

Protecting the Rights of Children in the Indonesian Juvenile Justice System

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Abstract

Delinquency rate of children every year always increases, if we look closely at the development of criminal acts committed by children so far, both in terms of quality and modus operandi. The research is an empirical legal research or commonly called as socio-legal research. It was conducted at Mamuju district, West Sulawesi, Indonesia. The results show that the implementation of the children rights' protection in the process of juvenile criminal justice has been going well, although there are still rights of the children that have not been fully fulfilled. Such as the right to be free from torture, punishment or other cruel, inhuman and degrading treatment, not being arrested, detained or imprisoned. The process of juvenile criminal justice is not fully running smoothly, because in practice several obstacles are encountered. These obstacles include: the lack of understanding from law enforcement officials regarding child protection, limited number of juvenile judges or judges specializing in child criminal cases, many courts still do not have a special courtroom for juvenile court trial, the lack of defendant's knowledge of the rights owned, there is no place to child custody or a Penitentiary for Children, so that child custody must be joined with adult in the sense that child custody with adult prisoners is not separated so that it can adversely affect child custody.

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1. Introduction

Children should receive protection from the negative effects of rapid development, the flow of globalization, and changes in lifestyle that greatly affect the values and behavior of children.¹ Deviations of behavior or unlawful action as committed by children are caused by factors outside the child. Sometimes the violations committed by children are felt to have troubled all parties especially parents. The phenomenon of increasing violent behavior by children seems not to be directly proportional to the age of the perpetrator. Therefore, various efforts to prevent and settle the delinquency of children need to be resolved immediately.²

Developed countries are countries that give serious attention to children, as a form of concern for the nation's generation. One of the efforts to prevent and settle the delinquency of children today is through the implementation of the juvenile justice system. The purpose of the implementation of the juvenile justice system is not merely aiming at imposing criminal sanctions on children who have committed a crime, but rather focusing on the rationale that the imposition of sanctions as a means of supporting the realization of the welfare of children as crime perpetrators.

At the practical level, children are often positioned as objects and the treatment of children in dealing with the law tends to harm the child.³ In addition, the laws are no longer in accordance with the legal needs in the community and have not comprehensively provided special protection for children in dealing with the law. Thus, there needs to be a paradigm shift in the handling of children in dealing with the law, among others based on the roles and duties of the community, government, and other State institutions that are obliged and responsible to improve children's welfare and provide special protection to children who are in dealing with the law.

In relation with the issue, then Act No. 11 of 2012 concerning the Criminal Justice System for Children is issued as response to the needs of the community and the government for regulations that provide protection for children, especially children who are in dealing with the law. In this laws there are many amendment, the most clear is the implementation of Diversion process in the settlement of children case, as well as a Restorative Justice approach that involves all stakeholders, especially the community, in the process of restoring the situation to be better. It is hoped with the issuing of this laws, it will provide a just legal basis for all parties, especially children who are dealing with the law, which in its development still requires attention, affection, and guidance from those around it to become intelligent, independent, noble, responsible individuals and useful for family, community, nation and country.⁴

¹ Harefa, B., & Ariyanti, V. Legal Protection For Narcotics Abuser Children In The Juvenile Justice System In Indonesia. International Journal of Business, Economics and Law, Vol. 12, Issue 4: 106-109

² Nandang Sambas, 2010. *Pembaharuan Sistem Pemidanaan Anak di Indonesia*, Graha Ilmu. Yogyakarta. p.103.

³ Yunus, Yutirsa. "Analisis Konsep Restorative Justice Melalui Sistem Diversi Dalam Sistem Peradilan Pidana Anak Di Indonesia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 2, No. 2 (2013): 231-245.

⁴ Annger Sigit Pramukti and Fuady Primaharsya, 2015. *Sistem Peradilan Pidana Anak*. Pustaka Yusticia. Yogyakarta. p.3.

2. Method of Research

The research is an empirical legal research or commonly called as socio-legal research. It was conducted at Mamuju district, West Sulawesi, Indonesia. The collections of data both primary and secondary are analyzed using qualitative analysis obtained through interviews and it will be used in answering and revealing the phenomena and reality.

3. The Concept of Diversion in the Settlement of Children Cases

Children become part of human, nation and State survival. In the Indonesian constitution, children have a strategic role that is explicitly stated that the State guarantees the right of every child to survival, growth and development and to legal protection from violence and discrimination.

In law, children are seen as subjects who have not really been able to protect themselves when dealing with the law, while it is generally known that children who are dealing with the law will surely feel the complicated facts of the settlement of a case, and often children feel pressures from the legal apparatus at the examination or even their social environment which sometimes punishes a naughty child as a human without a future, so that in order to prevent these things, the child must be assisted by others when dealing with the law, both with the status of child as an offender, the victim or as a witness when dealing with the law, this is intended because the condition of children who are still so unfamiliar with the implementation of the justice system. Of course, it is intended to protect children from the misapplication of the laws that are applied to them.

Generally, the juvenile justice process starts from the stages of investigation, prosecution, trial and implementation of court decisions in the Penitentiary. All stages as referred to above must be carried out by officials who are specially educated or at least know about the problem of the child, in this case it intended that the child gets protection in law. In addition, the treatment of legal apparatuses during the child criminal justice process must pay attention to the principles of child protection and still lead to the dignity of the child without ignoring the implementation of justice, but in fact this has not been fully realized, it is seen in terms of child investigations, investigators are still wearing official clothing, case examinations are conducted publicly and children are sentenced 14 and 15 years in prison and even life imprisonment.¹

In relation with this matter, it is necessary to pay attention to the legal protection of children in their enforcement must really be enforced both at the stage of investigation, prosecution, trial and Penitentiary. The handling of children in the administration of juvenile justice must be interpreted by refer to the principle that the juvenile justice is an inherent part of child welfare efforts.

As facts found in the field, children as individuals certainly have feelings or emotions in themselves, these feelings and emotions trigger children to do something that is considered by children to make him stand out, or to simply reciprocate other behavior of him or because only just want to join in, this is what sometimes makes children to doing actions that are based on statutory regulations strictly forbidden to be done.² Measuring index of the proposition as above can be seen with quite significant cases of children with status as perpetrator.

According to the author that here needs to be emphasized even though children as perpetrator, it is not the right reason for children to be treated in ways that can degrade their dignity, especially not applying the paradigm of legal protection in terms of resolving cases allegedly committed by children. In the process of resolving cases of children, there is an integrated element that is interrelated with each other; these elements are child investigators, prosecutors, judges and prison officers. At the same time, the enforcement of child protection must be upheld by each element of the subject because child protection is a major milestone in juvenile justice.

The author argues that it is necessary to explain the flow of the settlement of children case as follows:

Firstly; Investigation stage, the authority of investigation is a most important stage in the operationalization of the juvenile justice system, this is based because at the stage of investigation it can be seen the existence of a suspect and the determination of a suspect of a criminal before the perpetrator is ultimately prosecuted and tried in court and given sanctions criminal in accordance with their deed.

Without through the process or investigation stages then automatically the next stages in the criminal justice process are prosecution stage, the examination in front of the court and the implementation stage of the criminal decision cannot be carried out because it is considered a failure or procedural defect.³

At the investigation stage, the child as an offender can also be arrested and detained, that the arrest of the child is done with a strong allegation that the child has actually committed a crime based on sufficient evidence. The arrest was the task of the police element which in the arrest was required to show a warrant for the arrest, as well as to state the reason for the arrest and to state the place where the suspect would be examined.

At the investigation stage it is important to note that children as perpetrators in the process of settling their

¹ Elisabet Juniarti et al, 2014, *Diversi dan Keadilan Restoratif Kesiapan Aparat Penegak Hukum dan Masyarakat Studi di 6 Kota Indonesia*, Pusaka Indonesia, Medan. p. 22.

² Angger Sigit Pramukti and Fuady Primaharsa, 2015, *Sistem Peradilan Pidana Anak*, Pustaka Yustisia, Yogyakarta, p. 5.

³ Maidin Gultom, 2013, *Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Anak di Indonesia*, PT. Rafika Aditama, Bandung, p. 97.

cases must be carried out with the paradigm of upholding the presumption of innocence and by also paying attention to the rights and dignity of children. The arrest of a child suspected of committing a crime must be based on sufficient evidence and within a limited period of one day. In the detention of a child, the rights of children as suspects must also be considered, such as the right to obtain legal assistance at every level of examination.

After the arrest, the child can also be detained, detention of the child that is the placement of the suspect or defendant in a certain place by the investigator or the prosecutor or the judge who is suspected of committing a crime. Because in the phrase of *detention* there is a word “*able*” make there is no obligation for children as criminals must be detained, so that in this context the investigators as legal apparatuses must really pay attention and consider when detaining children. The reason the child will run away, the reason the child will damage or lose the evidence, or that the child no longer makes the same mistake must be really based on analysis accompanied by consideration of the condition of child. Basically, the juvenile criminal procedure code does not justify a child’s independence to be eliminated but to search the truth that a child violates the law; the independence of child can be limited by arrests and detention.

For the investigation, investigators can make arrests as stated in Act No. 11 of 2012 concerning the Juvenile Justice System on the basis of a strong allegation that a child has committed a criminal offense based on two sufficient evidences and the detention is carried out only on an alleged criminal offense sentenced to imprisonment for 5 (five) years or more. Along with the basis of the regulation it can be concluded that there are provisions that hope that investigators do not carelessly suspect child criminal acts, because detention can lead to mental trauma and will make a child feel depressed over these experiences.

Secondly; Prosecution stages after the police consider that the children’s case file is complete (P21) and meet the element of alleged violations, the file is then forwarded to the public prosecutor to furthermore the public prosecutor conduct his prosecution obligations. In principle,¹ Act No. 11/2012 requires that every state prosecutor have child prosecutor, but if the state prosecutor does not have one, a public prosecutor who has the task of prosecuting to child defendant and also prosecuting to adult.

The child prosecutor in doing his task, examining the minutes submitted by the investigator, that the results of the assessment could lead to cases of children who do not attempt to be submitted to the court which of course is done with the approval of the child judge before this. Children are only returned to their parents to get reprimands and advice from their parents. Even based on the permission of the judge, expert assistance can also be requested to deal with children who are dealing with the law. This is of course with the consideration that children need attention and love as well as education and a sense of security. Social workers such as community centers can be involved in fostering troubled children based on the judge’s order.

As described above indicates a form of diversion towards the settlement of child cases. Diversion is the transfer of a case of child from the criminal justice process to the process outside of criminal justice. As in diversion, it has been clearly stated in Article 6 of Act 11 of 2012 explains that the purpose of the diversion is to achieve peace between victims and children, settle cases of children outside the judicial process, prevent children from depriving children of independence, and encourage the community to participate and inculcate responsibilities to the children.

In the process of prosecution, the inherent rights of children must be protected and upheld, such as establishing the period of detention of children just in the urgency of the investigation, making indictments indiscriminately children, as soon as possible to submit a case of child to the court,² implement the judge’s decision in the spirit of coaching and/or conduct rehabilitation. The rights of the child at the time of the prosecution examination namely the right to get relief from the period of detention, change the status of the child from detention center to house or city custody, the right to be protected from threats, torture, extortion from the party having the right to obtain facilities in order prosecution examination and the right to be accompanied by a legal advisor.³

Thirdly, Trial stage; after the prosecutor’s case file is submitted to the court, the mechanism for the settlement of the children case is done through the trial. At the stage of examination in the trial before the hearing opened, the child’s judge ordered the social advisor to submit a social research report, after that the judge opened the hearing and was declared closed to the public. After that the defendant is called into the courtroom accompanied by a parent or guardian or foster parent, legal counsel, and social advisor.

The special characteristics of the juvenile trial in the Indonesian justice system are that the trial is closed to the public, the trial is conducted in a kinship system, the panel of judges does not use the attributes of their respective ranks, there is a necessity for separation of trials with adults both civil and military status and other special characteristics i.e., punishment for children is much lighter.⁴

¹ *Ibid.* p. 99.

² Bynum, Jack E., and William E. Thomppson, 2002, *Juvenile Delinquency a Social Approach*, Allyn and Bacon, Boston.

³ *Ibid.* p. 102.

⁴ *Ibid*

In the context of the settlement of children's cases, the sentencing of trial decisions against children is crucial as we know that the decision must be accompanied by the burden of responsibility. Judges in deciding cases of children must consider the social research report; it is made because the social report explains the background of children doing delinquency which can then be the basis for judges in making decisions. Basically, the judge is not fully bound by this matter because the measuring index of judge is based on the results of the examination at the trial.

Output at the trial stage is the decision of the judge. If the defendants or the public prosecutor are not satisfied with the decision, the parties have the right to appeal to the high court and if the parties are still not satisfied, the parties can submit an appeal to the Supreme Court.

In the context of the court decision, the juvenile judge is required to make a decision that does not separate children from their parents, that this is based on the understanding that a bad house is better than a good penitentiary for children. Judges in settling the children cases should really be thorough and have previously known the details of the child's background. In making decisions, judges must really pay attention to emotional, mental and intellectual maturity of children. Judges are prevented from making decisions that can result in a lifetime of inner suffering or revenge on children, on the basis that the decision is motivated by protection. Judges in the settlement of children cases are required to make decisions that are to improve the violators of the law and enforce legal authority.

Fourthly, Penitentiary stages; guidance is a mean that can support the success of the State in making prisoners a member of society.¹ In the context of child penitentiary, this institution then plays a role in fostering child prisoners so that children as perpetrators of crime become better, what need to be fostered is the personality of convicts, arouse self-esteem and develop a sense of responsibility to adjust to a peaceful and prosperous life in society so that people can be highly personal and moral.²

Every circumstance and situation affects human beings as well as children who undergo sentence. In accordance with the condition of his/her soul, children are very easily influenced by various situations. Children who undergo sentence will feel a change in their social environment, and criminal sanctions can affect the mental development of children until they are adults. The function of a penitentiary system is to prepare children as prisoners so they can integrate healthy with the community, their nature as humans can be restored in relation to the creator, with his/her person, with each other and his/her environment.

Children as part of the younger generation should be seen as successors to the ideals of the struggle of the nation and human resources for national development. Therefore, the criminal sanctions are actually reactive to an act, whereas criminal sanctions are more anticipatory against the perpetrators. If the criminal sanction of the child is directed at the conduct of one of the people through the imposition of suffering so that the person concerned is deterrent, then the focus of sanctions is directed to the effort to provide assistance so that he changes. It is clear that criminal sanctions emphasize the element of retaliation. This is a suffering that is deliberately given to someone who violates. Whereas, sanction for action comes from the basic idea of community protection and the formation of the maker.³

Certainly, the handling of criminal offense against children is different from the adulthood; the handling of these children is special because it is also regulated in separate regulations. Understanding of the process of handling cases of children of course there may still be a part of the community who do not understand or understand, so that sometimes raises various assessments, even more fatal when there is a misjudgment that the handling of children, especially children in conflict with the law get special treatment and there are also those who think that a child cannot be punished, only that the handling process is specifically regulated. Based on the description it is clear that the handling of children facing the law is different from the handling of adults who face the law, in the criminal justice system the child prioritizes the handling of child cases promoting restorative justice.

4. Diversion: Answers to the Ideal Concept of Children's Rights Protection in the Juvenile Justice System

Every child has the right to get legal protection from all forms of physical or mental violence, neglect and mistreatment and sexual harassment while in the care of a parent or guardian or any other party responsible for the child. The State and the government have the obligation and responsibility to respect and guarantee the rights of children without differentiating the ethnicity, religion, race, gender, legal status, and the physical and/or mental condition of the child. They are obliged to provide infrastructure support in the implementation of child protection. Therefore, to reinforce it then requires concrete and substantial child protection laws structurally and culturally embodied in the legislation, so that the basic rights and freedoms of children as future generations will

¹ S Muchtar and A Yunus 2019 Environmental law enforcement in forestry crime: A disjunction between ideality and reality. *IOP Conf. Ser.: Earth Environ. Sci.* **343** 012066

² Angger and Primaharsa, *Op. Cit.*, p. 76

³ Abdussalam, and Adri Desasfuryanto, 2016, *Hukum Perlindungan Anak*, Indonesian Police Academy - University of Police Science, Jakarta, p. 89.

become more solid, strong and independent in realize national ideals.

Fundamentally, the criminal justice system does not rule out the possibility that a child can become a suspect, defendant, or even convict, then a question mark will appear whether a child with legal status still has the right to obtain legal protection, because children with the status of a suspect, defendant and the convict must be accompanied by evidence underlying an increase in the status of children in the criminal justice system. To study from this, the author believes that the construct of the juvenile justice system is a framework for differentiating what is the right of children in criminal justice and adult justice systems.

The juvenile justice system is present with the purpose of justifying a child who has committed a criminal offense, then the rights of children as described above are not lost just because the child committed a criminal crime so that it becomes a logical consequence for the child in the criminal justice system with legal status as a suspect, defendant and convicted person still has the right to be protected. Guarantees for child protection in law are the fulfillment of one of the objectives of the law. Hence, the protection of children's rights in law must be given certainty. During the judicial process, children's rights must be protected, such as the enforcement of the principle of presumption of innocence, the right to understand the indictment, the right to remain silent, the right to present a parent or guardian or foster parent, the right to face and examine testimonies and the right for appeal.¹

In relation with the issues raised by the authors as discussed above, it is found that there are still many violations of the law on children's rights, both with the status of children as suspects, defendants, and or convicted in the administration of the juvenile justice system, certainly it is very unfortunate, because it is feared not to have a positive impact as expected by the Child Protection Acts. It is not even impossible that this process would have a psychological impact and trauma far greater than the harm caused by the criminal behavior of the child himself.

Furthermore, the author will explain the factors that influence the implementation of the fulfillment of children's rights in the juvenile criminal justice system. *First, Investigation stage* - the obstacles in conducting investigations of children in practice is caused child investigations are not always conducted by Child Investigators. This is due to the lack of police who meet the requirements to be appointed as Child Investigators. In practice, there is often no coordination between related-agencies in the investigation of children such as the collaboration with the Penitentiary.

If the police are negligent or late asking the head of Penitentiary for help in conducting social research on Naughty Children, then investigation is inaccurate and seems to be in a hastily, because the results of the social research are also conducted hastily, because the period of detention of children at the investigation stage is short, that is the longest 20 (twenty) days and can be extended for 10 (ten) days. The understanding of Police or Child Investigator of child protection is still inadequate, such as an understanding of the child's age limit, faults are still found. If the understanding relating to juvenile justice is not correct, this must be very detrimental to the child or make the child as victim of investigator ignorance.²

Investigator capability need to be improved through education, through upgrading or seminars or workshops related to juvenile justice and also to child protection. Low education will affects the quality of the investigations. Education affects the level of ability of investigators to understand child protection laws, so according to the author, the educational background of Child Investigators should be at least a Bachelor of Laws. Most child investigators have never received additional education in the form of upgrading or workshops on child protection. Actually, upgrading or workshop on child protection is useful to add insight into the Child Investigator in doing their duties.³

Second, Trial stage - obstacles to child trials such as lack of facilities and infrastructure. There is no special room for conducting child criminal trial, which can affect the mental development of the child. When attending trial on themselves or as witnesses, children are not separate from contact with other people, such as prosecutors or other judges who happen to have adult trials at the same time. A special courtroom should be held to conduct child trials, and conducting trials on certain days only, there are no other trials except for child criminal trial.

Regarding the human resources of child judges, they need to be supplemented and equipped with in-depth knowledge of juvenile justice and child protection. Based on the results of the research, it is known that coordination between related-agencies such as the Police, Public Prosecutors is not fast and precise or cannot present witnesses. It could also be because the head of Penitentiary has not been able to read the results of social research conducted on children, because it has not been finished with the reason for the request to conduct social research is late. In this case, there is a throwing of responsibilities between agencies, this shows that aspects of child protection are not reflected.

Third, Development stage - the obstacle in guiding prisoners is the lack of truly professional human resources. Based on the results of the research, it is known that the Penitentiary officers are more dominant the

¹ Munir Fuady, and Sylvia Laura L. Fuady, 2015, *Hak Asasi Tersangka Pidana*, Prenada Media Grup, Jakarta, p.32.

² Maidin Gultom, *Op.Cit*, p. 100.

³ *Ibid*

graduates of Senior High Schools, such as graduates of Junior- and Senior High School, Senior Economic High School, and equivalent. There are only a few people with a Bachelor degree. Education owned by the Penitentiary officer will affect the understanding of the importance of children protection, knowledge and understanding of the laws and regulations relating to juvenile justice, child welfare and other related regulations.

Also, the education will affect the level of ability to find ideas and policies taken in the context of child protection, especially if the legislation does not explicitly specify or does not regulate certain things. The ability to do approaching to the children in changing their mentality and behavior through development/guidance are influenced by the level of Penitentiary officer's education. If human resources are not improved, it will have a negative impact that can create prisoner not get better but become monsters that ready to commit offense again after serving their punishment in the Penitentiary. Special education is needed for Penitentiary officers, providing opportunities to participate in upgrading, seminars and short courses, so that cooperation with related institutions both government and private institutions such as NGOs, universities, companies and others needs to be established, as long as there is a connection with the development of child convicts.¹

These obstacles become a factor that prevents children from getting their full rights in the juvenile criminal justice system while we know that protection is one of the children's rights that must be fulfilled. This is what is even mentioned in the International Convention on the Rights of the Child. Not providing protection to children is tantamount to ignoring or violating child rights and the Child Protection Acts. We know that children of a certain age are not enough to be able to protect themselves. That is why it is the duty of adults to provide protection for them. And for that purpose the child is in the midst of an adult.

In handling and protection effort to children who dealing with the laws, the problem is very complex, not only due to the actions of the child resulting in victims, but far from why the child commits a criminal act which ultimately harms himself. The judicial process that must be taken by children as a form of responsibility for their actions has an impact on the development of child, the stages of each judicial process starting from the level of investigation, prosecution, trial and development in the Penitentiary take quite a long time and not infrequently occur irregularities and the injustice of each process.

The children's rights which are inherent and protected by law are often ignored by the judicial process, and it is felt to be still lacking in protecting the best interests of the child, so other efforts are needed in the settlement of children cases dealing with the law.² In fact it shows that in many prisons, children and young people are often denied their rights. Furthermore, the juvenile criminal justice process has a negative impact in the form of stigma (as a naughty child) which can increase deviant behavior and can form a criminal character so that it is difficult for children to return to society, therefore efforts should be made so that children do not imprisoned.

In this point, the diversion finds its relevance as an effort to resolve conflicts in the case of a crime committed by a child. By diversion, it is not every criminal case where the perpetrators of children are directly included in the criminal justice system. This is intended for a conflict resolution through a forum referred to as mediation become an alternative form of dispute resolution outside the court. The idea of diversion is a thought of granting authority to law enforcement agencies to take policy actions in dealing with or settling child violation issues with does not take formal measures, among others to stop or not continue the criminal justice process or return to the community and other forms of social service activities. The diversion can be carried out at all levels of examination, from investigation, prosecution, trial in the court to the decision implementation stage. This implementation is intended to reduce the negative impact of children's involvement in the justice process.

The diversion gives benefits for the community in the early and rapid handling of deviant behavior. This early handing also saves costs which are a burden incurred by the local police. The child who committed the crime will be guided by the police, the teenage conditional criminal advisor, the justice department officer, and the school to contact the police. Then, the teenager voluntarily participates in consultation and/or suitable education and social activities.

5. Conclusion

The implementation of the children rights' protection in the process of juvenile criminal justice has been going well, although there are still rights of the children that have not been fully fulfilled. Such as the right to be free from torture, punishment or other cruel, inhuman and degrading treatment, not being arrested, detained or imprisoned. The process of juvenile criminal justice is not fully running smoothly, because in practice several obstacles are encountered. These obstacles include: the lack of understanding from law enforcement officials regarding child protection, limited number of juvenile judges or judges specializing in child criminal cases, many courts still do not have a special courtroom for juvenile court trial, the lack of defendant's knowledge of the rights owned, there is no place to child custody or a Penitentiary for Children, so that child custody must be joined with adult in the sense that child custody with adult prisoners is not separated so that it can adversely

¹ Munir Fuady and Sylvia Laura L. Fuady, *Op. Cit.* p. 45

² O.C Kaligis, 2006, *Perlindungan Hukum atas hak asasi tersangka, terdakwa dan terpidana*, P.T Alumni, Bandung, p. 77.

affect child custody.

Providing special education for law enforcement apparatuses related to the case of children, by providing the opportunity to attend upgrading, seminars and short courses, so that requires cooperation with related-institutions both government and private institutions, such as NGO, universities, companies and others, as long as there is a connection with the development of child prisoners.

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