

# Protecting Children against Torture in Detention:

*Global Solutions for a Global Problem*



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# Table of Contents

vii	Acknowledgments
ix	Preface: <i>Macarena Sáez</i>
xi	Introduction: <i>Juan E. Méndez</i>
xv	Foreword: <i>Susan L. Bissell</i>
<b>1</b>	<b>I. Children Deprived of Liberty and Applicable Legal Frameworks</b>
<b>3</b>	The Global Overuse of Detention of Children <i>Michael Garcia Bochenek</i>
<b>23</b>	Reflections on a New Tool for Protecting the Rights of the Child <i>Ian M. Kysel</i>
<b>39</b>	Translating International Children’s Rights Standards into Practice: the Challenge of Youth Detention <i>Professor Ursula Kilkelly</i>
<b>57</b>	Access to Justice for Children Deprived of Their Liberty <i>Professor Ton Liefwaard</i>
<b>81</b>	Child Deprivation of Liberty and the Role of the Council of Europe <i>Regína Jensdóttir and Tara Beattie</i>
<b>109</b>	Meaningful Participation of Children and Adolescents in the Framework of the Recommendations to the Committee on the Rights of the Child and the Universal Periodic Review on Issues of Juvenile Justice and Cruel and Inhuman Treatment <i>Giovanna Brazzini</i>
<b>123</b>	Protecting the Rights of Children Deprived of their Liberty <i>Dr. Hiranthi Wijemanne</i>

- 141**      **II. Children in Conflict With the Law**
- 143**      Normative Developments and Legal Framework: The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice  
*Marta Santos Pais and Ann-Kristin Vervik*
- 165**      Stop Solitary for Kids: The Path Forward to End Solitary Confinement of Children  
*Jennifer Lutz, Jason Szanyi, and Mark Soler*
- 181**      End Detention of Children as Punishment  
*Leo Ratledge*
- 193**      Children and Diversion Away From Formal Criminal Justice Systems: A Perspective From an NGO Working on Criminal Justice Reform  
*Nikhil Roy and Frances Sheahan*
- 209**      Deprivation of Liberty of Children: The Importance of Monitoring  
*Benoit Van Keirsbilck and Sarah Grandfils*
- 217**      A Model of Psychosocial Intervention for Children Deprived of Liberty in a Juvenile Justice Framework: Efficiency Through International Standards  
*Francisco Legaz Cervantes, Juan José Periago Morant, and Amparo Pozo Martínez*
- 233**      **III. Children Deprived of Liberty in Non-Traditional Contexts**
- A. Migrant, Asylum-Seeker, and Refugee Children**
- 235**      The Principle of No-Detention of Migrant Children in International Human Rights Law  
*Pablo Ceriani Cernadas*
- 249**      “It Is Now Clear”: Immigration Detention as a Particular Form of Torture or Ill-Treatment of Refugee and Migrant Children  
*Ben Lewis*
- 261**      The Inter-American Court of Human Rights Standards Towards the Universality of a Rule of Non-Detention of Migrant, Asylum-Seeker, and Refugee Children  
*Romina I. Sijniensky*
- B. Children in Institutions and Orphanages**
- 285**      Children with Disabilities: Deprivation of Liberty in the Name of Care and Treatment  
*Shantha Rau Barriga, Jane Buchanan, Emina Ćerimović, and Kriti Sharma*
- 303**      A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture  
*Eric Rosenthal*
- 353**      Hidden and Invisible: Children with Intellectual Disabilities Deprived of Liberty  
*Diane Richler, Anna MacQuirrie, and Connie Laurin-Bowie*

**C. Children in Armed Conflict**

- 367** Abuses against Children Detained as National Security Threats  
*Jo Becker*
- 389** Addressing the Gaps in Security Sector Training: The Detention of Child Soldiers  
*Shelly Whitman, Darin Reeves, and Dustin Johnson*
- 403** Annex: Torture and ill-treatment of children deprived of their liberty (A/HRC/28/68)  
*Juan E. Mendez*

# A Mandate to End Placement of Children in Institutions and Orphanages: The duty of governments and donors to prevent segregation and torture

ERIC ROSENTHAL\*

## ABSTRACT

*UN Special Rapporteur on Torture Juan Méndez brings overdue attention to children detained in institutions and the need to protect them against torture or ill-treatment. The Méndez Report establishes that the obligation to prevent torture requires governments to stop the unnecessary institutional placement of any child. There are 8-10 million children detained in orphanages and other institutions around the world. Research demonstrates that raising children in a congregate setting is inherently dangerous, leading to psychological damage, developmental delays, and an increased risk of violence, abuse, and exploitation. The vast majority of children in orphanages are not orphans—80 to 98% have a living parent. The reason for most orphanage placement is the lack of protection and support for families who live in poverty as well as the lack of assistance for children with disabilities to remain at home. UNICEF has called for an end to institutionalization worldwide, and European regional branches of UNICEF and WHO have called for a moratorium on new placements of young children. Despite this, governments and international donors continue to support orphanages, and the institutionalization of children continues to grow. The implications of the Méndez report are clear: governments and donors who support the institutionalization of children are perpetuating an increased risk of torture.*

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\* Eric Rosenthal, JD, LL.D (hon.) is the founder and Executive Director of Disability Rights International (DRI). Rosenthal was the 2015-2016 Fr. Robert Drinan Chair in International Human Rights at Georgetown University Law Center.

*The Méndez Report calls for the placement of children in institutions to be limited to the last resort. This is consistent with current interpretations of the Convention on the Rights of the Child (CRC). In addition, Méndez calls for limiting placement to the shortest time possible in the least restrictive manner. These protections go beyond interpretations of the CRC in General Comment #9 of the CRC Committee. Since models of family care exist for all children—and most placement can be avoided by protecting families—Méndez’s recommendation would bring an end to long-term placement of children. Méndez’s recommendations are informed by the UN Convention on the Rights of Persons with Disabilities (CRPD), which protects the right of children to grow up in a family environment. To implement this right, the CRPD Committee has called for an end to the placement of children in institutions. General Comment #9 should be updated to harmonize it with the requirements of both CAT and the CRPD.*

*Immediate attention is also needed to protect the millions of children now placed in institutions. The protection against torture and ill-treatment is universal, without exception, and does not permit delays in implementation. The lack of funding is not an excuse for leaving children at continued risk. The Méndez Report demonstrates why urgent action is needed to create the community services and family support systems necessary to ensure that all children live and grow up in a family. A moratorium on new admissions is the most effective way to fulfill the mandate of the Méndez Report—combined with immediate action to integrate institutionalized children back into families.\*\**

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## Contents

Introduction.....	306
I. Scope of the Méndez Report .....	310
A. Application to orphanages and other institutions.....	311
B. Obligation to regulate international donors.....	312
II. Global context of institutionalization.....	313
A. Breadth of institutional placement .....	314
B. Inherent dangers of institutionalization.....	315
C. Mixed international response .....	317
III. Obligations of governments .....	318
A. Duty to prevent torture .....	318
B. Duty to protect against segregation.....	323
IV. Standards for Placement of Children in Institutions .....	326
A. Implications of the CRPD: a moratorium on orphanage placement .....	326
B. The Protection Against Torture in Detention Standard .....	328
C. General Comment #9.....	330
D. Least restrictive environment: the problem of group homes.....	331
E. Inclusion of children and adults with disabilities.....	333
V. Ill-treatment and torture in institutions.....	334
VI. Protecting against torture within institutions.....	337
A. Danger of Perpetuating Segregation.....	337
B. Immediate enforcement needed.....	338
C. Implementing protections against restraints.....	340
D. Oversight and monitoring.....	342
E. Benefits of a moratorium .....	344
VII. Implementing the protection against torture .....	346
A. Enforcement obligations.....	346
B. Learning from earlier reform movements .....	349
Conclusion .....	350

## Introduction

In March 2015, the United Nations (UN) Special Rapporteur on Torture Juan E. Méndez presented his thematic report on “torture and ill-treatment of children deprived of their liberty” to the UN Human Rights Council.<sup>1</sup> The Méndez Report demonstrates how the prohibition of torture under international law protects children from abuse and improper placement in any form of public or private institution.<sup>2</sup> The Méndez Report notes the “heightened risk” of violence and abuse<sup>3</sup> as well as the dangers to mental health and development inherent in placing children in institutions.<sup>4</sup> The Special Rapporteur on Torture calls on governments to recognize that “[t]he unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards for the prevention of torture and ill-treatment.” While much of the Méndez Report focuses on the need to protect rights within institutions, the report also calls on all States “[t]o ensure that deprivation of liberty is used only as a measure of last resort...”<sup>5</sup> The Méndez Report goes on to recognize that, even when detention is used as a last resort, it must be limited to:

the *shortest possible period of time*, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subject to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the *least restrictive means necessary*, adopt alternatives to detention that fulfill the *best interest* of the child, and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context.<sup>6</sup>

Limiting institutionalization to a measure of “last resort” appears in a number of international instruments<sup>7</sup>—including General Comment #9 of the UN Committee on the Rights of the Child (concerning children with disabilities).<sup>8</sup> But the Méndez Report adds new limitations on the time of detention and requires the least restrictive means necessary. For the millions of children who are placed in orphanages and other institutions around the world, these protections can be of life-saving importance. Méndez’s recommendations strengthen the protection of all children separated, or at-risk of separation, from their families as established under international law. These rights are now protected by Article 20 of the Convention on the Rights of the Child (CRC), which governs

<sup>1</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* Juan E. Méndez, UN Doc. A/HRC/28/68 (March 5, 2015), (hereinafter, the “Méndez 2015 Report” or “Report on Children in Detention”).

<sup>2</sup> *Id.* at para.21.

<sup>3</sup> *Id.* at para. 16 “Children deprived of their liberty are at a heightened risk of violence, abuse, and acts of torture or cruel, inhuman or degrading treatment or punishment.”

<sup>4</sup> *Id.*, at paras. 16-17.

<sup>5</sup> *Id.*, at para. 85 (a).

<sup>6</sup> *Id.*, at para. 72. [emphasis added]

<sup>7</sup> *See, e.g.* “The placement of a juvenile in an institution shall always be the disposition of the last resort and for the minimum necessary period,” United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter the “Beijing Rules”), GA Res. 40/33 UN Doc. A/40/53 (Nov. 29, 1985), section 19.1. The Beijing Rules only apply to juvenile justice detention and would not apply to placement for health or social reasons.

<sup>8</sup> UN Committee on the Rights of the Child, General Comment No. 9 (2006): The rights of children with disabilities, February 27, 2007, CRC/C/GC/9, para.47 [hereinafter “General Comment No. 9”].

the placement of children “temporarily or permanently deprived” of their family environment and guarantees them “special protection and assistance provided by the State.”<sup>9</sup>

The Méndez Report brings an overdue examination of the obligation of governments to protect children from torture or ill-treatment, as established by the anti-torture framework of the UN Convention Against Torture (CAT).<sup>10</sup> In addition, Méndez’s recommendations are informed by the new UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>11</sup> The CRPD protects the right of children to grow up in the community with a family.<sup>12</sup> The UN Committee on the Rights of Persons with Disabilities has recently interpreted that right to call for an end to the institutional placement of children. This interpretation of the CRPD has major implications for children’s rights and for institutional placement around the world. The implementation of Méndez’s recommendations would go a long way to protecting the right to a family as guaranteed by the CRPD.

By bringing to bear the requirements of CAT and CRPD, the Méndez Report points toward updates needed in international law and practice. The recommendations of a UN Special Rapporteur are themselves non-binding “soft law,” but they can become binding when incorporated into the decisions of international human rights bodies.<sup>13</sup> The Special Rapporteur can help “establish very precise norms and rules of interpretation regarding their activities, which lead to a widening of the protection granted to torture victims.”<sup>14</sup> The Special Rapporteur is well-placed to help international actors develop practices that will promote and protect human rights.

Part I of this article describes the scope of the Méndez Report. The recommendations apply to the detention of children in any institution—whether criminal, custodial, medical, or otherwise. Part I also describes the implications of the Méndez Report for international donors and development agencies—and the need for governments to regulate international aid.

Part II describes the breadth of the global problem. The vast majority of children are placed in orphanages because of poverty or disability. Such placement could be prevented if families received legal protections and support. Drawing on scientific research and human rights reporting, Part II describes why institutions are inherently dangerous and lead to increased disability. Part II also describes the inconsistent international response to evidence about the dangers of institu-

<sup>9</sup> UN General Assembly, Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44<sup>th</sup> Sess., Supp. No.49, at 166, UN Doc.A/44/25 (1989). Entered into force September 2, 1990 [hereinafter “CRC”].

<sup>10</sup> UN General Assembly, Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, UN. Doc. A/RES/29/46 (June 26, 1987) [hereinafter “CAT”].

<sup>11</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, GA Res. 61/106, UN Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter “CRPD”].

<sup>12</sup> *Id.*, Article 19, recognizes the “right of all persons with disabilities to live in the community, with choices equal to others...”. CRPD, Article 23, recognizes the right of children to grow up with a family and not be separated on the basis of disability. The failure of governments to create community-based supports and family protections puts all children at risk, whether or not they have a disability. Thus, as this article will describe, the protections established by the CRPD have implications for *all* children, whether or not they have a disability. See note 127 and accompanying analysis.

<sup>13</sup> Dinah L. Shelton, *Soft Law in HANDBOOK OF INTERNATIONAL LAW* (Routledge Press, 2008), 6. The standards and recommendations of the Special Rapporteur on Torture often become enforceable law when used by international and regional enforcement bodies, Association for the Prevention of Torture (APT) & Ctr. for Justice & Int’l Law (CEJIL), *TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE* (hereinafter, “APT & CEJIL, 2008”) at 3.

<sup>14</sup> Sylvie Bukhari-de Pontual, *Assessment of the Effectiveness of UN Mechanisms for the Prevention and Fight Against Torture*, 322 in *A WORLD OF TORTURE: ACAT-FRANCE 2011 Report* (Action by Christians for the Abolition of Torture, 2011). The role of the Special Rapporteur was originally created in 1985 by the UN Commission on Human Rights, and its mandate has been extended under the UN Human Rights Council. The mandate of the United Nations to the UN Special Rapporteur on Torture is described at: Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx> (last visited Nov. 16, 2016).

tions. In the 2013 State of the World's Children report, for example, the United Nations Children's Fund (UNICEF) called for an end to institutionalization of children throughout the world. Some branches of UNICEF and the World Health Organization (WHO) have called for a moratorium on new placements of children in institutions. Despite this, donors and international charities continue to support orphanages on a large scale, resulting in increases in the orphanage population in parts of the developing world.<sup>15</sup>

Part III examines the legal foundations for the duty to prevent torture and to promote community integration under CAT and the CRPD. The duty to prevent torture goes well beyond stopping practices that actually constitute ill-treatment or torture. The Méndez Report makes clear that implementing this obligation entails creating programs to support families so that they do not need to place their children in institutions. The duty to prevent torture is consistent with the requirements of the CRPD, which protect the right of children to grow up in the community in a family environment.

Part IV examines the standard for detention or placement of children established by UN Special Rapporteur on Torture Juan Méndez (referred to hereinafter as the "Torture Standard"). This section examines the exact requirements of the Torture Standard and why it is stronger than the protections established by the UN Committee on the Rights of the Child in General Comment #9. General Comment #9 limits the institutional placement of children to the last resort, and only when it is in the best interest of the child. But General Comment #9 places no time limitation or requirement that placement be in the least restrictive environment. By adding a time limitation, the Torture Standard effectively bars long-term placement of children in institutions.

While short-term in-patient care may be needed for medical or mental health reasons, long-term placement in an institution can be brought to an end.<sup>16</sup> Many countries have phased out long-term institutional care for children and more are doing so.<sup>17</sup> Part III also describes how the Torture Standard strengthens the influential UN "Guidelines for the Alternative Care of Children."<sup>18</sup> The

<sup>15</sup> For a description of the worldwide problem, see e.g. Eric Rosenthal and Laurie Ahern, *Segregation of children worldwide: the human rights imperative to end institutionalization*, 12 JOURNAL OF PUBLIC MENTAL HEALTH 193, 197 (2013); Laurie Ahern, *Orphanages are no place for children*, THE WASHINGTON POST, (August 9, 2013) [https://www.washingtonpost.com/opinions/orphanages-are-no-place-for-children/2013/08/09/6d502fb0-fadd-11e2-a369-d1954abcb7e3\\_story.html?tid=a\\_inl&utm\\_term=.36be4696d04f](https://www.washingtonpost.com/opinions/orphanages-are-no-place-for-children/2013/08/09/6d502fb0-fadd-11e2-a369-d1954abcb7e3_story.html?tid=a_inl&utm_term=.36be4696d04f) (last visited Nov. 16, 2016); Laurie Ahern, *Donors Need to Support Vulnerable Families Not Rebuild Nepalese Orphanages*, THE HUFFINGTON POST, May 22, 2016, [http://www.huffingtonpost.com/laurie-ahern/donors-need-to-support-vulnerable-families\\_b\\_7422618.html](http://www.huffingtonpost.com/laurie-ahern/donors-need-to-support-vulnerable-families_b_7422618.html) (last visited Nov. 16, 2016); Laurie Ahern, *Ukraine Orphanages Feeder for Child Trafficking*, THE HUFFINGTON POST (June 2, 2016), [http://www.huffingtonpost.com/laurie-ahern/ukraine-orphanages-feeder\\_b\\_7344882.html](http://www.huffingtonpost.com/laurie-ahern/ukraine-orphanages-feeder_b_7344882.html) (last visited Nov. 16, 2016). For further discussion of international support for orphanages, see notes 48 to 50 *infra* and accompanying text.

<sup>16</sup> Child Welfare Information Gateway, Children's Bureau/ACYF, DETERMINING THE BEST INTERESTS OF THE CHILD, (Child Welfare Information Gateway, 2012), 2-5. See further discussion in Section IV-B *infra*.

<sup>17</sup> Nigel Cantwell, Jennifer Davidson, Susan Elsley, Ian Mulligan, and Neill Quinn, MOVING FORWARD: IMPLEMENTING THE 'GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN 43 (Centre for Excellence for Looked After Children in Scotland, 2012) [hereinafter *Implementing the Guidelines*]. See also Ministry for Foreign Affairs Sweden, CHILDREN IN INSTITUTIONS: INTERNATIONAL DEVELOPMENT COOPERATION, 2001, available at <http://www.government.se/contentassets/42b806a7f8b046468116e4f1245428b5/children-in-institutions> (last visited Nov. 16, 2016); Kerryn Pollock, *Children's homes and fostering—Foster care and family homes*, TE ARA—THE ENCYCLOPEDIA OF NEW ZEALAND, <http://www.TeAra.govt.nz/en/childrens-homes-and-fostering/page-4> (last visited Nov. 16, 2016).

<sup>18</sup> UN General Assembly, Guidelines for the Alternative Care of Children, GA Res 64/142, UN Doc. A/RES/64/142, (February 24, 2010), para. 22 (hereinafter "Guidelines for Alternative Care" or "the Guidelines").

Guidelines now require that governments plan for the elimination of institutions—but they do not stop long-term placements in institutions or “residential care.”<sup>19</sup>

Part V describes the evolution of protections against torture or ill-treatment in the context of mental health and social care. International law prohibits torture as well as “cruel, inhuman or degrading treatment or punishment” (referred to collectively as “torture or ill-treatment”). The definition of torture is narrower than the protection against ill-treatment, requiring a showing of intent and purpose. But the prohibition of both torture and ill-treatment is universal and without exception. Whether a practice constitutes torture or ill-treatment, financial limitations of governments or social service agencies cannot be used to justify any delay in allowing such human rights violations to persist.

Despite the powerful obligation on governments to prohibit and prevent torture, the international human rights community has been hesitant to identify practices as torture in the context of health or social care. In addition to broad deference to medical authority, there has long been an assumption that practices cannot constitute ill-treatment or torture if they are well-meaning or intended to be in the best interest of the child, patient, or person with a disability. The recent adoption of the CRPD has provided an opportunity to re-examine the application of the torture protection in the context of health care. Recent UN Special Rapporteurs on Torture Juan Méndez and Manfred Nowak have examined the implications of the CRPD in identifying discriminatory actions that may lead to ill-treatment or torture. As Méndez and Nowak have now recognized, government-sanctioned practices that cause severe emotional or physical pain or suffering may constitute torture or ill-treatment *even if* these practices are done for the purpose of treatment or protection. This is true whether or not the family, caregiver or guardian claims to be acting in the “best interest” of the ward or patient. This analysis demonstrates why a narrow reliance on a best interest standard is not adequate to protect children from ill-treatment or torture.

Drawing on the important insights of reports by Nowak and Méndez, Part V describes how the protection against torture or ill-treatment can and must be enforced to protect children subject to detention in institutions. If a family member or social service authority acts in the so-called best interest of a child to subject them to unnecessary pain and suffering of institutional placement, it may be prohibited by the obligation to prevent torture.

Part VI describes the many challenges faced by governments in protecting against ill-treatment or torture for children who are already placed in institutions. By taking action to protect children in institutions, governments are likely to funnel new resources and support to segregated care in these facilities. Tragically, orphanage populations may increase as a result of these new investments. The Méndez Report does not resolve the dilemma facing governments seeking to protect children within institutions. Enforcement of the Mendez recommendations, however, would largely avoid this risk by limiting new placements in institutions. This analysis underscores the urgency of establishing a no-admission policy and rapidly working toward the elimination of institutions.

<sup>19</sup> The Guidelines state that “[r]emoval of a child from the care of a family should be seen as a measure of last resort and should be, whenever possible, temporary and for the **shortest possible duration.**” (para.13) [emphasis added]. This limitation is very important. But as drafted, the limitation on time applies only to removal from the family and not to placement itself. Once family ties have been broken or no longer exist, the Guidelines do not limit the time of placement in an institution or in residential care. Overall, social services must be reformed and governments must move toward “progressive elimination” of institutions (para. 22) in a “timely manner” (para. 23). Under the Guidelines, children may be placed in long-term residential care facilities indefinitely. Residential placement is accepted as a necessary “complement” to family-based care (para. 22). For further concerns about the Guidelines, see text accompanying notes 127 to 129 *infra*.

Part VII describes the obligation to enforce the protection against ill-treatment or torture under international law. Immediate steps must be taken to bring new placements in orphanages to an end. Since the vast majority of children placed in so-called “orphanages” actually have some living family, preventing placements can usually be accomplished by providing services and protections for families. The obligation to prevent torture also requires urgent efforts to close institutions and find new community placements for children who are now detained.

The implications of the Méndez Report are powerful: governments are subjecting children to an unjustifiable risk of ill-treatment or torture until such time as they eliminate institutions. International donors or charities that support institutions or orphanage placement are perpetuating this problem. The protection against torture creates new avenues for legal enforcement, as well as redress and reparations for victims. Governments are obliged to redress abuses through actions that will support return to a family and reintegration into society. The Méndez Report provides guidance to governments and international development agencies on ways to address the urgent concerns of millions of children who are now detained in institutions—or who are at risk of such detention.

In a world of burgeoning migration and refugee flows and tightening borders, the Méndez Report on Children in Detention is also a major contribution because it directs special attention to the dangers of detaining children based on their immigration status.<sup>20</sup> The Méndez report calls for an immediate end to the practice of immigration detention.<sup>21</sup> The same legal grounds that allowed the Special Rapporteur on Torture to call for an end to placement of children in immigration detention can and should also apply to all other children. This article argues that the duty to protect against torture and segregation provides a legal mandate to end all institutionalization of children.

### I. Scope of the Méndez Report

The Méndez Report applies the Torture Standard to placement in institutions of every kind. This article focuses on the significance of the Méndez Report for all kinds of institutions outside the criminal justice system. The term “institution” as used in this article, as in the Méndez Report, includes orphanages, psychiatric facilities, nursing homes, or any other form of residential care or custodial facilities.<sup>22</sup> Some international standards, including the UN Guidelines for the Alternative Care of Children (Guidelines for Alternative Care) distinguish between “institutions” (which must

<sup>20</sup> See, e.g. Georgetown Law Human Rights Institute Fact-Finding Project, THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN’S ACCESS TO INTERNATIONAL PROTECTION (2015), [http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF\\_English.pdf](http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf) (describing the human rights impact of children in immigration detention in Mexico); International Detention Coalition, DIGNITY WITHOUT EXCEPTION: ALTERNATIVES TO IMMIGRATION DETENTION IN MEXICO(2013), 120-142, <http://idcoalition.org/publication/view/dignity-without-exception/>; International Detention Coalition, CAPTURED CHILDHOOD: INTRODUCING A NEW MODEL TO ENSURE THE RIGHTS AND LIBERTY OF REFUGEE, ASYLUM SEEKER AND IRREGULAR MIGRANT CHILDREN AFFECTED BY IMMIGRATION DETENTION (2012), <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; Human Rights Watch, LEFT TO SURVIVE: SYSTEMATIC FAILURE TO PROTECT UNACCOMPANIED MIGRANT CHILDREN IN GREECE (2008) <https://www.hrw.org/report/2008/12/22/left-survive/systematic-failure-protect-unaccompanied-migrant-children-greece> ; UNICEF, Administrative Detention of Children: A Global Report (2012) [http://www.unicef.org/protection/Administrative\\_detention\\_discussion\\_paper\\_April2011.pdf](http://www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf)

<sup>21</sup> Méndez 2015 Report, *supra* note 2, para. 80.

<sup>22</sup> As described by the research literature in section II-B of this report, all children need to grow up with a family. Thus, this article refers to institutions as any placement where a child is not with his or her own family or a substitute family. An organization dedicated to the closure of all institutions, Lumos, has defined an institution as “any residential facility in which:

be eliminated over time) and “residential care” (smaller facilities that are considered acceptable).<sup>23</sup> Unless otherwise noted, the term “institution” in this article refers broadly to any residential placement other than family-based care.

This article employs the common term “orphanage” interchangeably with “institution” because these terms are popularly used—whether accurate or not.<sup>24</sup> In practice, the term “orphanage” is usually a misnomer because the vast majority of children in these facilities have at least one living parent—not to mention extended family.<sup>25</sup> This article uses this common terminology because the article is meant to address policies and practices of governments and donors who support facilities they think of as orphanages.

### *A. Application to orphanages and other institutions*

Custodial facilities commonly known as “orphanages” or “institutions” are not usually thought of as “places of detention,” but they should be recognized as such under international law, and fall under the scope of the Méndez Report. The Méndez Report states that its findings and recommendations apply broadly to “any form of detention or imprisonment or the placement of a child in a public or private custodial setting where the child is not permitted to leave at will by order of any judicial, administrative or other authority.”<sup>26</sup> The UN Special Rapporteur refers explicitly to health care institutions and other non-penal facilities in his report.<sup>27</sup> This is consistent with the require-

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- Children are separated from their families, isolated from the broader community and or compelled to live together;
  - Children (and their families) do not have sufficient control over their lives and decisions which affect their them;
  - The requirements of the organization itself tend to take precedence over the children’s individualized needs.

Other terms used to refer to children’s institutions include: orphanages, baby homes, residential schools, residential health facilities, children’s homes and homes for persons with disabilities that house both adults and children (e.g. social care homes).” Lumos, *IN OUR LIFETIME: HOW DONORS CAN END THE INSTITUTIONALIZATION OF CHILDREN 12* (2015), *citing* a similar analysis in European Commission, Report of the Ad Hoc Expert Group on the Transition from Institution to Community-Care 9 (August 12, 2009). It is important to note that what would be considered an institution for a child is not the same as for an adult, for whom independence and autonomy are greater factors in their mental health. Efforts to define traditional long-stay institutions for adults focus on the “rigidity of routine, such as fixed timetables for working, eating and activity, irrespective of individuals’ personal preference or needs.” Camilla Parker, *FORGOTTEN EUROPEANS FORGOTTEN RIGHTS: THE HUMAN RIGHTS OF PERSONS PLACED IN INSTITUTIONS*, (United Nations Office of the High Commissioner for Human Rights, Regional Office for Europe, 2010) 10 [hereinafter, “Forgotten Europeans”].

<sup>23</sup> Guidelines for Alternative Care, *supra* note 19, at para. 28(b). Residential care is defined as “any non-family-based group setting, such as places of safety for emergency car, transit centers in emergency situations, and all other short and long-term residential care facilities including group homes.” Some mental health experts have challenged the significance between large institutions and smaller long-term residential care facilities. See n.61 *infra* and accompanying text.

<sup>24</sup> Other organizations also use the terms inter-changeably. See, e.g. definition cited in note 23 *supra*.

<sup>25</sup> As described below, however, the term “orphanage” is almost always a misnomer (see n.51 *infra* and accompanying text). Estimates are that 80-98% of children in orphanages have at least one living parent.

<sup>26</sup> *Id.* at para. 21. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the “Havana Rules”), GA Res. 45/113, UN Doc. A/RES/45/113 (April 2, 1991), <http://www.refworld.org/docid/3b00f18628.html>, use the same definition of detention but do not explicitly extend them to social care, medical or custodial settings as does the Méndez 2015 report (Havana Rules, para.11(b)). This is consistent with the position of the Committee on the Rights of the Child which states in General Comment 10 that: “the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.” UN Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, note 1, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), <http://www.refworld.org/docid/4670fca12.html>.

<sup>27</sup> Méndez 2015 Report, *supra* note 2, paras. 50-51.

ments of the Guidelines for Alternative Care, which require that all placements in out-of-home care be made by “a judicial, administrative or other adequate and recognized procedure.”<sup>28</sup>

In practice, some public and many private institutions and orphanages operate off the public record or without official government regulation.<sup>29</sup> When this happens, operators of facilities for children effectively become formal or informal guardians for children that reside within them. Children are not allowed to exercise choice about their place of residence.<sup>30</sup> There is international precedent for treating non-penal social institutions as places of detention even if a government authority does not formally regulate placement.<sup>31</sup> The European Court has found that placement of an adult in a social care home for his own protection constitutes detention under the European Convention on Human Rights.<sup>32</sup> More broadly, governments are required under CAT to regulate all places of detention, including privately operated facilities, and take all actions necessary to protect against torture or ill-treatment.<sup>33</sup>

While the Méndez Report uses the term “detention,” the term “placement” is used in many laws and social policies regarding children in non-penal institutions. This article will use the term “placement” to emphasize that the Méndez Report and the protections against torture apply in the context of health care, social care, and to detention in all non-penal facilities.

### ***B. Obligation to regulate international donors***

The duty to protect people from torture requires governments to regulate behavior in the private sphere that would cause severe pain and suffering amounting to torture or ill-treatment.<sup>34</sup> Governments in recipient countries must, therefore, regulate international funding—including private charities—for institutions or residential facilities that put children at-risk of torture or

<sup>28</sup> Guidelines for Alternative Care, *supra* note 19, at para. 56.

<sup>29</sup> See Disability Rights International, ABANDONED AND DISAPPEARED: MEXICO’S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES (2010), <http://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf> (dedicated to Ilse Michel Martinez, a girl who disappeared from an orphanage) [hereinafter DRI Mexico (2010)]; Mental Disability Rights International, HIDDEN SUFFERING: ROMANIA’S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES (2006), [http://www.driadvocacy.org/wp-content/uploads/romania-May-9-final\\_with-photos.pdf](http://www.driadvocacy.org/wp-content/uploads/romania-May-9-final_with-photos.pdf) (includes findings from institutions off the public record) [hereinafter “DRI Romania Report”].

<sup>30</sup> Under the Guidelines for the Alternative Care, governments are under an obligation to ensure that a mechanism is in place to make decisions “[i]n situations where the child’s parents are absent or are incapable of making day-to-day decisions in the best interest of the child.” Guidelines for Alternative Care, *supra* note 20, para.100. The denial of choice and autonomy are the hallmarks of what constitutes “institutional culture.” European Commission Ad Hoc Expert Group on the Transition from Institutional to Community Care (2009), *supra* note 23 at 9.

<sup>31</sup> There is precedent under international law recognizing that placement in an institution is a form of detention whether or not there is any actual legal process — and whether or not the individual expresses any objection to institutional placement. See *H.L. v. United Kingdom*, Application no. 45508/99, Eur. Ct. H.R. (2004) (the European Court of Human Rights ruled that “informal” placement in an institution without due process of a non-verbal man with autism constitutes a form of detention under the European Convention on Human Rights. The absence of procedural safeguards in this case was found to violate his right to liberty and security under article 5(1) of the ECHR).

<sup>32</sup> *Stanev v. Bulgaria* Application no. 36760/06 Eur. Ct. H.R. (2012).

<sup>33</sup> The Committee Against Torture has stated in General Comment 2 that: “Where State authorities or others acting in their official capacity committed, new or have reasonable grounds to believe that acts of torture or ill-treatment had been committed by non-state officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention, the State bears responsibility to provide redress to victims.” UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2 (hereinafter, “General Comment No.2”): <http://www.refworld.org/docid/47ac78ce2.html>.

<sup>34</sup> UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture or cruel, inhuman, or degrading treatment or punishment)*, U.N. Doc HRI/GEN/1/Rev.1 (Mar.10, 1992), paras. 11 & 28.



ill-treatment. To the extent that international law requires governments to protect their own citizens from improper detention, the same standard applies to programs within their jurisdiction that are funded from abroad.

The duty to regulate international development aid also applies to donor countries. The CRPD includes an innovative provision in article 32 that commits governments to advance the “purposes and objectives of the convention” through international assistance and cooperation.<sup>35</sup> The European Union, which has adopted policies to include people with disabilities into its foreign assistance, has observed that the CRPD carries with it extra-territorial obligations:

The Convention recognizes that human rights being universal and inalienable, their protection must extend beyond jurisdiction of States Parties and include disabled people in third countries. Legal basis for including a disability perspective in all international cooperation initiatives is thus provided.<sup>36</sup>

Thus, international donors must ensure that government or private funding does not subject children to a risk of torture abroad that would similarly be impermissible in their own countries.

To the extent that placement in orphanages constitutes an impermissible risk of torture, or if torture takes place against a child within an institution, the extra-territorial obligations on governments are implicated. The protection against torture is recognized as a form of customary international law that applies in every country whether or not they have ratified relevant international treaties.<sup>37</sup> The Convention Against Torture (CAT) requires governments not only to prohibit acts of torture, but also to criminalize and prosecute such behavior by public or private actors.<sup>38</sup> There is universal jurisdiction to prosecute torture, and the Committee Against Torture has recognized that governments can bring to trial anyone in their territory who has committed torture abroad.<sup>39</sup>

## II. Global context of institutionalization

To evaluate the meaning and the challenges of implementing the recommendations in the UN Special Rapporteur on Torture’s Report on Children in Detention, it is essential to understand the context of children placed in these places of detention and the reasons such placement is so dangerous.

<sup>35</sup> These obligations go beyond a requirement to contribute toward economic and social rights but also include cooperation that impacts on “all rights including civil and political rights.” Office of the High Commission on Human Rights, *Thematic study on the role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities*, U.N. Doc. A/HRC/16/38, December 20, 2010, para. 5. See also European Commission, Directorate-General for External Policies, *Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU External Relations*, (2013) (describing the obligations on the EU imposed by CRPD article 32 to protect disability rights as part of its international assistance projects).

<sup>36</sup> *Id.* at 7.

<sup>37</sup> APT & CEJIL (2008), *supra* note 14, at 6.

<sup>38</sup> CAT, articles 4 and 7. See discussion in APT and CEJIL (2008), *supra* note 14, at 18 (summarizing the Committee Against Torture’s rulings on the extra-territorial application of these provisions).

<sup>39</sup> *Id.* at 21.

### *A. Breadth of institutional placement*

The placement of children in orphanages and other institutions is widespread.<sup>40</sup> The United Nations has estimated that there are 8 million children in orphanages around the world.<sup>41</sup> According to Save the Children “[t]he actual figure is likely to be much higher, due to the proliferation of unregistered institutions and the lack of data on vulnerable children.”<sup>42</sup> In addition to the population of orphanages, Disability Rights International (DRI) has found children detained in adult institutions, psychiatric facilities, hospitals, maternity wards, infant “feeding centers,” nursing homes, residential schools, vocational schools, convents, monasteries, emergency relocation facilities, and other specialized programs for children with disabilities—often uncounted, unregulated, or operated entirely off the public record.<sup>43</sup> Some estimates place the number of children in institutions around the world at 10 million or more.<sup>44</sup>

While many countries have phased out institutions for children,<sup>45</sup> the number of children in orphanages is on the rise in many parts of the world.<sup>46</sup> The populations of institutions are increasing particularly rapidly in countries that receive extensive foreign assistance and charity donations to orphanages.<sup>47</sup> In recent years, the practice of volunteering in orphanages has become a billion dollar business, resulting in a major new infusion of funding into these facilities.<sup>48</sup> While many

<sup>40</sup> For the definition of what constitutes an institution, see notes 23 to 25 *supra*. The legal scope of “children in detention” and the definitions used by the Guidelines for Alternative Care are analyzed further in sections II and IV below.

<sup>41</sup> UN Secretary-General, Rights of the Child: Note by the Secretary-General, U.N. Doc A/61/299 (Aug. 29, 2006), para. 55.

<sup>42</sup> Save the Children, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE (2009) 3-4.

<sup>43</sup> In Romania, for example, the government adopted a no-new-admission policy for children 0-3 as part of the country’s effort to gain accession to the European Union. DRI found infants in an institution off the public record, see *supra* note 30, DRI Romania Report. In Mexico, DRI also found children in institutions off the public record. In addition, there were a number of cases where children disappeared from institutions and were later found to have been trafficked. National authorities told DRI investigators that they had no idea how many children were in public or private institutions throughout the country, characterizing their own system as “a black hole.” DRI Mexico (2010), *supra* note 30, at 23. See also DRI reports on Uruguay (1995), Hungary (1997), Russia (1999), Mexico (2000, 2010, 2013, and 2015), Kosovo (2002), Peru (2004), Turkey (2005), Argentina (2007), Serbia (2008), Vietnam (2009), United States (2011), Guatemala (precautionary measures petition 2013), Republic of Georgia (2013), Ukraine (2015). Mental Disability Rights International (MDRI) changed its name to Disability Rights International (DRI) in 2010. All DRI reports (including those published as MDRI) are posted at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

<sup>44</sup> See Foreign Ministry of Sweden (2011), *supra* note 18; STUCK (Both Ends Burning, 2012) (documentary exploring the impact of international adoption) available at <https://bothendsburning.org/stuck-documentary-explores-international-adoption-photos>

<sup>45</sup> Implementing the Guidelines, *supra* note 18.

<sup>46</sup> Better Care Network and Every Child, ENABLING REFORM: WHY SUPPORTING CHILDREN WITH DISABILITIES MUST BE AT THE HEART OF SUCCESSFUL CHILD CARE REFORM, 12 (2012). In some countries of Central and Eastern Europe and the former Soviet Union, where the overall population is going down, the rate of institutionalization is going up. As of 2005, following the Cold War, some researchers found that the absolute number of children in institutions had gone down slightly, but the rate of institutionalization of children in Central and Eastern Europe had gone up by 3%. Richard Carter, FAMILY MATTERS: A STUDY OF INSTITUTIONAL CHILDCARE IN CENTRAL AND EASTERN EUROPE AND THE FORMER SOVIET UNION 1 (Every Child, 2005). International funding for reform has declined in recent years, and some observers have warned that even small moves toward community integration in Central and Eastern Europe may not be sustainable. Lucia Correll, Dana Buzducea, and Tim Correll, THE JOB THAT REMAINS: AN OVERVIEW OF USAID CHILD WELFARE REFORM EFFORTS IN EUROPE AND EURASIA (2009).

<sup>47</sup> Corinna Csaky, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE, 4 (Save the Children, 2009).

<sup>48</sup> See Jacob Kushner, *The Voluntourist’s Dilemma*, THE NEW YORK TIMES MAGAZINE, (March 22, 2016), <http://www.nytimes.com/2016/03/22/magazine/the-voluntourists-dilemma.html> (last visited October 5, 2016). “A 2008 study surveyed 300 organizations that market to would-be voluntourists and estimated that 1.6

countries have a long tradition of placing children with and without disabilities in institutions, international assistance from charities and development organizations appears to be one of the major drivers toward increased institutionalization of children.<sup>49</sup>

Perhaps the greatest misunderstanding about orphanages is that they mainly house orphans. Estimates vary, but Every Child has estimated that in Europe 90-99% of children in orphanages have at least one living parent.<sup>50</sup> Others have estimated that more than 80% of children in orphanages worldwide have a living parent.<sup>51</sup> Almost every child has some extended family. The majority of children are placed in orphanages because of poverty<sup>52</sup> or disability.<sup>53</sup> In societies without supportive services to help families keep their children with disabilities, DRI has observed that many parents feel they have no choice but to place a child in an orphanage or other residential institution.<sup>54</sup> Prejudices and discrimination against adults with disabilities also plays into orphanage placement, as mothers with disabilities are systematically deprived of their parental rights in many countries.

### *B. Inherent dangers of institutionalization*

At the outset of the report on Children in Detention, Méndez notes the “heightened risk of violence, abuse and acts of torture, cruel, inhuman or degrading treatment or punishment” for children in institutions.<sup>55</sup> It is important to understand that protections against torture for children in detention are not just needed for the old, run-down, under-staffed, or mismanaged facilities, as he recognizes that the dangers are inherent to institutionalization itself:

A number of studies have shown that, *regardless of conditions* in which children are held, detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine the child’s psychological and physical well-being and compromise cognitive development.<sup>56</sup>

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million people volunteer on vacation, spending around \$2 billion annually.”; “Research in South Africa and elsewhere has found that “orphan tourism” — in which visitors volunteer as caregivers for children whose parents died or otherwise can’t support them — has become so popular that some orphanages operate more like opportunistic businesses than charities, intentionally subjecting children to poor conditions in order to entice unsuspecting volunteers to donate more money.” See also, Laurie Ahern, *supra* note 16.

<sup>49</sup> *Id.*

<sup>50</sup> Carter (2005), *supra* note 47, at 19.

<sup>51</sup> Lumos (2015) *supra* note 25, at 17.

<sup>52</sup> Studies from different parts of the world consistently find that poverty is a major factor in forcing children into institutions, even though rates vary. Some studies from Europe have shown that 90% of placements in orphanages could be attributed to poverty and homelessness. Studies from Rwanda and Malawi have found that poverty, combined with death of one parent, contributed to 40% of orphanage placements. Faith in Action Initiative, CHILDREN, ORPHANAGES, AND FAMILIES: A SUMMARY OF RESEARCH TO HELP GUIDE FAITH-BASED ACTION 6 (2014).

<sup>53</sup> “Some children are placed in institutions precisely because their primary caregivers—in most cases parents—have died, have relinquished or abandoned them, or have had their responsibility for them withdrawn. Most are there, however, for other reasons, such as the need for special care, the temporary inability of parents to cope, instances of domestic violence or neglect, or loss of contact with parents and family in armed conflict or other emergency situations. Ironically, it is often simply through the very fact of their placement that the role and presence of these children’s ‘primary caregivers’ may be jeopardised or, at worst, definitively terminated.” UNICEF, *Children in Institutions: The Beginning of the End?* (2003), v.

<sup>54</sup> Eric Rosenthal & Laurie Ahern “Perspective: Children in Institutions” in UNICEF, STATE OF THE WORLD’S CHILDREN (2013) at 46 [hereinafter “UNICEF: State of the World’s Children (2013)”].

<sup>55</sup> Méndez 2015 Report, *supra* note 2, at para. 16.

<sup>56</sup> *Id.* *supra* note 2, at para. 33 (emphasis added).

The impact of depriving children of their liberty may be invisible because of the psychological damage it causes. Chief among such adverse psychological impact, Méndez notes “higher rates of suicide and self-harm, mental disorder, and developmental problems.”<sup>57</sup>

Méndez’s approach is supported by the findings of extensive empirical research. Longitudinal studies of children raised in congregate care show that, especially in early years, institutionalization can be psychologically damaging.<sup>58</sup> Basic human psychology is that children learn to form emotional attachments at an early age. Unless they have family members or consistent caregivers to whom they can form emotional attachments early on, they lose the ability to do so later in life.

Research and experience since the adoption of the CRC have greatly strengthened what has been known for decades: that all children, especially at younger ages, need to grow up with a family.<sup>59</sup> Researchers have called into question the difference between large and small institutions, noting that even placement in small residential facilities can cause emotional and developmental dangers.<sup>60</sup> While group homes were once considered the most appropriate alternative to institutional placement, new models of care for children emphasize the importance of family placement.<sup>61</sup>

While much attention is focused on the risk of attachment disorder in the newborn to three age-range, new research is increasingly showing that attachment disorder and other psychological dangers of institutions also impact children in middle childhood and adolescents.<sup>62</sup> Research shows cognitive deficiencies and developmental delays that can be linked to longer stays in institutions.<sup>63</sup> The absence of parental figures results in over-reliance on peers as children grow into adolescence, resulting in unhealthy and abusive future relationships.<sup>64</sup> The invisible psychological toll on children who grow up in orphanages can be seen in the high levels of suicide among children and young adults who “graduate” from these facilities. These are among the dangers children face when they are released into society without the support network that they would have from growing up with a family.

The European Office of the UN High Commissioner on Human Rights drew from research in Russia showing that “one in three children who leave residential care becomes homeless; one in five ends up with a criminal record; and in some cases as many as one in ten commits suicide.”<sup>65</sup>

<sup>57</sup> *Id.*

<sup>58</sup> See Better Care Network, GLOBAL FACTS ABOUT ORPHANAGES (2009) 6-7 (summarizing extensive research on the psychological dangers of orphanages).

<sup>59</sup> “During the first few years of a child’s life, when he or she is most dependent on adults for the realization of rights, the relationship between the right to a family and the rights to life, integral development, and personal integrity, is a particularly strong one.” Inter-American Commission on Human Rights, *The right of Boys and Girls to Have a Family, Alternative Care. Ending Institutionalization in the Americas*, OEA/Ser.L/V/II, Doc. 54/13, 17 (Oct. 17, 2013) para. 57.

<sup>60</sup> Mary Dozier, Joan Kaufman, Roger Kobak, Thomas G. O’Connor, Abraham Sagi-Schwartz, Stephen Scott, Carole Shauffer, Judith Smetana, Marinus H. van IJzendoorn, and Carles H. Zeanah, *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 *American Journal of Orthopsychiatry* 219, 220 (2014).

<sup>61</sup> See discussion in Arlene Kanter, “The right to live in the community for people with disabilities under Article 19,” 64, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 65-75, (2015) (describing the concept of a “home” and development of community care); see also notes 152 to 155 *supra* and accompanying text.

<sup>62</sup> “Researchers have long been aware of the importance to infants and young children of a healthy, secure attachment to at least one adult. Attachment is also critical to healthy development as children enter middle childhood and adolescence. Furthermore, benefits of secure attachments extend into adulthood...” Dozier, *et. al.* (2014), *supra* note 61, at 220.

<sup>63</sup> J Williamson and A Greenberg, *FAMILIES NOT ORPHANAGES: A BETTER CARE NETWORK WORKING PAPER* (2010) at 6.

<sup>64</sup> Dozier, *et. al.* (2015), *supra* note 61, at 220.

<sup>65</sup> United Nations Office of the High Commissioner on Human Rights, Regional Office for Europe, *The Rights of Vulnerable Children Under the Age of Three: Ending their Placement in Institutional Care*, 19 (2011) (hereinafter

Another study found that girls who grow up in institutions are ten times more likely than girls who grow up with a family to be victims of sexual exploitation and trafficking.<sup>66</sup> DRI has documented the trafficking of girls for sex and forced labor within and from orphanages in Mexico, Guatemala, and Ukraine.<sup>67</sup> DRI has also found that women and girls are widely sterilized—at times explicitly as a way for institutions to cover up sexual abuse within institutions.<sup>68</sup>

The most striking finding from studies of children raised in congregate care is that, even when the worst institutions are compared to the cleanest and most well-staffed facilities, these dangers persist.<sup>69</sup> Summarizing the research, Dr. Danius Puras, who has since become the United Nations Special Rapporteur on the Right to Health, found that:

...the improvement of conditions and hygiene does not solve the basic problem of the harmful effects of institutional care, especially in the cases of children below three or even children younger than five to eight years. While some factors can be significantly improved (e.g. feeding practice and physical conditions which appear to have reduced mortality rates in Bulgarian “orphanages”), other *key factors are intrinsic to institutional care*, not only to “bad” or poorly equipped institutions. It is not just a question of adequate nutrition and healing, or the absence of open violence and physical neglect.<sup>70</sup>

The importance of families and emotional bonding are so essential, says Dr. Puras, that they are “preconditions for the development of healthy attachment and trust in relations with other people in later stages of life. They cannot be secured in the institutional culture, despite all efforts to invest financial and human resources in those facilities.”<sup>71</sup> In its 2013 annual “State of the World’s Children” report for 2013, UNICEF finds that institutions are a “poor substitute for a nurturing home even if they are well run, responsive to children’s needs, and subject to inspection.”<sup>72</sup>

### *C. Mixed international response*

Citing the dangers of institutionalization, the main recommendation of the 2013 UNICEF State of the World’s Children report, with reference to this population, is to “end institutionalization.”<sup>73</sup> UNICEF published a “Perspective” in the same report by this author and Laurie Ahern, President of DRI, calling for a worldwide moratorium on all new placements in institutions.<sup>74</sup> In what has come to be known as the “Bucharest Declaration,” the World Health Organization’s European Office in 2010 called for an end to placements in institutions,<sup>75</sup> as did the European Commissioner

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“Europe Regional Office of the OHCHR (2011)”.

<sup>66</sup> Georgette Mulheir, *Deinstitutionalization: a human rights priority for children with disabilities*, 9 EQUAL RIGHTS REVIEW 120 (2012).

<sup>67</sup> Laurie Ahern, *supra* note 16. Disability Rights International reports on Mexico, Guatemala, and Ukraine are posted on the web at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

<sup>68</sup> Disability Rights International, *TWICE VIOLATED: ABUSE AND DENIAL OF SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN WITH PSYCHOSOCIAL DISABILITIES IN MEXICO* (2015).

<sup>69</sup> Save the Children, *THE RISK OF HARM TO YOUNG CHILDREN IN INSTITUTIONAL CARE*, (2009) 13 (“In terms of emotional attachments, even apparently ‘good quality’ institutional care can have a detrimental effect on children’s ability to form relationships throughout life”); *See also* European Regional Office of the OHCHR (2011), *supra* note 66 at 19.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> UNICEF: State of the World’s Children (2013), *supra* note 55, at 80.

<sup>73</sup> *Id.* at 80.

<sup>74</sup> *Id.* at 46. The legal and policy arguments for a moratorium on new placements in institutions is set forth in Eric Rosenthal and Laurie Ahern (2013), *supra* note 16, at 193-200.

<sup>75</sup> World Health Organization Regional Office for Europe, “European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families” [hereinafter “Bucharest Declaration”],

for Human Rights.<sup>76</sup> UNICEF has supported “starting with a moratorium on new admissions” as one of its top recommendations for ending the institutionalization of children.<sup>77</sup> But UNICEF’s State of the World’s Children Report backed off slightly from this position — saying that a world-wide moratorium should be considered as strategy to end institutionalization.<sup>78</sup>

International experience has shown that it is important not only to phase down institutions, but to close them entirely. As Save the Children has pointed out, “[t]he very existence of institutions encourages families to place their children into care and draws funding away from services that could support children to thrive within families and communities.”<sup>79</sup>

There is an enormous disparity between public perception that orphanages are humane places for children who have no place to go and research findings that they are both dangerous and inappropriate placements for children. Many well-meaning charities, faith-based donors and international development agencies support orphanages at the same time as UNICEF is calling for their closure.<sup>80</sup> One of the greatest challenges to the implementation of these positions by UNICEF, WHO, and the European Commissioner for Human Rights is that “many States do not yet believe that a full-scale move toward deinstitutionalization is justified.”<sup>81</sup>

### III. Obligations of governments

International law creates a duty on governments to prevent both torture and segregation. While these are two separate obligations, the Méndez Report shows that these rights are closely inter-dependent.

#### A. Duty to prevent torture

As defined by article 1 of the Convention Against Torture (CAT), torture is:

[A]ny act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him ... or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, which such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>82</sup>

For a practice to constitute torture, it must meet each of CAT’s four elements (1) severe mental or physical pain (2) intentionally inflicted (3) for a purpose (4) by an act or omission under gov-

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Para. 5, in *BETTER HEALTH, BETTER LIVES: CHILDREN AND YOUNG PEOPLE WITH INTELLECTUAL DISABILITIES AND THEIR FAMILIES*, EUR/51298/17/6 (2010).

<sup>76</sup> The European Commissioner for Human Rights went even further calling for no new institutional admissions of either children or adults with disabilities. European Commissioner on Human Rights, *THE RIGHT OF PEOPLE WITH DISABILITIES TO LIVE INDEPENDENTLY AND BE INCLUDED IN THE COMMUNITY*, CommDH/IssuePaper (Council of Europe, 2012), 21.

<sup>77</sup> A moratorium on new placements is the 4<sup>th</sup> of UNICEF’s top 9 recommendations for children in the Executive Summary of the 2013 State of the World’s Children Report. Recommendation #4 is: “End the institutionalization of children with disabilities, starting with a moratorium on new admissions. This should be accompanied by the promotion of and increased support for family based care and community-based rehabilitation.” UNICEF, *State of the World’s Children 2013: Executive Summary*, [http://www.unicef.org/sowc2013/files/SOWC2013\\_Exec\\_Summary\\_ENG\\_Lo\\_Res\\_24\\_Apr\\_2013.pdf](http://www.unicef.org/sowc2013/files/SOWC2013_Exec_Summary_ENG_Lo_Res_24_Apr_2013.pdf) (last visited Oct. 5, 2016).

<sup>78</sup> *Id.* at 23.

<sup>79</sup> Csaky, *supra* note 48, at 2.

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Implementing the Guidelines* (2012), *supra* note 18, at 43.

<sup>82</sup> CAT, *supra* note 11.

ernment authority. Where a practice does not rise to the level of torture—but nevertheless inflicts severe pain or suffering—it may still constitute “cruel, inhuman or degrading treatment or punishment” under article 16 of CAT. Together, these practices are all prohibited under article 3 of the International Covenant on Civil and Political Rights (ICCPR) and other conventions, are often referred to as “ill-treatment or torture.”

While the protection against torture has long been applied to situations of juvenile justice and conditions within institutions (including medical and psychiatric facilities, as well as institutions for children),<sup>83</sup> Méndez’s call to restrict placement to prevent torture brings a new focus to the prevention of torture. The Special Rapporteur on Torture has emphasized that the international legal prohibition against torture and ill-treatment is universal, absolute, and non-derogable.<sup>84</sup> The protection is so fundamental that the Convention Against Torture (CAT) was adopted “to make more effective the struggle against torture”<sup>85</sup> by creating a framework to support its prevention and enforcement.<sup>86</sup>

One of the core roles of the Special Rapporteur is to make recommendations to governments on policies and practices that they should take to prevent torture. Article 2(1) of CAT requires governments to take preventative measures—beyond banning torture itself—to ensure that people are protected.<sup>87</sup> Governments must not only ban torture, they must adopt policies and programs necessary for its prevention.<sup>88</sup> While the prohibition of torture or ill-treatment only applies to governments, General Comment 2 makes clear that governments are responsible for regulating and protecting rights in all “contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”<sup>89</sup>

As the Independent Expert to the UN Committee Against Torture, Felice Gaer, has pointed out:

[P]reventative measures are not limited to items enumerated in the Convention or even the General Comment, [and] the Committee [Against Torture] calls on States to reevaluate preventative measures for their effectiveness and to revise and replace them as needed. Thus, as technology evolves, new methods of prevention may be discovered...<sup>90</sup>

Much as new technology is taken into consideration in developing safeguards to prevent torture, so must new research and findings about the impact of orphanages and congregate care on

<sup>83</sup> See Eric Rosenthal et al., *International Human Rights Advocacy under the ‘Principles for the Protection of Persons with Mental Illness*, 16 (3-4) INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 257, 273 (1993) (reviewing early protections for institutionalized children and adults with disabilities).

<sup>84</sup> The universal protection against torture derives from customary law and a broad array of human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976), Article 7; American Convention on Human Rights, art. 5(2), July 18, 1978, 1144 U.N.T.S. 123 [American Convention], European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention].

<sup>85</sup> CAT, *supra* note 12.

<sup>86</sup> Manfred Nowak and Elizabeth McArthur, New York City: Oxford University Press, *The United Nations Convention Against Torture, A Commentary*, 25 (2008).

<sup>87</sup> A framework for implementing that right and preventing torture established by the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (hereinafter “CAT”); International Covenant on Civil and Political Rights, art.7, Mar. 23, 1976 S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171 (hereinafter “ICCPR”); Organization of American States, American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, Art. 5(2) (hereinafter, the “American Convention”); the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5, Article 3 (the “European Convention”).

<sup>88</sup> General Comment No.2, *supra* note 34.

<sup>89</sup> *Id.* at para. 15.

<sup>90</sup> Felice D. Gaer, *Opening Remarks: General Comment No. 2*, 11 New York City Law Review 187, 197(2008).

children. New understandings of disability rights and measures needed to protect against discrimination should also be taken into consideration.

The Méndez Report does not say that detention of a child, *per se*, can constitute torture or ill-treatment. But the Special Rapporteur's earlier reports support this conclusion. In his earlier report on torture in the context of health care, Special Rapporteur on Torture Juan Méndez notes the CRPD prohibition of detention on the basis of disability.<sup>91</sup> In this context, the Special Rapporteur says that the emotional pain and suffering caused by "segregation from family and community" could rise to the level of ill-treatment or torture.<sup>92</sup> To assess whether segregation meets the requisite severity to rise to the level of torture or ill-treatment, "such factors as fear and anxiety produced by indefinite detention" should be taken into account.<sup>93</sup> The trauma of separation from parents and extended family, compounded with the lack of understanding about his or her future, could certainly cause a child severe suffering as well as long-term emotional damage.

The European Court of Human Rights (ECHR) has not yet adopted the same analysis as the UN Special Rapporteur on Torture. But the Court appears to be moving in this direction. The ECHR has accepted that poor conditions within institutions may violate Article 3 of the European Convention that bans torture and ill-treatment.<sup>94</sup> But, in a case decided before the entry into force of the CRPD, the European Court also ruled that the "unavoidable level of suffering inherent in detention" does not factor into the analysis.<sup>95</sup> In *Stanev v. Bulgaria*, the Court considered the case of Rusi Stanev, a 48 year-old man diagnosed with schizophrenia and placed under guardianship (he was at least 57 when the European Court issued its decision on his case). The guardian, who he had never met, placed him in the remote Pastra social care home, in theory, to advance his care. Mr. Stanev was kept for more than eight years in "dirty, decaying" and "unhygienic" conditions without adequate food or running water.<sup>96</sup> Detainees were only allowed access to an indoor bathroom once a week,<sup>97</sup> and temperatures were so cold that people were forced to sleep in their coats.<sup>98</sup> BBC journalists who visited the facility reported that one in ten residents died each year due to the poor conditions.<sup>99</sup> The Court found that Mr. Stanev was not dangerous, and he alleged that he had not received any mental health treatment at the facility in years (indeed, there was none on offer, other than medications).<sup>100</sup> The European Court found that, after more than eight years, "[t]his period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him."<sup>101</sup> The

<sup>91</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* Juan E. Méndez, UN Doc. A/HRC/22/53 (Feb. 1, 2013), para. 68 (Hereinafter "Torture in Healthcare Report"). See also, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report*, Center for Human Rights and Humanitarian Law, Washington College of Law, American University (2013), which reproduces the Special Rapporteur's report [hereinafter "Torture in Healthcare Settings (2013)"].

<sup>92</sup> *Id.* at para. 69.

<sup>93</sup> *Id.*

<sup>94</sup> See Peter Bartlett, Oliver Lewis, and Oliver Thorold, *Insite Institutions: Institutional Standards and Institutional Controls*, in *MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007) 75-109 (reviewing European case law in this area).

<sup>95</sup> *Stanev v. Bulgaria*, *supra* note 33, para. 204.

<sup>96</sup> *Id.* at paras. 74-79. See Oliver Lewis, *Stanev v. Bulgaria: On the Pathway to Freedom*, 19 HUMAN RIGHTS BRIEF 2-7 (2012) (analyzing the findings and significance of the European Court's decision in the case).

<sup>97</sup> *Id.* at para. 23.

<sup>98</sup> *Id.* at para. 21.

<sup>99</sup> Karen Allen, *Mental health travesty in Bulgaria*, BBC NEWS, December 16, 2002, <http://news.bbc.co.uk/2/hi/health/2579865.stm> (last visited Nov. 11, 2016).

<sup>100</sup> *Stanev v. Bulgaria*, *supra* note 33, at para. 204.

<sup>101</sup> *Id.* at para. 129.



Court's decision turned on Mr. Stanev's improper detention, which was found to be unrelated to his mental health condition.<sup>102</sup>

The court ruled that, due to poor conditions of confinement, Mr. Stanev had been subject to "degrading" treatment.<sup>103</sup> "Degrading" treatment is prohibited under all circumstances under Article 3 of the European Convention, as it is under Article 7 of the ICCPR prohibiting "torture or ... cruel, inhuman, or degrading treatment or punishment." Despite the enormous danger and tremendous suffering over close to ten years to which he was subject, the Court did not find that the suffering rose to the level of what could be considered torture, however, noting that "there is no suggestion that the national authorities deliberately intended to inflict degrading treatment."<sup>104</sup> The court also noted that "it cannot be said that deprivation of liberty in itself raises an issue under Article 3."<sup>105</sup> To be considered a possible violation of the protection against torture or ill-treatment, the European Court said that the "suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."<sup>106</sup>

The protection against torture under Article 1 of CAT specifically excludes "pain or suffering arising from, inherent in or incidental to lawful sanctions."<sup>107</sup> The legal doctrine applied by the European Court make sense in the context of the suffering inherent in criminal commitment. It is highly problematic, however, to apply this doctrine to children or people with disabilities who are detained in institutions simply because social service systems are unable to provide the care they need in the community. An earlier Special Rapporteur on Torture, Nigel Rodley, has argued that the doctrine "must necessarily refer to those sanctions widely accepted as legitimate by the international community."<sup>108</sup>

Mr. Stanev was illegally detained and did not need or receive treatment. It is not clear why he should or would "inevitably" be subject to *any* suffering or humiliation. In view of the right to community integration under the CRPD, it is difficult to contend that such detention could be considered "legitimate." In light of the CRPD, however, the European Court does appear to be increasingly open to claims that the emotional pain caused by separation should be taken into consideration for a person with a disability. In the case of *Z.H. v. Hungary*, the "isolation and helplessness" associated with detention were factors taken into consideration by the European Court.<sup>109</sup> A similar analysis could also be extended to children placed in institutions.

<sup>102</sup> *Id.* at para. 190.

<sup>103</sup> *Id.* at para. 212.

<sup>104</sup> *Id.* at para. 211.

<sup>105</sup> *Id.* at para. 140.

<sup>106</sup> *Id.* at para. 141.

<sup>107</sup> See Nowak & McArthur, *supra* note 87, at 79-84 (describing the difficulty of defining what pain and suffering can be excluded under a lawful sanction).

<sup>108</sup> United Nations Economic and Social Council, Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment in particular: Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37 B, UN Doc., E/CN.4/1997/7, 10 January 1997, Para. 8.

<sup>109</sup> In a later case, the European Court considered the detention of a deaf man with an intellectual disability who was charged with a crime. This man used a form of sign language that only his mother could understand, and he was not allowed access to her. As a result, he could not understand the nature or extent of his detention, and he could not complain about alleged abuse by other detainees. In this case, the European Court cited the UN Special Rapporteur on Torture's analysis of CRPD as well as the obligation to provide reasonable accommodation to a person with a disability. The Court found that "the inevitable feeling of isolation and helplessness flowing from the applicant's disabilities, coupled with the presumable lack of comprehension of his own situation and that of the prison order, must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment, especially in the face of the fact that

The final and sad outcome of Mr. Stanev's personal situation demonstrates the limitations of the approach taken by the European Court. Bulgaria's laws on detention and access to justice were ruled to be in violation of the European Convention. Ten years after his initial detention, Mr. Stanev was awarded 15,000 Euros in damages.<sup>110</sup> But the European Court ordered no changes to the services provided by Bulgaria's mental health system. According to activists in Bulgaria, Mr. Stanev could not work and had no place to go following the ruling, and after he spent his damage award, he ended up back in another Bulgarian social care facility.<sup>111</sup> Conditions may be cleaner and nicer, but Mr. Stanev was again segregated from society. The funds used by Bulgaria to pay for Mr. Stanev's life-time of shelter could just as well have been used to pay for housing and living expenses in the community.

In contrast with the approach taken by the European Court, the Special Rapporteur's analysis in the 2013 Torture in Health Care Report recognizes that detention on the basis of disability is inherently discriminatory.<sup>112</sup> If the detention of children also fails to meet the standard set forth in the Méndez Report, it would follow that the pain caused by segregation and family separation for a child could constitute ill-treatment or torture. Explicit recognition that improper detention of children constitutes ill-treatment or torture would be a powerful development in the international legal framework on torture and ill-treatment, and it is the logical extension of the Special Rapporteur's Torture in Healthcare Report. A further clarification of this matter by the Special Rapporteur on Torture or other human rights bodies would be helpful. Indeed, an analysis of this kind by an authoritative source like the Special Rapporteur on Torture, the CRPD Committee, or the CRC Committee, could have a powerful impact on future decisions of regional human rights mechanisms.

It is important to recognize that the Méndez Report *does not* rely on a finding that segregation itself constitutes ill-treatment or torture (except, perhaps, in the case of immigration detention). The Special Rapporteur instead finds that the *increased risk* of torture or ill-treatment from institutional placement is sufficient to require governments to establish safeguards and prevent unnecessary commitment. The creation of community-based services to allow children with and without disabilities to live with family and in the community, as called for by the Méndez Report, must be seen as an essential "safeguard" against ill-treatment or torture. As recognized by the CRPD, the right to live with a family has value in and of itself. The services that help children stay with their families, however, also protect children against the risk of torture in an institution. The Méndez Report states that:

Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counseling, probation and community services, including mediation services and restorative justice.<sup>113</sup>

The report gives further details, calling on governments "to provide for a variety of non-custodial, community-based alternative measures to the deprivation of liberty."<sup>114</sup> This is consistent with

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he had been severed from the only person (his mother) with whom he could effectively communicate." Case of Z.H. v. Hungary, Application No. 28973/11, Eur. Ct. of H.R. (2012), para. 32.

<sup>110</sup> *Id.* at para. 266.

<sup>111</sup> Interview by the author with Kapka Panayotova, Executive Director, Center for Independent Living, Bulgaria (October 8, 2016). DRI has not been able to directly corroborate this report.

<sup>112</sup> Torture in Healthcare Settings Report (2013), *supra* note 92, at para. 68.

<sup>113</sup> Méndez 2015 Report, *supra* note 2, para. 21.

<sup>114</sup> *Id.* at para. 84(c).

the 2013 *Torture in Health Care Report*, which states that “community living, with support, is no longer a favourable policy development but an internationally recognized right.”<sup>115</sup>

### ***B. Duty to protect against segregation***

The right to community integration applies to both children and adults and has been broadly recognized as essential to the protection of a number of overlapping areas of rights, including the protection against discrimination and the right to health. The UN Special Rapporteur on the Right to Health, Paul Hunt, has stated, for example:

Deriving from the right to health and other human rights, the right to community integration has general application to all persons with mental disabilities. Community integration better supports their dignity, autonomy, equality, and participation in society. It helps prevent institutionalization, which can render persons with mental disabilities vulnerable to human rights abuses and damage their health on account of the mental burdens of segregation.<sup>116</sup>

For children, this right to community integration is closely related to—but distinct from—the right to grow up with a family. Both the ICCPR<sup>117</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) require governments to protect the family. The ICESCR states that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group of society.”<sup>118</sup> Article 9(1) of the Convention on the Rights of the Child (CRC) requires governments to ensure that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interest of the child.”

The CRC does not explicitly protect the right of a child to grow up with a family, but it does require governments to create services that allow for “the fullest possible” social integration. Article 23 of the CRC includes one of the first direct references to children with disabilities in international treaty law by recognizing 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.” It goes on to describe the range of services governments must provide for children with disabilities “in a manner conducive to the child’s achieving the fullest possible social integration and individual development.”<sup>119</sup> Cutting edge as this provision was at the time, concerns have been raised by disability experts about its emphasis on “special care” and its medicalized approach to community integration.<sup>120</sup>

The CRC has been enormously influential in protecting the rights of children in institutions. The United Nations General Assembly adopted the “Guidelines for Alternative Care” to “[a]ssist and encourage governments to better implement their responsibilities and obligations” to children.<sup>121</sup>

<sup>115</sup> *Torture in Healthcare Settings Report* (2013), *supra* note 92, at para. 68.

<sup>116</sup> UN Human Rights Council, *Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/61/338 (Sept. 13, 2006), para. 85.

<sup>117</sup> ICCPR, art. 23(1).

<sup>118</sup> UN General Assembly, International Covenant on Economic, Social, and Cultural rights, GA Res. 2200A (XXI), U.N. Doc. A/6316 (Jan. 3, 1976) (ICESCR), art.10(1).

<sup>119</sup> CRC, art. 23(3).

<sup>120</sup> Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS LAW REVIEW 13, (2008).

<sup>121</sup> Guidelines for Alternative Care, *supra* note 19, preamble.

The Guidelines are in some ways more progressive than the language of the CRC itself, which includes some language about institutions that may now be outdated. Article 20 of the CRC concerns the rights of children “in whose own best interests cannot be allowed to remain” in their family and deserve “special protection and assistance.” These children should be placed in “alternative care” which “could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”<sup>122</sup> As the European Office of the OHCHR stated:

...the wording ‘in suitable institutions’ needs clearer interpretation to avoid misuse as a justification for institutional care. The CRC was drafted during the 1980s, when the issue of institutionalization was not perceived as one of the most serious concerns. The then-Communist countries of Eastern and Central Europe, where institutional placement of children was part of the ideology governing child-protection systems, were among its active drafters. Therefore, it is understandable that an elastic definition of ‘suitable institutions’ might have represented the lowest common denominator in that geopolitical situation....**Today, more than two decades after the adoption of the CRC, it is appropriate to raise the question of whether institutional care can be a “suitable option” for children at all, especially for children under three years of age; whether any exceptions are acceptable; and whether it is time to seriously consider its elimination.**<sup>123</sup> [emphasis in the original]

The new UN Convention on the Rights of Persons with Disabilities (CRPD) is a major step forward in the protection of the right to community integration—and the right of *all* children to grow up with a family. While the CRPD does not create new rights, in many ways it creates more effective protections than previously existed under international law.<sup>124</sup>

The CRPD describes the way society must be adapted to allow for the full inclusion of people with disabilities, and creates what has been called a new “social order,” with implications that extend more broadly, beyond the population that the CRPD was created to protect.<sup>125</sup> One of the most important and cutting edge protections of the CRPD is found in Article 19, which recognizes the “equal right of all persons with disabilities to live in the community, with choices equal to others.” As the European Regional Office of the UN High Commissioner for Human Rights has described it:

Although the CRPD is specific to persons with disabilities, Article 19 is founded on the rights that apply to everyone. It emphasizes the importance of developing good-quality and sustainable alternatives to institutional care.<sup>126</sup>

In the most practical terms, the Article 19 is directly relevant to non-disabled children who may be at risk of placement in an institution because their parents have a disability or are perceived to

<sup>122</sup> UN General Assembly, Convention on the Rights of the Child, GA Res 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), art. 20(3).

<sup>123</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66, at 10-11.

<sup>124</sup> See Kayess & French, *supra* note 121 (assessing the new contributions of the CRPD).

<sup>125</sup> See Arlene Kanter, “Moving beyond the CRPD: will it make a difference,” *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 300 (2015). CRPD will impact larger society, according to Kanter, “by affirming that all people, regardless of their labels, impairments, limitations, challenges, or abilities are entitled to equality, dignity, and autonomy, as well as the support they may need to exercise their rights and to live their lives.” *Id.*, 302.

<sup>126</sup> Forgotten Europeans, *supra* note 23, at 7.

be unable to take care of them. Thus, all children, not just children with disabilities, are protected by the right to community integration under the CRPD.

CRPD Article 23 protects the right to grow up with a family, and this provision of the CRPD is more explicit in its application to children with and without disabilities. Article 23(4) requires governments to “ensure that a child shall not be separated from his or her parents against their will” and “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” All children may be at risk of separation from their family and segregation from society when there is discrimination against their parents.

CRPD article 23(5) establishes the most important protection of the right to grow up in a family, stating that governments shall “where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.” Article 23(5) never mentions the possibility of placing a child in an institution or in any form of residential care.

CRPD Article 23(5) provides stronger protections for the right of a child to grow up in a family than do UN Guidelines for Alternative Care. The Guidelines guarantee that children under age three should grow up with a family, but they do not provide similar protections for children of older ages.<sup>127</sup>

While the UN Guidelines for Alternative Care take a strong stand on the elimination of institutions, they state that residential care facilities “complement” family-based care—implying that residential care is not only acceptable, but necessary. Indeed, the Guidelines allow for the creation of new residential facilities as long as they are part of a strategy for “deinstitutionalization.”<sup>128</sup> The Guidelines do not limit the size of a residential facility and they leave ambiguous the difference between residential care and institutions. The Guidelines mention that group homes are one form of residential care, but they clearly suggest that other forms of residential care are acceptable. This appears to justify small institutions. Even if a small institution is called a “group home,” research shows that group homes can effectively become institutions.<sup>129</sup>

The CRPD does not specifically prohibit placement in residential care, but where the child’s family is not available, governments must make every effort to place a child in another family setting. As described in Part IV below, “every effort” should now be interpreted in light of the Torture Standard.

The protections established in the CRPD, which entered into force in 2009, are so new that their full implications are still being discovered. In 2017, the UN Committee on the Rights of Persons with Disabilities is expected to adopt a new General Comment helping to guide States in understanding the meaning and requirements of the right to community integration.<sup>130</sup>

<sup>127</sup> Guidelines for Alternative Care, *supra* note 19 at para. 21.

<sup>128</sup> *Id.* at para. 22.

<sup>129</sup> James Conroy and Valerie Bradley, THE PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, (US Department of Health and Human Services, 1985), <https://aspe.hhs.gov/pdf-report/pennhurst-longitudinal-study-combined-report-five-years-research-and-analysis> (last visited Oct. 13, 2016). On page 198, the study states: “Our preliminary findings indicate that the degree of normalization of a community setting makes a difference, with people in more normalized settings making more progress. We also find evidence that size makes a difference, with people in smaller settings doing slightly better (even though the size of the settings only ranges from 1 to 8 people).”

<sup>130</sup> The UN Committee on the Rights of Persons with Disabilities held a Day of General Discussion on article 19 on April 19, 2016 in Geneva. They solicited submissions for a general comment to be issued in 2017. See:

We have some indication of which direction the CRPD Committee is going based on its reviews of compliance reports of the Czech Republic and Guatemala in 2016 and in other countries before that.<sup>131</sup> In May 2016, the Committee called on the Czech Republic to “abolish” institutions for children with disabilities.<sup>132</sup> In September 2016, the Committee asked Guatemala to “abolish institutionalization” of children (and the Committee’s statement is *not* limited to the detention of children with disabilities).<sup>133</sup> This Comment, which appears in Spanish, appears to endorse a moratorium on new placements in institutions.<sup>134</sup>

#### IV. Standards for Placement of Children in Institutions

##### *A. Implications of the CRPD: a moratorium on orphanage placement*

The Méndez Report was submitted to the UN Human Rights Council in March 2015, more than a year before the CRPD Committee took its strong stand on the abolition of orphanages and orphanage placement. If Special Rapporteur Juan Méndez had been aware of these coming developments, perhaps he would have explicitly recommended a moratorium on new placements. The Méndez’s Report does recommend a total ban on any placement in “administrative immigration detention,” e.g. children detained because they are in violation of immigration laws.

With regard to children in immigration detention, the Méndez Report states that even short-term detention violates the protection against torture or ill-treatment and should be banned.<sup>135</sup> He states that detention is “*never* in the best interest of the child, exceeds the requirements of necessity, and becomes grossly disproportionate” to any legitimate need.<sup>136</sup> Therefore, States should “...expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status.”<sup>137</sup> Given the need for children to remain with their family, “the imper-

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Committee on the Rights of Persons with Disabilities, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CallDGDtoliveindependently.aspx>.

<sup>131</sup> When the CRPD Committee has examined the application of the right to community integration for children, it has emphasized the importance of keeping children with families. In its review of Hungary’s report, the Committee “stresses the importance of allocating sufficient resources to enable children with disabilities to continue living with their families in their own communities.” Most of the Committee’s recommendations regarding the enforcement of Article 19, however, do not distinguish between institutions for children and adults with disabilities. In its review of China’s report, for example, the CRPD Committee recommended “immediate steps to phase out and eliminate institution-based care for people with disabilities.” *IDA’s Compilation of the CRPD Committee’s Concluding Observations and List of Issues, Article 19, Hungary and China, International Disability Alliance, cited in Arlene Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW 89-90 (2015).*

<sup>132</sup> UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic*, UN Doc. CRPD/C/CZE/CO/1 (May 15, 2015), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en)

<sup>133</sup> CRPD Committee review of Guatemala’s record. “Abolir la colocación de niños y niñas de todas las edades bajo el cuidado de instituciones”. “Abolish the placement of children of all ages under the care of institutions”. UN Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities on the Initial Report of Guatemala*, UN Doc. CRPD/C/GTM/CO/1 (August 31, 2016), para. 54, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=4&DocTypeID=5) (author’s translation).

<sup>134</sup> DRI will ask the CRPD for a clarification of its position on the placement of children in institutions in relation to article 19 of the convention. Copies of DRI’s submissions and those of other NGOs will be posted on the CRPD Committee website in 2017. DRI’s submission is available through the author of this article at [erosenthal@DRIadvocacy.org](mailto:erosenthal@DRIadvocacy.org)

<sup>135</sup> Méndez 2015 Report, *supra* note 2 at para. 62 (Méndez cites jurisprudence from the European Court to back this position).

<sup>136</sup> *Id.* at para. 80.

<sup>137</sup> *Id.*

ative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family."<sup>138</sup>

The Méndez Report does not adopt similarly strong and clear language with respect to children in custodial institutions or orphanages. If he had taken into consideration the CRPD's recognition of the right to community integration, however, he might have been just as explicit. Special Rapporteur Méndez has already provided valuable guidance, however, on the requirements of the protection against torture as interpreted under the CRPD. In his 2013 report on Torture in Healthcare, Méndez cites that protecting the right to choice is critical to the protection against torture.<sup>139</sup> He concludes that "[l]egislation authorizing institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished."<sup>140</sup>

Special Rapporteur Méndez' earlier recommendation on the abolition of involuntary admission rests, in part, on the issue of "voluntariness." An innovative provision of the CRPD, article 12, recognizes the right of persons with disabilities to make choices for themselves. Throughout the world, adults with disabilities—especially adults with intellectual or psychosocial disabilities—are seen as unable to make decisions and are placed under guardianship. When a guardian makes a "substitute decision" that detention is in a person's best interest, many legal systems recognize a legal fiction that detention is voluntary since the guardian is acting in the best interest of his or her ward. With the adoption of the CRPD, persons with disabilities have a right to support in making decisions for themselves. If a person has difficulty making a decision, they have a right to support in decision-making. Yet, the protection against torture creates an absolute limitation on subjecting any individual to severe pain or suffering. Even if a guardian or healthcare provider claims to be acting in the best interest of this individual, the Special Rapporteur recognizes that a person cannot be subject to involuntary admission or involuntary treatment.

A similar analysis could be applied to children in detention. When an adult or legal authority determines that a child should be in an institution, they may make that decision in what they perceive to be in the child's best interest. But if that choice is likely to lead to severe pain and suffering, the absolute legal obligation to prevent torture need not defer to this judgment. As stated by the European Office of the UN High Commissioner on Human Rights, "[a]n adult's judgment of a child's best interest cannot override the obligation to respect all the child's rights under the Convention."<sup>141</sup>

It would be inconsistent for adults involuntarily admitted to institutions to have even greater protections than children. Indeed, the Méndez Report calls for "higher standards" for children and "broader protections" against ill-treatment torture.<sup>142</sup> The evidence about the dangers of institutionalization shows that children are even more vulnerable than adults to the dangers of institutionalization. The core finding of Méndez's Report on Children in Detention is that children are at greater risk of being subjected to torture and ill-treatment and require higher levels of protection than adults.

The Méndez Report unfortunately misses the opportunity to call for a moratorium on new placements in institutions. But this would be the logical extension of the Special Rapporteur's analysis in

<sup>138</sup> *Id.*

<sup>139</sup> Torture in Healthcare Report, *supra* note 92, para. 68.

<sup>140</sup> *Id.* at para. 89(b).

<sup>141</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 9.

<sup>142</sup> Méndez 2015 Report, *supra* note 2, at para. 16.

light of developments from the CRPD Committee. Explicit recognition of this position by a future Special Rapporteur would be helpful.

### *B. The Protection Against Torture in Detention Standard*

The standard for placement of children in the Méndez Report on Children in Detention is spelled out fully as follows:

The deprivation of liberty of children is intended to be an *ultima ratio* [Latin for “last resort”] measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply the safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the least restrictive means necessary, adopt alternatives to detention that fulfill the best interest of the child...<sup>143</sup>

As set forth here, there are four elements to what is referred to in this article as the Torture Standard for detention:

1. last resort;
2. best interests;
3. shortest time;
4. least restrictive means necessary.

When all four elements are taken together, the Torture Standard serves as guiding principles for preventing torture or ill-treatment. The Torture Standard, as set forth in the Méndez Report, makes clear that placement in an institution, intended to be long-term, is never an acceptable outcome.

The CRC Committee’s General Comment #13 states that the best interest of the child, by itself, should not be used to justify subjecting a child to violence.<sup>144</sup> Using the same rationale, a best interest analysis, by itself, should never be used to subject a child to the dangers and suffering of institutional placement. Given everything that is known about the negative impact of institutionalization on a child, it is a fundamental contradiction in terms to call such placement in the “best interest” of the child. No child should ever be placed in an institution for the long-term for his or her best interest without other limiting factors.

When a child is placed in an institution as a last resort, it is because of the failure of the social service system to provide a more acceptable placement that will nurture the child and avoid need-

<sup>143</sup> This section of the Méndez report states in full: The deprivation of liberty of children is intended to be an *ultima ratio* measure, to be used only for the shortest possible period of time, only if is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the least restrictive means necessary, adopt alternatives to detention that fulfil the best interests of the child and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context. Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counselling, probation and community services, including mediation services and restorative justice. Furthermore, if circumstances change and the reclusion of children is no longer required, States are required to release them, even when they have not completed their sentences. *Id.*, at para. 72.

<sup>144</sup> UN Committee on the Rights of the Child, General Comment 13 (2011): The right of the child to freedom from all forms of violence, April 18, 2011 CRC/C/GC/13, para. 61.



less pain and suffering. There will always be emergency situations where any form of placement could be in the best interest of the child for a very short period of time—be it administrative bungling or a broader failure of a social service system that lacks emergency family placement. When placement of the last resort takes place in this situation, it must be brought to an end as soon as possible. Given the emotional trauma of separation from a family and the dangers of placement, as Dr. Dana Johnson has observed, “a few days in an institution should be as long as children are asked to endure.”<sup>145</sup>

The institution is *usually* safer than the street though not always—given findings of exploitation and abuse in many institutions. But that should never be the choice facing children. By placing demands on social service systems to create alternatives, human rights law forces them to avoid presenting a child with these options. Emergency foster care or extended family placement systems must be established to ensure that children are not even temporarily placed in institutions. When those systems do not exist or are inadequate, governments are subjecting children to unnecessary dangers and the risk of ill-treatment or torture.

To implement the Torture Standard, social service systems should not set a high bar for placing a child in a safe family situation. The most fundamental needs for a child, beyond food, shelter, and safety are for the presence of individuals who can provide a stable environment for care and the formation of emotional attachments. The provision of more sophisticated psychological support, counselling, education, rehabilitation, or habilitation services, may be lacking in the home. If so, the same professional services are probably lacking in the institution as well. Access to education, recreation and cultural opportunities in the community, or other benefits of community life may not be fully available to every child placed in a family-setting. But if those services are not accessible to a child living in a family, they are usually less accessible to a child in an institution.<sup>146</sup>

Children should not be forced to wait for the creation of a fully inclusive society before they are given a chance to grow up with a family. As viewed within the framework of the CRPD, children have a right to full community integration under Article 19, which must be implemented by means of the provision of a full range of community services. Many other provisions of the CRPD, such as accessibility to housing, education, medical care, and cultural life, are also essential to creating a fully inclusive society. When countries fail to meet their obligations under Article 19 and other provisions of the CRPD, however, this does not mean children should forgo their right to grow up with a family under CRPD Article 23. Given the dangers of institutional care and the need to protect against the risk of torture, it is especially important to recognize that the right to a family, in some circumstances, may have to stand on its own.

It is important to keep in mind that human rights oversight, monitoring, and protection are essential in community and family settings, just as they are in the institution. These protections are described below in Section VI.

<sup>145</sup> DRI Romania Report, *supra* note 44 at 21. Dana Johnson, MD, PhD, is Professor of Pediatrics in the Division of Neonatology at the University of Minnesota.

<sup>146</sup> Apart from short-term acute care, DRI investigations have not found meaningful treatments or programs provided in institutions that are not or could not be provided for in the community. Indeed, there is little treatment other than medication and no habilitation or rehabilitation provided in many facilities. *See*, DRI reports at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

### *C. General Comment #9*

Unlike the Torture Standard, General Comment #9 of the UN Committee on the Rights of the Child only includes the first two elements of last resort and best interests of the child. The Committee:

urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child. It recommends that the States parties prevent the use of placement in institution merely with the goal of limiting the child's liberty or freedom of movement. In addition, attention should be paid to transforming existing institutions, with a focus on small residential care facilities organized around the rights and needs of the child, to developing national standards for care in institutions, and to establishing rigorous screening and monitoring procedures to ensure effective implementation of these standards.

Once a child is placed in an institution as a last resort, the language of General Comment #9 does not require such placement to be temporary. Of greater concern is the fact that the above language appears to share the same assumption of CRC Article 20 that children can be placed in "suitable institutions." The creation of "small institutions" seems to be a goal, rather than a transitional step toward full community integration.

The term "transforming institutions" can be very misleading — especially to non-experts or people not familiar with the community integration of children or adults with disabilities. This author has often heard the term used by international development organizations as they invest new funds in fixing-up institutions. Recently in Ukraine, for example, Disability Rights International learned of a large World Bank Project to close institutions for children and integrate them into the community. Since there were not adequate community services available for children with disabilities, the plan called for "transforming" existing residential institutions to provide rights-oriented and family-like settings.<sup>147</sup>

As discussed in Part II of this paper, many professionals now question whether efforts to improve institutions can really meet the needs of children.<sup>148</sup> As stated by Karen Green McGowan, President of the US Developmental Disabilities Nurses Association:

A family-like institution is an oxymoron, and the effort to create one is a fool's errand. When children are tucked into bed at night, they can tell the difference between a parent and a care-giver who is heading home to take care of his or her own children. As health care professionals, we can see the impact of this difference on the child.<sup>149</sup>

Despite the ambiguities created by the language of General Comment #9, it was clearly not intended to favor long-term institutionalization and has other important provisions requiring governments to ensure that children can grow up with a family. The General Comment says that States parties are "urged to set up programmes for de-institutionalization of children with disabilities, re-placing them with their families, extended families or foster-care system. Parents and other extended family members should be provided with the necessary and systematic support/training

<sup>147</sup> Disability Rights International, *NO WAY HOME: THE EXPLOITATION AND ABUSE OF CHILDREN IN UKRAINE'S ORPHANAGES*, (2015) 21 [hereinafter *DRI Ukraine Report*]. Following the publication of the DRI report, the World Bank revised its program.

<sup>148</sup> See *supra* notes 70-73 and accompanying text.

<sup>149</sup> Karen Green McGowan, personal correspondence with the author, October 5, 2016.

for including their child back in their home environment.”<sup>150</sup> Like CRPD Art. 23, this provision of General Comment #9 mentions only family alternatives to institutions.

#### *D. Least restrictive environment: the problem of group homes*

The final element of the Torture Standard is the requirement that any placement of a child be in the least restrictive environment. Further guidance from the Special Rapporteur on Torture and social service experts would be helpful to determine exactly what kind of placement would be acceptable for specific children and particular ages. There is consensus, as reflected in the Guidelines for Alternative Care, that group homes for children under age 3 are never acceptable. Yet there is growing controversy about the acceptability of group homes for older children—or even adolescents. It is beyond the scope of this paper to resolve these issues. But the requirement that children be placed in the “least restrictive environment” raises the question as to whether the use of group homes violates the Torture Standard.

Group homes were once viewed as “the best alternative to institutionalization.”<sup>151</sup> But group homes proved not to be “family-like” because staff changes over time, conditions may become regimented, and numbers can be increased for the convenience of authorities. Studies of the population moved out of the Pennhurst Institution have demonstrated that smaller group homes produced better outcomes.<sup>152</sup> But the inherent limitations of group homes remain. Describing the US experience with deinstitutionalization of facilities for adults with mental disabilities, Professor Arlene Kanter writes:

Group homes, halfway houses, quarterway houses, and board and care homes are hardly “homes” at all. Like institutions, they segregate people with disabilities and confine them with little, if any, individual choice. The residents of such homes are seldom asked where or with whom they want to live....The places where people with mental disabilities have lived are called “congregate living facilities,” “community residences,” “residential living environments,” “community living arrangements.” And “community care facilities.” Noticeably absent in these varied descriptions is the simple word “home.”<sup>153</sup>

Problematic as they are for adults, group homes are even more inappropriate for children. The essential emotional support that children need is to live in a family where they can form long-term emotional attachments.<sup>154</sup>

<sup>150</sup> General Comment No. 9, *supra* note 9, para. 49.

<sup>151</sup> See, Kanter (2015) *supra* note 126 at 64-80 (reviewing the development of the right to community integration and the evolving “meaning of a home,” discussing the right to live in the community for people with disabilities under Article 19). See also Arlene Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 *The American University Law Review* 925, 932 (1994) [hereinafter “A Home of One’s Own”].

<sup>152</sup> James Conroy and Valerie Bradley, *THE PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS*, (Office of the Assistant Secretary for Planning and Evaluation, US Department of Health and Human Services, 1985). Available at <https://aspe.hhs.gov/pdf-report/pennhurst-longitudinal-study-combined-report-five-years-research-and-analysis> (last accessed October 13, 2016). On page 198, the study states: “Our preliminary findings indicate that the degree of normalization of a community setting makes a difference, with people in more normalized settings making more progress. We also find evidence that size makes a difference, with people in smaller settings doing slightly better (even though the size of the settings only ranges from 1 to 8 people).”

<sup>153</sup> *A Home of One’s Own*, 932.

<sup>154</sup> Dozier *et. al.*, *supra* note 61, at 220.

The Guidelines for Alternative Care prohibit the use of group homes for children under age three, requiring instead that young children be placed with a family. Valuable as this provision is for the youngest children, research has shown that living in a family is also essential for older children and adolescents.<sup>155</sup>

Some professionals recognize that group care is a valuable short-term placement “as a respite, ‘cooling off’ period, or a time-limited therapeutic intervention with specific goals.”<sup>156</sup> But these professionals also believe that, for anything but short-term or transitional placement, “group care is not an appropriate living arrangement, and it can never substitute for a home environment.”<sup>157</sup>

Placement in a group home is especially dangerous for children with behavioral problems (as would be expected from children coming from institutions), leading to higher rates of delinquency and criminal activities than for children raised in foster homes. Even for young children with no previous behavioral issues or disabilities, however, group homes are likely to lead to attachment disorders.<sup>158</sup> Studies from Romania show that even children “placed in small family-like homes with four consistent care-givers” experienced attachment problems.<sup>159</sup> Recent experience has shown that all children can be transferred out of institutions and into families without reliance on group homes—and with much better social and psychological outcomes.<sup>160</sup>

Writing in a 2014 consensus statement, mental health professionals and researchers from the United States and Europe have raised concerns about so-called “residential care” and have challenged the position of the Guidelines for Alternative Care that “residential care facilities and family-based care can complement each other.”<sup>161</sup> These experts believe that while valuable in their broad support for deinstitutionalization, the Guidelines for Alternative Care do not go far enough in calling for full community integration in a family setting:

We assert a stronger position by contending that institutional care is non-optimal for children of all ages, including teenagers, and that even smaller group care settings can be detrimental to the growth and well-being of youth.<sup>162</sup>

Other professional groups have come to similar conclusions:

The vast majority of research pointed in the same direction. Residential care lacks sufficiently parent-like adult relationships to be appropriate long-term placements for maltreated children; these facilities also mirror too closely aspects of maltreatment that set children up for life-long developmental challenges.<sup>163</sup>

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 221.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 222.

<sup>159</sup> Save the Children (2009), *supra* note 70 at 13.

<sup>160</sup> In Oklahoma, for example, all institutions for children have been closed. Noting the dangers of placement in group homes, the reform was designed to ensure that all children with disabilities are able to live within a family or substitute family. Six-year outcome studies have shown that this reform has not only been successful—it has resulted in great improvements in quality of life. Conroy, J., *THE HISSOM OUTCOMES STUDY: A REPORT ON 6 YEARS OF MOVEMENT INTO SUPPORTED LIVING: THE PEOPLE WHO ONCE LIVED AT HISSOM MEMORIAL CENTER: ARE THEY BETTER OFF?* (The Center for Outcome Analysis, 1996); Conroy, J., Spreat, S., Yuskaskas, A., & Elks, M. (2003). *The Hissom Outcomes Study: A Report on Six Years of Movement to Supported Living. Mental Retardation, 41, 4, 263–275.*

<sup>161</sup> Dozier, *et. al.*, *supra* note 61 at 220.

<sup>162</sup> *Id.*

<sup>163</sup> Anne E. Casey Foundation, *RECONNECTING CHILD DEVELOPMENT AND CHILD WELFARE: EVOLVING PERSPECTIVES ON RESIDENTIAL PLACEMENT* (2013).

Drawing on the findings from mental health research, European human rights authorities conclude that any congregate settings, regardless of size, fail to meet the requirements of the right to community integration under the CRPD for both children and adults:

In as much as there are legal obligations that are to be immediately achieved in article 19, it would perhaps be entirely fair to infer that Article 19 prohibits the construction of new institutions—entities that are not defined exclusively by their size but by their characteristics which can effectively exclude people from meaningful engagement in the community. The fixation on size of an institution is a talisman—i.e. the view that entities with 2, 5, 10, 15 or 20 or so are unproblematic—seems entirely misplaced. No congregate setting appears conducive to the right to live independently and be included in the community.<sup>164</sup>

Rather than focusing on the type or size of a building, the CRPD emphasizes emotional connect- edness and ties with the community.

While there is a trend away from the use of group homes in parts of the world, group homes are still widely used as a part of community-based support for adults, adolescents, and even children. Experts who consider the use of group homes or other forms of residential care acceptable for children, under some circumstances, do so because they believe it “is the best currently available alternative to an abusive family situation, and it can be a short-term measure until the child can be placed with a family.”<sup>165</sup> Yet even these experts recognize the risk that this will become “the default option for children without adequate family care.”<sup>166</sup>

### *E. Inclusion of children and adults with disabilities*

The most significant limitation of the “last resort” rule without a time limitation is that it derives from what social service systems happen to offer at a given time—rather than looking to the inher- ent rights or needs of the individual child. If a social service system only provides a choice of an orphanage or the street, then an orphanage is (usually) preferable. When a social service system fails to provide protections for families or community supports for children with disabilities, it is effectively offering a child a choice between the orphanage and the street. Irrespective of his or her needs, every child with a disability must be placed in an institution when family protections and community services are absent.

Recent reforms in the Republic of Georgia demonstrate the risks of current standards established by General Comment #9. In a highly regarded manual on the implementation of the Guidelines for Alternative Care, deinstitutionalization in Georgia is identified as a “promising practice” for deinstitutionalization.<sup>167</sup> Georgia received an infusion of foreign assistance after its 2008 war with Russia and UNICEF guided the country through a rapid process of closing its orphanages. In the four years between 2008 and 2012, the number of children in institutions was reduced from 2,500 to 250.<sup>168</sup> In 2012-2013, Disability Rights International (DRI) conducted an investigation into the situa-

<sup>164</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 30 (discussing the challenges of implementing progressive development).

<sup>165</sup> Williamson & Greenberg (2012), *supra* note 64, at 3.

<sup>166</sup> *Id.* at 4.

<sup>167</sup> Implementing the Guidelines, *supra* note 18 at 45.

<sup>168</sup> *Id.* During this time, a third of children were reunited with their families, 400 were placed in small group homes, and the rest were placed in a new foster care system.

tion of children in Georgia's institutions.<sup>169</sup> In many ways, Georgia's rapid reforms were impressive, and they demonstrate a far greater commitment to child protection and rights enforcement than other countries of the region.<sup>170</sup> DRI found that children with disabilities, however, were largely excluded from this reform. Children with limited support needs were integrated into the community, but reformers did not plan from the outset to create the supports necessary for children with disabilities to be integrated in to the community.<sup>171</sup> As a result, by 2013, when DRI documented this situation in Georgia, three institutions for children with disabilities remained. Both governmental and international funding for reform had dried up.<sup>172</sup>

The CRPD brings the attention of governments and international development agencies to the obligation to include children with disabilities in all programs. The protection against discrimination should be understood to mean that children with disabilities must be included at all stages of reform, and not left to the end. The Torture Standard effectively complements the CRPD in this regard. Placement for the "shortest time" possible should never be interpreted to mean "whenever the needs of all the non-disabled children are met."

### V. Ill-treatment and torture in institutions

Special Rapporteurs on Torture Manfred Nowak and Juan Méndez have contributed greatly to the recognition of ill-treatment and torture in the context of health and social care. While the international legal framework for the protection against ill-treatment and torture has been applied to conditions of detention in prisons, mental health facilities, and social care institutions for children, human rights law has generally been deferential to practices justified as "treatment" or actions taken for the ostensible protection of individuals with disabilities.<sup>173</sup> Healthcare professionals are assumed to be "well intended," so it is often assumed that there is no "intent" to cause pain or suf-

<sup>169</sup> Disability Rights International, *LEFT BEHIND: THE EXCLUSION OF CHILDREN AND ADULTS WITH DISABILITIES FROM REFORM AND RIGHTS PROTECTION IN THE REPUBLIC OF GEORGIA* (2013), <http://www.driadvocacy.org/wp-content/uploads/Left-Behind-final-report.pdf> [hereinafter "DRI Georgia Report"].

<sup>170</sup> See, e.g. DRI Ukraine Report, *supra* note 148; Disability Rights International, *NO JUSTICE: TORTURE, TRAFFICKING, AND SEGREGATION IN MEXICO* (2015).

<sup>171</sup> UNICEF's Director in Georgia informed DRI in 2012 that the intention was to prioritize the deinstitutionalization of non-disabled children, and then to return to concerns of children with disabilities after that. Among the problems with this approach is that it can leave the impression that segregation is the norm. Georgia's Minister of Labor, Health, and Social Affairs stated in November 2013, for example, that: "The strategy is that physically healthy children will not stay in large-scale child care institutions, but be adopted and raised in family-based care—according to international experience it is the best option for them. As for children with disabilities, it is reasonable and fairly normal to be brought up and stay in a child care institutions." DRI Georgia Report, *supra* note 170, at viii. The Minister reversed himself after the release of DRI's report. When he was interviewed for a documentary by PBS: *Disability Rights International—THE VISIONARIES* (PBS, 2014), <http://www.driadvocacy.org/media-gallery/>. He stated that all children with disabilities would be integrated into the community within a year. (last visited November 11, 2016). As of July 2016, authorities at two remaining facilities for children with disabilities reported to this author that new admissions are still taking place in these facilities. Ministry officials report that they are committed to their closure.

<sup>172</sup> DRI found that approximately 150 children with disabilities remained in three institutions while approximately 2,000 children had been integrated into the community. DRI also found that more than 1,000 children in church-run institutions were overlooked by reformers. DRI Georgia Report, *supra* note 170, at 21. See discussion of these overlooked children and the need for improved monitoring at note 228 *supra* and accompanying text.

<sup>173</sup> See Eric Rosenthal & Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19(2) Human Rights Brief 13-17 (2012) (describing DRI's efforts to seek recognition of improper treatment as torture and examining the records of Special Rapporteurs Manfred Nowak and Juan Méndez in recognizing these protections).

fering. Demonstrating purpose has been even harder, as treatment practices are justified as a form of medically necessary care in the best interest of the subject.

As discussed in Part III above, The European Court's decision in the *Stanev* case demonstrates the challenge. Mr. Stanev was wrongfully detained for nearly ten years in a remote facility without adequate food, heat, or running water—where one in ten people died each year—yet the Court found only that conditions were “degrading.” The Court said treatment was not torture because there was no evidence that authorities at the facility “deliberately intended to inflict degrading treatment.”<sup>174</sup>

Bulgaria had not yet ratified the CRPD when the *Stanev* case was originally filed. The CRPD may now shape the Court's understanding about torture and detention, as it has influenced the work of the UN Special Rapporteurs on Torture. Shortly after the adoption of the CRPD in 2006 and before its entry into force in 2008, UN Special Rapporteur on Torture Manfred Nowak convened a group of experts on disability and torture to discuss the application of the torture convention in the context of disability.<sup>175</sup>

DRI presented its findings from recent reports on Turkey and Serbia, in which it identified “treatment” practices as a form of torture. In Turkey, DRI found that psychiatrists used so-called “unmodified” electro-convulsive therapy (ECT)—electric shock without anesthesia—on thousands of children and adults admitted to the country's Bakirköy Psychiatric Facility each year.<sup>176</sup> In Serbia, DRI found children who were tied down for years in beds or left in the cage-like confines of a crib.<sup>177</sup>

In calling these practices torture, DRI made the case that acts merely need to be intentional and that the goal of causing pain was not needed to meet the definition of torture.<sup>178</sup> DRI noted that Article 1 of CAT lists “discrimination of any kind” as a prohibited purpose. Thus, it is appropriate to look to other human rights conventions to understand the evolving concept of discrimination.<sup>179</sup> The CRPD is designed to ensure that people with disabilities are treated equally and have the same opportunities as others—and thus defines discrimination against people with disabilities. If a practice meets all the other requirements of the CAT torture definition, causing “severe pain or suffering” through the “consent or acquiescence of a public official” DRI argued that acts contrary to the CRPD, such as deprivation of liberty in an institutions, could constitute discrimination.<sup>180</sup> The DRI

<sup>174</sup> *Stanev v. Bulgaria*, *supra* note 33, at para. 211

<sup>175</sup> Office of the High Commissioner for Human Rights, EXPERT SEMINAR ON FREEDOM FROM TORTURE AND ILL TREATMENT AND PERSONS WITH DISABILITIES REPORT, (United Nations Office Geneva, 2007) [hereinafter “OHCHR Expert Seminar”].

<sup>176</sup> See Disability Rights International, BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS FOR TURKEY, 12 (2005), <http://www.driadvocacy.org/wp-content/uploads/turkey-final-9-26-05.pdf>.

<sup>177</sup> Mental Disability Rights International, TORMENT NOT TREATMENT: SERBIA'S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES, 16 (2007), <http://www.driadvocacy.org/wp-content/uploads/Serbia-rep-english.pdf>. [hereinafter MDRI Serbia].

<sup>178</sup> OHCHR Expert Seminar, *supra* note 176 at 5.

<sup>179</sup> These arguments were spelled out further in DRI's challenge of the use of electric shock as a form of behavior modification on children detained at the Judge Rotenberg School in Massachusetts. See Mental Disability Rights International, *supra* note 213, 20-22.

<sup>180</sup> Id. DRI (then known as MDRI) made this case as part of its report on abuses in Serbian institutions, arguing that the deprivation of liberty constitutes a form discrimination under the CRPD. MDRI Serbia, *supra* note 178, at 26.

report and an accompanying video based on findings in Serbia<sup>181</sup> galvanized the understanding of participants that such practice constituted nothing less than torture:

Many participants agreed that the situation presented in the video constituted torture as provided in Article 1 of CAT. Further, some noted that situations like the one in the video were not exclusive to Serbian institutions and that it was important to start applying the torture framework fully to the treatments and conditions inflicted on persons with disabilities.<sup>182</sup>

Nowak's final report in his capacity as Special Rapporteur on Torture finds that "there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment."<sup>183</sup> The Nowak report also confirms DRI's analysis regarding the practice of unmodified ECT as torture or ill-treatment.<sup>184</sup> Nowak's report does not speak to whether specific practices constitute torture or ill-treatment because the specific facts of each case are relevant to making this distinction.<sup>185</sup> More important, however, Nowak clarifies that the stated "intent" of the treating professional could not shield a practice from rising to the level of torture:

This is particularly relevant in the context of medical treatment of persons with disabilities, where serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals... [T]he requirement of intent in Article 1 of CAT can be effectively implied where a person has been discriminated against on the basis of disability.<sup>186</sup>

Special Rapporteur Méndez's report on Torture in Healthcare follows Nowak's analysis, citing the evolving definition of torture as "subject to ongoing reassessment in light of present-day conditions and the changing values of democratic societies."<sup>187</sup> In both his reports on Torture in Health Care and Children in Detention, Méndez looks to the CRPD and CRC for a determination of intent and prohibited purpose.<sup>188</sup>

Méndez has accepted that "intent" can be "effectively implied where a person has been discriminated against on the basis of disability." He also added that "purely negligent conduct lacks the intent required under article 1, but may constitute ill-treatment if it leads to severe pain and suffering."<sup>189</sup> Méndez notes that this is particularly relevant for "children deprived of their liberty outside the criminal justice system" as ill-treatment in institutional settings may involve "acts of omission rather than commission, such as emotional disengagement or unsanitary or unsafe conditions, and result from poor policies rather than form an intention to inflict suffering."<sup>190</sup>

Acts or conditions that might rise to the level of torture, as strictly defined under CAT Article 1, are a particularly great risk within institutions. Citing Nowak's earlier report, Méndez notes

<sup>181</sup> The original raw footage from Serbian orphanages is on file with the author. NBC Nightly News broadcast part of this video posted on the Disability Rights International website at <http://www.driadvocacy.org/media-gallery/>

<sup>182</sup> OHCHR Expert Seminar, *supra* note 176, at 5.

<sup>183</sup> UN Human Rights Council, *Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak, U.N. Doc. A/63/175 (Jul. 28, 2008) [hereinafter "Nowak 2008 Report"].

<sup>184</sup> *Id.* at para. 42 n.3.

<sup>185</sup> *Id.* at para. 47.

<sup>186</sup> *Id.*

<sup>187</sup> Torture in Healthcare Report, *supra* note 92, para.14.

<sup>188</sup> Méndez 2015 Report, *supra* note 2, para. 19.

<sup>189</sup> Torture in Healthcare Report, *supra* note 92, para. 20, citing Manfred Nowak's earlier report A/t3/175, para. 49; Méndez 2015 Report, *supra* note 2, para. 4

<sup>190</sup> *Id.*



that “[t]orture as the most serious violation of the human right to personal integrity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person.”<sup>191</sup> The special vulnerability of children must also be taken into account, and the “threshold at which treatment or punishment may be classified as torture or ill-treatment is therefore lower in the case of children, and in particular children deprived of their liberty.”

Identifying a practice as torture is particularly important, because CAT requires that such a practice be criminalized and prosecuted. Torture can be hard to prove, and some practices that do not meet this strict level are also protected under the CAT. In his reports on Torture in Health Care and Children in Detention, Méndez takes aim at stopping “ill-treatment” or practices that qualify somewhere on the scale of “torture or ill-treatment.” While not conflating torture and ill-treatment, the Méndez Report on Children in Detention refers jointly to both of them as “torture or ill-treatment” with regard to most of the obligations outlined in the report. Following the guidance established in CAT’s General Comment #2, Méndez points out that “conditions that give rise to ill-treatment frequently facilitate torture.”<sup>192</sup> CAT creates a duty to prevent and to provide a remedy and reparation for both torture and ill-treatment “so that it is immaterial for this purpose whether abuses in health-care settings meet the criteria for torture *per se*. This framework opens new possibilities for holistic social processes that foster appreciation for the lived experience of persons, including measures of satisfaction of non-repetition...”<sup>193</sup>

As noted above, the Special Rapporteur’s call for limiting unnecessary detention of children is based on the risk of torture created by such detention. The Children in Detention Report never states that the pain and suffering caused by detention need amount to torture. In the 2013 report on Torture in Healthcare, however, Méndez recognizes the possibility that segregation itself may constitute ill-treatment or torture. To evaluate whether detention violates the torture convention, Méndez says that it is necessary to examine “factors such as fear and anxiety produced by indefinite detention [and] the segregation from family and community.” It is unfortunate that Méndez did not develop this idea in either his 2013 or 2015 report to provide further guidance as to exactly when detention is in itself torture. This possibility, however, demonstrates the important link between protecting against torture within institutions and protecting the right to community integration. If the emotional pain and suffering caused by segregation itself constitutes ill-treatment or torture, then there can be no remedy against abuse in an institution other than community integration.

## VI. Protecting against torture within institutions

Many of the dangers of institutions, and the psychological pain and suffering that results from segregation, are inherent to placement in institutions. Yet some acts of ill-treatment or torture within institutions can be stopped by changes in law, policy, or practice. Where such practices within institutions induce severe pain, governments are obliged to act immediately to remedy those abuses. Protecting children within institutions presents a complex array of challenges.

### A. Danger of Perpetuating Segregation

Even if particular abuses within an institution can be remedied, the broader impact of such responses creates an inherent dilemma for governments. Efforts to stop torture by improving con-

<sup>191</sup> Torture in Healthcare Report, *supra* note 92, para. 31.

<sup>192</sup> Méndez 2015 Report, *supra* note 2, para. 24, *citing* General Comment No. 2, para. 3.

<sup>193</sup> Torture in Healthcare Report, *supra* note 92, para. 84.

ditions in institutions may have the unintended consequence of reinforcing a segregated service system. The experience of Romania after the fall of Nikolei Ceausescu looms large over the child protection field, as international efforts bring an end to abusive conditions in institutions created new incentives for poor families to place children in institutions.<sup>194</sup> As a result, in the six years after the fall of Ceausescu from 1989 to 1995, there was a “dramatic” increase in the population of Romania’s orphanages.<sup>195</sup> It was during this time that researchers conducting the Bucharest Early Intervention Study found that even cleaned up and well-staffed institutions were still dangerous for children.<sup>196</sup>

After many years of fruitless new investments in institutions, UNICEF described a “growing global consensus” that priority should be given to preventing new institutionalization rather than to what are called “sporadic or isolated” efforts to protect against abuses within facilities.<sup>197</sup> The Guidelines on Alternative Care reflect this new consensus contributing an invaluable shift toward deinstitutionalization and improvement of care in the community.<sup>198</sup>

The Torture Standard does not allow governments to delay protections or sacrifice any individual, even when broader policies are working toward the progressive enforcement of human rights protections. This legal principle is easier to state than it is to enforce. Some of the challenges of enforcing human rights in an institution are described below.

### ***B. Immediate enforcement needed***

The shift of resources and attention toward the creation of community alternatives is, as a general rule, a valuable trend. Yet there is a great danger of overlooking basic rights protections for children who happen to be left behind in institutions. Disability Rights International’s findings from the Republic of Georgia demonstrate this risk.<sup>199</sup>

<sup>194</sup> See Eric Rosenthal, Elizabeth Bauer, Mary F. Hayden, and Andrea Holley, *Implementing the Right to Community Integration for Children with Disabilities in Russia: A Human Rights Framework for International Action*, 4(1) HEALTH AND HUMAN RIGHTS 83, 89 (1999) (describing lessons learned from Romania and its impact on reform in other countries).

<sup>195</sup> One study found that in the six years after the fall of Ceausescu, from 1989 to 1995, there were at least 10,000 new placements of children with disabilities and the overall orphanage population increased by nearly 37%. UNICEF, *Children at Risk in Central and Eastern Europe: Perils and Promises* 66 (1997). Given the difficulties of pinning down exact numbers in institutions, other estimates are more conservative. But even one of the most cautious observers concluded that “[g]iven that the number of newborn infants fell by more than 30 percentage points during these years, this climb in cases of institutionalization must be considered dramatic.” E. Zamfir and C. Zamfir *Children at Risk in Romania: Problems Old and New*, UNICEF International Child Development Centre Innocenti Occasional Papers 37 (1996).

<sup>196</sup> Charles H. Zeanah et al., *Designing research to study the effects of institutionalization on brain and behavioral development: The Bucharest Early Intervention Project*, 15 Development and Psychopathology 885, 886 (2003) (reviewing five decades of research literature on the damaging effects of institutionalization). See also discussion about the inherent dangers of institutions in Part IIB.

<sup>197</sup> “There is a growing global consensus that sporadic or isolated efforts to improve individual institutions will not solve the problems of children in residential care, or meet their best interests. Efforts must focus more especially on the underlying reasons for decisions to place children in care in the first place. Complex and often interlinked factors—such as poverty, family breakdown, disability, ethnicity, inflexible child welfare systems and the lack of alternatives to residential care—require holistic responses that identify families at risk, address their needs and prevent the removal of their children. The ethical and practical challenge that we face is to ensure that families—with special emphasis on women who are increasingly heads of household—have the support they need to nurture and raise their children and effectively assume their childrearing responsibilities.” UNICEF, *Children in Institutions: The Beginning of the End?* (2003), *supra* note 54, at vi.

<sup>198</sup> See *Implementing the Guidelines* (2012) at 37 (describing the Guidelines and their broad implications for policy-making) and 43 (describing the importance of moving toward deinstitutionalization).

<sup>199</sup> See Disability Rights International (2013), *supra* note 170 (describing Disability Rights International’s findings in the Republic of Georgia).

As described in Part IV, the international community supported Georgia's reforms to move quickly toward the closure of orphanages. Children with disabilities, including babies at the Tbilisi Infant's Home, were overlooked. Without supportive care for children with disabilities or an opportunity to return to their families, these children were left in the institution while non-disabled children were returned to families or placed in foster care.<sup>200</sup> During this time, international funding was used to rebuild the Tbilisi Infant Home. The US Agency for International Development (USAID) funded a playground at this facility. Yet inside, many children with disabilities never left their cribs. When DRI investigators first visited in 2010, they found children with hydrocephalus left untreated—their heads growing so large that they died a slow and painful death. In one four month period between DRI visits in 2012, 50% of the children with hydrocephalus in the Tbilisi Infant Home passed away.<sup>201</sup>

Physicians interviewed by DRI said that treatment for hydrocephaly (including the placement of a shunt to drain off fluid buildup in the skull) was available in Georgia. But staff at the facility reported that children were not given this treatment because they were seen as "already damaged" by disability and would lead incomplete lives even if treated.<sup>202</sup> DRI brought in a medical expert who found that these children were not even given pain medication. The UN Special Rapporteur on Torture has stated that the denial of pain medication itself can constitute torture.<sup>203</sup> The explicit discrimination on the basis of disability in this case, causing severe pain and suffering—and eventual death—demonstrates that these children were being subject to torture.

Children with disabilities are particularly at risk of denial of pain medication because they may not be able to express the pain they are suffering. Or more likely, they face the perception that they do not feel pain or will soon die anyway because of their disability. Perceptions of caregivers or the public can be reinforced by the psychiatric or medical label they are given. At the time DRI found the children at the Tbilisi Infants Home, authorities reported that they planned to transform this into a "palliative care" facility—a designation that formally excluded them from any future inclusions in plans for community integration (and suggesting, implicitly, that they were nearing death). It is essential to challenge such assumptions through careful independent oversight and monitoring, and to ensure that children with disabilities—wherever they are—have the same right to medical care and pain relief as all other children.

While the right to basic care and treatment within an institution must be legally enforceable, it is important to recognize that there are inherent risks in the provision and funding of such care. Support for essential care inevitably allows the facility to shift resources to other operating expenses. This will support the continued operation of the institution, which will continue to draw limited funds away from community-based alternatives. To some extent, the impact of such support can be reduced by funding mechanisms that "follow the patient" or child. If a child can obtain care at home or find placement outside the facility, the funding for care must still be available to that child wherever he or she may need it. Funding mechanisms must be carefully established so that provision of care within the institution is not used as an excuse for detention of the child. Human rights monitors must be able to identify such funding sources to examine their impact on direct care and the continued operation of the institution.

<sup>200</sup> *Id.* at 11.

<sup>201</sup> *Id.* at 4.

<sup>202</sup> *Id.* at 5.

<sup>203</sup> Torture in Healthcare Report, *supra* note 92, para. 54-56.

### *C. Implementing protections against restraints*

Various international instruments have tried to establish clear and enforceable standards for the protection against the severe pain and suffering caused by physical restraint. The adoption of the strongest possible protection is essential to avoid abuse. The experience of DRI in Mexico, however, shows that stopping the abusive use of physical restraints within institutions can be extremely difficult. Even after Mexico adopted strong international human rights standards, and after its abuses had been widely exposed and publicized, DRI has continued to find widespread abuse of restraints in Mexico's institutions.<sup>204</sup>

Following DRI's presentation about the use of restraints on children in Serbian orphanages, UN Special Rapporteur on Torture Manfred Nowak stated that the prolonged use of restraints may constitute Article 1 torture.<sup>205</sup> As Nowak's report describes:

Poor conditions in institutions are often coupled with severe forms of restraint and seclusion. Children and adults with disabilities may be tied to their beds, cribs or chairs for prolonged period, including with chains and handcuffs... [P]rolonged use of restraint can lead to muscle atrophy, life-threatening deformities and even organ failure.<sup>206</sup>

The Méndez Report specifies that States should "use restraints or force only when the child poses an immediate threat of injury to himself or others, and only for a limited period of time and only when all other means of control have been exhausted..."<sup>207</sup> Méndez's earlier 2013 report on Torture in Healthcare demands an even higher standard of protection for persons with disabilities, urging States to adopt an "absolute ban" on restraints for children or adults with mental disabilities in all places of detention.<sup>208</sup>

Neither of the Méndez reports distinguishes between chemical restraints (e.g. psychotropic medication as a sedative), mechanical restraints (such as straitjackets or even ripped pieces of bed-sheets, as commonly used in orphanages), and other physical restraints (such as having a staff member hold a child down). The European Committee for the Prevention of Torture (CPT) provides a valuable guidance and strong protections for children by distinguishing between these different kinds of restraints:

Minors below 16 years of age should in principle never be subjected to means of restraint. The risks and consequences are indeed more serious taking into account the vulnerability of minors. In extreme cases where it is necessary to intervene physically to avoid harm to self or others, the only acceptable intervention is the use of physical (manual) restraint, that is, staff holding the minor until he or she calms down.<sup>209</sup>

The CPT limits all forms of restraints except manual holding of a child. This differs slightly from a complete ban on restraints. The CPT recognizes that staff may need to hold a child for a short time until a dangerous situation is avoided. Both the 2013 and 2015 reports of the Special Rapporteur on Torture can and should be read in a manner consistent with the more specific CPT standard.

<sup>204</sup> DRI Mexico (2010), *supra* note 30, at 10; DRI No Justice (2015), *supra* note 171.

<sup>205</sup> Nowak 2008 Report, *supra* note 184, at 49.

<sup>206</sup> *Id.* at para. 55.

<sup>207</sup> Méndez 2015 Report, *supra* note 2, para. 86(f).

<sup>208</sup> Méndez states that "...any restraint on people with mental disabilities for even a short period of time may constitute torture or ill-treatment. It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including psychiatric and social care institutions." *Id.*

<sup>209</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The use of Restraints in Psychiatric Institutions*, (June 13, 2012), para. 3.7.

The Guidelines for Alternative Care have their own provision for the use of restraints on children. They contain a strong recommendation to limit restraints to situations where they are “strictly necessary,” but their formulation falls short of the protections called for by the UN Special Rapporteur on Torture:

Use of force and restraints of whatever nature should not be authorized unless strictly necessary for safeguarding the child’s or others’ physical or psychological integrity, in conformity with the law and in a reasonable and proportionate manner and with respect for the fundamental rights of the child. Restraint by means of drugs and medication should be used on *therapeutic needs* and should never be employed without evaluation and prescription by a specialist.<sup>210</sup>

The Guidelines allow chemical and mechanical restraints to be used on children in institutions, and they suggest that the use of restraints might be therapeutic. The Special Rapporteur on Torture has made very clear that restraints should *never* be used for therapeutic purposes.<sup>211</sup> Many social service agencies and development agencies serving children rely on the Guidelines for Alternative Care as their main guideline for protecting the rights of children. This is one area where the Guidelines for Alternative Care must be updated to reflect important developments in human rights law.

The most serious dangers of so-called “therapeutic” use of restraints can be seen in the US experience. In the state of Massachusetts at the Judge Rotenberg Center, DRI found the intentional infliction of pain was used as a form of behavior modification treatment—including the use of both electric shock and restraints for “therapeutic purposes.”<sup>212</sup> Special Rapporteurs Manfred Nowak and Juan Méndez publicly stated on US television that this practice constitutes torture.<sup>213</sup>

While international standards may make hair-splitting distinctions as to what extremely limited circumstances might permit the use of some form of restraint, the reality of children in institutions creates powerful incentives for staff to engage in practices that lead to torture. Any effort to stop the abuse of restraints must recognize this context.

The use of restraints in institutions often stems from self-abusive or other behaviors thought to be the product of a child’s disability. Children with challenging behaviors who are considered dangerous to themselves or others are the most likely to be detained in institutions. Unfortunately, the very neglect of institutional placement makes these behaviors even worse. Save the Children describes an example of this situation from an orphanage in Serbia:

A two-year-old girl with suspected learning difficulties learned that scratching herself and pulling her hair quickly got the attention of staff. The more this happened the more she scratched herself and pulled out her hair. Pain was preferable to being neglected. Given that each member of staff had seven other children to care for, they managed the situation by tying the child up in her own bed clothes to prevent her from self-harming.<sup>214</sup>

DRI has observed situations like these in hundreds of institutions around the world—they are regrettably much more the norm, rather than the exception. In such circumstances, laws or policies

<sup>210</sup> Guidelines for Alternative Care, *supra* note 19, at para. 96.

<sup>211</sup> Torture in Healthcare Report, *supra* note 92, para. 63.

<sup>212</sup> Disability Rights International, TORTURE NOT TREATMENT: ELECTRIC SHOCK AND LONG-TERM RESTRAINT IN THE UNITED STATES ON CHILDREN AND ADULTS WITH DISABILITIES AT THE JUDGE ROTENBERG CENTER (2011).

<sup>213</sup> Rosenthal & Ahern, *supra* note 174, at 16.

<sup>214</sup> Save the Children, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE, 7 (2009).

restricting the use of restraints are often ignored because they cannot be enforced. In one institution documented by DRI in Mexico, where children were held in cages and cage-like cribs, authorities announced that they would adopt one-to-one staffing to end the use of cages. When DRI brought in an expert team to monitor the newly reformed institution, it was denied access.<sup>215</sup> Karen Green McGowan, President of the US Developmental Disabilities Nurses Association, who observed the facility on an earlier visit observed:

Going back to the days of Willowbrook in the 1970s, vast resources and staffing have been invested in trying to stop the most serious self-abusive behaviors in institutions. Yet what we have found is that these efforts, no matter how well funded, have proven futile. After all is said and done, it is when we got children into stable family environments, that is when behaviors drastically improved. Based on what I observed in Mexico, I believe that the only way to protect these children from being tied down or placed in cages is to get them out of the institution and into a family.<sup>216</sup>

Unless children are returned to the community and given the opportunity to grow up with the love and attention of a family, it may be impossible to stop self-abuse. Merely banning restraints may be a futile exercise. These protections are almost guaranteed to be violated over time by institutions, when the underlying conditions leading to self-abuse are still present. Banning improper restraints is a step that is necessary but not sufficient.

The use of restraints on children with behavioral challenges is an example of why the prevention of torture requires an investment in community services to allow children to return to their families. The initial challenge, however, may be to convince authorities that community integration of these children is even possible. Research has shown that children with the most serious behavioral difficulties can be integrated into the community and benefit greatly from such inclusion.<sup>217</sup>

The steps recommended by the Méndez Report for protection within institutions are necessary but not sufficient. Whenever new investments are made in institutions, there is a risk of creating incentives to increase the institutional population. In the immediate future, a moratorium on new placements would stop investments in institutions from serving as a magnet for new placements. To effectively prevent and stop ill-treatment and torture from taking place, however, governments must create community-based alternatives to ensure that children can live with their families.

#### ***D. Oversight and monitoring***

One component of the Méndez report on Children in Detention that is unequivocally important is the requirement that governments create safeguards for monitoring and human rights enforcement. This is an example of a protection that does not reinforce existing service systems. UNICEF has expressed concerns that oversight, monitoring, and enforcement will not, in themselves, end

<sup>215</sup> *Threats continue against DRI staff in Mexico* (ABC Evening News with David Muir, television broadcast May 12, 2016).

<sup>216</sup> Karen Green McGowan, RN, personal correspondence, October 5, 2016. Willowbrook was an institution, located in Staten Island, NY, that housed more than 5,000 people with disabilities. Following exposure of abuses at the facility and a federal lawsuit, the facility was closed down in the 1970's. Karen Green McGowan (then Karen Green) was a witness in the federal case and an expert who assisted in planning for the full community integration of all residents of Willowbrook. See David Rothman and Sheila Rothman, *THE WILLOWBROOK WARS* (2005)(describing the history of the lawsuit and community integration of Willowbrook residents).

<sup>217</sup> Raymond A. Lemay, *Deinstitutionalization of People with Developmental Disabilities: A Review of the Literature*, 28 *Canadian Journal of Community Mental Health*, 188-190 (2009).

the dangers inherent to institutions.<sup>218</sup> Oversight and monitoring are also necessary but not sufficient to prevent torture.

Special Rapporteur Méndez calls on governments to establish effective complaint mechanisms,<sup>219</sup> to investigate allegations of abuse,<sup>220</sup> and to create strong and independent oversight mechanisms.<sup>221</sup> Méndez says that States should “establish independent monitoring mechanisms at all places of deprivation of liberty, including places run by private actors, through regular and unannounced visits, and to include civil society organization in the monitoring of places of deprivation of liberty.”<sup>222</sup>

The Georgia example is again instructive and demonstrates the essential link between thorough monitoring and any effective planning for reform. Reforms in the Republic of Georgia have been cited as examples of a “promising practice” of deinstitutionalization in a manual on the application of the Guidelines for Alternative Care.<sup>223</sup> At the start of the reform, there were thought to be 2,500 children in institutions. All of the orphanages in the country were closed down except two facilities for children with disabilities. While the program was successful for the children it served, planners did not have the full information necessary to serve the entire population of children in institutions. DRI’s 2013 investigation brought to light that, in addition to leaving out children with disabilities, children in religious facilities were overlooked.<sup>224</sup> As described to DRI investigators in 2013 by the chief of the Georgia UNICEF office: “[i]t is very political and sensitive. The church is very powerful....We don’t even know the exact number of institutions or kids. It is unregulated.”<sup>225</sup> As described by a leading children’s rights advocate, “It’s trafficking. The real word is trafficking. According to law, children being transferred to church institutions are supposed to be regulated by the state, but they’re not. There’s no paperwork. Nothing.”<sup>226</sup> DRI investigators were denied access to religious facilities, but in 2016 another Georgian advocacy organization was able to visit these institutions. The report demonstrated the existence of an entire “shadow” system of services:

There are 1146 children living away from their biological families in 36 residential services throughout Georgia. All of these services are unregulated and thus are not covered by the statutory agency’s child-protection oversight and care standards. The services where these children reside in fact largely represents a shadow system of residential care services for children, where they are admitted without any assessment and decision of the mandated statutory guardianship & care authority. These children do not appear on the social services’ “radars.”<sup>227</sup>

DRI’s findings in Georgia are not unique. Romania, as it sought access to the European Union, sought to demonstrate its commitment to deinstitutionalization and adopted a moratorium on new placement of children in institutions. Yet Romania failed to create community services and family supports for these children. During an investigation in 2006, DRI found that infants were

<sup>218</sup> UNICEF: State of the World’s Children (2013), *supra* note 55, at 80.

<sup>219</sup> Méndez 2015 Report, *supra* note 2, para. 84(q).

<sup>220</sup> *Id.* at para. 84(a)

<sup>221</sup> *Id.* at para. 84(r)

<sup>222</sup> *Id.*

<sup>223</sup> Implementing the Guidelines, *supra* note 18.

<sup>224</sup> DRI Georgia Report, *supra* note 170, at 22.

<sup>225</sup> *Id.* at 22.

<sup>226</sup> *Id.*

<sup>227</sup> Partnership for Children, “Equal Treatment to the Schools of Faith: Final Report October 2015-2016” iii (2016) (report on file with the author).

abandoned in maternity wards of hospitals.<sup>228</sup> DRI also discovered a facility for 65 infants entirely off the public record. DRI found that the staffing at this facility was so low that the children never left their cribs.<sup>229</sup>

The Romanian experience demonstrates the dangers of adopting a moratorium on admissions in name only—without a corresponding effort to support families or create community services. It also underscores the need for independent advocacy. The lack of data or information about children’s services is not necessarily due to lack of knowledge or comprehensive data gathering systems. For various political reasons, governments and social service authorities may know about and choose to overlook the existence of specific residential services or abuses. Monitoring, oversight, and enforcement systems must be established with this awareness in mind.

The CRPD provides a valuable guide to the implementation of the recommendations in the Méndez Report. While Article 33 of the CRPD requires data gathering at a national level to establish policies for the enforcement of the convention, Article 16, provides for much more specific programs to monitor and protect rights in institutions and community services. To protect against violence, exploitation, and abuse, Article 16 demonstrates that visiting and counting children in an institution once is not close to sufficient. Article 16 requires the creation of age and gender sensitive information, education, and assistance programs for people with disabilities, their families, and their caregivers.<sup>230</sup> The CRPD requires that people with disabilities and advocacy organizations representing them be involved in monitoring and advocacy and program implementation.<sup>231</sup> This requirement reflects the experience that people who are most at-risk of abuse may be afraid or unable to speak to government authorities or even representatives of official monitoring organizations. In order to identify certain types of abuse that may be associated with stigma and shame, people who have experienced such abuse may be more able to establish trust and gain information.

Perhaps most importantly, Article 16 of the CRPD emphasizes that remedies for abuse should promote “physical, cognitive and psychological recovery, rehabilitation and social reintegration...”<sup>232</sup> These remedies must be gender and age sensitive. The CRPD makes a direct link between the right to a remedy for abuse and the right to community integration.

### *E. Benefits of a moratorium*

After the adoption of the CRPD, European experts recommended that EU Structural Adjustment funding for new accession countries be used only to support community integration. Yet they had to confront the immediate problem of responding to abuses within institutions, and they considered the dilemma facing donors. The “purist” response, as they described it, would be to restrict all funding to institutions. The European experts recognized that a “more nuanced” response might be needed to help countries going through a difficult reform process. They suggested that if funds were used to fix up institutions, there would be “an extremely heavy onus of proof ... on the State to show that any such investment in institutions is strictly temporary (although it is never experienced that way by the ‘residents’) and for the overriding purpose of eliminating inhumane and degrading treatment.”<sup>233</sup> That said, the experts recommended that European financial assistance

<sup>228</sup> DRI Romania Report, *supra* note 44, at iii.

<sup>229</sup> *Id.*

<sup>230</sup> CRPD, art. 16(2).

<sup>231</sup> CRPD, art. 4(3).

<sup>232</sup> CRPD, art. 16(4).

<sup>233</sup> *Id.*



should be “expended exclusively on a transition process since primary responsibility and legal liability for existing human rights institutions rests with Member States.”<sup>234</sup> This is a strong argument that could be extended to all foreign assistance to all countries that still have orphanages, rationalizing why international funding should be used only to support community integration. But it does not resolve the difficulties faced by governments themselves who have primary responsibility for the protection against torture in their own institutions.

In 2010, the World Health Organization Regional Office for Europe, in partnership with UNICEF and the European Commission, organized a conference of experts to confront the difficult question of responding to abusive institutions in Eastern Europe. The conference resulted in the adoption of the “European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families” (also known as the “Bucharest Declaration”), and is historic as the first set of international standards on the rights of children that explicitly draws on the new standards established in the CRPD. The Bucharest Declaration recognizes that “young people with intellectual disabilities have the right to grow up in a family environment.”<sup>235</sup>

The Bucharest Declaration never mentions residential care or group homes as an alternative to institutional care. The Action Plan for implementing the Declaration calls for children to be placed in kinship care, foster care, or adoption when their families cannot keep them.<sup>236</sup> Even more importantly, the Bucharest Declaration states that “[n]ew admissions to such institutions should be stopped through the development of community services.”<sup>237</sup> The Action Plan states that the “first priority must be to stop all new admissions by providing adequate support to families who are struggling for care. Children with intellectual disabilities already living in institutional care should be given high priority in the allocation of access to community-based alternative services.”<sup>238</sup> The Bucharest Declaration also emphasizes the importance of protecting children “wherever they live” to be sure that they are “guaranteed lives free from bullying, harm or abuse and should not live in fear or neglect.”<sup>239</sup> The Bucharest Declaration makes clear that children must be protected, but the focus is on the rights of the child rather than on the improvement of the institution.<sup>240</sup> The background paper for the conference speaks of the importance of improving direct care and treatment but not support of the institutions themselves.<sup>241</sup>

The Bucharest Declaration threads the needle by calling for the protection of children within the community and in the context of ending new placements. Protections and care should be provided in a manner that follows the child wherever he or she resides — and does not provide an incentive or excuse for detention or separation from family.

<sup>234</sup> Parker, *supra* note 23 at 30.

<sup>235</sup> World Health Organization Regional Office for Europe (2010), *supra* note 76, para. 5.

<sup>236</sup> *Id.*, “Action Plan” at 9.

<sup>237</sup> *Id.*, Bucharest Declaration, para. 3.

<sup>238</sup> *Id.*, at 9.

<sup>239</sup> *Id.*, para. 1.

<sup>240</sup> The “Action Plan” describes the termination of new placements—not limited to any particular age group—as a “necessary first step” that has “proved, in combination with deinstitutionalization, capable of acting as a forceful stimulus for developing modern and effective care services for children and families in the community.” WHO (2010), *supra* note 76, at 13.

<sup>241</sup> The report goes on to say that, even while moving swiftly toward deinstitutionalization, some funding for institutions would be needed “to make them acceptable, humane environments for the children placed in them, no matter how temporary. Training and support to their staff is of paramount importance, both to improve current practices pending closing and because many of them will continue to work with people with disabilities in the future, after deinstitutionalization.” *Id.*, 21.

## VII. Implementing the protection against torture

In calling on States to limit placement of children to a measure of last resort, the Méndez Report enters the field with recommendations in many ways similar to the Guidelines for Alternative Care and other reports recently inspired by the CRPD. But the Méndez report frames this as a necessary step to ensure protection against torture. The Méndez report states, for example, that “[a]lternatives to detention must be given priority in order to prevent torture and the ill-treatment of children.” The report gives further details, calling on governments “to provide for a variety of non-custodial, community-based alternative measures to the deprivation of liberty.”<sup>242</sup> This is consistent with Méndez’s earlier 2013 report on Torture in Health Care, which states that “community living, with support, is no longer a favorable policy development but an internationally recognized right.”<sup>243</sup>

### A. Enforcement obligations

The Méndez Report and recommendations demonstrate how the authority of the anti-torture framework can be used to protect children from torture and segregation. This recognition will be meaningless, however, until it is enforced. The additional obligations created by the duty to prevent torture must be understood within the broader context of the critical international law and standards already dedicated to protecting children and promoting their full inclusion in society. The most influential standard in this area, the Guidelines for Alternative Care, will be strengthened by the immediate obligations to prevent torture. As drafted, the Guidelines reflect a perspective that they are policy recommendations rather than requirements necessary to enforce rights. The Guidelines state that they are intended to “[a]ssist and encourage” governments and “[g]uide policies.”<sup>244</sup> To “promote application” of the Guidelines for Alternative Care:

States should, to the maximum extent of their available resources and, where appropriate, in the framework of development cooperation, allocate human and financial resources to ensure the optimal and progressive development of the present Guidelines throughout their respective territories in a timely manner.<sup>245</sup>

“Progressive development” of certain human rights derives from the ICESCR and is included in other conventions.<sup>246</sup> In order to strengthen this protection—and to make clear that immediate action is required, the ICESCR adopted General Comment #3, requiring that States must take action that is “deliberate, concrete, and targeted” toward full enforcement.<sup>247</sup> The Committee on Economic, Social, and Cultural Rights has also adopted recommendations on the pro-active steps and financial investments governments must take to address “structural disadvantages” faced by

<sup>242</sup> *Id.* at para. 84(c).

<sup>243</sup> Torture in Healthcare Report, *supra* note 12, para. 68.

<sup>244</sup> Guidelines, paras. 2(c) and 2 (d).

<sup>245</sup> *Id.* at para. 23.

<sup>246</sup> ICESCR, art. 2(1); CRPD, art.4(2). See generally Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories* 24 Md. J. Int’l L. 209, 221 (2009).

<sup>247</sup> To strengthen the obligation, the UN Committee on Economic, Social, and Cultural Rights adopted Committee on Economic, Social and Cultural Rights, General Comment #3, to give this obligation some teeth “...while the full realization of the relevant right may be achieved progressively, steps toward that goal must be taken within a reasonably short time....Such steps should be deliberate, concrete, and targeted as clearly as possible toward meeting the obligations recognized in the Covenant.” UN Committee on Economic and Social Rights, General Comment No.3: The Nature of States Parties’ Obligations (Art.2, Para. 1, of the Covenant), E/1991/23, December 13, 1990, para.2.

people with disabilities.<sup>248</sup> Thus, governments must act immediately to come up with concrete and targeted plans for full community integration of children—avoiding unnecessary placements and planning for the closure of institutions. Since the vast majority of children in orphanages come from families, immediate steps can be taken in any country to ensure that they are served there rather than in institutions.

When it comes to the creation of new community services for children with disabilities, however, additional resources will be needed. Even though it is well established that serving families in the community is less expensive<sup>249</sup> than placing children in institutions, a temporary infusion of resources may be needed to help countries reform their service systems (since they must maintain the old segregated systems until new community care is established).<sup>250</sup>

While there is an obligation to expend funds to implement rights, there is an inevitable competition for scarce resources within social service systems. In any competition for funding, however, there is inevitably a tendency of governments to delay—especially during times of emergency, economic transition or austerity.<sup>251</sup>

One of the important contributions of the CRPD is that it frames the right to community integration within the legal right to protection against discrimination.<sup>252</sup> The protection against discrimination does create an obligation on governments to bring about immediate enforcement.<sup>253</sup> To the extent that the creation of community services may require funding, planning, and implementation over time, it has also been characterized by the European Commissioner for Human Rights as a “hybrid right”—requiring immediate implementation supplemented by careful planning and financing over time.<sup>254</sup> This would include, according to the European Commissioner, the obligation to adopt a no-admission policy and to create “a statutory and enforceable individual entitlement to a level of support which is necessary to ensure one’s dignity and ability to be included in the community.”<sup>255</sup> Governments must budget the necessary resources to “enable a child [to live] a full life within family and community and prevent isolation and institutionalization.”<sup>256</sup>

Powerful as the obligations already are, the Torture Standard adds critical new elements. Where a practice constitutes torture, the lack of resources cannot be an excuse for its continuation. Méndez addressed this issue in his recent analysis of the torture protection in the context of healthcare:

the absolute and non-derogable nature of the right to protection from torture and ill-treatment establishes objective restrictions on certain therapies. In the context of health-related abuses, the focus on the prohibition of torture strengthens the call for

<sup>248</sup> The ICESCR Committee has stated that governments must “do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equity within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose.” General Comment #5 U.N. Doc. E/1993/22, 11<sup>th</sup> Sess., para 3 (1993).

<sup>249</sup> “Analyses of children of all agencies in Romania, Ukraine, Moldova, and Russia show that institutional care is six times more expensive than providing social services to vulnerable families or voluntary kinship carers [and] three times for expensive than professional foster care...” Save the Children, “The Risk of Harm to Young Children in Institutional Care” 6 (2009).

<sup>250</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 30.

<sup>251</sup> *Id.*

<sup>252</sup> OHCHR, *supra* note 66, at 30.

<sup>253</sup> *Id.*

<sup>254</sup> European Commissioner on Human Rights (2012), *supra* note 77, at 21.

<sup>255</sup> *Id.* at 5.

<sup>256</sup> *Id.*

accountability and strikes a proper balance between individual freedom and dignity and public health concerns. In that fashion, attention to the torture framework ensures that system inadequacies, lack of resources or services will not justify ill-treatment. Although resource constraints may justify only partial fulfillment of some aspects of the right to health, a State cannot justify its non-compliance with core obligations, such as the absolute prohibition of torture, under any circumstances.<sup>257</sup>

The protection against torture provides the strongest possible claim on government resources. The European Court has taken a similar stand, making it clear that the lack of financial resources cannot be used to justify conditions of detention that amount to ill-treatment or torture.<sup>258</sup> If the European Court can call on governments to expend whatever funds are necessary to improve conditions within institutions, it should also be able to require governments to expend the same funds to provide community alternatives.

The injection of new resources into community service systems is especially important to help children who are already placed in institutions, who have lost ties to families, and who have suffered the damaging effects of institutionalization. The prevention of improper placements in orphanages is not just a question of financial resources, however. There is evidence from around the world that providing the services and protections for children to live in families is, in the long-term, less expensive than paying for them to live in institutions.<sup>259</sup> Since a large factor in institutional placement is poverty and homelessness, financial support to families can prevent orphanage placement. This is an area where some immediate savings can be realized. By protecting the child before ties with the family are broken and damage is caused by institutional placement, protecting families can avoid needless human suffering and increased financial costs for society. Thus, a major factor in avoiding orphanage placement is a matter of advance planning—and of political will.

Beyond staking a claim on financial resources, the protection against torture can be a powerful motivating factor to bring about public support for change. Failure to enforce these rights can leave a country open to the strongest national and international approbation.

In addition, the Torture Standard is associated with the obligation to “prevent, prosecute, and redress” violations of the right to protection against torture. As Méndez explains:

Examining abuses in health-care settings from a torture protection framework provides the opportunity to solidify understanding of these violations and to highlight the positive obligations that States have to prevent, prosecute, and redress such violations.<sup>260</sup>

If an act constitutes torture, CAT requires governments to criminalize this behavior and prosecute individuals who perpetrate the act.<sup>261</sup> Human rights laws also require reparations to those individuals—which includes not only monetary compensation but also medical and psychological care and other kinds of rehabilitation.<sup>262</sup> As described in Part I-B above, the recognition of improper detention or treatment as ill-treatment or torture creates opportunities for international enforce-

<sup>257</sup> Torture in Healthcare Report, *supra* note 92 at para. 83.

<sup>258</sup> See, e.g. *Stanev v. Bulgaria*, *supra* note 33, para. 210.

<sup>259</sup> “Analyses of children of all agencies in Romania, Ukraine, Moldova, and Russia show that institutional care is six times more expensive than providing social services to vulnerable families or voluntary kinship carers [and] three times for expensive than professional foster care...” Save the Children, “The Risk of Harm to Young Children in Institutional Care” 6 (2009).

<sup>260</sup> Torture in Healthcare Report, *supra* note 92. para. 82.

<sup>261</sup> CAT, art. 4.

<sup>262</sup> CAT art. 14. See discussion in Manfred Nowak & Elizabeth McArthur, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* (Oxford University Press, 2008) 88,10.

ment. Significantly, the offense of torture is subject to universal jurisdiction under international law. The courts of any country can prosecute any individual in their country who has perpetrated ill-treatment or torture abroad.

In a case from Mexico being filed before the Inter-American Commission on Human Rights, DRI is now testing the theory that the right to reparations for ill-treatment in an institutions adds to the obligation to provide funding for the support necessary for a person to live in the community with adequate services. DRI's case involves 37 survivors of the abusive *Casa Esperanza* in Mexico City.<sup>263</sup> Most of these individuals were raised as children in Mexico's orphanages and subsequently transferred to a facility where many were tied down, caged, physically abused, sterilized, raped, and trafficked for sex. After DRI exposed these abuses in 2015, Mexico City authorities simply moved these individuals, mostly young adults, to supposedly cleaner and safer institutions. Two of the thirty-seven have since died, and one woman has been repeatedly sexually abused over a one-year period.<sup>264</sup> The *Casa Esperanza* case is a sad and vivid reminder of what may happen to children who are placed in institutions—supposedly for their own protection. It is also a reminder why immediate, individual remedies are needed—and why it may be dangerous for “progressive enforcement” to play itself out.

Governments may fall short of their human rights obligations and may take years to fully meet their obligations under international law. But when charities or private service providers risk criminal prosecution, they will have motivation to immediately reign in their activity. If governments were required by their own courts to remunerate victims of improper institutionalization for the damage caused by institutional placement, there would be powerful incentives for them to resolve these issues. And if governments were forced to pay a political price in the international arena for needlessly subjecting their children to ill-treatment or torture, the practice of placing children in institutions could be easily brought to an end.

In practice, it is not necessary to distinguish between different types of rights, and the international human rights community is moving away from such distinctions.<sup>265</sup> In 1993, at the Vienna Conference on Human Rights, the international community recognized that all human rights are “indivisible and inter-dependent.”<sup>266</sup> The right to community integration is a perfect example of a right that is interdependent: protection of the right to health is essential to prevent arbitrary detention, segregation from society, and the risk of torture. Without progressive enforcement through the creation of community services, people will be segregated from society and subject to discrimination. Avoiding improper placement in institutions is also necessary to protect against torture.

### ***B. Learning from earlier reform movements***

The use of the anti-torture framework to stop improper placement of children resembles, in some ways, the wave of deinstitutionalization of people with intellectual or psychosocial (mental health) disabilities that began in the United States in the 1960s and continued through the 1970s

<sup>263</sup> The facts of the case and DRI's recent history of advocacy on behalf of *Casa Esperanza* survivor are included in DRI No Justice (2015), *supra* note 171.

<sup>264</sup> Documentation of these developments are in DRI's brief submitted to the Inter-American Commission on Human Rights. At the time of this publication, details of the brief are not yet public. DRI's documentation can be obtained by contacting Disability Rights International at [info@DRIadvocacy.org](mailto:info@DRIadvocacy.org).

<sup>265</sup> See generally Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories* 24 Md. J. Int'l L. 209, 221 (2009).

<sup>266</sup> World Conference on Human Arts., June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF.157/23 (July 12, 1993).

and 1980s—driven by the dangers and horror of the abuse witnessed by the public in institutions.<sup>267</sup> That approach to deinstitutionalization brought about profound changes in the United States. But it has also been criticized because it closed the door to new placements before creating the community services needed to ensure the safety of formerly institutionalized people.<sup>268</sup>

The United States made mistakes in failing to provide community care for people with disabilities, but there are many reasons to be assured that these shortcomings need not happen again. The reform of the 1960s and '70s was not the first wave of deinstitutionalization in the United States. Policies against the placement of children in orphanages in the United States can be dated back to the White House Conference of 1906.<sup>269</sup> These reforms have been so successful that most people do not know about the enormous transformations that have since taken place. The protection of children within their own families is so much less expensive than institutional care and has such vastly improved outcomes in part because it avoids the damage and the cost imposed on children in institutions.<sup>270</sup>

A moratorium on new placements of children in institutions would close the gateway to a lifetime of suffering and the vastly larger problem of segregating adults. A no-new-admissions policy is a strategy that has proven effective in bringing about reform and continues to be used in court-ordered right to community integration *Olmstead* settlements in the United States.<sup>271</sup>

## Conclusion

The Méndez Report strengthens current international standards for the protection of children by requiring that any placement in an institution, even as a last resort, be limited to the shortest possible time in the least restrictive environment. More broadly, it establishes that preventing placement in institutions or orphanages is essential to protect children against ill-treatment or torture.

Since all children need to grow up with a family and models exist for integrating all children into the community, the Méndez standard effectively requires a ban on long-term placement of children in institutions. Given the lessons learned about the inherent dangers of institutions, and the existence of models for avoiding such placements, placement of a child in an institution will never meet their “best interest.” Any situation requiring placement of the “last resort” stems from the failure of the service system to provide the family support and care that the child needs—and is necessary to protect against ill-treatment or torture. The creation of protections to ensure that

<sup>267</sup> See, e.g. Rothman & Rothman, *supra* note 217 (describing the closure of Willowbrook in New York in the 1970's).

<sup>268</sup> Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation* 34 *Cardozo Law Review* 50 (2012).

<sup>269</sup> During the last century—since the Progressive Era and the first White House Conference on Children in 1909—the federal government has vastly expanded its role in promoting the welfare of America's children and youth. While families remain the bulwark for successful child development, and states, localities, and a host of private entities provide services to infants, children, youth, and their families, the federal government has long supported and provided services ranging from health care to education and enforces a wide range of laws and regulations to protect and enhance the well-being and rights of Americans under age 21. First Focus, “History of US Children's Policy 1900-Present,” posted at <https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf>

<sup>270</sup> See discussion *supra* note 260.

<sup>271</sup> See, e.g. Settlement Agreement, *United States v. State of Georgia*, Civil Action No. 1:10-CV-249-CAP, United States District Court for the Northern District of Georgia, Atlanta Division; Settlement Agreement, *United States v. Delaware*, Civil Action 11-591-LPS, United States District Court for the District of Delaware, July 15, 2011.

children grow up with a family, and the creation of community supports to make that possible, provide essential safeguards against torture.

The Torture Standard, recommended by the Méndez Report, should temper the legitimate concerns of those who fear that children will end up on the streets. In a crisis, where imminent danger is created by the lack of other options, placement may be used as a “last resort.” But even then, service systems should be structured to provide emergency foster care so that no form of residential care is needed. At that point, experience shows, the “shortest possible” placement can be effectively reduced to zero. As soon as family supports and emergency foster care can be established, therefore, governments are mandated to bring an end to new placements in institutions.

The recommendations of the Méndez Report support and strengthen the protections of the CRPD. The CRPD protects the right of children to grow up with a family under Article 23 and to live as part of the community under Article 19. The Méndez Report demonstrates that failure to enforce CRPD Articles 19 and 23 subjects children to the risk of ill-treatment or torture. The duty to prevent torture should inform and drive policy in societies where service systems have not yet been brought into full compliance with the CRPD. Countries that have not yet created a fully inclusive society—as mandated by CRPD Article 19—are still required to enforce Article 23 and ensure that children can grow up with a family. As a start, the CRPD Committee also appears to be supporting a moratorium on new placements. The CRPD Committee should clarify its position on a moratorium in 2017 when it adopts a General Comment on Article 19.

The UN Committee on the Rights of the Child should update standards on placement in institutions to reflect these important developments in the protection against torture and the right to full inclusion in society. General Comment #9 and the Guidelines on Alternative Care should be revised to add the additional restrictions to institutional placement recommended in the Méndez Report: placement should be for the shortest time possible and in the least restrictive environment. A clear and strong endorsement of the mandate to adopt a moratorium on new placements would also be helpful. Further attention is needed to carefully examine the UN Guidelines for Alternative care to distinguish between what is called “residential care” and what actually constitutes an “institution.”

As established by CRPD Article 23, the right of children to grow up with a family is fundamental and does not stop at the age of three. If there are limited circumstances when residential care might be appropriate for adolescents, experience shows that careful attention is needed to ensure that “residential” alternatives are not merely small institutions. In combination with CRPD Article 23, the Méndez Report’s call limiting placement to the “least restrictive alternative” can be fulfilled by ensuring that children are provided the opportunity for full integration into society with the support of a family.

The Méndez Report is a reminder that the protection against torture can never be delayed or denied. The duty to prohibit or prevent torture must not be limited by the level of resources available to service systems. If governments can be ordered to expend the necessary funds to improve care in institutions, as the European Court has done, those funds could just as well be used to support community alternatives. As a general rule, this is the way funding should be used consistent with the duty to prevent torture and segregation.

Further guidance from the UN Special Rapporteur on Torture would be helpful to identify exactly when segregation itself rises to the level of ill-treatment or torture. Since abuses within institutions can amount to torture, governments should be challenged to fulfill their obligation to

criminally prosecute acts of torture and provide reparations as a remedy for survivors of abuse. The remedy for individuals subject to abuse should include the provision of services and supports necessary for full community integration. As described above, DRI's *Casa Esperanza* case against Mexico before the Inter-American Commission of Human Rights is testing the enforceability of this approach.

Nearly fifty years ago, Professor Louis Henkin asked the question: why do governments follow international law? His answer was that “[n]ations decide whether to obey law or agreements as they decide questions of national policy not involving legal obligations...on the basis of cost and advantage to the national interest....Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so, and fear unpleasant consequences if they do not observe it.”<sup>272</sup> Governments condemned for consigning their children to segregation from society will not think of building new institutions. Nor will international charities and development agencies support such practices when it is understood that they are also perpetuating ill-treatment and torture. On the contrary, recognition of the dangers faced by children and the risk of torture may encourage and inspire international development organizations and charities to prioritize the concerns of children in institutions. Support for at-risk families and investments in community services for children with disabilities are essential to protect against ill-treatment and torture, exploitation and trafficking, and possibly life-time segregation of a large population.

Powerful as it may be to condemn human rights violations, the Méndez Report opens important new avenues for international collaboration. As he accepted his mandate as Special Rapporteur, Juan Méndez emphasized that he would take a “victim-centered” approach with the objective of “identifying areas of cooperation in this common quest and engaging States to prevent torture, and to join efforts to look for the most effective ways to achieve compliance with the absolute prohibition of torture as provided by international law.”<sup>273</sup> The analysis and recommendations in the Méndez Report can be of help to governments and international donors in developing the most effective programs to address the needs of some of the most at-risk children in the world.

The fate of 8 to 10 million children now living in institutions and orphanages—and future generations of children who may be separated from their families—hangs in the balance. Many of the troubles of the world derive from intractable problems or require the commitment of resources so great as to overwhelm efforts to bring them to an end. The segregation and abuse of children is not one of those problems. The separation of children from their parents and from society is the result of misguided, but often well-meaning, policies and programs. The resources now going to fund institutions are more than enough to protect the right of every child in the world to grow up with a family. The enormous outpouring of volunteer efforts now going to support orphanages is an indication of the deep care and concern felt for children around the world. That same energy can be redirected to protect the right of every child to grow up with a family. We are deeply in debt the UN Special Rapporteur for lighting the fire of urgency to solve this worldwide problem.

<sup>272</sup> Louis Henkin, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 88 (Columbia University Press, 1968).

<sup>273</sup> Juan Méndez, “Statement by Mr. Juan E. Méndez, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” Human Rights Council, 16<sup>th</sup> session, March 7, 2010, [http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE\\_March2011.pdf](http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf)