



**WRITTEN COMMENTS**

submitted by

**MENTAL DISABILITY ADVOCACY CENTER**

**Blokhin. v. Russia**

European Court of Human Rights

Application no 47152/06

11 July 2014  
By mail and fax

## TABLE OF CONTENTS

### Introduction

#### I. Generic Background Information in Brief

- a. Persons with disabilities and criminal proceedings
- b. Children and criminal proceedings

#### II. Access to Justice for Children with Disabilities

#### III. Detention of Children with Disabilities

#### IV. Conclusion

## INTRODUCTION

These written comments are submitted by the Mental Disability Advocacy Center ('MDAC') pursuant to leave granted by the President of the Court under Rule 44(3), Rules of Court.

Founded in 2002, MDAC is an international human rights NGO which is independent of all governments. It has participatory status with the Council of Europe, a special consultative status with the United Nations Economic and Social Council, and it has standing to lodge collective complaints under the European Social Charter. It works to advance the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities (mental health disabilities). MDAC operates at the global level as well as regional and domestic levels in Europe and Africa. MDAC has previously served as a third party intervener in a number of cases before the European Court of Human Rights ('the Court'), including *Kędzior v. Poland* (no. 45026/07, judgment of 16 October 2012), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (no. 47848/08<sup>1</sup>) and *ZH v Hungary* (no. 28973/11, judgment of 8 November 2012). It seeks in this intervention to assist the Grand Chamber, in accordance with the Rules of Court and the terms of the Deputy Grand Chamber Registrar's letter of 19 June 2014.

These comments (i) briefly summarise the generic background, and then set forth international human rights standards on the issues of (ii) access to justice for and (iii) detention of children with disabilities. There is now a substantial body of international and European legal instruments which address the specific needs of children and those of persons with disabilities in relation to access to justice and conditions of detention. Whilst these child-specific and disability-specific instruments do not focus upon children with mental disabilities, read together they demonstrate the particular 'double disadvantage' faced by such children – both as children, and as individuals with mental disabilities. Considering only the child-specific instruments would not give the full picture, and would not address the additional vulnerabilities and needs of children with mental disabilities.

It is well established that the Convention is a living instrument which must be interpreted "*in the light of present-day conditions*"<sup>2</sup> and must be read "*in the light of the notions currently prevailing in democratic States.*"<sup>3</sup> In interpreting its provisions and the scope of States' obligations in specific cases, the Court will look "*for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.*" It is respectfully submitted that international standards regarding the rights of both children and persons with disabilities should inform the Court's interpretation of Articles 3 (freedom from torture or inhuman or degrading treatment or punishment), Article 5 (right to liberty), Article 6 (right to a fair trial) and Article 14 (right to non-discrimination in the

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<sup>1</sup> Relinquishment in favour of the Grand Chamber, March 2013, regarding the victim requirement and the standing of a non-governmental organisation to lodge an application on behalf of a deceased mental patient.

<sup>2</sup> See, among many other authorities, *Selmouni v. France* (GC), no. 25803/94, [101], ECHR 1999-V.

<sup>3</sup> *Van der Mussele v. Belgium*, 23 November 1983, [32], Series A no. 70.

enjoyment of protected rights and freedoms) of the Convention in this case. There is a clear consensus internationally regarding the importance of both child-specific and disability-specific human rights protections. There is also an emerging recognition of the fact that children with mental disabilities are particularly vulnerable to violations of their rights. In order to ensure that they are both protected from such violations, and that they have the ability to obtain effective remedies when such violations occur, States have a positive obligation to apply stringent and effective safeguards in order to ensure that rights are 'practical and effective.' This is also necessary to ensure compliance with the overarching requirement of Article 1 of the European Convention on Human Rights ('the Convention'), requiring States to secure its rights for 'everyone,' including this particularly vulnerable group.

## I. GENERIC BACKGROUND INFORMATION IN BRIEF

### ***a. Background Information on Persons with Disabilities and Criminal Proceedings***

According to the 2011 World Report on Disability one billion people worldwide have a form of disability: that is, 15% of the global population<sup>4</sup>, including 80 to 120 million Europeans<sup>5</sup>. It is estimated that 150 million of these people are children<sup>6</sup>.

The Court recognised in *Kiss v. Hungary* that people with mental disabilities are a "particularly vulnerable group in society" having suffered discrimination and prejudice resulting in social exclusion<sup>7</sup>, and Judge Sajó commented in an additional opinion in *M.S.S. v Belgium and Greece* that all members of such a group deserve "special social protection"<sup>8</sup>. This is particularly relevant in light of the evidence that, for example, people with disabilities are at a greater risk of ill-treatment than those without disabilities<sup>9</sup>.

People with learning disabilities may have limited understanding of what is taking place at the time of arrest, detention and charging. Communication problems between people with disabilities and service providers in general translates in the justice system into inaccessible legal information, lack of awareness of legal rights, and an inaccessible legal system<sup>10</sup>. Australian research by the New South Wales Law Reform Commission found that people with learning disabilities tended to be unaware of their legal rights: more than three-quarters of those interviewed said they would sign anything the police requested<sup>11</sup>. Research in the United Kingdom, conducted by Mencap and the Prison Reform Trust, echoes this; it found that, "people with a learning disability will often answer 'yes' to a question to try to be helpful and can incriminate themselves wrongly."<sup>12</sup> This emphasises the importance of adequate safeguards being in place during questioning. In many Western nations, people with intellectual disabilities face different treatment within the system in comparison to those without intellectual disabilities<sup>13</sup>. For example, Prison Reform Trust research in the United Kingdom found

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<sup>4</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. xi; p. 44; p. 261

<sup>5</sup> Commissioner for Human Rights, *Issue Paper: Human Rights and Disability: Equal rights for all*, 2008; European Commission, *People with disabilities have equal rights: The European Disability Strategy 2010-2020*, 2010

<sup>6</sup> Committee on the Rights of the Child, General Comment No. 9, The rights of children with disabilities (Forty-third session, 2007), U.N. Doc. CRC/C/GC/9 (2007).

<sup>7</sup> *Kiss v. Hungary*, no. 38832/06, 20 May 2010, at [42].

<sup>8</sup> *MSS v. Belgium and Greece*, no. 30696/09, 21 January 2011.

<sup>9</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. 59; House of Lords and House of Commons Joint Committee on Human Rights, *Seventh Report of Session 2008-08: A Life Like Any Other? Human Rights of Adults with Learning Disabilities – Volume 1*, 2008, p. 68.

<sup>10</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. 72; Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, p. 23-30.

<sup>11</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, 1996; Hayes, S., 'Missing out: offenders with learning disabilities and the criminal justice system' (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 150.

<sup>12</sup> Reported by Corin Williams, 'People with Learning Disabilities in Prison,' *Community Care*, 2<sup>nd</sup> March 2009; *No One Knows: Learning Disability and Learning Difficulty in Prisons*, PRT, 2008.

<sup>13</sup> Cant, R., & Standen, P., 'What professionals think about offenders with learning disabilities in the criminal

that people with intellectual disabilities are less likely than those without to receive a fair hearing, and also found examples of mistreatment by the police of persons with learning difficulties and disabilities.<sup>14</sup>

Failure to identify offenders with intellectual disabilities early on in proceedings, and to take appropriate steps at that stage, can lead to consequences such as placement in inappropriate units<sup>15</sup>. Criminal justice professionals need adequate training to ensure more effective investigation practices from the outset<sup>16</sup>. Nevertheless, Inclusion Europe found that such training is not undertaken systematically, thereby hindering the improvement of access to justice for persons with intellectual disabilities<sup>17</sup>.

### **b. Background Information on Children and Criminal Proceedings**

The number of children deprived of liberty as a result of conflict with the law is estimated to be at least one million worldwide<sup>18</sup>. Children in detention are exposed to a wide range of risks to their safety; the United Nations reports that once in contact with a justice system that is unresponsive to children's needs, children deprived of liberty are at a heightened risk of abuse, violence, exploitation, and health related concerns, such as injury and HIV/AIDS infection<sup>19</sup>, they also risk becoming further isolated from society, particularly where children's welfare, education, and reintegration are not fully promoted within the formal justice system.

The Court has long recognised the specific vulnerability of children in society and required specific measures to ensure their protection in a wide ranging circumstance, in *X and Y v the Netherlands* it was said that, “children and other vulnerable individuals, in particular, are entitled to State protection”<sup>20</sup>. Children within the criminal justice system are especially vulnerable and those with disabilities even more so.<sup>21</sup> In *S and Marper v UK* this heightened vulnerability was emphasized by the Court who noted the “special position of minors in the criminal-justice sphere.”<sup>22</sup> Children in conflict with the law, who are also disabled, are widely recognized to have an even higher level of vulnerability<sup>23</sup> due to the combination of two disadvantages – the dual disadvantage we referred to at the outset of this written submission.

Children are likely to have limited understanding of what is taking place at the time of arrest, detention and charging and further specific needs if they are detained. Consequently, the recommendation for appropriate specialised juvenile justice procedures is widely recognised in international law.<sup>24</sup> The Inter American Court of Human Rights has highlighted the importance that a

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justice system’ (2007) *British Journal of Learning Disabilities*, 35, 174–180.

<sup>14</sup> Prison Reform Trust evidence to the House of Lords and House of Commons Joint Committee on Human Rights, *Seventh Report of Session 2008-08: A Life Like Any Other? Human Rights of Adults with Learning Disabilities – Volume 1*, 2008, p. 75-76.

<sup>15</sup> Hayes, S., ‘Missing out: offenders with learning disabilities and the criminal justice system’ (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 147-149.

<sup>16</sup> Hayes, S., ‘Missing out: offenders with learning disabilities and the criminal justice system’ (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 149-150.

<sup>17</sup> Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, p. 30.

<sup>18</sup> <http://www.unodc.org/unodc/en/justice-and-prison-reform/childrensvictimswomensissues.html> (last accessed 29 June 2014).

<sup>19</sup> <http://www.unodc.org/unodc/en/justice-and-prison-reform/childrensvictimswomensissues.html> (last accessed 30 June 2014).

<sup>20</sup> *X and Y v. the Netherlands*, Application no. 8978/80 [21-27], 26 March 1985; *Stubbings and Others v. UK*, Application nos. 22083/93; 22095/93, 22 October 1996.

<sup>21</sup> Unicef report on the Rights of the Child at 25th Regular Session of the Human Rights Council, March 2014. [http://www.unicef.org/ceecis/media\\_25842.html](http://www.unicef.org/ceecis/media_25842.html) (last accessed 29 June 2014).

<sup>22</sup> *S and Marper v. UK* (GC), Nos. 30562/04 and 30566/04, [24] 04 December 2008; *T. v. UK* [GC], no. 24724/94, at [75] and [85], 16 December 1999.

<sup>23</sup> Committee on the Rights of the Child, General Comment No. 9, The rights of children with disabilities (Forty-third session, 2007), U.N. Doc. CRC/C/GC/9 (2007).

<sup>24</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty Adopted by General Assembly resolution 45/113 of 14 December 1990 (“Havana Rules”).

child participates in the criminal justice system under different conditions from those of an adult and that to argue otherwise “...is to omit adoption of special measures for protection of children, to their grave detriment”<sup>25</sup>. Judicial procedures should be adapted to protect children and ensure that their needs are assessed, and that children are referred to appropriate services, and that they are offered care and assistance with reintegration into the community. In order to combat this vulnerability, a juvenile justice system should embody a child-friendly environment, using appropriate language and the minimum possible use of physical restraints and include separation from detained adults. The Court has recognised the need to take positive steps within the justice system to provide children with “necessary protection and assistance so that they can fully assume their responsibilities within the community”, and prepare them “to live an individual life in society”<sup>26</sup>.

However, in many states the implementation of such systems is still embryonic, UNICEF reported earlier this year that justice systems in the eastern European and Central Asian region are generally not adapted to children’s rights and that in most of these countries, legislation and procedures concerning the treatment of children participating in justice processes have not been adapted to their particular rights and needs<sup>27</sup>. At its forty fourth session, the Committee on the Rights of the Child noted that “it is also clear that many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort”<sup>28</sup>.

## II. ACCESS TO JUSTICE FOR CHILDREN WITH DISABILITIES

Access to justice is a cornerstone of a legal system respectful of human rights and abiding by the rule of law. For children with mental disabilities, who are particularly vulnerable to violations of their rights, meaningful access to justice is critical. It is respectfully submitted that ensuring access to justice for children with disabilities on a basis of equality with others and without discrimination, and in a manner which is ‘practical and effective,’ requires that procedural and age-appropriate accommodations are implemented in all cases and at all stages of involvement with the legal system. The treatment of juveniles with disabilities at the investigative stage and in the imposition of any penalties (as well as at all other stages) must be sensitive and tailored to the needs arising from their intersecting identities as children and as people with disabilities, and the consequent double disadvantage which they face. In addition, their ability to access justice to seek redress for violations of their rights must be facilitated in light of impairments arising from their disability which may hinder this. This includes facilitating their ability to participate and be heard in legal proceedings affecting them through reasonable accommodations where necessary. This submission is supported by the key international standards of relevance, summarised below.

### ***United Nations Convention on the Rights of Persons with Disabilities (CRPD)***

The CRPD was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008. As of 1 July 2014 it was signed by 158 and ratified by 147 Parties including the European Union<sup>29</sup>; 41 Council of Europe Member States have ratified and all except Liechtenstein have signed the CRPD. Russia signed the CRPD on 30 March 2007 and ratified it on 20 July 2007.<sup>30</sup>

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<sup>25</sup> IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. In I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, [96].

<sup>26</sup> *Nortier v Netherlands*, Application no. 13924/88, 24 August 1993.

<sup>27</sup> Insights: child rights in central and eastern Europe and central Asia, 2014, UNICEF. ([http://www.unicef.org/ceecis/Insights2014\\_on\\_promoting\\_equitable\\_access\\_to\\_justice\\_for\\_all\\_children.pdf](http://www.unicef.org/ceecis/Insights2014_on_promoting_equitable_access_to_justice_for_all_children.pdf) last accessed 29 June 2014).

<sup>28</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice* (Forty fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007).

<sup>29</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=iv-15&chapter=4&lang=en) (last accessed 30 June 2014).

<sup>30</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&lang=en) (last accessed 29 June 2014).

The CRPD has been characterised as a major leap forward in international human rights law which represents the first serious effort to discontinue the marginalisation of disability within human rights.<sup>31</sup> It does not create new rights, but it is the first legally binding instrument to comprehensively reaffirm and reinforce existing rights in a framework specific to persons with disabilities.<sup>32</sup> The fundamental purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>33</sup> The principles of equality and non-discrimination are among the main features of the CRPD. The general provision on equality and non-discrimination can be found in its Article 5(2). The latter expressly obliges States to “*prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*”. This general wording is further emphasised and reiterated throughout the other provisions of the CRPD.

The Court has in *Glor v. Switzerland*<sup>34</sup> made explicit reference to the CRPD as the basis for the “*existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment*”, despite the fact that the relevant events had taken place before the adoption of the CRPD by the General Assembly in 2006. Since then the Court has cited the CRPD in a number of other cases such as *Kiss v. Hungary*<sup>35</sup>, *Jasinskis v. Latvia*<sup>36</sup>, *Kiyutin v. Russia*<sup>37</sup>, *Seal v. the United Kingdom*<sup>38</sup>, *Stanev v. Bulgaria*<sup>39</sup> and *D.D. v. Lithuania*<sup>40</sup>.

As the UN Special Rapporteur on Disability noted: “[*The CRPD*] has risen from the very core of the human rights principles of the United Nations. It is founded on the principles of dignity and justice; and rooted in the concepts of inalienability, universality and indivisibility of human rights. It highlights the right to full participation, and rests upon the notion of equality without distinctions; underlines the right to enjoyment without discrimination; stresses the belief in the dignity and worth of all human being, and their right to equality and protection by the law.”<sup>41</sup>

The CRPD addresses access to justice for people with disabilities and associated rights in Articles 13 and 5. Article 13 is the key provision for present purposes. Article 13(1) guarantees that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Reasonable accommodation means necessary and appropriate modification and adjustments which do not impose a disproportionate or undue burden, where needed in a particular case, to ensure that people with disabilities enjoy or exercise of all human rights and fundamental freedoms on an equal basis with others.<sup>42</sup> The Committee on the Rights of Persons with Disabilities (‘CRPD Committee’) stated that denial of reasonable accommodation constitutes discrimination and that the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realisation.<sup>43</sup>

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<sup>31</sup> Andreas Dimopoulos, *The UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing Limited, 2010) [79].

<sup>32</sup> United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), [5].

<sup>33</sup> Article 1 of the CRPD.

<sup>34</sup> *Glor v. Switzerland*, no.13444/04, [53], 30 April 2009.

<sup>35</sup> *Kiss v. Hungary*, no. 38832/06, [14], 20 May 2010.

<sup>36</sup> *Jasinskis v. Latvia*, no. 45744/08, [40], 21 December 2010.

<sup>37</sup> *Kiyutin v. Russia*, no. 2700/10, [32], 10 March 2010.

<sup>38</sup> *Seal v. UK*, no. 50330/07, [41-43], 7 December 2010.

<sup>39</sup> *Stanev v. Bulgaria*, no. 36760/06, [72], 17 January 2012.

<sup>40</sup> *D.D. v. Lithuania*, no. 13469/06, [84], 14 February 2012.

<sup>41</sup> Statement by the Special Rapporteur on Disability, *Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument*, September 2006, [www.un.org/esa/socdev/enable/srstathrc2006.html](http://www.un.org/esa/socdev/enable/srstathrc2006.html)

<sup>42</sup> Article 2 of the CRPD.

<sup>43</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations: Spain, 19 October 2011, CRPD/C/ESP/CO/1, [44].

The CRPD Committee urged the State Party to raise awareness on non-discrimination among members of the legal profession, particularly the judiciary, and persons with disabilities themselves, including through training programmes on the concept of reasonable accommodation.<sup>44</sup> The CRPD highlights the importance of appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>45</sup> The CRPD Committee also stressed that guidance, awareness-raising and training should be given to ensure a better comprehension by all stakeholders, including persons with disabilities, of the concept of reasonable accommodation and prevention of discrimination.<sup>46</sup>

### ***The United Nations Convention on the Rights of the Child (UNCRC)***

The UNCRC was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. As of 4 July 2014 it was signed by 140 and ratified by 194 Parties<sup>47</sup>. Russia signed the UNCRC on 26 January 1990 and ratified it on 16 August 1990.<sup>48</sup>

In the 20 years since its conception, the Court has directly cited the UNCRC in a range of cases, demonstrating the recognition of the wide acceptance of the UNCRC's provisions both in the Council of Europe Member States and internationally. In *Nortier v Netherlands*<sup>49</sup>, Judge Morenilla, quoted from both the preamble and article 40(3) of the Convention on the Rights of the Child in order to state that the child criminal justice system should afford children the 'necessary protection and assistance so that they can fully assume their responsibilities within the community', and prepare them 'to live an individual life in society' by promoting 'the establishment of laws, procedures, authorities and institutions applicable to children alleged as, accused of, or recognised as having infringed the penal law'. In *S and Marper v UK* the Court recognised that children were in a "special situation" and "the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere..."<sup>50</sup>. Other examples of the Court referring directly to the CRC are found in the cases of *Maslov v Austria*<sup>51</sup>, *V. v United Kingdom (Joined with T. v United Kingdom)*<sup>52</sup>, *Nunez v Norway*<sup>53</sup> and *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*<sup>54</sup>. The CRC has also been referred to in six opinions of Advocate Generals between 2003 and February 2009<sup>55</sup>.

The Convention has over 40 substantive articles, but the fundamental underpinning principle is that enunciated in Article 3.1: "*In 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.*" Article 3(2) provides that, "*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being*".

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<sup>44</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations: Tunisia, 13 May 2011, CRPD/C/TUN/CO/1, [13].

<sup>45</sup> Article 13(2) of the CRPD.

<sup>46</sup> CRPD/C/ESP/CO/1, [20].

<sup>47</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last access 29 June 2014).

<sup>48</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last accessed 29 June 2014).

<sup>49</sup> *Nortier v Netherlands*, No. 13924/88, 24 August 1993.

<sup>50</sup> *S and Marper v. UK* (GC), Nos. 30562/04 and 30566/04, [24] 04 December 2008; *T. v. the United Kingdom* [GC], no. 24724/94, at [75] and [85], 16 December 1999.

<sup>51</sup> *Maslov v Austria*, No. 1638/03, 23 June 2008.

<sup>52</sup> *V v. UK*, No. 24888/94, 16 December 1999.

<sup>53</sup> *Nunez v Norway*, No. 55597/09, 28 June 2011.

<sup>54</sup> *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, 12 January 2007.

<sup>55</sup> Governance Fit for Children: To what extent have the general measures of implementation of the UNCRC been realized in EU institutions? (Save the Children, Sweden, 2011).

The principle of 'best interests' appears repeatedly within the UNCRC, for example in Articles 9, 18, 20 and 21. Article 9 deals with enforced separation of the child from his or her parents or guardians. Whilst it is primarily of relevance to conditions of detention, it also raises access to justice issues when a child is detained, as it incorporates a vital safeguard of ensuring a family member is promptly informed of that detention (which may be a gateway to the child receiving further assistance, such as legal advice) (emphasis added):

***4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.***

Article 23 UNCRC is specifically concerned with disabled children, in recognition of their vulnerability to segregation and discrimination. It states:

*“(1) States Parties recognize 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.  
(2) States Parties recognize the right of the disabled child to special care....”*

The UNCRC also requires that State parties must respect the rights and responsibilities of parents to provide appropriate guidance and direction on the exercise of their rights under the Convention (Art. 5); that children shall be protected from unlawful interference with their family life (Arts. 8 and 16); and that States shall assure to the child capable of forming his or her own views the right to “express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” (Article 12). The UN Committee on the Rights of the Child has on a number of occasions, in different contexts, made clear that for the Article 12 right to be effective advocates or additional assistance may be required.

The Committee on the Rights of the Child specifically recognises the additional vulnerability suffered by children with disabilities who are in conflict with the law. In its General Comment No.9 (2006) the Committee established further guidance as to the treatment of such individuals, set out in the following terms:

*“With reference to the rights enshrined in article 23 and given the high level of vulnerability of children with disabilities, the Committee recommends ... that the following elements of the treatment of children with disabilities (allegedly) in conflict with the law be taken into account:*

- a) A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard;*
- b) Governments should develop and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein;*
- c) Children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by way of pre-trial detention nor by way of a punishment. Deprivation of liberty*

should only be applied if necessary with a view to providing the child with adequate treatment for addressing his or her problems which have resulted in the commission of a crime and the child should be placed in an institution that has the specially trained staff and other facilities to provide this specific treatment. In making such decisions the competent authority should make sure that the human rights and legal safeguards are fully respected<sup>56</sup>.

In order to protect children with such heightened vulnerability and to ensure compliance with the standards set out in the relevant international law, the Committee on the Rights of the Child specifically recommends that “States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as ... children with disabilities... In this regard, training of all professionals involved in the administration of juvenile justice is important, as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation<sup>57</sup>”.

### **Further International Standards**

Additional standards of relevance concerning access to justice for children with disabilities are to be found in, inter alia, the ICCPR, the European Convention on the Exercise of Children’s Rights, the Beijing Rules, and the Guidelines of the Council of Europe’s Committee of Ministers on Child Friendly Justice.

### **III. DETENTION OF CHILDREN WITH DISABILITIES**

Deprivation of liberty and detention of people with disabilities, including children with disabilities, is an area of law, which has been addressed by a number of international courts, including this Court, and other bodies.

#### **Duty of reasonable accommodation: article 3 and CRPD**

The UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment has noted the increased susceptibility of people with disabilities to neglect, abuse, torture and ill-treatment in detention, among other things. Failure to provide reasonable accommodation in detention, or failure to provide appropriate medical care, may amount to a breach of Article 3 of the Convention. This Court has found that where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions correspond to the person’s individual needs resulting from his or her disability (see *Price v. the United Kingdom*, no. 33394/96, at [30], ECHR 2001-VII, *Farbtuhs v. Latvia*, no. 4672/02, at [56], 2 December 2004). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge (*Z and Others v. the United Kingdom* [GC], no. 29392/95, at [73], ECHR 2001-V)<sup>58</sup>.

The CRPD emphasises the importance of reasonable accommodation not only concerning access to justice for people with disabilities but also with regard to their detention. It is the responsibility of the State Party to ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and treated in compliance with the objectives and principles of the Convention, including by

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<sup>56</sup> Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities* (Forty-third session, 2007), U.N. Doc. CRC/C/GC/9 (2007), [74].

<sup>57</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice* (Forty-fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007).

<sup>58</sup> *Jasinskis v. Latvia*, application No. 45744/08, 21 December 2010 at [59].

provision of reasonable accommodation.<sup>59</sup> This is emphasised by article 15 of the CRPD that includes an equality provision in stating that “States Parties are responsible to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, *on an equal basis with others*, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. “ Preventing ill-treatment against persons with disabilities in detention must include providing reasonable accommodations on an individualised basis. Ensuring adequate protections for persons with disabilities may also be advanced by measures such as the implementation of independent monitoring mechanisms, staff training and therapeutic interventions.

These standards and norms concerning the detention of people with disabilities are heightened when considering the detention of children with disabilities, and must be seen in the context of clear international standards requiring detention of children to be a last resort, and for the shortest possible time. Again, the double disadvantage faced by the particularly vulnerable group of children with disabilities must be considered, in addition to the applicable child-specific and disability-specific standards.

### **UNCRC**

We have outlined the UNCRC’s relevance above. Articles 9 (see above), 37 and 40 are of particular significance in relation to detention. Article 37(b) provides, *inter alia*, that, “*the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*” and Art. 37(c) that, “*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age,*” including in particular a right that “*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 a right to maintain contact with his/ her family, save in exceptional circumstances.

Article 40 in essence provides that any child of under 18 accused of, or guilty of, breaking the law must be treated with dignity and respect, and they have a range of minimum procedural rights which must be provided in a manner which takes account of their “*age and situation.*” It is submitted that their “*situation*” must include their disabilities, in the case of a disabled child.

Article 40(2)(b) describes the bare minimum requirements (“*at least the following guarantees*”), and in guarantees (ii) and (iii) the important role of the parents is recognised. Guarantee (ii) also recognises the importance of legal and other assistance to a child:

(ii) *To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;*

(iii) *To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians...*

Art. 40(3) requires that State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children, rather than treating them in the same manner and through the same mechanisms as adult suspects or adult offenders.

### **United Nations Rules**

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<sup>59</sup> Article 14(2) of the CRPD.

The principles enshrined in the UNCRC are complimented by a set of United Nations Rules prescribing specific standards for the treatment of children within the criminal justice system. *Inter alia*<sup>60</sup>, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)<sup>61</sup> requires restrictions on the personal liberty of the juvenile to only be imposed only after careful consideration and shall be limited to the possible minimum; and that the well-being of the juvenile shall be the guiding factor in the consideration of her or his case<sup>62</sup>. The UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)<sup>63</sup> opens with the principle that “The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort”, whilst rule 28 provides that “The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being”.

## **CONCLUSION**

Under international law, the obligation of non-discrimination requires that reasonable accommodation be provided for persons with disabilities in any type of judicial proceeding. The provision of such accommodation ensures the effective participation of persons with disabilities in legal proceedings. When rights as fundamental as the right to liberty are at stake, the State’s obligation to ensure that persons with disabilities are provided with appropriate legal, communications, and other assistance at every phase of the investigative and judicial proceedings is heightened accordingly.

In addition, international law provides an obligation to ensure that there are reasonable procedural safeguards for children in conflict with the law and that the child’s best interest are the primary consideration in decision making within the juvenile justice systems. This includes ensuring that the process of the justice system is amended to meet the needs of children, and any accommodation or arrangements during detainment take account of their vulnerability and provide protection where it is necessary.

For children with disabilities, these disability-specific and child-specific standards must be read together, as a complementary and overlapping body of law, in order to address the double disadvantage faced by this particularly vulnerable group, and to ensure their rights are meaningfully protected.

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<sup>60</sup> Including the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the 1990 United Nations Standard Minimum Rules for Non-custodial measure; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency.

<sup>61</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985.

<sup>62</sup> Rules 17.1(b) and (d), the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

<sup>63</sup> Adopted by General Assembly resolution 45/113 of 14 December 1990.