Solitary Confinement of Juveniles in Europe

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Abstract
Solitary confinement can amount to inhuman and degrading treatment or punishment, and even to torture. Children are amongst the most vulnerable people in criminal justice systems and as the Standard Minimum Rules for the Treatment of Prisoners reflect, should not be subjected to solitary confinement. However, juvenile solitary confinement (JSC) persists and is a feature of juvenile justice across a significant number of Council of Europe states. Drawing from a range of primary sources at UN, European and (as relevant) domestic level, and complemented with findings in the literature, this Chapter identifies and evaluates recurrent themes in the use of JSC across Europe and draws attention to the complexity of the practice's continued use. A case study of the United Kingdom at the end of the Chapter grounds these findings: illustrating in context and in detail many of the Europe-wide trends, the complexity of issues, JSC's interface with vulnerability, and difficulties (both practical and legal) associated with implementing the prohibition of JSC.

1. Introduction
There is growing recognition in international human rights law that solitary confinement can amount to inhuman and degrading treatment or punishment, and even torture.[1] Children are amongst the most vulnerable people in criminal justice systems and as the Standard Minimum Rules for the Treatment of Prisoners (SMRs) reflect, should not be subjected to solitary confinement.[2] The practice has long-term detrimental implications for a young person's neurological, physiological and psychological development and has been linked with an increased risk of self-harm and suicide.[3] However, juvenile solitary confinement (JSC) persists and is a feature of juvenile justice across a significant number of Council of Europe (COE) States. Moreover, the practice is in some states strongly linked with high levels of inter-juvenile violence in detention and 'segregating' juveniles is often done with the rationale of safeguarding. Drawing from a range of primary sources at UN, European and (as relevant) domestic level, and complemented with findings in the literature, the present contribution identifies and evaluates recurrent themes in the use of JSC across Europe. The aim is to draw attention to the complexity of the practice's continued use, having particular regard to root causes (or 'justifications') and its interface with vulnerability.

[1] See in particular UN Special Rapporteur on Torture, Manfred Nowak's statement to the UNGA at its Sixty-third session, A/63/175, 28 July 2008; UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011; *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul.
[2] Also known as the 'Nelson Mandela Rules', GA/RES/ 70/175 adopted on 17 December 2015, Rule 45(2). Notably the 2015 revision of the SMR was adopted unanimously by the General Assembly. See also Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para 95(g)-(h).
[3] British Medical Association, the Royal College of Psychiatrists and the Royal College of Paediatrics and Child Health, 'Joint position statement on solitary confinement of children and young people', April 2018, <https://www.bma.org.uk/media/1859/bma-solitary-confinement-in-youth-detention-joint-statement-2018.pdf> accessed 25 November 2020; also The Lancet (2018), 1638. Discussed below, the practice has a detrimental impact on the physical and mental health of all people. The focus of this chapter is nevertheless on children.

In what follows Section 2 provides a note on methodology. Section 3 outlines JSC's harmful effects, and Section 4 examines its prohibition in international and European human rights law. Section 5 details the prevalence of lawfully sanctioned JSC in COE states following which Section 6 indicates themes in JSC's use in the region. Section 7 provides a case study of the UK which draws detailed attention to the complexity of relevant issues identified through the preceding sections, and contextualises the work by highlighting their practical significance on the ground. Section 8 concludes.

2. A Note on Method

The research presented in this Chapter is doctrinal. To identify recurrent themes in the use of JSC across Europe, the published Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) were analysed. The CPT is an independent, interdisciplinary body of experts mandated to undertake preventive visits to places of detention across all COE states.[4] Crucially, this means that the CPT goes into detention sites and observes precisely what is occurring on the ground. Visiting teams frequently include a psychiatrist or psychologist, and always include at least one medic. Following each visit the CPT makes a report which is transmitted to the relevant state party, including its recommendations for how the state can improve the situation.[5] Though the CPT's Reports are transmitted confidentially to states, almost all states authorise their publication with an increasing trend to do so automatically.[6]

For this work, all published CPT Reports on its visits since 2016 were considered. The year 2016 was chosen for two key reasons. Firstly, the SMRs, to which the CPT frequently refers, were revised in 2015 to include the prohibition of JSC. Hence 2016 allows time for their absorption and avoids overlap with an outdated understanding. Secondly, because of the high number of Reports to process, the sample of almost 5 years from 2016[7] is both manageable and sufficiently representative for the present purpose. The CPT aims to undertake a periodic (announced) visit to each Member State at least once every 4-5 years as well as shorter, targeted visits as circumstances require. In each of the years 2016, 2017 and 2018 the CPT made 18 country visits, and in 2019 it undertook 16 visits. In spite of the inevitable impact of the coronavirus pandemic on its work, by the end of September 2020 the CPT had nevertheless carried out 8 country visits that year. Hence, during the relevant 5 year period the CPT visited most COE states at least once. At the time of writing only 10 COE states do not have a published CPT report from a visit undertaken during the period under review.[8] The published reports on visits to three further states[9] relate to ad hoc visits with foci not relevant to the immediate question of JSC. The publication of a periodic visit report to a country is deemed relevant to the present research since it is the key opportunity for the CPT to raise any concerns it has, including any concerning JSC. Whilst the unpublished reports leave a gap that puts a full inventory of JSC's prevalence across the COE beyond reach,- at least by

[4] The CPT derives its mandate from the European Convention for the Prevention of Torture. For more detail on its work, role, and interrelationships with other mechanisms, particularly the European Court of Human Rights, see: Bicknell, Evans, and Morgan (2018).

[5] It is an obligation of the European Convention for the Prevention of Torture, para. 10(2) for the state seek to 'to improve the situation in the light of' the CPT's recommendations.

[6] Depending on the state, publication of the visit report and the government's reply which is usually also published, can come after some considerable (years) delay.

[7] The research considers Reports published before 21 September 2020.

[8] Armenia, Austria, Bosnia and Herzegovina, Finland, Luxembourg, Malta, San Marino, Sweden, and Switzerland.

[9] France, Germany, and Russia.

reliance on the CPT's reports, - there remain 34 states from which trends can be identified. These offer insight into factors which may influence both the reasons and the extent to which JSC is used in the region.

The CPT Reports contain only sparse detail in a number of respects however, including detail of the medical implications of JSC, root causes, and solitary confinement's interface with vulnerability. Accordingly, although themes observed in the CPT Reports are a major aspect of this contribution, the research draws from and comments upon supplementary information in international law (particularly 'soft law'), European law, relevant domestic law, and published research in the literature, to deepen the analysis. The United Kingdom has been the subject of significant CPT scrutiny in recent years for its use of JSC which has been found to be both prevalent and under-reported.[10] The CPT's published scrutiny of the issue in the UK has been much greater than it has been for the other COE states. For this reason, and because of detailed attention JSC has also received domestically in the last 3 years, the UK is presented as a case study. The case study provides a detailed illustration of many of the complexities associated with JSC in context and many of the themes identified in the broader Europe-wide findings are perceptible within it. In particular the disjoin between international standards and domestic law, and JSC's interface with vulnerability are both brought into sharp focus.

Reflecting the trend in international standards, in the discussion JSC is linked primarily to cruel, inhuman and degrading treatment (referred to herein as 'ill-treatment') rather than to torture. Torture can however be understood as an aggravated form of inhuman treatment.[11] The terms 'children' and 'juveniles' are used interchangeably, and are to be understood here as any person below the age of 18 years. It is beyond the scope of this work to consider or evaluate alternatives to JSC.

3. Solitary Confinement: Harmful Effects and vulnerability

The relative positions on JSC in international and European human rights law are discussed in Section 4. Given the vulnerable condition of children in detention however, it is helpful first to set out the impact of the practice on the physical health and minds of people subjected to it. This is done using the widely accepted definition of solitary confinement, and that advanced in the SMRs and European Prison Rules (EPRs), as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'.[12] 'Prolonged solitary confinement' is such practice lasting anything more than 15 days.[13] The topic at issue is thus detaining and depriving children in the criminal justice system from meaningful human contact for periods exceeding 22 hours a day.

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[10] UK Joint Committee on Human Rights, 'Youth detention: solitary confinement and restraint', Nineteenth Report of Session 2017-19, HC 994, HL Paper 343, Published on 18 April 2019.

[11] Aggravating factors may be the presence or absence of purpose underlying the harm, and/or the severity of pain and suffering. See Bicknell, Evans, and Morgan (2018), 60-67.

[12] UN Standard Minimum Rules on the Treatment of Prisoners (Nelson Mandela Rules), GA/RES/ 70/175 adopted on 17 December 2015, Rule 44; EPR, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, as r*evised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies,* para. 60.6(a). On the meaning of 'meaningful human contact' see in this volume Shalev and Naylor 'Solitary confinement and the meaning of 'meaningful human contact', Chapter 12. The CPT in 2011 defined solitary confinement slightly differently (CPT/Inf (2011) para 54) notably without referring to the duration of separation. It has nevertheless fed into the revision of both the SMRs and EPRs since, and its Reports reflect the relevance of time.

[13] SMR, ibid.

It is known 'from a wide range of international studies and research that solitary confinement is a dangerous practice that can have significant negative health effects.'[14] Moreover, the majority of studies that reach this conclusion relate to the practice's impact on the adult mind and not the developing mind of a child. For children one would logically expect the harmful effects of isolation to be amplified, causing serious and long lasting psychological and emotional harm. Such a view was presented for example, by Juan Méndez in his capacity as UN Special Rapporteur on Torture (SR on Torture),[15] and is equally the view of the CPT.[16] According to one expert medical position statement on JSC:

> 'As children are still in the crucial stages of developing socially, psychologically, and neurologically, there are serious risks of solitary confinement causing long-term psychiatric and developmental harm.'[17]

The documented harmful effects of solitary confinement (on adults) include impairment of normal psychological functioning which for some prisoners may be 'permanent and life-threatening.'[18] It can cause 'deep emotional disturbances'[19] and 'other negative symptoms from which prisoners in solitary confinement disproportionately suffer ... [including] appetite and sleep disturbances; anxiety, panic, and a sense of impending emotional breakdown; hypersensitivity; irritability; aggression, and rage; ruminations, paranoia, and hallucinations; cognitive dysfunction; loss of emotional control, mood swings, hopelessness, and depression; social withdrawal; and self-harm and suicidal ideation and behaviour.'[20] To clarify the reference to disproportionate experience of these pathologies for people held in solitary confinement, the majority of studies take the general prison population as their control group. Hence there is a sound evidence base demonstrating a causal relationship between solitary confinement and these experiences, which is reinforced by the volume of studies making such findings.[21]

It is the widely documented view that after 15 days 'some of the harmful psychological effects of isolation can become irreversible'[22] and accordingly isolation lasting longer than 15 days is considered 'prolonged solitary confinement'.[23] Former prisoners held in such conditions have reported 'a rapid and profound loss of depth perception' occurring very soon after the beginning of isolation in a small cell, and which effect seems to have been

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[14] Lobel and Scharff Smith (eds) (2020) *Solitary Confinement: Effects, Practices, and Pathways toward Reform*, 4, citing Chapters 8, 9, 10, 13 and 2 of the volume.
[15] UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011, para 77.
[16] See for example CPT/Inf (2019) 8 (Hungary 2018) para. 72; CPT/Inf (2018) 49 (Moldova 2018), para 56; CPT/Inf (2019) 2 (Montenegro 2017), para 170.
[17] British Medical Association, the Royal College of Psychiatrists and the Royal College of Paediatrics and Child Health, 'Joint position statement on solitary confinement of children and young people', April 2018, <https://www.bma.org.uk/media/1859/bma-solitary-confinement-in-youth-detention-joint-statement-2018.pdf> accessed 25 November 2020.
[18] C Haney (2020), 131.
[19] Ibid, 132.
[20] Ibid, 132-3. An extensive list of the effects of solitary confinement is also included and contextualised in UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011.
[21] See generally, Lobel and Scharff Smith (2020).
[22] UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011, para 26, citing Haney (2003), 124-156.
[23] Ibid; UN Standard Minimum Rules on the Treatment of Prisoners (Nelson Mandela Rules), GA/RES/ 70/175 adopted on 17 December 2015, Rule 44.

permanent.[24] There is nothing in the literature to say conclusively whether these effects would be experienced sooner, more severely, or more permanently by a child.[25] However, Huda Akil, a neuroscientist, has argued that subjecting the mammalian brain (which includes the human brain) to isolation actually changes the physical circuitry of the brain.[26] Since a child's brain is developing, this raises serious questions about the risk and likelihood of permanent harm.

Irrefutably, solitary confinement is dangerous. Moreover, it exacerbates the vulnerability of individuals within a group (prisoners) that are already vulnerable for the fact they are in detention. People in prolonged or indefinite solitary confinement have aptly been described as 'in a prison within a prison'.[27] When the person in question is a child, and irrespective of the duration of JSC, they have a triple vulnerability: child-detained-isolated. Moreover, for a child to end up in the criminal justice system, there is a high degree of likelihood they were vulnerable for additional reasons long before they entered into the system.[28] Crucially, placing vulnerable children at risk of such serious harm as JSC entails, reinforces the importance of its prohibition. Nevertheless, circumstances, and particularly the purpose of isolation, still seem to influence the evaluation of JSC at domestic level, including decisions as to its lawfulness. These points are exemplified and considered through this work and with particular detail in the UK case study.

4. International and European human rights law positions on the use of JSC

Noting the harm solitary confinement can cause, this section examines the prohibition of JSC in international and European human rights law. This is approached from three distinct angles: JSC's relationship with definitional elements of ill-treatment; the purpose underlying JSC's use; and the legal status of instruments in which the prohibition and relevant definitions are presented.

4.1 JSC and ill-treatment

The serious harm JSC is capable of causing means it is considered unacceptable in international law. Before the amended SMRs were unanimously adopted by the UN General Assembly in 2015 to include the prohibition of JSC, the SR on Torture Juan Méndez had in 2011 presented his view that

> 'the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman and degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture.'[29]

This was not the first time an SR on Torture or other UN or expert body had raised the issue. A high-level multi-disciplinary 'task group' of experts was convened in December 2007 at the Fifth International Psychological Trauma Symposium in Istanbul to directly consider

[24] Akil (2020), 205: supported by the testimony of Robert King et al, Chap 14 of the same book.
[25] Nor, conversely, whether less so.
[26] Akil (2020), 205.
[27] Juan Méndez has described people held in prolonged or indefinite solitary confinement as 'in a prison within a prison', UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011, para 57.
[28] UN Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para. 9 where overcoming or otherwise managing specific vulnerabilities are indicated in its very first point to prevent child offending.
[29] UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011, para 77.

solitary confinement. Together the group authored the 'Istanbul Statement on the use and effects of solitary confinement' (Istanbul Statement) which was adopted by the Conference on 9 December 2007.[30] This was something of a watershed moment. The SR on Torture, Manfred Nowak (who had been in the drafting team)[31] used his statement to the UN General Assembly in 2008 to highlight the issue of solitary confinement and to make calls for its use to be 'kept to a minimum, used in very exceptional cases, for as short a time as possible, and only in the last resort.'[32] The Istanbul Statement is included as an annex to Nowak's statement and makes abundantly clear: 'solitary confinement should be *absolutely prohibited*' for death row and life sentenced prisoners, for mentally ill prisoners, and 'for children under the age of 18.'[33] Both statements refer to Concluding Observations made by the Committee on the Rights of the Child (CRC) recommending children should not be subjected to solitary confinement.[34]

When in 2011 Special Rapporteur Méndez stated unequivocally that JSC constitutes ill-treatment, he supported the view with reference to relevant human rights treaty law, General Comments and findings of UN Treaty Bodies, findings in the literature, and his own empirical findings on the ground, all of which pointed in the same direction. In particular Méndez cited the CRC's General Comment No. 8: '"all forms of physical or mental violence" does not leave room for any level of legalized violence against children';[35] and paragraph 67 of the 1990 UN Rules on the Protection of Juveniles Deprived of their Liberty[36] (RPJDL), discussed below.

This was subsequently reflected in the SMRs where Rule 45(2) indicates the prohibition of JSC. It does so however, in the following way:

> 'The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.'

The second sentence is of course most relevant to the present discussion, but the first is included here also since there will be children in criminal justice systems with pre-existing mental or physical disabilities as described. Importantly, the prohibition set out in the SMRs refers in footnote to paragraph 67 of the RPJDL. Accordingly, to understand the content of the prohibition adopted by the UN General Assembly, it is necessary to look also at Rule 67. This is with the further observation that the SMRs refer to the prohibition of JSC contained in

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[30] *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul.
[31] As indeed had Sharon Shalev, co-author of Chapter 12 in this volume.
[32] UN Special Rapporteur on Torture, Manfred Nowak's statement to the UNGA at its Sixty-third session, A/63/175, 28 July 2008, para 83.
[33] *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul. Emphasis added.
[34] Concluding Observations on the third periodic report of Denmark (CRC/C/DNK/CO/3), para 59(a).
[35] Committee on the Rights of the Child, General comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), CRC/C/GC/8, 2 March 2007, para 8, cited in UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011, para 77.
[36] GA/RES/45/113, adopted on 14 December 1990.

UN standards and norms at the time the SMRs were adopted (it 'continues'), and not to future adjustments to its declared content.

The relevant part of RPJDL Rule 67 states:

> 'All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned...'

There is obvious consonance between the Rule and the SR on Torture's published view (both of which predate the 2015 SMRs) that JSC constitutes ill-treatment. Quite vitally however, the prohibition of JSC included in Rule 67, and hence that reinforced in the SMRs, refers only to one very specific context: discipline. In reality, and as the themes indicated in Section 5 make clear, there are other motivations beyond discipline informing JSC's use. This raises an important question that must be addressed: what is the relevance of the purpose for which JSC is imposed to its prohibition?

This question is considered in more detail in the section below. As far as the prohibition of JSC in the European context is concerned, the EPRs (as revised in 2020) state very directly:

> 'Solitary confinement, that is the confinement of a prisoner for more than 22 hours a day without meaningful human contact, shall *never* be imposed on children...'[37]

The rule neither links JSC directly to ill-treatment prohibited under Article 3 of the European Convention on Human Rights (ECHR), nor signals a purpose or context that may render the practice lawful. The European Court of Human Rights (ECtHR) has not to date had a case come before it concerning JSC, but it cannot be forgotten that the EPRs and SMRs will assist it in forming a view. The ECtHR's and the CPT's contextual approaches may nevertheless temper this and are relevant to the discussion of JSC's purpose to which we now turn.

4.2 JSC and purpose

The purpose underlying JSC recurs as a major theme throughout the remainder of this Chapter. The central issue is whether context, for example removing a child from threats to their safety, is capable of justifying the practice. This would mean interpreting JSC as prohibited in some, but not all contexts. However, such an interpretation would necessarily require a re-evaluation of the harm experienced by a child subjected to JSC because fundamentally the presence or absence of inhuman treatment (prohibited absolutely in all circumstances) requires a particular threshold of severity of suffering to be met. That threshold can be, and frequently is met without any reference whatsoever to purpose.[38] Crucially, the evidence-based expert views discussed above suggest the ill-treatment threshold is always met where the person subjected to solitary confinement is a child. It is therefore striking that there is no obvious consensus surrounding the relevance of JSC's purpose in either the applicable law, its interpretation or application. This is evident in the provisions discussed above, the trends in state practice revealed in CPT reports, and in the

[37] European Prison Rules, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, *as revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies*, Rule 60.6.a. Emphasis added.

[38] See UN Convention against Torture Article 16 compared with Article 1 (torture). Purpose is not a necessary aspect of CIDT, but it is a defining aspect of torture.

UK case study below. In fact, purpose in this context is rarely considered directly and, as will be shown, it really should be.

The CPT has a standardly worded position regarding JSC which, by its prevalent use, can be considered a standard.[39] Even this appears to hold a tension. The CPT's main position is that 'any form of isolation may have a detrimental effect on the physical and/or mental well-being of prisoners, which applies even more to juveniles.' It does not at this point set out a belief that JSC is prohibited, but crucially, neither does it refer to a particular context for isolation. Specifically, it is not only referring to disciplinary measures. The remainder of the standard however refers to the 'increasing trend at the international level to promote the abolition of solitary confinement *as a disciplinary sanction* in respect of this age group.'[40] It thereby reintroduces discipline as the relevant context for the prohibition at the international level, and Rule 45(2) of the SMRs which it references does not (as discussed above) eliminate this problem. But what of other contexts beyond punishment?

The EPRs support the prohibition of JSC, apparently in all contexts.[41] Added to this, the Special Rapporteur's 2011 statement makes clear in the starkest terms, - without any reference to the surrounding context, including purpose, - that JSC for any duration constitutes ill-treatment. A subtle shift in this same direction has recently occurred through the CRC's General Comment No.24[42] which amends General Comment No.10.[43] Whereas the latter referred to solitary confinement as a disciplinary measure which must be 'forbidden',[44] General Comment No.24 includes this detail[45] then builds on it. In the following, but importantly separate paragraph, the CRC, again without any reference to the reason for which they may have been separated from other people, indicates that '[s]olitary confinement should not be used for any child.'[46]

The extremely dangerous nature of JSC supports such an approach. A child in such circumstances holds a triple vulnerability (child-detained-isolated), not to mention any extraneous vulnerabilities they might have. The mental and emotional pressures created by separating them from meaningful human contact can be significant, and the resulting harm may be permanent and irreversible. The absolute nature of the ill-treatment prohibition means that so long as the suffering caused by the practice meets the requisite threshold of severity, purpose can never provide justification for the use of JSC. The statements thus far stated take this approach without any mention of a legitimating role for purpose. Indeed, the only way purpose could justify the use of JSC is if it were capable of reducing the level of pain and suffering experienced sufficiently to bring it within a lawful limit. Notably however, none of the above-mentioned pronouncements suggest this is possible.

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[39] See for example CPT/Inf (2019) 8 (Hungary 2018), para. 72; CPT/Inf (2018) 49 (Moldova 2018), para 56; CPT/Inf (2019) 2 (Montenegro 2017), para 170. The same sentiment is expressed elsewhere with slightly different wording in for example: CPT/Inf (2019) 35 (Denmark 2019), para 82; CPT/Inf (2019) 28 (Albania 2018), para 92; CPT/Inf (2017) 16 (Latvia 2016), para. 96.

[40] Emphasis added.

[41] They also prohibit, apart from in 'exceptional circumstances' for a 'specified period', solitary confinement as a disciplinary punishment.

[42] UN Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019.

[43] UN Committee on the Rights of the Child, General comment No. 10 (2007), Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007.

[44] Ibid, para. 89.

[45] UN Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para 95(g).

[46] Ibid, para 95(h).

Although seemingly dominant through international and European standards and expert opinion, the absolutist view is not strictly a settled position, a point most evident in the practice of states. Conceivably the purpose underlying JSC, for example, where a child requests separation for their own safety, might be adjudged as capable of reducing the severity of suffering. (Certainly, working in the opposite direction, purpose is capable of moving ill-treatment into the territory of torture.[47]) Although the ECtHR has never heard a case directly on JSC, its approach is notable. When it considers whether a person's treatment and conditions in detention amount to a breach of Article 3 ECHR, the ECtHR's assessment is both relative and contextual.[48] The two main ECtHR cases on prolonged solitary confinement of adults,[49] although markedly different in content and context to the situation of children in prisons [50] bear this out: the centrality of context to the ECtHR's overall evaluation is evident in both. Age can be a relevant (aggravating) factor,[51] but contexts such as separation in the case of mental illness or for safeguarding from violence would almost certainly also be taken into account.

By the nature of its work, the CPT also makes a contextual evaluation whenever it makes recommendations, which both inform and are informed by its standards. CPT recommendations during the period under review however, reflect consistently the standard discussed above. Its language is one of discouraging the practice of JSC, and during that period, in no context has the CPT indicated JSC as legitimate. On the contrary, even in the context of safeguarding such as seen in the UK case study below, the CPT has inclined more towards condemning the practice, often strongly.

It is a key finding nevertheless, that within the international and European legal framework as it stands, there is not full clarity as to the role and relevance of purpose, particularly in regard of its ability to render JSC permissible. As will be seen, state practice on the other hand, informed by the complex practicalities of detaining children, suggests recognition of the purpose underlying the decision to hold a child in JSC is highly relevant.

4.3 JSC and the problem with Soft law pronouncements

The final point of note regarding statements of JSC's prohibition in international and European human rights law is most damaging for its implementation at domestic level. The prohibition is based on the consensus of experts that JSC constitutes ill-treatment. It relies on a particular interpretation of UN Convention against Torture (UNCAT) Article 16, and also the International Covenant on Civil Political Rights (ICCPR) Article 7. Whilst the interpretation itself seems irrefutable when linked to the evidence[52] it remains true that all the above mentioned expressions that JSC is prohibited have uncertain status in law. Primarily

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[47] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.
[48] Bicknell, Evans and Morgan (2018), 67-70.
[49] *Ramirez-Sanchez v France*, (Grand Chamber), Appl No 59450, 4 July 2006, (2007) 45 E.H.R.R. 49; and *Babar Ahmad v UK*, Appl No 24027/07, 10 April 2012, (2013) 56 E.H.R.R. 1.
[50] A 'professional revolutionary' (*Ramirez-Sanchez*) and five terror suspects challenging extradition to the United States (*Babar Ahmad*).
[51] Highlighted in the very early case law: *Ireland v UK* (Plenary), Appl No 5310/71, 18 January 1978, (1979-80) 2 E.H.R.R. 25, [162]. For examination of the contextual approach, see Bicknell, Evans and Morgan (2018), 67-70.
[52] See UN Special Rapporteur on Torture, Manfred Nowak's statement to the UNGA at its Sixty-third session, A/63/175, 28 July 2008, and UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011.

they are 'soft law' and even though it is understood the UN Treaty Bodies' General Comments clarify the content of the relevant treaty law, they still do not by themselves create binding law. At the international level, the CRC's General Comments Nos. 8 and 24, as a clarifying comments, are probably the strongest expression we have of the unlawfulness of JSC, alongside the respective SR on Tortures' interpretation. However these, the Istanbul Protocol, the RPJDL and the SMRs, even when taken together are instructive, but not strictly binding sources of international law.[53] The EPRs, albeit highly influential in both ECtHR decisions and the CPT's evaluation of the detention and treatment of prisoners, are also soft law.

This is both important and concerning, as it impacts directly implementation at the national level. The UK case study illustrates this very starkly, where the courts have declined to pronounce JSC 'inhuman' in large part because of the soft law nature of international pronouncements to that effect. If JSC's prohibition could be said to have crystallised into customary international law, it would be binding on all states. This has not yet happened however, and the next section shows in Europe an absence of either state practice or *opinio juris* to support it.

5. JSC in Europe: Prevalence and Lawful Duration in COE States

Since 2016 the CPT has highlighted the issue of JSC in its published reports to 18 separate States. In most of these[54] the practice is (or was at the time of the visit) permitted in law, although JSC's lawfulness in a state does not paint a full picture of its de facto use. Where lawful, JSC is limited to differing maximum periods of time, often dependent on the purpose for which the measure is implemented and/or the length of sentence of the child in detention. In practice it is used to varying degrees which may either differ between institutions in the state, - suggesting the relevance of institutions' management and culture, - or be relatively consistent across like institutions.[55] Differing applicable safeguards, including a juvenile's right to appeal, are also observed across the states.

Where JSC is formally provided for by law in the states considered, the shortest maximum period of isolation is in Poland where up to 12 hours isolation is permitted for a child under the age of 14 years. For children who are 14 years or older, 48 hours JSC is permitted. The second shortest upper limit of JSC is 3 days,[56] whilst maximum permitted durations of 5,[57] 7[58] and 10[59] days are more common. The longest maximum durations of JSC permitted in law are in Denmark and in Liechtenstein. In law Liechtenstein allows for up to 4 weeks JSC, but the likelihood of this ever being used is remote.[60] In Denmark, in exceptional

[53] The accepted sources of international law as set out in the 1945 Statute of the International Court of Justice, Article 38(1) mean disputes will nevertheless be decided at the international level 'in accordance with' soft law.
[54] The precise number is not clear, as some CPT Reports are silent or unclear as to whether JSC is lawful or not. It is lawful in at least 15 states: Albania; Croatia; Czech Republic; Denmark; Estonia; Greece; Hungary; Latvia; Liechtenstein; Moldova; Montenegro; Poland; Spain; Turkey; and Ukraine.
[55] Similar trends are observable in the use of solitary confinement for adults. For example, CPT/Inf (2019) 7 (Romania 2018), para. 130.
[56] Moldova.
[57] Greece, Czech Republic (remand only).
[58] Spain, Croatia.
[59] Albania, Czech Republic, North Macedonia, Hungary.
[60] Liechtenstein rarely has more than 10 adult inmates and agreements with neighbouring states means sentenced prisoners are generally detained elsewhere.

circumstances involving violent behaviour towards staff, up to 28 days JSC is allowed for.[61] More usually, the duration of JSC in Denmark is 'as a general rule' limited to 3 days and 7 days 'under specific circumstances',[62] whereas the CPT's 2019 visit Report does not suggest the measure was used at all in practice, let alone excessively. In Estonia, whose maximum duration of JSC set out in law is the second highest of the European states considered, juveniles can face up to 20 days in isolation. Notably, because they exceed 15 days, the maximum limits for JSC set in Liechtenstein, Denmark and Estonia constitute 'prolonged solitary confinement': the point at which the dangerousness of the measure to the health, especially mental health, of adults is perceptible and includes effects that start to become irreversible.[63]

A separate phenomenon whereby states impose sequential, uninterrupted periods of solitary confinement however, means that in practice, there are other states which exceed for children the absolute maximum duration of solitary confinement that the expert bodies, including the CPT, currently recommend for adults. In Spain the lawful maximum duration of JSC is 7 days, but the CPT during its visit in 2016 recorded cases of children being placed in JSC for three consecutive periods of 7 days, spending 21 days continuously in JSC.[64] In Estonia in 2017, the CPT noted one 16 year old prisoner had been held continuously in a punishment cell 'for a total of 36 days (serving, without interruption, 20 disciplinary sanctions).'[65]

Additionally, there is a problem with accurately labelling JSC. This is discussed in greater detail below, but is relevant to JSC's prevalence. Essentially mislabelling JSC means states may claim it is either unlawful or does not occur, but nevertheless continue confining children alone for 22 hours or more without meaningful human contact.

In spite of this gloomy picture, there are two notable good news stories where, and arguably as a direct consequence of the CPT's recommendations, JSC is prohibited in law. Shortly after the CPT's visit to the Slovak Republic in 2013, the relevant law was amended to abolish JSC.[66] Remarkably, the same is true of Azerbaijan which, when the CPT visited in 2016, was proposing legislative change that would reduce the legally permitted duration of JSC to 5 days. Instead, by the time of the CPT's visit the following year, Azerbaijan had abolished JSC altogether.[67] Azerbaijan has not historically had a glowing record with the torture prevention bodies[68] but in 2016 it was put on notice that the CPT was considering making a Public Statement for its lack of cooperation.[69] The concession over JSC was one positive change, though it remains to be seen how far the legal prohibition is observed in practice, or indeed, what alternatives might be introduced.

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[61] CPT/Inf (2019) 35 (Denmark 2019), para. 82.
[62] Ibid.
[63] Montenegro, in exceptional circumstances permits JSC of up to 15 days.
[64] CPT/Inf (2017) 34 (Spain 2016), para. 133.
[65] CPT/Inf (2019) 31 (Estonia 2017), para. 67.
[66] CPT/Inf (2019) 20 (Slovak Republic 2018), para 89.
[67] CPT/Inf (2018) 37 (Azerbaijan 2017), para 70.
[68] It has long hidden behind confidentiality, declining to publish visit reports. The majority of CPT Reports on visits to Azerbaijan were published in July 2018, whereas the CPT had been visiting the country since 2002. Azerbaijan was such an uncooperative partner during a visit from the SPT in 2014, that the SPT suspended its visit: <https://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=15047&LangID=E> accessed 25 November 2020.
[69] CPT/Inf (2016) 35 (Azerbaijan 2016), para 7.

In summary, there is by no means a common recognition among COE states that JSC should be prohibited, let alone that it is. The CPT's reports indicate the practice is not only deemed lawful by many COE states, but also made use of to varying degrees in practice. For this reason alone, it is clear that in spite of strongly worded and evidenced expert statements that the practice of holding children in solitary confinement is inhuman and by extension prohibited absolutely in international law, European states are having some trouble in catching up. Hence also, it cannot yet be claimed that international customary law supports JSC's prohibition. This is not necessarily cause for pessimism, indeed the positive stories above suggest the opposite. But it should be recalled that the shift in understanding of the harm done by JSC is only relatively recent, as is international law's reflection of and response to this harm. It was not until the SMRs were updated in 2015 that the UN General Assembly agreed JSC should be abolished, and even as recently as 2012 the CPT was still suggesting an upper limit of 3 days JSC was acceptable.[70] Change in the law and practice of states themselves may take a little more time, but awareness among states (and their citizens) of the key issues is equally important to bring this about. The following section thus identifies and examines dominant themes in the use of JSC across COE states.

6. JSC and Themes across COE states

The CPT reports considered for this Chapter indicate several key themes surrounding JSC. These pertain respectively to legal, medical, and practical considerations, and are arranged and discussed accordingly.

6.1 The separation of law and practice

The naming and labelling of the practice when isolating a person for 22 hours or more without meaningful human contact, specifically its mislabelling, happens regrettably frequently and has very real practical implications. Mislabelling JSC as something else creates the danger that the practice will escape both recognition for the harm it causes and appropriate scrutiny or safeguards where it is used. Consequently children held in such circumstances escape the care, attention and protection they are due. Separation from contact may occur without detaining staff necessarily realising it meets the definition of JSC or that anything should be done to rectify the situation. The UK case study illustrates this and the problem of isolation's underlying purpose very well. According to the UK authorities, JSC is prohibited in law. However, the UK among others, isolates children in conditions the CPT refers to frequently and diplomatically as 'akin to solitary confinement'.

In Hungary, JSC referred to and understood as 'solitary confinement' has a disciplinary purpose and is lawful for a maximum duration of 10 days. Alongside this however Hungary employs a different isolation measure called 'security segregation'. To the CPT's visiting delegation in 2018 'there appeared to be very little difference between disciplinary solitary confinement and security segregation.'[71] Those imposing the measure were themselves not clear on 'the borderline between the two measures [which] was rather flexible and ... in practice, it was often up to them [prison staff] to choose between the disciplinary punishment and security segregation routes.'[72] In practice the security measure was imposed on children as 'an immediate reaction to violent episodes', refusal to obey an order, or attacking staff. The measure could be imposed for a maximum of 20 days (10 days, renewable once), but crucially, unlike solitary confinement, there was no possibility to appeal against security

[70] CPT, 18th General Report, CPT/Inf (2008) 25, para 26. See also Kilkelly and Casale, (2012).
[71] CPT/Inf (2019) 8 (Hungary 2018), para 75
[72] Ibid.

segregation. Hence not only is there greater prevalence of JSC than Hungary records as such, but based on an arbitrarily applied label, a child may end up in 'security segregation' with the practical implication they cannot even challenge the sanction. On three distinct grounds this runs the possibility of being inhuman within the meaning of the UNCAT and Article 3 ECHR: it is JSC; it may be prolonged; and there is no recourse to the protection of the law which appeal affords. In addition, in one Hungarian institution in 2018, the CPT received several allegations that children held under both types of JSC were handcuffed during their daily outdoor exercise.[73]

Estonia similarly distinguishes between administrative segregation and solitary confinement for a disciplinary purpose. The latter, the CPT describes as a 'measure to cope with prisoners who persistently refuse to comply with the rules or pose a major security risk.'[74] It noted however, little practical difference between the two regimes, since prisoners under both were held in the same accommodation block and appeared equally to be held in solitary confinement.[75] Furthermore, the imposition of consecutive periods of solitary confinement led to a 16 year old in Estonia being held in JSC for an uninterrupted period of 36 days.[76]

Further informal use of JSC was noted during the CPT's 2018 visit to the Czech Republic where in one institution it observed a 'strict reward and punishment system' in the juvenile unit. '[E]ven minor breaches of discipline' would 'frequently' result in segregation from other inmates, meaning juveniles who were not attending school could be kept 'in a solitary confinement-type regime for several days.'[77] In Poland, the CPT in 2017 raised suspicions that JSC or certainly isolation was occurring informally in one institution.[78]

Added to these trends, remand prisoners (that is, people not convicted of any crime) including children, in Serbia are held in a regime considered a 'relic of the past':

> 'locked in their cells for 22 or more hours a day for months on end with no access to purposeful activities and numerous restrictions imposed by judges [which] remain in place throughout the pre-trial period.'[79]

The CPT found in 2017 that juvenile remand prisoners in Serbia were 'not offered any activities or support in prison' and during the visit met two juveniles who had been held in such conditions for six weeks.[80] Children on remand in the Czech Republic may similarly be held in JSC, this time for a maximum duration of 5 days.

Evidently, within COE states, at both state and institutional levels, there is significant confusion over categorisation. Firstly, there is not agreement, or it is not recognised that certain practices meet the JSC criteria. Secondly, where separation occurs for different reasons, resulting in different *types* of separation, the delineation between those categories is neither clear nor understood.

6.2 Medical considerations and the use of JSC

[73] CPT/Inf (2019) 8 (Hungary 2018), para 76.
[74] CPT/Inf (2019) 31 (Estonia 2017), para. 78.
[75] Ibid, para. 77.
[76] Ibid, para. 67.
[77] CPT/Inf (2019) 23 (Czech Republic 2018), para. 79.
[78] CPT/Inf (2018) 39 (Poland 2017), para 107.
[79] CPT/Inf (2018) 21 (Serbia 2017), para. 50.
[80] Ibid, para. 51

Several COE states approach self-harm as a disciplinary offence which may carry the consequence of isolation, including JSC. The phenomenon is seen mostly in post-Soviet states and entirely side-lines the fact 'self-harm may frequently reflect mental health problems and should be approached from a therapeutic rather than a repression-oriented standpoint'.[81] Without direct reference to children, the approach is observed in Ukraine,[82] and in Spain self-harm can lead to 2 days' solitary confinement for an adult.[83]

CPT reports from the period under consideration highlight three states where JSC is used in such circumstances. In Montenegro, treating self-harm as a disciplinary offence led to locking juveniles 'for prolonged periods in conditions akin to solitary confinement'[84] and in Poland the same approach was indicated, albeit not prolonged.[85] Moldova, which has notably high levels of violence in juvenile detention reveals one further depressing feature. Self-harm was considered a disciplinary offence, punishable by solitary confinement.[86] However,

> 'many prisoners, in particular juveniles, used self-harm as a means of securing protection from fellow inmates and would rather spend prolonged periods in the disciplinary punishment cells than living in constant fear of other prisoners.'[87]

JSC for the purpose of protecting children in custody is returned to in the sections below and the experience of AB examined in the UK case study shows in detail many of the complexities that can be involved.

A further medical theme in the CPT reports is requiring medics to assess and even certify a child's fitness to undergo JSC as a punishment. This is seen in both Hungary[88] and Ukraine.[89] It was also true for remand prisoners in Montenegro,[90] and fitness certificates were required of medics in Spain although it is not clear from the CPT report whether this related to JSC or only to adults in some prisons.[91]

6.3 Practical challenges and the use of JSC

The final two prominent themes in the use of JSC across Europe relate to practical challenges bound up especially with detaining violent children. This also is relevant and considered in the case study in Section 7. High levels of inter-juvenile violence were identified particularly in Hungary, Moldova, and the UK. As already noted, children in Moldova may even self-harm in order to be segregated and thereby achieve some degree of safety. It would be incorrect however to regard this as an informed choice to be held in JSC especially since presumably child inmates would not know the full risks. The context in Moldovan prisons indicates informal power structures and hierarchy among inmates, including an 'untouchable' class; a 'criminal subculture'; and a strong culture of the authorities having 'trusted inmates'. It appears from the CPT's 2018 report that the authorities reinforced the hierarchical structure including by allowing certain inmates, including children, to meet with newly arrived

[81] CPT/Inf (2019) 2 (Montenegro 2017), para 169. The same sentiment is reflected in reports on Moldova, Ukraine, Poland, and Spain.
[82] CPT/Inf (2018) 41 (Ukraine 2017), para 106.
[83] CPT/Inf (2017) 34 (Spain 2016), para 135.
[84] CPT/Inf (2019) 2 (Montenegro 2017), Executive summary and para 169.
[85] CPT/Inf (2018) 39 (Poland 2017), para 103.
[86] CPT/Inf (2018) 49 (Moldova 2018), para 58.
[87] Ibid, para 58.
[88] CPT/Inf (2019) 8 (Hungary 2018), para 77.
[89] CPT/Inf (2018) 41 (Ukraine 2017), para 103.
[90] CPT/Inf (2019) 2 (Montenegro 2017), para 75.
[91] CPT/Inf (2017) 34 (Spain 2016), para 88.

prisoners and designate them to a point in the hierarchy.[92] Therefore, self-harm for segregation could be more accurately regarded as children selecting what they perceive as the lesser of two evils.

Inter-juvenile violence in Hungary is a serious concern and in 2018 the CPT received

> 'several consistent and credible allegations that newly-admitted juveniles were forced by longer-established inmates to take part in a fist-fight which would determine their "status" within the juvenile prison population. ... If a newly-admitted juvenile refused to take part in the fight, he would have to serve other inmates (e.g. clean for them) and ran the risk of being sexually abused (including being raped) by them. The alleged victims did not report instances of inter-prisoner violence to staff or refused to undergo a medical examination if they had visible injuries out of fear that they would be regarded as "traitors" and would face retaliation by other inmates.'[93]

Hungary's approach to violence as either a disciplinary measure using solitary confinement or 'security segregation' was discussed above. As with Moldova, whether the child is placed in JSC or detained with the main juvenile prison population, their situation appears especially dire.

The inter-juvenile violence seen in these two countries feeds into the final theme: the authorities in a number of states are uncertain how else other than by JSC, it is possible to detain some individuals. In Albania a 15 year old forensic psychiatric patient, the only one in the country, was found (as he had been previously, albeit with time as an outpatient between whiles) 'in *de facto* solitary confinement, being locked up in a dilapidated and dark cell for 23 hours per day and without being offered regular meaningful human contact and any purposeful activities.'[94] This 'unacceptable' state of affairs 'could easily be considered to be inhuman and degrading' and indeed, even if this child were the only juvenile forensic psychiatric patient, it is incomprehensible why he was held in such conditions.

The other two notable countries in this relation are the UK and the Czech Republic. The UK is discussed in the case study below. In circumstances very similar to the UK child AB, an adult in the Czech Republic was separated for his own safety. The isolation measure was taken after the man had 'previously been repeatedly physically attacked by other inmates.'[95] Consequently however, he had been living 'with virtually no human contact' in conditions 'akin' to solitary confinement.[96] In its visit report the CPT observed that although it is imperative for their own safety that juveniles must not be detained with the adult prison population, this must never be allowed to reach a situation where the child is placed '*de facto* in solitary confinement'.[97] This of course resonates with the discussion of JSC's purpose in Section 6 and becomes a key point for consideration in the UK case study.

7. The United Kingdom and JSC: a case study

[92] The situation for adult prisoners appears from the 2018 report to be worse. However, though inter-juvenile violence seemed to be decreasing, the same structures appeared to be in place for juveniles. See CPT/Inf (2018) 49 (Moldova 2018), paras 48-58 (adults), paras 59-61 (juveniles).
[93] CPT/Inf (2019) 8 (Hungary 2018), para 46.
[94] CPT/Inf (2019) 28 (Albania 2018), para 106.
[95] CPT/Inf (2019) 23 (Czech Republic 2018), para 46.
[96] Ibid.
[97] Ibid, para 52.

The CPT has given close consideration to the use of JSC in the UK, specifically in England,[98] and much greater focus to the matter in the UK than in other states to date. Accordingly, and because of detailed attention the issue has also received domestically in recent years, the UK context provides a useful practical example of many of the themes identified above, and the complexities associated with JSC on the ground.

The CPT highlighted the issue of JSC in its UK visits in March 2016 and May 2019, and discussed it directly with the UK authorities in high-level talks in June 2019.[99] Relatedly, the use of JSC and restraints, including in young offenders' institutions (YOIs), were the subject of a detailed UK Parliamentary Report published in April 2019 by the Joint Committee on Human Rights (JCHR Report).[100] In addition, in January 2019, the UK's Court of Appeal had heard the case *R (AB (A Child) v Secretary of State for Justice,*[101] (*R(AB)*), concerning a 15 year old boy who was held for a total of 55 days in what, by the accepted international definition, amounted to JSC. AB's case is not discussed directly in the JCHR Report, but the circumstances of similarly vulnerable children were considered. Although the CPT's 2019 report does not name *R(AB)* directly, it visited the same institutions in which AB was held and refers to 'a court ruling' following which 'juveniles [in that facility] were no longer placed in the segregation unit'.[102] The case, which one assumes to be *R(AB)*, had also acted as a catalyst for re-evaluation of 'how to manage particularly challenging young persons.'[103] Read together, the three sources draw attention to key themes in the use of JSC in England, most of which map with the themes in other COE states.

7.1 Themes in the 2019 CPT visit and JCHR Report

During its periodic visit to the UK in 2016 the CPT discovered very high levels of inter-juvenile violence in the juvenile prison estate. It raised in addition 'serious concerns' that the response to 'sustained levels of violence' in one YOI, was increased use of segregation and resort to force.[104] 'Serious concern' was voiced also at children being held in 'conditions akin to solitary confinement for prolonged periods'.[105] This was imposed under a disciplinary provision, Rule 49 of the YOI Rules, providing 'for the maintenance of "good order or discipline or in ... [the juvenile's] own interests" (GOOD).'[106] The UK has consistently maintained, including in its reply to the CPT's 2016 report, that it does not use JSC and that 'any segregation is not for punishment purposes and is surrounded by specific safeguards and regular review.'[107] The CPT has never shared this interpretation and indicated again in 2019:

> 'the fact is that juvenile inmates who are separated under Rule 49 are often kept in conditions akin to solitary confinement as they are confined alone in their cells for 23 or more hours per day. The findings of the 2016 visit clearly demonstrated this state

[98] The United Kingdom comprises four nations: England, Wales, Scotland, and Northern Ireland, and three separate criminal justice systems: England and Wales, Scotland, and Northern Ireland. Criminal justice is a 'devolved matter' in the latter two.
[99] High-level talks 4-5 June 2019: <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-holds-high-level-talks-in-the-united-kingdom> accessed 25 November 2020.
[100] UK Joint Committee on Human Rights, 'Youth detention: solitary confinement and restraint', Nineteenth Report of Session 2017-19, HC 994, HL Paper 343, Published on 18 April 2019.
[101] [2019] EWCA Civ 9, 18 January 2019.
[102] CPT/Inf (2020) 18 (United Kingdom, May 2019), para 151.
[103] Ibid.
[104] Ibid, para 113.
[105] Ibid, para 146.
[106] Ibid.
[107] Ibid.

> of affairs and, regrettably, the findings from the 2019 visit show that solitary confinement remains a real concern.'[108]

The CPT's 2019 visit was an 'ad hoc' visit[109] arranged 'specifically, to examine issues concerning violence, segregation, the use of force and means of restraint in local male prisons and juvenile detention establishments across England.'[110] Whilst the CPT observed the UK was taking serious steps to overhaul youth justice,[111] it indicated nevertheless that addressing the systemic issues perceived was going to take some time. The situation in 2019 was one of 'increasing levels of violence ... recorded across the youth secure estate' with 'even higher levels of violence' in YOIs since 2016.[112] In the two YOIs visited in 2019, Cookham Wood and Feltham A, there had been an increase in assaults (on both juveniles and staff) of respectively 10% and 60% since 2016.[113] Though the institutions had comparable numbers of juveniles detained at the time of the visit, Feltham A[114] had the higher rate of violence. Between 1 January and 10 March 2019 there were 231 recorded assault incidents,[115] almost exclusively inter-juvenile violence.

According to the CPT, violence was mostly 'a result of gang culture and affiliations being imported from the community, combined with the fact that a high proportion of the young persons were children placed in care, often with a history of trauma and/or mental health issues.'[116] Strategies to reduce violence included limiting interactions between rivals, but with the challenge that

> 'the delegation was informed that in Cookham Wood, 78 gangs were represented through 127 affiliated boys (80% of the population). This resulted in a five-page document listing names of which boy could not associate with which boy(s).'[117]

Given that Cookham Wood at the time of the 2019 visit was holding 159 male juveniles, the number of gang affiliations and the complexity of managing this is staggering.[118] Although efforts were made to keep gang rivals separated, '[r]estrictive security, separation and use of force continued to be the basis of the approach to violence containment', albeit not very effectively.[119]

The JCHR Report by comparison places greater emphasis on insufficiency of staffing levels, staff training and experience, and inadequate facilities in its account of high rates of JSC and restraint, than it does on the high levels of inter-juvenile violence.[120] Alongside this, the JCHR found that instances of separation were both poorly and inconsistently recorded.[121]

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[108] Ibid.
[109] A visit undertaken as appears to be 'required in the circumstances', Article 7(1) ECPT
[110] CPT/Inf (2020) 18 (United Kingdom, May 2019), para 151, para 1.
[111] Ibid, para 114.
[112] Ibid, para 113.
[113] Ibid, para 118.
[114] 124 boys under 18 years at the time of the visit.
[115] CPT/Inf (2020) 18 (United Kingdom, May 2019), para 151, para 118.
[116] Ibid.
[117] Ibid, para. 119.
[118] See ibid, where arrangements are outlined.
[119] Ibid.
[120] UK Joint Committee on Human Rights, 'Youth detention: solitary confinement and restraint', Nineteenth Report of Session 2017-19, HC 994, HL Paper 343, Published on 18 April 2019.
[121] Ibid, paras 49-50.

Apart from a single reference in a witness testimony[122] and a fleeting observation[123] however, the JCHR Report does not refer to gang membership at all.[124] What the JCHR Report does identify as a trend (on which the CPT this time is silent) is that the use of restraint and segregation in YOIs to deal with violence disproportionately affects children from Black, Asian and Minority Ethnic (BAME) backgrounds. For very complex reasons in the community in London, where the YOIs seen by the CPT and which held AB are situated, 'gang-related violence ... disproportionately affects ... particularly young black men' both as victims and as perpetrators.[125] Without far deeper research and consideration of other factors it is impossible to know how far gang membership influences the disproportionate use of restraint and segregation for BAME children in YOIs.[126] Nevertheless, and without knowing the relationship between them, gang-related violence, and disproportionate use of JSC for BAME children, are two notable and concerning trends in the respective reports. Additionally, when violence erupts in a YOI, it can lead to all children in the facility being locked inside their rooms,[127] a point which maps into the JCHR's findings of inadequate staffing, training and facilities.

The final dominant theme in the English context is the practical problem of knowing what to do with especially difficult inmates: children with 'complex needs'. AB fits exactly into this category, but more generally the CPT noted ('following a court decision') an awareness at Feltham A that such young people 'should not be maintained on segregation units or in conditions akin to solitary confinement, and that on the contrary, they were in need of extra support and care.'[128] However,

> 'despite the positive attempts to establish units that address the complex needs of particularly challenging young persons ... at the time of the visit ... a number of boys were in practice confined to their cells for some 23 hours per day ... They were effectively in conditions akin to solitary confinement and in many instances, they remained in such a situation for prolonged periods (i.e. for longer than 14 days).'[129]

For one young person this lasted for 151 days.[130]

The JCHR Report recorded similarly: 'there are cases of children in custody who are so unwell, violent or afraid that it is difficult to know how to treat them.'[131] It recommended such children 'should be moved to an institution that is equipped to look after them, or the institutions in which they reside should be reconfigured to enable them to adopt responses other than solitary confinement.'[132] It is beyond the scope of the present Chapter to consider

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[122] Ibid, para 39.
[123] Ibid, para 68.
[124] The only reference to gangs in *R(AB)* - AB was perhaps not part of one - is in a quote from the 2016 CPT report. *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [98], which refers to CPT/Inf (2020) 18 (United Kingdom, May 2019), para 91.
[125] Mayor of London Office for Policing and Crime, *Review of the Metropolitan Police Service Gangs Matrix*, (MOPAC December 2018), 6-7: https://www.london.gov.uk/sites/default/files/gangs_matrix_review_-_final.pdf> accessed 25 November 2020.
[126] Such further research really ought to be conducted.
[127] UK Joint Committee on Human Rights, 'Youth detention: solitary confinement and restraint', Nineteenth Report of Session 2017-19, HC 994, HL Paper 343, Published on 18 April 2019, para 40.
[128] CPT/Inf (2020) 18 (United Kingdom, May 2019), para 151, para 152.
[129] Ibid, para. 154.
[130] Ibid.
[131] UK Joint Committee on Human Rights, 'Youth detention: solitary confinement and restraint', Nineteenth Report of Session 2017-19, HC 994, HL Paper 343, Published on 18 April 2019, para 58.
[132] Ibid.

alternatives to JSC or what 'reconfigured' institutions would look like. The following case nevertheless gives an example of a complex-needs child inmate and is useful to the broader JSC discussion because it (i) illustrates the interrelationship between vulnerability and child detention, including specifically JSC; and (ii) shows unfavourable handling of international and European soft law prohibiting JSC.

7.2 *R (AB (A Child) v Secretary of State for Justice*

R(AB) concerned AB's claim that his detention (in JSC) at Feltham YOI in 2016-7 when he was 15 years old, amounted to inhuman and degrading treatment contrary to Article 3 (and as a default, Article 8) of the ECHR. There is much to criticise within the judgment, but for present purposes it is necessary only to focus on points of relevance to the wider JSC discussion in this Chapter.[133]

AB was vulnerable long before his first encounter with the criminal justice system. At only 6 months old he was placed on the child protection register because of the 'likelihood of emotional abuse'.[134] AB witnessed and experienced traumatising violent events in his early childhood, he has special educational needs, has been through the care system, and was 'known to the police' from the age of 10 years old. At a Secure Training Centre when aged 14, AB 'suffered abuse at the hands of officers'.[135] Perhaps understandably, AB is also not a nice person. His pre-sentence reports evaluated his level of 'dangerousness' and 'risk of causing serious harm' as 'high' and his list of offences include assaulting officers, 'sexual offences', 'a history of setting fires', and being 'found preparing weapons'.[136] AB's 'highly sexualised behaviour' means he cannot be left alone with a female. In many ways whilst in the YOI, AB was the author of much of his own vulnerability to other juvenile inmates. His behaviour included shouting racist and Islamophobic abuse at other youths, threatening other youths to defile their religious texts and to rape their family members, and persistently misusing the call bell. During his detention AB was at once violent, at risk of violence, and vulnerable for additional reasons.

In AB's application to the Court solitary confinement is defined as 'being confined in a cell for more than 22 hours in a day and there being minimal meaningful contact with other human beings.'[137] Consistent with a trend seen in other COE states, AB was subjected to three consecutive periods of JSC which lasted a total of 55 days.[138] The Court of Appeal however declined to find that Article 3 ECHR has reached a point whereby JSC must be considered always to constitute ill-treatment. It declined also to find a rebuttable presumption that whenever JSC occurs, it amounts to ill-treatment. Within its reasoning, it is the Court's handling of relevant international law, both treaty and soft law, that is especially important to the broader themes within this work. Consistent with the original judgment, the Court of Appeal indicated that neither the UN Convention on the Rights of the Child, nor the UNCAT (both of which ratified in international law, but not incorporated into UK law) add anything

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[133] Shortly after this chapter was accepted for publication the case was appealed to the UK Supreme Court under an adjusted case name: *R (AB) v Secretary of State for Justice*, Case ID: UKSC 2019/0155. At the present time, the judgment is still pending but one issue under consideration is whether the Court of Appeal 'erred in its approach to international materials'. As the below discussion demonstrates, it is strongly this authors view that it did. Irrespective of the outcome of this appeal, the vulnerability of soft law in domestic courts is evident.
[134] *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [14].
[135] Ibid, [14]-[17].
[136] Ibid, [18]-[20].
[137] Ibid, [57].
[138] 10 December 2016 to 2 February 2017; 2 February to 16 February 2017; and 16 February to 2 March 2017.

'material' to the content or interpretation of Article 3 ECHR.[139] The Court dismissed the relevance of the CRC's General Comment No.10 because it refers to JSC only in the context of discipline, which was not AB's context.[140] The SMRs and Rule 67 of the RPJDL[141] were deemed irrelevant to AB's case for the same reason.[142] The Court found the Istanbul Statement to have 'no specific legal status' and its position that JSC should be absolutely prohibited was 'a recommendation for future action by States, not a statement of current legal principle.'[143]

In addition, the Court considered the CPT's 2016 visit report which described children

> 'effectively being held in conditions of solitary confinement. In the CPT's view, holding juvenile inmates in such conditions amounts to inhuman and degrading treatment.'[144]

This also was dismissed (incorrectly) as 'recommendations for the future ... [that] would not necessarily have immediate effect.'[145]

Taking all of this together, the Court of Appeal found

> 'nothing in the international materials cited either to require or to justify any departure from what the Strasbourg Court has so far said in its interpretation of article 3 in the context of detention of prisoners.'[146]

As has already been indicated in the sections above however, the ECtHR has not yet said anything about JSC and the two ECHR cases relied upon in *R(AB)* relate to the prolonged solitary confinement of adults in remarkably different contexts. *Ramirez-Sanchez v France*[147] concerned a professional revolutionary[148] held in isolation for 8 years and 2 months. *Babar Ahmad v UK*[149] was a case brought by five terror suspects contesting their extradition to the United States inter alia because they may be held in solitary confinement. Since the applicable soft law was dismissed by the Court as contextually irrelevant, the same can be said of these cases. On their content they are in fact, less relevant. The judgments also predate the 2015 iteration of the SMRs and the much firmer understanding reflected now in international law of the harm connected with both JSC and prolonged solitary confinement.

Considering specifically whether AB, a 15 year old boy held in isolation for 55 days had been subjected to 'inhuman treatment', the judgment is similarly dubious. Although it indicates only 9 interactions with other people during the 55 days, the Court found AB had not been 'simply left to languish, isolated in his cell',[150] and the purpose of AB's isolation 'essentially for the protection of others and for his own protection'[151] was a strongly decisive factor in the

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[139] *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [74 – 75].
[140] Ibid, [77].
[141] UN Rules on the Protection of Juveniles Deprived of their Liberty, GA/RES/45/113, adopted on 14 December 1990.
[142] *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [106].
[143] Ibid, [83].
[144] Ibid, [98] citing CPT CPT/Inf (2020) 18 (United Kingdom, May 2019), para 151, para 91.
[145] Ibid, [100].
[146] Ibid, [108].
[147] *Ramirez-Sanchez v France*, (Grand Chamber), Appl No 59450, 4 July 2006, (2007) 45 E.H.R.R. 49.
[148] 'Carlos the Jackal', ibid, [10].
[149] *Babar Ahmad v UK,* Appl No 24027/07, 10 April 2012, (2013) 56 E.H.R.R. 1.
[150] *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [111].
[151] Ibid, [143].

case. Space does not permit detailed elaboration or critique of all points in the decision. It is nevertheless worth pointing out that, troublingly, given the absolute nature of the ill-treatment prohibition, proportionality, specifically the financial cost of accommodating AB any other way, was a further decisive factor in the judgment.[152]

Overall, this case study gives a detailed illustration of some of the extremely complex issues facing those working in detaining institutions, where they must make decisions as to how best, and most safely to manage the children in their facilities. In it we see several of the wider COE trends intersect. The UK declines to recognise that JSC is permitted in law, yet in practice, it is used by a differently labelled mechanism. JSC also arises incidentally when a facility becomes locked down. JSC's use is linked with high levels of violence and the management of both a volatile and violent institutional setting, as well as specific violent children. Some detained children have particular complex needs. Vulnerability in the context is demonstrated especially starkly through AB's history. At the same time, the *R(AB)* case shows vividly the UK Courts' present position includes: an unwillingness to accept JSC as absolutely proscribed; a willingness to downplay, even refute the relevance of international treaty and soft law; regarding JSC's purpose as relevant, even decisive; and also regarding proportionality as relevant. This refusal by certain states to accept international standards as applicable to them must be borne in mind, and is built upon in the recommendations which follow.

8. Conclusions

JSC continues to be lawful and practiced to varying degrees across COE states. The aim in this Chapter was to identify and evaluate recurrent themes in JSC's use across Europe. Having particular regard to justifications given for using JSC, and JSC's interface with vulnerability, the intention has been to draw attention to the complexity of the practice's continued use. Vulnerability was illustrated very starkly in the UK case study above, where the complexity of several interlocking trends was also shown in example. Across the COE the following dominant trends were identified: 'informal', including mislabelled JSC; self-harm as a disciplinary offence which may lead to JSC; medics requested to assess a child's fitness to undergo JSC; inter-juvenile violence; and the authorities' difficulty establishing how else to safely detain particular child(ren). In addition, consecutive periods of JSC can frequently make it prolonged; corruption in prisons such as collusion to reinforce prison hierarchy worsens the surrounding context; and remand prisoners, including children, are still in some states held in JSC. It is however relevant that the applicable international and European legal standards lack clarity, and it is argued this particularly needs to be addressed if an appropriately strong response to JSC in Europe is to occur.

JSC is capable of causing serious and irreversible harm and this informs the dominant view in international law that JSC constitutes ill-treatment as prohibited absolutely under the ICCPR and UNCAT. The EPRs' prohibition aligns with this absolutist stance, stating JSC must 'never' be imposed. Nevertheless, the extent of the JSC prohibition is unclear owing particularly to confusion in statements and standards as to what is in fact being referred to as JSC. As this discussion has shown, many of the international law statements prohibiting JSC place emphasis on the practice as a disciplinary measure. At the same time, others such as the SR on Tortures' positions and the EPRs set out an absolute prohibition but are silent as to the relevance of either the context or purpose of the practice. In Europe, the ECtHR has not set

[152] Ibid, [144] – [145].

out a standard, though its approach in Article 3 ECHR case law is generally relative and contextual. Whilst this might mean a willingness to permit JSC for example, for a short period for safeguarding reasons, its position is currently untested, so unknown. The CPT also contextualises its recommendations to states, and though its standard perhaps compounds the confusion by its reference to discipline, it has during the period under review always cautioned strongly against and even condemned the practice of JSC irrespective of the purpose for its use.

Consequent to the opaque international and European standards, there remains uncertainty as to JSC's lawfulness or limits in contexts other than discipline. This has direct implications for state level implementation, and can be related to certain trends identified in this research, such as mis-labelling or not recognising a practice as constituting JSC. The legal uncertainty is relevant also to the practical difficulty states sometimes face of not knowing what else they can do with a certain child. This problem was illustrated in detail in the UK case study, and aligns with the hard question of whether the purpose for which a child is isolated is capable of reducing the severity of pain and suffering experienced sufficiently to render it lawful. There is no consensus on this point, and no clear direction from the international standards to help resolve it. If there is to be even a possibility of a coherent and consistent approach to JSC across Europe, it is therefore necessary that the issues of context and purpose should be revisited and, as a priority, given some serious focussed consideration by those institutions with a standard-setting function.

The JSC prohibition's prospects of implementation suffer a second critical weakness. The 'soft law' legal status of the provisions in which it is set out means the prohibition may readily be dismissed by some states as not binding upon them. As the UK example shows, this can even extend to domestic courts rejecting the prohibition standards as applicable. This is not an issue that can be overcome easily, if at all. Nevertheless, future statements setting out the JSC prohibition would do well to link its empirically evidenced harms directly to the definitional scope of ill-treatment prohibited in international and European law. The SR on Torture Méndez did this in 2011 for solitary confinement generally, yet it carried no weight in the case study considered. However, continued emphasis on harm, especially if linked to children directly, may eventually have some impact by the socialising and normalising effects of repetition. Future statements of standards would be strengthened further if they at the same time addressed the issues of context and purpose indicated above, clarifying them in relation to JSC. Once the ECtHR has heard a case on JSC, we can also expect a much firmer understanding than presently on this matter.

Referring to the trends identified in this Chapter in JSC's use across Europe, the situation with most of these would be vastly improved by greater clarity in the standards. For some of the trends, the most appropriate answer would be a strong and consistently emphasised expression, ideally from multiple relevant actors, that the practice should be discontinued. It is argued that this should apply to: (i) treating self-harm as a disciplinary offence which may lead to JSC; (ii) corruption in prisons such as collusion to reinforce prison hierarchy thereby worsening the surrounding context; and (iii) placing children on remand in JSC. Any departure from this should be rare and reserved for highly exceptional circumstances relating to the remand point only. It is impossible to see any reasonable exceptions to the first two points at all.

Beyond this, there is a need for both detailed research and dialogue between those international and European institutions with safeguarding and standard-setting functions to

establish a clear, consistent, comprehensive and evidence-based position. In the first instance there needs to be a definite and definitive position as to whether JSC is or should be considered ill-treatment in all contexts and irrespective of the reason for which it is imposed. If not, there is a need for clarity as to when, in what circumstances, and bound by what baseline rules, - such as absolute maximum duration, access to medics, and the opportunity to appeal, - JSC might be considered lawful.

Improved clarity in the applicable standards would help address the frequent disjoin between law and practice, including the 'informal' use of JSC, and the mis-labelling of JSC as some other practice. Indeed a function improved and comprehensive standards could fulfil would be to set out clear distinctions between types of JSC such as: for discipline; for management or control purposes, which may include safeguarding in a violent institution; or that which is incidental, for example because of single cell facilities and little time for out of cell activities, or because there is only one child in the facility. Approaches to dealing with each could then be set out. Certainly this would help states to categorise periods of isolation appropriately, and guard against arbitrary use and abuse of JSC. By consequence of correct categorisation, improved safeguards would in some states inevitably become more available, such as a right to appeal a JSC decision in Hungary. More comprehensive standards could also address the issue of consecutive periods of JSC which can frequently make it prolonged. Finally, there is a trend by which some states request medics to assess a child's fitness to undergo JSC. Although this has been questioned and may seem dubious, for as long as JSC remains a possibility there is a clear safeguarding role for medics to play. Hence, standards could clarify that role, but it is suggested that the appropriateness of medics undertaking this fitness certification role should be contextually evaluated.

In summary, the international and European framework surrounding JSC is unclear. To address the trends observed in JSC's use in Europe there is a need for much clearer and, as appropriate, more comprehensive standards surrounding JSC. This would be strengthened particularly if a consistent approach were to be taken by international and European institutions with a standard-setting role. The standards need to be evidence-based, and there is a need for further research as set out above. For standards on any of the above points to have traction with states however, several additional things would need to happen. Further standards should link the empirical findings about the harms associated with JSC directly to the definitional elements of the ill-treatment prohibition. Doing so will support the credibility of, and thereby strengthen, the prohibition. Any situations or circumstances in which JSC might be deemed acceptable should also be linked with a strong empirical evidence base. Repetition of a consistent set of standards by multiple actors can have a socialising effect on states, so they should be duplicated and repeated by different relevant actors. Finally, if it becomes more widely known, within states and at European level, just how dangerous yet widespread JSC is across the COE, this may mobilise the necessary political pressure for change. These suggestions create only a partial approach however, and what no standards can answer are the specifics of dealing with issues on the ground that compound and frequently underlie the JSC problem. They cannot answer for states what to do to address widespread violence in institutions, or how to handle children with complex needs, and they do not produce answers about alternatives to JSC. For each, further research input is also needed, perhaps although not necessarily, within the context of specific states or at an even more local level as is required.

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