

4 - Children's right in detention

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International law clearly mandates that detention should only be used as a last resort and for the shortest possible period of time (Article 37 (b) CRC) (see also Factsheet no. 3 on Pre-trial Detention). Further, alternatives to detention are encouraged through numerous instruments (see also Factsheet no. 9 – sentencing). Nevertheless, detention as a sanction has not yet been prohibited and it continues to be imposed in most countries across the globe ([2019 UN Global Study on children deprived of liberty](#), A/74/136, 11 July 2019).

Detention does not suspend the rights of children as set out in the CRC. On the contrary, placing a child in detention results in the state taking over the obligation to protect him or her. In practical terms such protection entails offering children certain material conditions of detention as well as the obligation not to subject them to inhuman or degrading treatment and to ensure that allegations of such treatment are properly investigated. In addition, while all children's rights should also apply in detention, several particular aspects (such as the right to contact with parents, education, etc) have been particularly highlighted in international instruments.

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1. Material conditions of detention

It is accepted in international law that certain hardship is inherent in any deprivation of liberty. However, under Article 3 ECHR, once in the custody of the state, the state is bound to ensure that the conditions of detention do not reach the level of severity to as to amount to inhuman and degrading treatment. Article 37 (c) of the CRC expressly provides that children deprived of liberty should 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 their age. Article 37 (c) CRC further exemplifies types of treatment to which children should be entitled, such as the right to maintain contact with family members, the right to correspondence or the right to be separated from adults. Other rights to which children deprived of liberty are entitled to have been developed with binding authority through the case-law of the ECtHR and in the Procedural Safeguards Directive. Many other documents, including most recently General Comment no 24 include further authoritative

guidelines on these topics. The sections below elaborate on the key aspects concerning material conditions of detention as outlined principally under the ECtHR case law, the EU Law and General Comment no 24.

1.1. Separation from adults

Article 37 (c) of the **CRC** expressly mandates states not to detain children together with adults. The same right for children is laid down in Article 12 of the **Procedural Safeguards Directive**. The Procedural Safeguards Directive also clarifies that the right not to be detained with adults includes periods of police custody. The CRC Committee further explains in **General Comment no 24** that the reasoning behind the rule is the evidence attesting that placement with adults compromises children's health and basic safety as well as their potential for reintegration (paragraph 92).

The only potential exception is where detention together with adults would be in the best interests of the child, although this exception should be interpreted narrowly and mere convenience of the state does not amount to a best interest consideration (General Comment no 24, para 92). One situation where it may be in the best interests of the child to be detained together with adults may be where their caregivers or family members are also in detention (see in this sense the ECtHR case-law concerning administrative detention of children, although it should be noted that this case-law relates to immigration detention; eg. *Popov v France*, nos 39472/07, 39474/07; *S.F. and others v Bulgaria*, no. 8138/16). The ECtHR has found that detaining children together with adults, taken together with other elements of the detention, can amount to inhuman and degrading treatment contrary to Article 3 ECHR (for example *Guvec v Turkey*, no 70337/01, § 98). It should be noted however, that so far the ECtHR has not held that detention with others alone, i.e. in absence of other aggravating circumstances, is capable of triggering an infringement of Article 3 ECHR (for example *Zherdev v Ukraine*, § 93).

1.2. Medical examination and treatment

Article 8 of the **Procedural Safeguards Directive** provides that Member States are to ensure that children deprived of liberty receive a medical examination as soon as possible in view of assessing primarily their mental and physical condition. This medical examination - which is to be considered as a right of children in detention - should be distinguished from the medical examination which may be conducted in the context of age determination proceedings. The latter is usually an invasive procedure to be refrained from and, if necessary, it should only be used as a last resort, whereas the former is seen as a right the child is entitled to. Under Article 8 of the Procedural Safeguards Directive, the medical examination should be carried out by the authorities, ex officio, or at the request of parents, the child or his/her lawyer. Article 8 (4) of the Procedural Safeguards Directive also obliges state authorities to record in writing the conclusions of the medical examination.

In its turn, the **ECtHR** has held that Article 3 of the Convention requires the State to protect the physical well-being of persons deprived of liberty, through the provision of the requisite medical assistance (*Guvec v. Turkey*, § 96). The Court has further held that the medical assistance should be adequate for the child's needs (*Guvec v. Turkey*, § 94).

With specific reference to children, the Court has held:

“When dealing with children, the Court considers that, in line with established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community (see, for example, Rules 57, 62.2, 62.5, 69.2, and 73 (d) of the 2008 European Rules for juvenile offenders subject to sanctions or measures, Article 3 § 3 of the CRC, and Rules 49-53 of the Havana Rules in paragraphs 79, 81 and 87 above). The authorities should always be guided by the child’s best interests, and the child should be guaranteed proper care and protection. Moreover, if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child’s state of health to determine whether or not he or she can be placed in a juvenile detention centre.”

(*Blokhin v Russia*, no. 47152/06, § 138)

Further, regarding the adequacy of the medical treatment the Court applies the following general principles:

“The Court reiterates that the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee’s state of health and his or her treatment while in detention (see *Khudobin*, cited above, § 83), that diagnosis and care are prompt and accurate (see *Melnik v. Ukraine*, no. 72286/01, §§ 104-06, 28 March 2006, and *Hummatov*, cited above, § 115), and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee’s health problems or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Popov*, cited above, § 211; *Hummatov*, cited above, §§ 109 and 114; and *Amirov v. Russia*, no. 51857/13, § 93, 27 November 2014). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Holomiov v. Moldova*, no. 30649/05, § 117, 7 November 2006, and *Hummatov*, cited above, § 116). Furthermore, medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. Nevertheless, this does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities (see *Cara-Damiani v. Italy*, no. 2447/05, § 66, 7 February 2012).”

1.3. Solitary confinement

In the case of *Coselav v Turkey*, where the authorities had left a 17-year-old inmate alone in his cell without adequate supervision, the **ECtHR** found that the authorities should have known of the risk of suicide, finding therefore a violation of Article 2 of the Convention (*Coselav v Turkey*, 1413/07, §§ 68-70).

The **CRC Committee** has interpreted Article 37 of the CRC as prohibiting solitary confinement. Where in exceptional circumstances a child is separated from others it should be done in the presence or under the strict supervision of suitably trained staff (General Comment no 24, § 95 (h)). The Committee has considered that other disciplinary measures which are not consistent with upholding the child's sense of dignity, such as placement in a dark cell, corporal punishment or any other punishment that may compromise the physical or mental health or well-being of the child concerned (General Comment no 24, § 95 (g)).

In its [24th General Report](#) Committee for the Prevention of Torture (the "CPT Committee") has considered that solitary confinements should in no circumstance be imposed for longer than 3 days. This standard appears lower than that adopted by the CRC Committee; it should be also noted that it has been adopted 7 years prior to that of the CRC Committee. It could therefore be argued that General Comment no 24 represents the most recent and up to date norm in this area.

Incommunicado detention is not permitted for all persons under 18 years old ((General Comment no 24, § 95 (a)).

2. Protection from ill treatment

Article 3 of the **ECHR** guarantees that everyone is protected against torture, inhuman or degrading treatment. The ECtHR will find that the substantive limb of Article 3 has been breached if (1) the treatment complained of amounts to torture, inhuman or degrading treatment or punishment and (2) if the perpetrator was a state agent or if not, the state knew or should have known of it and no appropriate measures were taken to prevent the treatment.

Allegations of torture, by virtue of their seriousness do not raise legal obstacles in relation to meeting the threshold of Article 3. However, there have been other situations where the Court was called upon to determine whether the behaviour complained of has reached the minimum level of severity so as to amount to inhuman or degrading treatment. Under the Court's settled case-law "Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3." (*Bouyid v Belgium*, no. 23380/09, § 87).

In the case of *Bouyid v Belgium* (no. 23380/09), the applicants complained that they had been slapped in the face during police custody. The Grand Chamber of the ECtHR assessed whether this could qualify under the notion of 'degrading treatment' under Article 3 ECHR. In finding that indeed, a slap constitutes degrading treatment as it humiliates and debases an individual, the Court also stressed that one of the applicants was 17 years old at the time and that ill treatment was likely to have a greater psychological impact on him than on an adult.

In *Zherdev v Ukraine* (no. 34015/07), the question was whether stripping the applicant and leaving him handcuffed in his underwear for 2 hours at the police station constituted degrading treatment contrary to Article 3 of the Convention. The Court found that especially in light of the applicant's age such treatment, together with his subsequent placement in a cell with adult detainees for three days amounted to degrading treatment contrary to Article 3 ECHR.

Further, under the procedural angle of Article 3, once an arguable allegation of ill treatment has been made, the state has the duty to conduct an effective investigation, meaning an investigation capable of leading to the identification and punishment of those responsible. For an investigation to be considered effective, it must be prompt, it should be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used force but also all the surrounding circumstances. Further, any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the required standard of effectiveness. (*Bouyid v Belgium*, §§118 - 120).

3. (Other) rights of children in detention

3.1. The right to family life

Article 12 (5) (c) of the **Procedural Safeguards Directive** provides that Member States shall take appropriate measures to ensure the effective and regular exercise of their right to family life. Recital 51 also details that children should have the right to regular contact with their parents, family and friends unless exceptional restrictions are required in the child's best interests or in the interests of justice.

The right to family life is also provided under Article 37 (c) of the **CRC**. The **CRC Committee** has interpreted this provision to encourage states to place children in facilities which are as close as possible to their families (§ 94 of General Comment no 24). In the Committee's view the exceptional circumstances which may lead to the restriction of this right should be clearly laid down in law and left to the discretion of authorities.

3.2. Education during detention

Article 12 (5) (b) as well as Recital 48 of the **Procedural Safeguards Directive** provide for the children's right to education while in detention.

The same right is mentioned in § 95 (c) of General Comment no 24.

It should be pointed out that under the **ECHR**, detention for the purposes of educational supervision (Article 5 (1) (d)) does not relate to children accused or suspected of crime, therefore the criteria set out for educational supervision do not apply.

3.4. Leisure and rest

The right of the child to rest and leisure is recognized in Article 31 of the CRC.

Pursuant to paragraph 95 (b) of CRC Committee's General Comment no. 24: "Children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement. Due regard should be given to their needs for privacy, for sensory stimuli and for opportunities to associate with their peers and to participate in sports, physical exercise, arts and leisure-time activities." The CRC Committee has stressed the importance of the right to play and to participate in games, physical exercise, cultural and artistic life for children in detention

in the context of [General Comment No. 17 \(2013\)](#) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) (§ 51).a

3.5. Freedom of religion and belief

Article 12 (5) (e) of the **Procedural Safeguards Directive** obliges Member States to respect children's right to freedom of religion or belief. However, Recital 52 limits this obligation to not interfering with children's religion or belief without any requirement for states to take any active steps to assist children in worshipping.

Further reading

Non-binding instruments (in addition to the instruments discussed above the following non-binding instruments cover particular aspects related to the pretrial detention of children:

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the '[Havana Rules](#)', 14 December 1990;

Council of Europe, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the [European Prison Rules](#), June 2006

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, '[Child Friendly Justice Guidelines](#)', 17 November 2010

[2019 UN Global Study on children deprived of liberty](#), A/74/136, 11 July 2019

United Nations Standard Minimum Rules for the Treatment of Prisoners, the [Nelson Mandela Rules](#)), A/RES/70/175, 8 January 2016

(Academic) literature, reports

<http://www.childrensrightsbehindbars.eu/outputs/practical-guide>

ECtHR factsheet: [Detention conditions and treatment of prisoners](#)