prostitutes and clients implemented by law enforcement… which foresees detention for periods ranging between six months and two years… The State Council "Methods of Forced Detoxification", adopted on 12 January 1995, which allow local Public Security Bureau officials to commit, for three to six months, a drug user to a forced detoxification centre… Work Study Schools, implemented to correct what is described in the Law on Preventing Juvenile Delinquency adopted on 28 June 1999 as "Seriously unhealthy behaviour that seriously harms society but does not qualify for criminal punishments". 41. According to other sources, another form of "extrajudicial" detention known as *shuang gui* ("two designated", also known as "*liangzhi*" or "*lianggui*") is still implemented... Party authorities or supervision departments can interrogate persons suspected of corruption… This is regulated in the 1997 Administrative Supervision Law and the 1994 party document "CCP Disciplinary Organs' Working Regulations on Case Investigation". Public Security also have the power to commit individuals to psychiatric facilities called *ankang* ("Peace and Health"). 42… the Working Group… concentrated its attention on Re-education through Labour, which is currently the most controversial form of non-judicial deprivation of liberty. In addition… forcible holding and treatment in psychiatric institutions of persons of unsound mind. 62. The decision to deprive someone of his/her liberty by placing him in a mental health institution against his/her will, as well as to release him/her, seems to be in the hands of psychiatrists employed by the mental health institutions. No genuine avenue is available to challenge such a decision before an outside and independent body. 63. For offenders whose accountability is diminished or who are not liable because of their mental state, there are some 23 mental health institutions nationwide, run by public security organs (Ministry of the Interior). Before the cases are sent to a court, the decision to transfer suspected criminals to such institutions as well as to release them lie exclusively with the public security organs, without an effective remedy available to the patient. 64. The Working Group is of the opinion that the Chinese system of confinement of mentally ill persons in mental health facilities, which they are not allowed to leave, is to be considered a form of deprivation of liberty, since it lacks the necessary safeguards against arbitrariness and abuse… international law requires that everyone deprived of his/her liberty on any ground, including health grounds, be able to challenge before a court the lawfulness of the detention. 65. The draft law on mental health… If adopted, it will regulate in a uniform manner across the whole country the holding against their will of mentally ill persons in mental health institutions. Secondly, patients hospitalized on suspicion of being mentally ill must be examined by two psychiatrists without delay. Only if both of them agree that the patient's confinement in the mental health institution is absolutely necessary, and in the patient's of the community's interest is the forcible holding and compulsory treatment decided. 66… Judicial review of the lawfulness of a patient's deprivation of liberty should, however, be made possible if the patient so requests. Source: United Nations Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Mission to China (2004).
Colombia	80. The Committee…is seriously concerned over the grave consequences the internal armed conflict has on children in Colombia…In particular, the Committee is concerned over: (…) (b) Interrogation of captured and demobilized child soldiers and delays by the military in handing them over to civilian authorities in compliance with the time frame of maximum 36 hours stipulated in the national legislation… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Colombia (2006).
	Between June 1996 and June 2002 approximately 2,869 people were arrested arbitrarily in Colombia. The current administration analyses the advance of its security strategy, among other

	things, for the number of captured people…As a result of this policy, many children have been victimized too, as it can be seen with the following examples: In the framework of the "Orion Operation", deployed in "Comuna 13" area of Medellín, in October 2002, 240 people were arrested. 23 out of them were children, and only 32 of the arrested had a warrant for the arrest (p. 41 – 2). (…) Unexplained detentions have happened, like the case of two young boys that…were detained without any warrant for arrest by the Public Force. After completing 36 hours of detention, they were released, but 500 meters far from their detention place they were recaptured this time following a warrant for arrest issued by the Attorney's General Office. Currently they are held in the Buenaventura prison. (p. 41-2) Source: *Coalición contra la vinculación de ninos, ninas y jóvenes al conflicto armado en Colombia*, Alternative Report to the United Nations Committee on the Rights of the Child (2005).
Côte d'Ivoire	96. With regard to children in extremely difficult circumstances or in danger (physical or moral) articles 10 et.seq. of the 1970 Minority Act provide for educational assistance measures in cases where the child's health, education, morality or safety are seriously jeopardized, whether through the child's own fault or on account of the immorality or incapacity of the parents or guardians. The child should then be placed with the parent who did not have custody, with a trustworthy third party, or in a reception centre…There are two observation centres in Côte d'Ivoire, one in Bouaké and one in Abidjan; they are located within located within local prisons. There is a public socio-educational centre at Dabou, and a private centre at Bassam. 117. Children in conflict with the law should be better protected with… the observance of a maximum 48-hour detention in police custody for minors and the presence of lawyers at the preliminary investigation. Source: United Nations Committee on the Rights of the Child, State Party Report: Côte d'Ivoire (1999).
Democratic Republic of the Congo	50. During his visits to places of detention in Kinshasa and Bunia, the Special Rapporteur was extremely concerned to note that, given the slowness of the judicial system, and in some cases the absence of any trial, men, women, and children are often held in preventive detention for months or even years without being found guilty by a court of law. What is more, these persons are usually held with convicted prisoners. Source: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (2008).
	41. The recruitment of children and their use in active combat by CNDP increased because of the resumption of fighting with FARDC in late 2007 and since September 2008… CNDP also detained children captured from various armed groups during the fighting. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict (2009).
	29. Serious concerns have been raised regarding the arrest of children formerly associated with armed groups. Children have been arrested during military operations, or intercepted when escaping, ending up in military holding cells. Such activities were mostly reported in the Kivu provinces. Interviewed children reported that they were subjected to cruel, degrading and inhumane treatment by FARDC while in detention. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in the Democratic Republic of the Congo (2008).
Equatorial Guinea	44. … Minors who commit less serious offenses are usually taken to police stations, where they sometimes spend several days or weeks and are then handed back to their families, sometimes on the conditions of carrying out community work. Source: United Nations Working Group on Arbitrary Detention, Country Report: Equatorial Guinea (2007).
Estonia	10. The Committee…is concerned at some aspects of the administrative procedure related to the detention of a person for mental health reasons…and, in light of the significant number of detention measures that had been terminated after 14 days, the legitimate character of some of these detentions. The Committee considers that a period of 14 days of detention for mental health reasons without any review by a court is incompatible with article 9 of the Covenant. Source: United Nations Human Rights Committee, Concluding Observations: Estonia (2003).
	10. The Committee is concerned about the possibility of "administrative detention in jail" and "administrative arrest" (paras. 89 and 215 of the State party report) and about the complete absence of information on such detention in the report as well as from the delegation, especially regarding the competent authority and the applicable legal safeguards (art. 2)

	Source: United Nations Committee against Torture, Concluding Observations: Estonia (2008). 182. The basis and procedure for the expulsion of foreigners staying in Estonia illegally are provided for in the Obligation to Leave and Prohibition on Entry Act. If expulsion cannot be completed within 48 hours, the person subject to expulsion is placed, with the decision of the administrative judge, in the expulsion centre until the expulsion, but not longer than two months. If during this period the expulsion cannot be executed, the administrative court will extend the term of expulsion of the person by two months at a time until the execution of the expulsion or until the foreigner's release from the expulsion centre. 183. In the period from 1 March 2003 until 15 October 2004, the average time in the expulsion centre was 3.4 months… Source: United Nations Committee against Torture, State Party Report: Estonia (2005).
Finland	515. In accordance with the Aliens Act, persons under the age of 18 may not be placed in detention without first hearing the social welfare authorities or the Ombudsman for Minorities. As an exception to this provision, an alien in detention can be placed in detention facilities of the police if all detention units are temporarily engaged, or the alien is taken into detention far from the nearest detention unit, in which case the detention may last a maximum of four days… 37. The procedure applied to and the acceptable grounds for the administrative detention of foreigners are mainly provided in sections 47,48,48a and 51 of the Aliens Act…"If the conditions described in section 45, paragraph 1, above apply and there exist reasonable cause, with regard to an alien's personal and other circumstances, to believe that he will hide or commit criminal offences in Finland, or if his identity has yet to be established, he may be placed in detention instead of employing means of control specified in section 45 above." However, in accordance with the purpose and objective of the principle of proportionality…the means of control such as the obligation to report to the police, provided for in section 45 of the Act, should prevail over detention. According to section 47 of the Aliens Act, "an alien who is placed in detention shall be taken to detention facilities specifically reserved for this purpose as soon as possible". Persons detained under the provisions of the Aliens Act have occasionally been held in prisons. 39. Under an amendment (117/2002) made to the Aliens Act, which also entered into force on March 1 2002, a detained foreigner may temporarily be placed in a police establishment when the special detention units are temporarily full or when the foreigner is detained in a town which is located far from the closest detention unit. Detention in a police establishment may not last longer than four days. A temporary placement of a foreigner in a police establishment shall be notified to the district court of the place of detention…Under the amendment to the Aliens Act, a decision on temporary detention of a foreigner, not exceeding 48 hours, *may be made either by the police or by a high-ranking frontier guard officer* [emphasis added]. 42. The Minority Ombudsman drew attention to the fact that, before the special detention unit was opened, he had been informed of cases where asylum-seekers had been held in a police establishment for a relatively long time (three to four weeks). Furthermore, in some cases the police had carried out interrogations of asylum-seekers while they were being held in detention, in order to find out whether their applications were founded…The Minority Ombudsman notes that interrogations which are carried out for a purpose other than establishing the identity of the asylum-seeker may be considered to be contrary to the administrative purpose of the detention. 43. As far as the detention of minors are concerned, section 46 (661/2001) of the Aliens Act provides that persons under 18 years of age may not be detained before their cases are heard by the social welfare authorities or the Minority Ombudsman. 44. On the basis of the number of requests for opinion submitted to the Minority Ombudsman, between December 2001 and May 2002, 30 asylum-seekers under 18 years old arrived to Finland without a custodian…three had been detained by the police because of unclear identity. The minors taken into police custody were born in 1983, 1984, and 1985, and they were held in detention for one, five, and eight days, respectively. During detention, one of the boys was interrogated twice, and there was only an interpreter present apart from the police officer. According to the Minority Ombudsman, a legal representative should always be present during the interrogation of a minor. Source: United Nations Committee against Torture, State Party Report: Finland (2003).
France	50. Foreign unaccompanied minors continue to be deprived of their liberty and placed in detention

	with adults…In addition to this, the age determination process allows for errors which may lead to minors not being accorded protection they are entitled to. Source: United Nations Committee on the Rights of the Child, Concluding Observations: France (2004).
Germany	16. The Committee is concerned that unaccompanied children may be detained. Source: United Nations Committee on the Rights of the Child (Optional Protocol on Children in Armed Conflict) Concluding Observations: Germany (2008).
	798… in some Länder there are special initial acceptance facilities, so-called clearing offices, for unaccompanied minor refugees. In principle, all unaccompanied minor refugees are housed in these facilities until they are 16. In individual cases, young people between 16 and 18 are also accepted. Source: United Nations Committee on the Rights of the Child, State Party Report: Germany (2003).
Greece	68 (f) The detention of asylum-seekers, refugees and illegal immigrants in poor conditions and for long periods without appearing before a court… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Greece (2002).
	62 (c) Detention cannot exceed three months. If an administrative deportation cannot be carried out for any reason, in application of article 45 of Law 2910/2001, the person is permitted to stay in the country temporarily until the obstacles are removed, albeit under restrictive conditions (residence, travel to certain places, practice a specific occupation, or obligation to appear before police authorities). Source: United Nations Committee against Torture, State Party Report: Greece (2004).
	150 Article 48, paragraph 1, provides that the family court is the body exclusively competent to decide whether a child will be admitted to an institution or whether its protection will be assigned to social organizations (see also article 3 for the institution of the family court). However, the institution of the family court has not yet been fully implemented in Greece. Until the full implementation of the law, the admission of children to institutions or the assigning of their protection to social organizations continues to be carried out in accordance with the previously effective law, which provided that such action could be taken: By virtue of a *public prosecutor's order or* court decision, if there are no parents [emphasis added]. Source: United Nations Committee on the Rights of the Child, State Party Report: Greece (2001).
	58 (d) (…)(d) Many children with disabilities in need of alternative care are institutionalized, that residential care for persons with disabilities remains of poor quality, limiting respect for children's rights, and that children in some institutions experience abuse and inhuman or degrading treatment… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Greece (2002).
Guatemala	57. In line with its own previous recommendation…the Committee recommends that the State party…expedite the adoption of the Children and Adolescents Code of 1996 which guarantees due process of law for children and social and educational correctional measures. In particular, the Committee reminds the State party that juvenile offenders should be dealt with without delay, in order to avoid periods of incommunicado detention… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Guatemala (2001).
Haiti	58. MINUSTAH confirmed that 297 children, including 30 girls, are being detained in detention centres throughout the country as at the end of December 2008; 60 per cent of them are being detained for their alleged association with armed groups and 87 per cent are held in prolonged pre-trial detention, some of them since 2004. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict (2009).
Honduras	196. It is recognized that the detention of children under the age of 18 by the police is one of the most arbitrary and illegal expressions of the doctrinaire approach prevalent in many fields related to the rights of the child in Honduras…Detentions have been increasing as a result of public security policy which has focused a large part of its activities on children and adolescents. Source: United Nations Committee on the Rights of the Child, State Party Report: Honduras (2006).
	87. …Article 332 of the Criminal Code, governing the offence of "illicit association" and commonly referred to as the "*ley anti-maras*", is, therefore, not on its face incompatible with human rights law… 88. The practical application of article 332, however, does raise serious concerns. The police (as well as the general public and *mara* members themselves) identify *mara* members by the tattoos they bear, highly visibly, all over their body. As membership of an "illicit association" is a continuous offence, a tattooed young man or woman is permanently *in flagrante delicto*, and can be arrested by the police at any time without warrant and could be immediately rearrested upon

	release. 89. Moreover, detention on remand is mandatory for persons detained on charges under article 332 of the Criminal Code. This raises concern with regard to article 9 (3) ICCPR, providing that"[i]t shall not be the general rule that persons awaiting trial shall be detained in custody". 93. …In the centre "Renaciendo", e.g. at the time of the Working Group's visit 72 out of 112 detainees were in preventive detention, and only 40 serving "socio-educational measures"… Source: United Nations Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Mission to Honduras (2006).
Hungary	518. Detention and police custody of a juvenile are considered to be the last resort in the Criminal Procedure Act...About 3 to 4 per cent of juvenile perpetrators are remanded in police custody…Detention may last at the most 72 hours for juveniles...The new Criminal Procedure Code enacted on 1 January 2003 does set a limit on police custody, which cannot be more than two years for a juvenile. Source: United Nations Committee on the Rights of the Child, State Party Report: Hungary (2005).
	"36. § (1)In cases where an expulsion order has been issued…in cases where the expulsion has been ordered under a decision by the Immigration Police Authority (31. § (1)), the authority responsible may…detain, under the Immigration Act, the foreigner… (…) (3) Detention under the Immigration Act may be ordered for a maximum period of five days, which the local court having jurisdiction in the place of detention may extend until the departure of the foreigner. 43. § (1) The National Police Commissioner's Office, the Border Guards, the Directorate or Branch Office of the Border guards may, by a formal decision, order the foreigner to reside in a designated place, as a measure of restricting personal freedom but not falling under the concept of detention under the Immigration Act… (…) (e) There are legitimate grounds for excluding or expelling but under the prohibition set forth in 32. § (1), he may not be sent back or expelled. (2) The enacting part of the decision must state the place of compulsory residence and the conditions of leaving the place of residence. (5) The decision ordering residence in a designated place cannot be appealed against. The foreigner may request a judicial review of the first-instance verdict… Source: United Nations Human Rights Committee, State Party Report: Hungary (2001).
Indonesia	36… Street children… police including arbitrary arrest or detention during sweeping operations took place so widely and frequently that the children see it as 'normal'. 60. With respect to the issue of street children… The Government must take significant steps to end violence, arbitrary arrest and detention committed by State apparatus against street children, especially during sweeping operations. Source: Indonesian NGO Coalition for CRC Monitoring, Alternative Report to the United Nations Committee on the Rights of the Child, Comments on the first Periodic Report by the Government of Indonesia (2004).
	10. The Committee is deeply concerned… there are insufficient legal safeguards for detainees, including: (a) Failure to bring detainees promptly before a judge, thus keeping them in prolonged police custody for up to 61 days; (b) Absence of systematic registration of all detainees, including juveniles, and failure to keep records of all periods of pre-trial detention… Source: United Nations Committee against Torture, Concluding Observations: Indonesia (2008).
	Chapter 6… suspects detained either at the police station for the investigation or at the state detention house for the pre-trial detention… Under the KUHAP, a criminal suspect may be subject to a maximum of 460 days of detention before charges are pressed as provided by the article. This covers detention at the investigation level, prosecution level, and pre-trial detention level. The lengths of these phases of detention certainly increase the risk for suspects to be exposed to torture or other forms of ill treatment (p. 32). … During the interrogation process, the investigator has to complete the investigation in a very short period of time. The period of detention for such stage is different than stipulated in the Criminal Procedure Code. The Law on Juvenile Justice provides for a shorter period of detention (20 days and can be extended for another 10 days) compared to the Criminal Procedure Code (20 days and can be extended for another 40 days) (p. 39). Source: Indonesian Working Group on the Advocacy Against Torture, Alternative Report to the United Nations

	Committee against Torture (2007).
	33. Preventive detention, if considered necessary for the purposes of the police investigation, is regulated as follows (arts. 2437). Upon expiration of the 24 hour period after arrest, the police investigators must provide the person concerned with a detention order, which remains in effect for 20 days. The order can be extended, if necessary, for a period of 40 days, with the authorization and under the supervision of the prosecutor, or at his own initiative after examining the file. After this first 60 day period during which the detained person need not be presented before the prosecutor – another extension can be ordered, if considered necessary, for a period not exceeding 20 days. This second extension must be authorised by a judge. After transmittal of the file to the tribunal of first instance, the judge in charge of the case can grant another extension for 30 days. This may be followed, upon decision of the president of the tribunal, by a supplementary 60 days if considered necessary for the completion of file work and investigation of the case… The maximum length of detention before trial and judgement is therefore 400 days. Source: United Nations Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Visit to Indonesia (1999).
Iraq	67. The administrative detention of children allegedly associated with armed groups by MNF-I had been a major concern in the recent past. The situation is no longer at a crisis level, with a decrease in detainee figures from 874 as of 8 December 2007 to approximately 500 as of mid-May 2008, and to 58 as of 17 December 2008. The children are being treated well, but the vague basis for their internment "required for imperative reasons of security" remains troubling. The United States-Iraq security agreement that came into force on 1 January 2009 no longer authorizes MNF-I to detain individuals for reasons of imperative security. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict (2009).
Iran	6… article 33 of the Code of Criminal Procedure allows for a suspect to be detained without charge for one month, which may then be renewed. Source: United Nations General Assembly, Report of the Secretary General on the situation of human rights in the Islamic Republic of Iran (2008).
	122… Children without guardians kept at boarding centres are, compared to other children, more vulnerable, due to awkward living conditions, and are sometimes exploited. Exploitation refers to any behaviour that harms the rights of the child, including physical, psychological, emotional and social abuse, or neglect of children's basic needs. Source: United Nations Committee on the Rights of the Child, State Party Report: Islamic Republic of Iran (2003).
Israel	62. The Committee is concerned about: (…) (b) The practice relating to the arrest and interrogation of children in the occupied Palestinian territories; (c) Military Orders Nos. 378 and 1500, as well as all other military orders which may allow prolonged *incommunicado* detention of children… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Israel (2002).
	Palestinian youth detained in Occupied Territories in connection with Intifada violence…have also on occasion been held for long periods of time with no explanation of the delay (p.225). The result is that there is no administrative or judicial supervision or oversight of the involuntary commitment of minors in Israel. There is a real danger that these minor's liberty will be deprived without any examination of their cases, and without or their relatives enjoying the right to appeal against the State's decision to impose involuntary commitment (p.228). Source: Defence for Children International-Israel Section, in consultation with members of The Israeli Children's Rights Coalition, Alternative Report to the United Nations Committee on the Rights of the Child, "Mixed Bag: Lawmaking to Promote Children's Rights, Ongoing Discrimination, and Many Serious Violations" (2002).
	The fact that Palestinians of this region are not citizens of the Israeli state is key to the understanding the form that punishment of Palestinians has taken…The military legal system which has been the primary arbiter in the occupied territories, "condones and facilitates abusive interrogation methods through policies that allow for prolonged incommunicado detention…(p.21) Source: Defence for Children International-Palestine Section, Alternative Report to the United Nations Committee on the Rights of the Child (2002).
	93… between 8 and 15 children were being held in administrative detention at any given point during the reporting period. Children can be detained in administrative detention for up to six months without charge or trial on the basis of information of which neither the detainees nor their

	legal representatives are advised. The administrative detention of two girls aged 16 years, with no charges made against them, was reported. That was the first reported incident of girls in administrative detention recorded by the United Nations. The girls have since been released. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict (2009).
Kenya	While some…children may in fact be involved in criminal activity, the government response has been to criminalize large numbers of street children just because they are homeless, rounding them up and arresting them in large numbers, detaining them in jails and remand centres… Once arrested, street children are held in deplorable conditions…stay in lockups for periods extending from several days to weeks without review of the legality of their detention by judicial authorities. They are then either brought to court, or released back onto the streets. Source: Human Rights Watch, Kenya, Alternative Report to the United Nations Committee on the Rights of the Child, Rights at Risk: Issues of Concern for Kenyan Children (2001).
	2.4 Children spend the first 24-48 hours in police cells before being taken to court… In violation of international law, police round [street children] up and hold them for days or weeks under deplorable conditions, together with adults. Source: The Kenya NGO Convention on the Rights of the Child Coalition, Alternative Report to Kenya's First Country Report on Implementation of the United Nations Convention on the Rights of the Child (2001).
	It is common for any person on the streets after 6.00 pm to be arrested on false charges. On a regular basis the police arbitrarily arrest young people, particularly in informal settlements and in the evening, based on insignificant suspicion or inexistent charges and notwithstanding the absence of a curfew…It was reported that young people, who had been remanded for months without charge, were exploited in police stations to do manual and demining jobs (p. 15). In particular, it is a common practice for police to round up…street children, and then proceeds with massive arrests for the most disparate charges such as…vagrancy or simply the suspicion of being an illegal alien. Those arrested are subsequently held in police stations (p. 31). Source: World Organisation Against Torture (OMCT), Alternative Report to the United Nations Committee against Torture, Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya (2008).
	Children's Homes provide protection and care to young children. Children in need of special protection, for example…HIV/AIDS orphans amongst others, are sent to those institutions (p. 43). Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or private hospital, and children's officers (p. 43). Source: World Organisation Against Torture (OMCT), Alternative Report to the United Nations Committee against Torture, Violence against women and children in Kenya (2008).
Lebanon	71… The Committee notes with concern that since the State party does not extend asylum, many children and their families seeking asylum are subject to domestic laws for illegal entry and stay, and thereby are at risk of detention, fines and deportation. 72… the Committee urges the State party… (c) To ensure that detention of refugee/asylum-seeking children takes place only when necessary, is in their best interests and is for the shortest time possible, and that deportation is in full compliance. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Lebanon (2006).
	496. Israel applies on the Lebanese war detained the laws in force that were applied during the British Mandate on Palestine that allows administrative arrest. Source: United Nations Committee on the Rights of the Child, State Party Report: Lebanon (2005).
Lesotho	61. While the Committee notes that a juvenile justice system has been established in the State party, the Committee remains concerned at...(g) The failure to monitor the length of time children spend in detention facilities… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Lesotho (2001).
	7.2 The only child protection legislation currently in force, Child Protection Act (1980), does not differentiate between a child in need of care and a child offender. According to CPA, DSW [Department of Social Welfare] does not have a mandate to determine whether a child is in need of care; this power is vested with the Police and the Probation Unit. The legal responsibility for this important decision needs to be clarified urgently so that the relevant agency can be adequately resourced and staffed and proper child friendly procedures put in place. Source: NGO Coalition for the Rights of the Child and Save the Children UK, Complementary Report to the United Nations Committee on the Rights of the Child on the Implementation of the United Nations Convention on the Rights of the Child in Lesotho (2000). 18. With regard to pre-trial detention the Committee is concerned about the detention of suspects for periods longer than 48 hours before they are brought before a magistrate. Source: United Nations Human Rights Committee, Concluding Observations: Lesotho (1999).

Liberia	234. In Liberia, anyone having probable cause to believe that a juvenile is within the purview of the code may file a petition against the child. This petition originates with the police, who may dispose of the case or forward said petition to the juvenile court. The peace officer (police) may take the juvenile in protective custody without a warrant and this is not to be construed as an arrest. Source: United Nations Committee on the Rights of the Child, State Party Report: Liberia (2003).
Malaysia	82… the Committee expresses concern at the absence of a legal framework in Malaysia for the protection of refugee and asylum-seeking children… The Committee is particularly concerned that that implementation of the current provisions of the Immigration Act 1959/63 (Act 155) has resulted in detaining asylum-seeking and refugee children and their families at immigration detention centres, prosecuting them for immigration-related offences, and subsequently imprisoning and/or deporting them. 95. The Committee notes… with concern that trafficked children, although they are victims, are often detained, for example, in the case of missing residence/work permits or falsified documents, and subsequently deported… 103… The Committee expresses its concern, among other things, at long (pre-trial) detention periods… Furthermore, the Committee is concerned at the deprivation of liberty at the pleasure of the Yand di-Pertuan Agong or the ruler or the Yang di-Pertua Negeri, which results in the undetermined length of deprivation, causing problems in terms of the development of the child, including his/her recovery and social reintegration. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Malaysia (2007).
Mali	19. The Committee notes that, under Malian law, police custody may be extended beyond 48 hours, and that such extensions are authorized by the public prosecutor. The State Party should: (a) supplement its legislation to conform to the provisions of article 9, paragraph 4 of the Covenant, which requires that a court decide without delay on the lawfulness of detention in custody… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Mali (2003).
Madagascar	23. The Committee remains concerned by the excessive length of police custody and remand detention which leads to persons being held for lengthy, sometimes indefinite periods… Source: United Nations Human Rights Committee, Concluding Observations: Madagascar (2003).
Mongolia	34… the Committee recommends that the State party: (b) Ensure that the placement of children in institutional care is always assessed by a competent, multidisciplinary group of authorities and that the placement is done for the shortest period of time and subject to judicial review and that it is further reviewed in accordance with article 25 of the Convention… 62… According to the Law on Temporary Detention of Children without Supervision adopted in July 1994, a runaway child can be detained up to one week. 63… (b) As regards the implementation of the Law on Temporary Detention of Children without Supervision, adopted in July 1994, refrain as a matter of policy from detaining runaway children and seek alternative forms, which are fully compatible with the provisions of the Convention, for their detention… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Mongolia (2005).
	67… Article 383 of the Criminal Procedure Code provides that minors can be arrested or detained to prevent a crime… 147… For example, detention or custody of persons during criminal investigations are the most common measures in the country and are applied in almost every criminal case. But sometimes failure to comply with the conditions of pre-trial detention in terms of minimum standards of human rights cause loss of human life or damage to the health of children. Source: United Nations Committee on the Rights of the Child, State Party Report: Mongolia (2004).
	11. The Committee is deeply concerned about all aspects of detention before trial… (b) Conditions of detainees' confinement by the police; (d) Means of ensuring that a detainee is promptly brought before a judge or judicial officer; Source: United Nations Human Rights Committee, Concluding Observations: Mongolia (2000).
Myanmar	78. The Committee recommends…(k) Review the procedure concerning the quasi-judicial decisions to send children under the age of 18 to training schools, without the possibility of appeal.

	Source: United Nations Committee on the Rights of the Child, Concluding Observations: Burma (2004).
	116. The Minister for Social Welfare… may at any time issue an order to release, either absolutely or subject to conditions, a child committed to the custody of a training school or a custodian under this law… the Minister may issue an order to transfer a child undergoing imprisonment to a training school or to a custodian till the day the child attains the age of 18 years, if it is considered beneficial for the child. 117. …The Director General, in accordance with the report presented by the social welfare officer, sends a child whose character needs to be reformed to any training school till he attains the age of 18 years as a maximum period. Source: United Nations Committee on the Rights of the Child, State Party Report: Myanmar (2004).
	6. (b) … Rohingya children as well as their parents are subject to severe restriction of movement. Source: Forum-Asia, Alternative Report to the United Nations Committee on the Rights of the Child, Issues to be raised concerning the situation of Rohingya children in Myanmar (Burma) (2003).
Nepal	295. For a decade, 100,000 refugees of Nepalese ethnic origin from Bhutan have been living in seven camps administered by UNHCR in eastern Nepal… 323. In relation to the treatment of children deprived of liberty, article 42 of the Children's Act (1992) provides for correction homes where children in conflict with the law, addicted to drugs, or involved in immoral activities, as well as runaway children are kept. Source: United Nations Committee on the Rights of the Child, State Party Report: Nepal (2004).
	78. …the Committee is concerned about: (d) The restrictions on Bhutanese refugees on their freedom of movement… 81… The Committee is also deeply concerned that there are reports of detention of children under the 2004 amendment to the Terrorist and Disruptive Activities (Control and Punishment) Ordinance… 98. The Committee is also concerned about the reports of persons under 18 held under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance which has no set minimum age and grants security forces wide powers to arrest and detain any person suspected of being associated with the armed groups, including children. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Nepal (2005).
	14. The Committee is also concerned about: (a) The number of detainees in prolonged detention without trial under the Public Security Act and the Terrorist and Disruptive (Control and Punishment) Ordnance (TADO) of 2004; (b) The extensive resort to pretrial detention lasting up to 15 months and the lack of fundamental guarantees under the Terrorist and Disruptive (Control and Punishment) Ordnance 2005 of the rights of persons deprived of liberty, including the right to challenge arrest, resulting in numerous alleged cases of incommunicado detention. 21. The Committee is concerned about: (g) The lack of a well-functioning juvenile justice system in the country, with children often being subjected to the same procedures, laws and violations as adults. In particular, the Committee is concerned about allegations of children being held under TADO for prolonged periods. Source: United Nations Committee against Torture, State Party Report: Nepal (2005).
	26. No new cases of arrest under the Terrorist and Disruptive Activities (Control and Prevention) Ordinance were reported. The Ordinance expired at the end of September 2006 and has not been renewed. Most children arrested under the Ordinance during the conflict were released but some were kept in detention on charges of common crimes; all of them are now over 18 years of age. Three female CPN-M detainees have been in pre-trial detention for between six and seven years, two of whom were 13 years old and one 17 years old at the time of their arrest. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Nepal (2008).
	24. On 26 November 2001, the then Government promulgated an anti-terrorist law, the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO). The Ordinance lapsed at the end of September 2006 and has not been renewed. A significant number of children were captured by RNA or arrested by the Nepal Police and the Armed Police Force because of their alleged association with CPN-M. The legality of their subsequent detention, including the lack of due process and their treatment, was a major concern. 25. From 2001 to 2006, six TADO ordinances and one Act were promulgated consecutively, all providing powers to hold persons in preventive detention for up to 12 months if there were

	reasonable grounds to believe that they should be prevented from committing any TADO offences, as well as to hold in pre-trial detention persons suspected of having committed such offences. During the reporting period, task force members documented the cases of 195 juveniles held under TADO in various places, including army barracks, police stations, prisons and high security centres. 26. Among the 195 children, 43 per cent were below the age of 16 at the time of their arrest, the youngest being 11 years old. Fifty-eight were girls (30 per cent). Some 73 per cent identified RNA as the arresting authority, while the remaining children identified the police or the Unified Command. A small number identified the Armed Police Force. Most of these children were detained in army barracks and base camps and did not have any contact with their families. The majority claimed to have been held incommunicado when detained by RNA for periods sometimes amounting to six months, in violation of international standards. For example, a 16-year-old boy in the Morang High Security Centre has been detained for 10 months with no means of communicating with his relatives. 27. According to the findings of the monitoring and reporting task force, the majority of the children held under TADO were victims of ill-treatment or torture after their arrest, mainly during the initial interrogations. More than 80 per cent of the 101 children who responded to the interviews by the task force provided detailed accounts of ill-treatment and torture. The methods of torture included blindfolding and handcuffing for extended periods of time, beatings with sticks mainly on the soles of the feet, kicking and punches on the head and the chest. Some children also reported electric shocks, water immersion until suffocation and mock executions. 28. In May 2006, the new Government publicly announced that all detainees held under TADO, including juveniles, were to be released. Documentation has indicated that at least two juveniles are still kept in detention under other offences, but most of the others are thought to have been released. The task force members documented the situation of two girls, 15 and 17 years of age, both formerly associated with CPN-M, who are now charged with murder and are detained in the Nuwakot District Police Office together with other CPN-M members. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Nepal (2006).
	11. The Committee against Torture considered the report of Nepal (CAT/C/35/Add.6) in November 2005. In its concluding observations and recommendations (CAT/C/NPL/CO/2), the Committee recommended that the practice of preventive detention should be made consistent with international human rights norms and that the authorities should ensure fundamental rights of persons deprived of liberty are guaranteed, including the right to habeas corpus, the right to inform a relative, access to a lawyer and to a doctor of one's choice. The Committee also recommended that all detainees should be immediately transferred to legally designated places of detention which conform to international standards, and emphasised the need for systematic documentation of all arrests and detention, including the creation of a central register for persons deprived of liberty, to be made accessible to national and international monitors. It further recommended measures to be taken to ensure compliance by security forces of all orders of the courts, including habeas corpus, and the establishment of an independent body to investigate acts of torture and ill-treatment committed by law enforcement personnel. 26… OHCHR-Nepal was concerned about the absence of guarantees required by international standards in TADO, which provides for preventive detention for up to one year and police custody for up to 60 days for investigation purposes (see A/60/359, para.16). It also noted persistent failure to respect in practice even the requirements of this legislation. 28. Most TADO detainees were held in army barracks when first arrested, and some for long periods thereafter. Since OHCHR-Nepal began visiting army barracks, the number of detainees in RNA custody has decreased as both long-term detainees and some arrested recently have been transferred to civilian detention facilities. RNA established a central registry of those held in army custody and between May 2005 and January 2006 provided six lists of detainees. According to a list of 27 January 2006, 53 detainees including two women were held in 24 army barracks across the country; 11 had been held for over six months… 29. Detainees were often arrested by security officials in plainclothes, without being informed of the reasons, and held in detention without notification to their families or access to their families or a lawyer. An analysis of cases where habeas corpus writ petitions were filed shows frequent

	denial of detention (giving rise to cases of disappearances), false or misleading information provided to the court by authorities or security forces, and rearrest after a court ordered release. Many detainees have been held beyond the one-year maximum period, with TADO orders signed only on a date long after arrest or Chief District Officers (CDOs) of different districts issuing orders of detention in turns to the same person. 30. The long-standing pattern of immediate rearrest after a court had ordered a detainee's release persisted, despite instructions issued on 27 June 2005 by the Ministry of Home Affairs to CDOs that such rearrests should not be carried out. Over 75 such cases were reported to OHCHR-Nepal between May 2005 and late January 2006, 67 of them after 27 June… 31. While TADO contains provisions for people to be charged and tried for "terrorist and disruptive activities", the overwhelming majority of TADO detainees have been held without charge or trial. Following criticism of detention beyond the legal limit and of rearrests following court orders, a committee was constituted under the aegis of the Crime Investigation Department at Police Headquarters involving all concerned agencies of the Government to initiate investigations in TADO. 68. The situation of children accused of being associated with CPN (Maoist) who were arrested by security forces was of concern, especially those detained under TADO without judicial oversight. OHCHR learned of at least 100 cases of children detained under TADO in prisons and police stations during 2005, some of them for long periods beyond the limits of the law; at least a quarter of this number were arrested when they were under 16, the definition of a child in Nepal's Children's Act 1992. Two girls who, according to the initial detention orders signed by the CDO, were 15 years old, were held under TADO in Kapilvastu District from 27 April 2005 and rearrested immediately after their release by a court on 5 September 2005; the District Police Office provided false information to the police human rights cell in response to OHCHR-Nepal's inquiries. 92… children suspected of petty crimes continue to be arrested and held for long periods of time by police. In the course of visits to prisons and police stations, OHCHR-Nepal regularly found children detained with adults and without legal representation. It made representations about the detention of five children, including an 8-year-old, who were held in Hanuman Dhoka police station in December 2005 in overcrowded cells with adults. They had been remanded into police custody by a court without being produced before the judge, and lawyers who had tried to see them had been denied access. Source: Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal (2006).
	26. No new cases of arrest under the Terrorist and Disruptive Activities (Control and Preventions) Ordinance were reported. The Ordinance expired at the end of September 2006 and has not been renewed. Most children arrested under the Ordinance during the conflict were released but some were kept in detention on charges of common crimes; all of them are now over 18 years of age. Three female CPN-M detainees have been in pre-trial detention for between six and seven years, two of whom were 13 years old and one 17 years old at the time of their arrest. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Nepal (2008).
	24. On 26 November 2001, the then Government promulgated an anti-terrorist law, the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO). The Ordinance lapsed at the end of September 2006 and has not been renewed. A significant number of children were captured by RNA or arrested by the Nepal Police and Armed Police Force because of their alleged association with CPN-M. The legality of their subsequent detention, including the lack of due process and their treatment, was a major concern. 25. From 2001 to 2006, six TADO ordinances and one Act were promulgated consecutively, all providing powers to hold persons in preventive detention for up to 12 months if there were reasonable grounds to believe that they should be prevented from committing any TADO offences, as well as to hold in pre-trial detention persons suspected of having committed such offences. During the reporting period, task force members documented the cases of 195 juveniles held under TADO in various places, including army barracks, police stations, prisons and high security centres. 26. Among the 195 children, 43 per cent were below the age of 16 at the time of their arrest, the

	youngest being 11 years old. Fifty-eight were girls (30 per cent). Some 73 per cent identified RNA as the arresting authority, while the remaining children identified the police or the Unified Command. A small number identified the Armed Police Force. Most of these children were detained in army barracks and base camps and did not have any contact with their families. The majority claimed to have been held incommunicado when detained by RNA for periods sometimes amounting to six months, in violation of international standards. For example, a 16-year-old boy in the Morang High Security Centre has been detained for 10 months with no means of communicating with his relatives. 27. According to the findings of the monitoring and reporting task force, the majority of the children held under TADO were victims of ill treatment or torture. Source: United Nations Security Council, Report of the Secretary General on Children and Armed Conflict in Nepal (2006).
Pakistan	65. While noting some progress in this field, for instance, the introduction of birth registration in the refugee camps in May 2002, the Committee remains concerned at the very harsh living conditions in Afghan refugee camps, the scarcity of food and water and the lack of shelter and medical care, which have serious implications for the situation of children living in these camps. The Committee is also concerned at reports of ill-treatment of refugees by the police. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Pakistan (2003).
Philippines	83… The Committee emphasizes that unlawful arrest and detention of street children are serious violations of the provisions and principles of the Convention. 84 (b) Ensure that children living in the streets are not unlawfully arrested and detained, protect them from police brutality and where needed, secure their access to adequate legal services. 90… Unlawful detention of children, street children for instance, for the extended period of time and limited, or lacking access to appropriate legal aid and assistance and adequate social and health services give cause for serious concern. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Philippines (2005).
	…In its fight against the New People's Army (NPA), the government has repeatedly unlawfully killed children and arbitrarily detained them... 4.2 Children in situations of armed conflict and child soldiers (cases of grace violence, unlawful killings, arbitrary detention, and torture towards children by military forces) 4.2 In addition, NGOs working throughout the affected areas reported violations of children's rights, which, according to the Task Force Detainees of the Philippines include arrest and detention. …Meanwhile, under Article 125 of the RPC, all persons who are arrested must be brought before the prosecutor, municipal court judge or duly assigned officer for an inquest investigation with specific time frames, within 36 hours at the most, depending on the classification of the alleged crime. It would seem that in practice this only applies to cases of arrests without warrant. 5.2.3 Pre-trial Detention… The majority of the children in the case studies reported that the arraignment was their first opportunity to appear before the relevant court… As shown by the case studies, weeks or even months may lapse before the arraignment takes places… a child was arraigned within a week of his detention. In the case of another, it took more than 18 months… In all of the cases documented by PREDA, there is evidence of serious delays and breaches of the laws… Children accused of having committed a crime… yet many find themselves languishing in jail prior to their trial for lengthy periods of time. Of the children located in the various jails, not one is actually serving a sentence after trial and conviction in court… In practice, it seems that prosecutors, complainants and even judges view the pre-judgment period – which can amount to years in some cases – as adequate punishment for the crime that was allegedly committed. …On 7 June, 2006, the military rescued three 15 year old boys after an encounter with NPA units in Lopez, Quezon province. They were detained in jail for a day and were subsequently released to the custody of their respective parents… Reports indicate that these procedures are to charge children with criminal offences and even detain them in camps. In addition, there is no government or independent oversight body to ensure compliance, and no provisions for sanctions against agencies that fail to comply with the MOA.70. Source: South East Asia Coalition to stop the use of Child Soldiers, Alternative Report to the United Nations Committee on the Rights of the Child (2002).
	14. The Committee is concerned that the law allowing for warrant-less arrest is open to abuse, in

	that arrests in practice do not always respect the statutory conditions that the person arrested is actually committing a crime or that the arresting officer has "personal" knowledge of facts indicating that the person arrested committed the crime. The Committee is also concerned that a vaguely worded anti-vagrancy law is used to arrest persons without warrant, especially female prostitutes and street children. Source: United Nations Human Rights Committee, Concluding Observations: Philippines (2003).
Rwanda	69. The Committee recommends that the state party…(b) Consider addressing the situation of street children under the system of youth social welfare services and stop rounding up these children and sending them to detention centres… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Rwanda (2004).
	16. The Committee is concerned about reports that the Kigili authorities often arrest…street children…on the grounds of vagrancy. Such persons are reported to be held in detention without any charges being brought against them and in precarious material conditions. Source: United Nations Human Rights Committee, Concluding Observations: Rwanda (2009). 206. …The person must be brought before a court within 72 hours from the issuance of the arrest warrant so that a decision may be taken on his detention… Source: United Nations Human Rights Committee, State Party Report: Rwanda (2007).
Saudi Arabia	4. The Committee is concerned about the following: (d) Allegations of prolonged pre-trial detention of some individuals beyond the statutory limits prescribed by law, which heightens the risk of, and may on occasion of itself constitute, conduct in violation of the Convention… Moreover, the Committee is concerned at the limited degree of judicial supervision of pre-trial detention; (e) Reports of incommunicado detention of detained persons, at times for extended periods, particularly during pre-trial investigations. The lack of access to external legal advice and medical assistance, as well as to family members, increases the likelihood that conduct violating the Convention will not be appropriately pursued and punished. Source: United Nations Committee against Torture, Conclusions and Recommendations: Saudi Arabia (2002).
	26… the Kingdom's regulations make provision for the rights recognized in this article as follows: (e) If the accusation against him is substantiated, the accused person shall be remanded in custody, pending completion of the investigation, for a period of not more than three days from the date of his arrest (art. 5) Source: United Nations Committee against Torture, State Party Report: Saudi Arabia (2001).
Sierra Leone	Current laws in Sierra Leone do not *explicitly* explain how children in direct conflict with the law should be treated. For example, bail is left exclusively to the discretion of the arresting officer based on the gravity of the offense…Despite the fact that statutory law prohibits the incarceration of accused youths beyond the limit of 72-hours for minor offences, children are rarely taken to court after this period in order to be potentially granted bail (p. 36). Only one juvenile court exists in the country, in Freetown… The solitary existing court consists of what is actually a *makeshift* court, comprising court officials (including Justices of the Peace and Magistrates) who have not been trained in children's rights or child crime…The system results in extended delays for children in Remand Homes or jails awaiting trial. It is not unheard-of for a child to live for years in a prison or Remand Home without even having faced preliminary trial (p. 37). Source: Child Rights Coalition Sierra Leone, Alternative Report to the United Nations Committee on the Rights of the Child, A Complimentary Report to the State Party Report of Sierra Leone 2005 on the implementation of the Convention on the Rights of the Child (2008).
South Africa	14. There are also a number of displaced children from SADC (Southern African Development Community) countries detained in prison cells and police "lock-up" facilities for criminal activities or for lack of appropriate documentation. Source: National Children's Rights Committee, South Africa's First Supplementary CRC Report to the United Nations Committee on the Rights of the Child (2006).
	6. The Committee is concerned with the difficulties affecting documented and undocumented non-citizens detained under the immigration law and awaiting deportation in repatriation centres, who are unable to contest the validity or their detention…and without access to legal aid… as well as with the absence of an oversight mechanism for those centres… Source: United Nations Committee on the Rights of the Child, Concluding Observations: South Africa (2006).
	298. The Immigration Act, 2002 (*Act 13 of 2002*) provides for the regulation of the admission into and sojourn of foreigners…Section 34 of the Act deals with the arrest, detention, and deportation

	of illegal foreigners from the Republic… Source: United Nations Committee against Torture, State Party Report: South Africa (2005)
Spain	153. The Committee…notes with concern that the Organizational Act 7/2000 on terrorism increases the period of police custody… for children accused of terrorism. Source: United Nations Committee on the Rights of the Child, Concluding Observations: Spain (2002).
Sri Lanka	24. The provisions of ER require the relevant law enforcement authorities to produce persons arrested before a magistrate prior to the expiry of 30 days from the date of arrest. The Inter-Ministerial Working Group on Human Rights Issues proposed to amend this Regulation… 25. Under the provisions of PTA, if a suspect is detained under detention order section 9 (1), such person should be produced before a magistrate not later than 72 hours from the time of arrest… 26. With the signing of the ceasefire agreement between the Government of Sri Lanka and LTTE on 22 February 2002, arrests under PTA ceased. 27. Owing to the extraordinary security situation that prevailed in the country, it was an essential security requirement to retain legal provision that authorizes the Secretary to the Ministry of Defence to empower law enforcement authorities to detain persons against whom there was material evidence that they would pose a threat to national security or the maintenance of public order or essential services if permitted to live in an open society. However, such detention should not exceed one year. 28. The Secretary to the Ministry of Defence can authorize the detention of a suspect under the foregoing regulation (Regulation 17 (1) of ER). Therefore, the power of the Secretary to the Ministry of Defence to authorize "preventive detention" is subject to judicial review during the entire period of detention. The Committee furthermore recommends that the State Party: (a) Review the emergency regulations and the Prevention of Terrorism Act as well as rules of practice pertaining to detention to ensure that they conform with the provisions of the Convention. 88. The Prevention of Terrorism Act No. 48 of 1979 was introduced as temporary legislation to prevent acts of terrorism and other unlawful activities owing to the extraordinary security circumstances that prevailed in the country. 89. Consequent to the ceasefire agreement which came into force on 22 February 2002, no arrests or detentions are carried out under the provisions of the Prevention of Terrorism Act (PTA). Arrests are made under due process of law in accordance with the Criminal Procedure Code. Source: United Nations Committee against Torture, State Party Report: Sri Lanka (2004).
Sudan	21. The Committee expresses concern at the permitted legal duration of detention in police custody (*garde a vue*) which can be prolonged to as much as six months and, in practice, beyond. It also notes with concern that in actual fact the right of a detainee to have access to a lawyer, a doctor and family members, and to be tried within a reasonable time, is often not respected…The State party should ensure that the permitted legal duration of detention in police custody (*garde a vue*) is restricted by the Code of Criminal Procedure in accordance with the Covenant, and guarantee that that permitted duration will be respected in practice. The right of detainees to have access to a lawyer, a doctor and family members should be laid down in the Code of Criminal Procedure. Source: United Nations Human Rights Committee, Concluding Observations: Sudan (2007).
	197. The Juvenile Welfare Act of 1983 (annex 17) and the Criminal Code, 1991, stipulates that delinquent minors are to be accorded special treatment conducive to their reformation and social rehabilitation. They are placed in reformatories. 221. One of the main amendments to that law is subjecting the prerogatives of the "Security Organs" in arresting and detaining individuals to judiciary controls. The law stipulates that the Constitutional Court may appoint a judge to whom the detainee may resort to appeal against detention. The judge may issue the appropriate writs after enquiring into reasons of the detention. The law also has defined the maximum period of detention or arrest. Any member of the Security Organ appointed by the Director to investigate has the authority to arrest any person for not more than three days for investigation and interrogation reasons with a statement of accusation. If the three days are not sufficient for interrogating the detainee, the law grants the director of the Organ the authority to extend the period of detention for up to 30 days. The law also gives the Director the right, in accordance with the imperatives of National Security, to renew the detention for a period of time that shall not exceed another 30 days if the detainee is accused of a crime against

	the State and if there is proof and evidence for that accusation. In such a case the competent Public Prosecutor, who must be the head of a legal department appointed by the Minister of Justice, shall be informed of this. The law gives the National Security Council the right to extend the detention for a period of time not exceeding two months if the Director of the Organ refers to it any case for which it deems it necessary, for reasons of national security, to extend the detention. However the detainee shall be immediately set free after the expiry of two months. Source: United Nations Human Rights Committee, State Party Report: Sudan (2007).
	36. The Committee recommends that the State party: (c) Immediately end the practice of detaining children in camps where they suffer torture and other cruel, inhuman or degrading treatment or punishment and make sure that those responsible for such acts are brought to justice… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Sudan (2002).
Thailand	493. …Previous practice involved separation of the children from their parents and detention in observation and protection centres for an average duration of three to six months before being allowed to stand trial. With the new procedures, displaced children only need to be dealt with at the police station level and are released within a matter of hours to the care of the head of the temporary shelter… Source: United Nations Committee on the Rights of the Child, State Party Report: Thailand (2005).
Timor-Leste	73. Since independence, many children have continued to be separated from their families, still in the absence of appropriate judicial review… The placement of children (normally with the parents' consent but without any judicial or administrative review) into a residential institution… Source: United Nations Committee on the Rights of the Child, State Party Report: Timor-Leste (2007).
Togo	74. The result is that juveniles are being held in custody and pre-trial detention for longer periods. Pre-trial detention is the only option available before they are examined by a children's judge. No alternative measures, such as close supervision or placement with a family or in an educational setting or home, are available, for lack of appropriate facilities. Source: United Nations Committee on the Rights of the Child, State Party Report: Togo (2003).
	74. The Committee is concerned about…(b)The long pre-trial detention periods…(d) The lack of access to free legal advice… Source: United Nations Committee on the Rights of the Child, Concluding Observations: Togo (2005).
Tunisia	13. The Committee is concerned that Tunisian law allows the police to make arrests and detain individuals for a period of three days, renewable subject to a judge's consent. During these periods of deprivation of liberty, detainees do not have access to a lawyer. According to numerous reports transmitted to the Committee, the legal guarantees of persons deprived of their freedom are not observed in practice. Thus the lawful period of police custody is allegedly exceeded, in certain cases, without the persons arrested being allowed to undergo medical examinations and/or without their families being informed of their arrest. Furthermore, the Committee is concerned at the fact that persons deprived of their liberty do not have the right to take proceedings before a court so that it may decide without delay on the lawfulness of their detention (article 9 of the Covenant). Source: United Nations Human Rights Committee, Concluding Observations: Tunisia (2008).
Uganda	2.2.3.3. Reform of Juvenile Justice System …The backlog of cases in the court system also affects the juveniles. Where as juveniles are brought before magistrates courts for committal, the lack of jurisdiction of magistrates in capital offences has meant that children cannot take plea before the magistrate and as such they have been remanded for periods longer than twelve months without charges being made against them… 10.1.2. …Street Children Most recently the government implemented an apparently hastily drawn up policy of getting children off the streets. Though this violated the Children Statute 1996…children were rounded up and taken to the National Rehabilitation Centre. Source: Uganda Child Rights NGO Network, NGO Complementary Report to the GOU First Period Report on the CRC to the UN Committee on the Rights of the Child (2000).
	219. The Criminal Investigation Department (CID), especially, is faced with the problem of enforcing the 48 hour rule…(a) With regard to deportees, sometimes the line Ministry concerned with availing funds for the one-way air ticket to send them to their countries of origin, takes long to do so. For instance, as of May 2002, there were seven foreign nationals who had been custody for three months. Source: United Nations Human Rights Committee, State Party Report: Uganda (2003).

	6. The Committee is further concerned about: (a) The length of pre-trial detention, including detention beyond 48 hours as stipulated by article 23, clause 4, of the Constitution and the possibility of detaining treason and terrorism suspects for 360 days without bail… Source: United Nations Committee against Torture, Concluding Observations: Uganda (2005).
United Kingdom	77 (h) The provisions of the Counter-Terrorism Bill also apply to children suspected or charged with terrorism offences; in particular, the Committee is concerned at the provision for extended pre-charge detention and notification requirements… 70 (a) As also acknowledged recently by the Human Rights Committee, asylum-seeking children continue to be detained, including those undergoing an age assessment, who may be kept in detention for weeks until the assessment is completed… Source: United Nations Committee on the Rights of the Child, Concluding Observations: United Kingdom (2008).
United Republic of Tanzania	Prejudice towards children living and working on the streets is common amongst the Tanzanian police force who regards such CYP as delinquents and criminals…CYP are frequently detained at police stations on charges of vagrancy and begging…The situation is exacerbated by the City Council and District Authorities who periodically instruct the police to round-up street children. (p.45). Source: The National Network of Organizations Working with Children (NNOC), The Non-Government Organisations' Report to the United Nations Committee on the Rights of the Child on the Implementation of the United Nations Convention on the Rights of the Child in Tanzania (2005).
United States	28. 'Notes: the presence of considerable numbers of children in US-administered detention facilities in Iraq and Afghanistan. While taking note: of measures undertaken to establish educational programmes for children detained in Iraq, regrets that not all detained children have access to education. Concerned: at the number of children detained over extended periods of time, in certain instances, for one year or more, without adequate access to legal advisory services or physical and psychological recovery measures. Concerned: over reports indicating the use of cruel, inhuman and degrading treatment of detained children. Concerned: reports indicating the detention of children at Guantanamo Bay for several years and that child detainees there may have been subject to cruel, inhuman or degrading treatment. Seriously concerned: children who were recruited or used in armed conflict, rather than being considered primarily as victims, are classified as "unlawful enemy combatants" and have been charged with war crimes and subject to prosecution by military tribunals, without due account of their status as children. Recommends: SP 1) ensure that children are only detained as a measure of last resort and that the overall number of children in detention is reduced. If in doubt regarding age, young persons should be presumed to be children, 2) guarantee that children, even if suspected of having committed war crimes, are detained in adequate conditions in accordance with their age and vulnerability. The detention of children at Guantanamo Bay should be prevented, 3) inform parents or close relatives where a child is detained, 4) provide adequate free and independent legal advisory assistance for all children, 5) guarantee children a periodic and impartial review of their detention and conduct such reviews at greater frequency for children than adults, 6) ensure that children in detention have access to an independent complaints mechanism. Reports of cruel, inhuman and degrading treatment of detained children should be investigated in an impartial manner and those responsible for such acts be brought to justice, 7) conduct investigations of accusations against detained children in a prompt and impartial manner, in accordance with minimum fair trial standards. The conduct of criminal proceedings against children within the military justice system should be avoided and 8) provide physical and physiological recovery measures. including educational programmes and sports and leisure activities, as well as measures for all detained children's social reintegration.' Source: United Nations Committee on the Rights of the Child, Optional Protocol on Children in Armed Conflict, Concluding Observations: United States of America (2008).
Uruguay	… children with psychiatric disorders and addiction problems can be forcefully committed for the sake of "protection", by means of a medical prescription and a summary proceeding (arts. 121 and 122 of the Code of the Child and Adolescent)… (p. 22) Source: NGO Alternative Report to the United Nations Committee on the Rights of the Child, *Comité de los Derechos del Nino y Adolescente*-Uruguay (2007).
Viet Nam	236… those from 12 years old to under 18 years old violating administrative rules on order and social security and who were educated many times… but did not change… Source: United Nations Committee on the Rights of the Child, State Party Report: Viet Nam (2002).

	Between 2003 and 2006, Human Rights Watch received credible reports of serious abuses of street children in Hanoi. Primarily poor children from the countryside who go to Hanoi to find work, street children are routinely and arbitrarily rounded up by police in periodic sweeps. They are sent to two compulsory state "rehabilitation" centres on the outskirts of town, Dong Dau and Ba Vi social protection centres, where they may be detained for periods ranging from two weeks to as much as six months… In fact, the Ministry of Public Security plays a significant role in their operation…The centres operate as part of the Vietnamese administrative – rather than criminal justice – system. This means that, according to Vietnamese law, court orders are not required in order for children and others to be rounded up and detained at the centres, and the normal criminal law safeguards do not apply. Children living or working on the streets who have not committed any crime (or only minor offences) are usually dealt with through Vietnam's administrative system when they are picked up by the police, rather than the criminal justice system. As an administrative matter, the children are not formally charged with a criminal offence, and thus the due process rights that normally precede someone's detention, such as court proceedings and a hearing, are not required by Vietnamese law in order for children to be sent to the Social Protection Centres (I. Summary).. Source: Human Rights Watch, Alternative Report to the United Nations Committee on the Rights of the Child,, Children in the Dust: abuse of Hanoi Street Children in Detention (2006).
	8. Notwithstanding the information provided by the delegation that only three persons were currently subject to administrative detention, referred to as probation by the delegation, the Committee remains concerned about the continued use of this practice as prescribed under decree CP-31, since it provides for persons to be kept under house arrest for up to two years without the intervention of a judge or a judicial officer. The Committee is equally concerned at the provisions of article 71 of the Code of Criminal Procedure, pursuant to which the Principal Prosecutor may prolong the duration of the preventive detention of an individual without time limits, "if required and for serious offences against national security". Source: United Nations Human Rights Committee, Concluding Observations: Viet Nam (2002).
Yemen	13. ..The Committee remains concerned, however, about reported grave violations of articles 6, 7, 9 and 14 of the Covenant committed in the name of the anti-terrorism campaign. It notes with concern reported cases of… indefinite detention without charge or trial… Source: United Nations Human Rights Committee, Concluding Observations: Yemen (2005).
	208. Article 176 reads as follows: "The Department of Public Prosecutions may not detain any person longer than seven days for questioning, and a warrant for detention may be extended only upon the order of the magistrate of the competent court." 209. Article 189 reads as follows: "A warrant for detention issued by the Department of Public Prosecutions shall be valid only for a period of seven days following the arrest of the suspect or his transfer to the Department if he was arrested earlier." 221. Paragraph 18 of the concluding observations of the Human Rights Committee reads as follows: "While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern about the effects of this campaign on the human rights situation in Yemen, in relation to both nationals and foreigners. It is concerned, in this regard, at the attitude of the security forces, including Political Security, which arrests and detains anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (art.9)… Source: United Nations Human Rights Committee, State Party Report, Fourth Periodic Report: Yemen (2004).
Zambia	Police continue to round up children living and working on the streets, a practice that can be described as arbitrary detention (Lukas Munting, Evaluation Report on Zambia Child Justice System, Government of the Republic of Zambia, at 20) (p. 13). Source: World Organisation Against Torture (OMCT), Human Rights Violations in Zambia, Part III: Child Right's Situation: Shadow Report, United Nations Human Rights Committee (2007).