

In re Brian Keller

REPORT OF WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT

MAY 27, 2022

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STATEMENT OF INTEREST

1. The United Nations Working Group of Experts on People of African Descent is comprised of international law, race, and human rights experts, charged with fact-finding and reporting to the United Nations Human Rights Council on issues at the intersection of race and human rights. The mandate of the United Nations Working Group of Experts on People of African Descent was developed at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001 and set forth in the Durban Declaration and Programme of Action. The Working Group was established in 2002 by the Commission on Human Rights resolution 2002/68 and subsequently renewed by the Commission on Human Rights and the Human Rights Council.

2. Within its mandate, the Working Group is required “to study the problems of racial discrimination faced by people of African descent living in the diaspora,” “to propose measures to ensure full and effective access to the justice system by people of African descent,” and “to address all the issues concerning the well-being of Africans and people of African descent contained in the Durban Declaration and Programme of Action.”¹ In addition to annual sessions, country visits, financial and development activities, and reporting to the U.N General Assembly and Human Rights Council, the Working Group also responds to information and allegations received concerning its mandate under the communications procedure. Pursuant to this mandate, the Working Group conducted a fact-finding visit to Switzerland in January 2022 and met with Brian Keller and people with relevance to his case in government and in civil society.

3. This expert report was drafted on behalf of the Working Group by Dominique Day, a member appointed to the Working Group of Experts on People of African Descent in 2018 by the President of the UN Human Rights Council. Ms. Day served as Chair-Rapporteur of the

¹ The Working Group is mandated, pursuant to U.N. Human Rights Council resolution 9/14, in pertinent part: (a) To study the problems of racial discrimination faced by people of African descent living in the diaspora and, to that end, gather all relevant information from Governments, non-governmental organizations and other relevant sources, including through the holding of public meetings with them; (b) To propose measures to ensure full and effective access to the justice system by people of African descent; (c) To submit recommendations on the design, implementation and enforcement of effective measures to eliminate racial profiling of people of African descent; (d) To make proposals on the elimination of racial discrimination against Africans and people of African descent in all parts of the world; (e) To address all the issues concerning the well-being of Africans and people of African descent contained in the Durban Declaration and Programme of Action; (f) To elaborate short-, medium- and long-term proposals for the elimination of racial discrimination against people of African descent, bearing in mind the need for close collaboration with international and development institutions and the specialized agencies of the United Nations system to promote the human rights of people of African descent through, inter alia, the following activities: (i) Improving the human rights situation of people of African descent by devoting special attention to their needs through, inter alia, the preparation of specific programmes of action; (ii) Designing special projects, in collaboration with people of African descent, to support their initiatives at the community level and to facilitate the exchange of information and technical know-how between these populations and experts in these areas; (iii) Liaising with financial and developmental institutional and operational programmes and specialized agencies of the United Nations, with a view to contribute to the development programmes intended for people of African descent by allocating additional investments to health systems, education, housing, electricity, drinking water and environmental control measures and promoting equal opportunities in employment, as well as other affirmative or positive measures and strategies within the human rights framework.

Working Group from August 2020 – May 2022. Ms. Day was also Chair-Rapporteur during the Working Group’s fact-finding country visit to Switzerland. This report was finalized and adopted by the entire Working Group of Experts on People of African Descent during its 30th Session in May 2022.

The Visit of the Working Group of Experts on People of African Descent

4. The UN Working Group of Experts on People of African Descent met with Brian Keller, in person, at JVA Pöschwies in Zurich, Switzerland on 19 January 2022. The lengthy visit took place in a small outdoor cell with high walls, adjacent to Brian Keller’s solitary cell, an area designed to allow Brian outdoor time without access to any persons. The delegation, which included two members of the Working Group, two members of its UN secretariat, and two interpreters, as well as Mr. Keller congregated in the outdoor area, in person and without restraints. The area was under video surveillance, via cameras embedded in the ceiling of the outdoor area, so visual surveillance of the meeting may be available from Swiss authorities. The Working Group also had the opportunity to meet with Brian Keller’s father and sister, individuals involved in his case, and to speak with prison personnel and others about the case.

5. On 26 January 2022, the Working Group issued its preliminary conclusions and recommendations to Switzerland, which included analysis relating to Brian Keller, namely that his situation was a clear example of systemic racism in Switzerland.²

INTRODUCTION

6. Brian Keller, a young Swiss man of African descent, has been subject to an extraordinarily extreme and comprehensive denial of his human rights under the Convention on the Rights of the Child, the Convention Against Torture, the International Convention to End All Forms of Racial Discrimination, and other treaties. The record in this case is replete with violations of his rights, amounting to a nearly wholesale denial of childhood and personhood. There is no single allegation or series of allegations that justify the amount of time Brian Keller has spent incarcerated, or the various (often violent) interventions he has experienced at the hands of the State. The misconduct alleged is consistent with adolescence and provocation, even if true; it is not wanton or indiscriminate crime against people or property. No crimes against the community occurred. Yet, the State has consistently criminalized and punished Brian, rather than demonstrating insight into the developmental needs and process of a child.

7. Brian Keller’s race is directly relevant to the current situation. Throughout, Brian’s own actions have been interpreted as less childlike, more culpable, less innocent, and more criminal than his peers.³ The decision-making that has resulted in a comprehensive denial of his childhood and freedom has not been checked by the expertise available to indicate this was a

² See [Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland](#), Jan. 26, 2022 at ¶21.

³ Compare Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *Journal of Personality and Social Psychology* 526 (2014) (“Black boys are seen as older, less childlike, less innocent, and that observers offer Black children a less essential conception of childhood than their White same-age peers.”)

child who should be treated as a child. The judicial, legal, and medical authorities reviewing or overseeing his situation have upheld denial after denial of his human rights, even in the face of evidence that actions taken purportedly in his ‘best interests’ were extreme and unusual, if not unprecedented.

8. Nevertheless, it appears that no state personnel have examined the role that systemic racism, a culture of denial, or lack of awareness of their own racialised decision-making played in the trajectory of Brian Keller’s fate at the hands of state officials. Nor has there been a public reckoning of the instrumentalization of race by the State and by the media to shape opinion and consciousness of Brian’s situation within the public imaginary, despite a lack of underlying conduct to justify his protracted denial of liberty, childhood, access to family, education, and more. There is increasingly an understanding inside Switzerland that race played a role in perpetuating the injustice, torture, and repeated denials of human rights. The cost to Brian Keller of this complex and intersecting denial of rights is enormous and ongoing. An exceptionally gifted child was recharacterized as a danger to the community and explicitly referred to as a “monster.” But Brian Keller is not and has never been a monster. Even today, his potential and his contributions remain unfulfilled and unrecognized.

9. In parallel, by the internationally agreed definition of the term, Brian Keller has been subject to torture on the basis of his race at the hands of the State since he was a young child. It has resulted in a widespread, overlapping, and ongoing deprivations, including a wholesale denial of his rights under the Convention on the Rights of the Child, and other core human rights treaties, and a theft of nearly his entire childhood. This surprising and untenable situation persists, despite clear violations of human rights and public policy in Switzerland. Neither law nor practice nor policy has superseded Brian Keller’s race as the key factor in decisions made about his life and his freedom. Even Brian’s demonstrations of his desire and capacity to live in the community and reclaim his life – via a previous successful community-based placement and his current successful period in a general population setting after years of solitary confinement and public engagement by JVA Pöschwies claiming such an event was not possible – have not resulted in a revision of the negative stereotyping he has been subject to by many, or in the acceptance that he is ready, willing, and able to live in the community as a productive citizen.

10. Much of the focus on Brian’s case thus far has focused on inappropriate use of solitary confinement and isolation measures as punitive responses to his adolescent conduct. However, (a) the wholesale deprivation of childhood for a twice-exceptional child forced into during protracted periods of incarceration and psychiatric commitment, (b) the acknowledged determinations to deprive him of his freedom against the best interests of the child but instead based on political expediency and a public smear campaign, and (c) Brian’s ongoing incarceration each constitute ongoing torture and severe violations of his human rights, even as the solitary confinement has been recently lifted. Today, these severe violations of Brian’s human rights persist as he remains incarcerated due to scaffolded and racialised decision-making of medical, justice, police, and prison officials that have operated to objectify and vilify, i.e., erase the individual, Brian Keller, a Swiss child entitled to care and protection, from the story.

BACKGROUND

Who is Brian Keller today?

11. Today, Brian Keller is a thoughtful young man with a ready smile. He is engaging, sober, well-spoken, and warm. He has a serious manner belied by a quick wit and an incredibly sharp mind. Despite the multiple deprivations he has been subject to his entire childhood, including uninterrupted solitary confinement for the last three-and-a-half years, he easily welcomed an entire UN delegation of six people who spontaneously appeared at his door. In the hour we spoke, Brian was relaxed and comfortable. He spoke with open body language, candid and unfiltered responses, and consistent eye contact. He fluidly corrected a small mistranslation, demonstrating facility with English and German despite the denial of formal education for nearly his entire childhood and adolescence. He immediately recognized a book referenced by a member of the UN delegation, offering a critical analysis from a new perspective on the spot. Throughout, Brian demonstrated a complex and nuanced understanding of his situation, including the racialized nature of decision-making in his case and the ongoing racialized harassment and provocation at the foundation of his incarceration.



Pic 1 Brian Keller during his 1-hour+ meeting with the Working Group at JVA Pöschwies (January 2022)

12. Perhaps most importantly, Brian Keller is a child of Switzerland. He was born, in France, to a white Swiss father and a mother of African descent. He has never lived anywhere but Europe. Brian was recognized as a gifted and talented child at a very young age but, nevertheless, his earliest childhood memories include specific incidents of racism and discrimination. One oft-repeated demand, “Go back to where you came from,” was particularly puzzling to Brian as a young child. “I didn’t understand. My dad was from Switzerland. Where am I supposed to go back to?” Yet, he has continued to hear this appeal including from State personnel during his periods in custody, and from the media, even until today. The grave failures of the administration of justice in his case, from his earliest childhood encounters, also reflect the idea he was consistently “othered” in the public imaginary. The severity of treatment he received, particularly vis-à-vis the Convention on the Rights of the Child, also suggest the State did not view Brian Keller as its own child from a very early age.

Twice Exceptional

13. Brian Keller, a Swiss citizen born September 21, 1995, was determined to be a gifted child, by his teachers in kindergarten, and referred for special enrichment education as early as the age of 5.⁴ At the same time, he exhibited clear signs of Attention Deficit/Hyperactivity

⁴ In kindergarten, Brian was registered for “Universikum” courses: “City of Zurich’s specialist department for gifted students offers the “Universikum” program for gifted students. “Universikum” courses are subordinate to the school’s own support measures for gifted students. They deepen or complement the curriculum. The courses are aimed at highly gifted students from kindergarten to 6th grade.” https://www.stadt-zuerich.ch/ssd/de/index/volksschule/besondere_beduernisse/begabung_begabten_foerderung/universikum.html.

Disorder (ADHD) from a very young age. In Brian's case, he sometimes exhibited signs of aggressiveness, and even violence, as a young child, perhaps because he was underchallenged.⁵ Brian's ADHD symptoms were adequately pronounced that he was referred to outpatient psychiatric treatment at age 10 due to severe behavioural concerns.⁶ Thus, at a very young age, Brian was understood to be, in today's terms, "twice exceptional."⁷

14. However, it appears as though the prosecutors, police, and the courts never considered existing global scientific research,⁸ including that "twice exceptional" children, like Brian, were often misunderstood and misdiagnosed.⁹ Brian never benefited from any intervention grounded in the research that children like him were particularly receptive to intervention strategies to promote learning and growth.¹⁰ Often twice exceptional children are subject to separate interventions that seek to remediate their disability (in this case, ADHD) while ignoring or separately addressing their talents and gifts, i.e., squashing their potential rather than nurturing it

⁵ "Typical behaviors among academically gifted learners with characteristics of [emotional and behavioral disorders] (EBD) include disruptiveness, aggression, academic underachievement, poor self-concept, oversensitivity, insubordination, and being off task" Owens, C.M., Ford, D.Y., Lisbon, A.J. and Owens, M.T. (2016) '*Shifting paradigms to better serve twice-exceptional African-American learners*', *Behavioral Disorders*, 41(4), 196 (citing Karnes, F. A., Shaunessy, E., & Bisland, A. (2004). *Gifted students with disabilities: Are we finding them?* *Gifted Child Today*, 27(4), 16-21; Missett, T. C. (2013). *Exploring the relationship between mood disorders and gifted individuals*. *Roeper Review*, 35(1), 47-57; Peterson, J. S. (1997). *Bright, tough, and resilient --and not in a gifted program*. *Journal of Secondary Gifted Education*, 8(3), 121-136; Simonsen, B., Little, C. A., & Fairbanks, S. (2010). *Effects of task difficulty and teacher attention on the off-task behavior of high ability students with behavior issues*. *Journal for the Education of the Gifted*, 34, 245-260).

⁶ See *In re Brian Keller*, Federal Tribunal Judgment of September 14, 2011 (redacted), ¶5.1, at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html

⁷ Others believed to be twice exceptional historically include Albert Einstein, Charles Darwin, Leonardo da Vinci, Michelangelo, Wolfgang Mozart, and many more.

⁸ See Amran HA, Majid RA. *Learning Strategies for Twice-Exceptional Students*. *Journal of Natural & Applied Sciences*. 2018;22(3): 954-976 (global survey of research on interventions and effectiveness for twice exceptional children). See also Foley Nicpon, M. et al. (2011) '*Empirical Investigation of Twice-Exceptionality: Where Have We Been and Where Are We Going?*', *Gifted Child Quarterly*, 55(1), pp. 3-17 (comprehensive summary of global empirical research from 1991-2011 examining gifted students with specific learning disabilities, Attention-Deficit/Hyperactivity Disorder, or autism spectrum disorders).

⁹ See e.g., Reis SM. (1995) *Talents in two places: case studies of high ability students with learning disabilities who have achieved*; Schiff MM, Kaufman AS, Kaufman NL. (1981) *Scatter analysis of WISC-R profiles for learning disabled children with superior intelligence*. *J Learn Disabil*. 14:400-404; Maker, C. J. (1976). *Searching for giftedness and talent in children with handicaps*. *The School Psychology Digest*, 5: 24-37.

¹⁰ See Baum SM, Owen SV. *To Be Gifted & Learning Disabled: Strategies for Helping Bright Students with Learning & Attention Difficulties*. Prufrock Press Inc (2004); King EW. *Addressing the social and emotional needs of twice-exceptional students*. *Teaching Exceptional Child* (2005); Winebrenner, S., & Brulles, D. (2012). *Teaching gifted kids in today's class- room: Strategies and techniques every teacher can use*. Minneapolis, MN: Free Spirit Publishing; *Twice-exceptional kids; a guide for assisting students who are both academically gifted and learning disabled*. Reference & Research Book News (Aug. 2008) (includes tips for teachers and parents on meeting the special needs of intellectually gifted students who are challenged by such disorders as attention-deficit/hyperactivity disorder).

in its complexity.¹¹ Throughout the relevant period, until today, Brian was never recognised as a ‘twice exceptional’ child who required enrichment and stimulation, rather than imprisonment, and whose misconduct reflected immaturity, disability, and lack of appropriate forms of intervention and guidance by educational, medical, and justice system professionals in his life.

Eleven: a year of false allegations, ongoing detention, and social isolation

15. Shortly after his 11th birthday, Brian was arrested at his home, handcuffed in front of his parents, and taken away by the police on suspicion of having committed arson on October 13, 2006. The police reportedly did not present an arrest warrant or allow his parents to accompany him. Mr Keller was interrogated at the Zurich police station, without the presence of his parents or a social worker and subsequently transferred to the Winterthur detention centre. An ex officio lawyer was then appointed to represent him.

16. In Winterthur, Brian was reportedly locked in an individual cell and deprived of contact with the outside world for approximately 9 days. After this, family visits were authorized, once weekly. Brian was not given access to schooling during this period, a deprivation of his right to education, and had minimal contact with others held in the facility. The personnel in the detention facility reportedly imposed disciplinary measures and made racist, anti-Black comments toward him, in response to his protests at being falsely accused. This prison-like environment deeply affected Brian, creating in him a feeling of injustice and social exclusion. Brian was reportedly released on 27 November 2006, after 45 days in detention, as the charges against him were proven unfounded.

17. Even though the charges against him had proven false, Brian was not released and allowed to go home with his family. From Winterthur detention centre facility, Brian was sent to the Zurich University Hospital Department of Child and Adolescent Psychiatry on 28 November 2006, a reportedly therapeutic measure where medication was used to attempt to calm and treat 11-year-old Brian and where he was held until 13 April 2007. Brian spent more than 4 months in the locked ward at Zurich University Hospital and denied the home visits and outdoor time other children were permitted. Any perceived agitation or resistance was met with medication and forcible confinement in an isolation room. Brian disliked being medicated and family visits were restricted, based on the claim that his parents would disrupt the “calming process” the facility was conducting. During one family visit, Brian was saying goodbye to his father and hospital personnel physically pulled him away. While 11-year-old Brian was crying and calling for his father, his father argued with the orderlies. In the aftermath, Brian was locked in solitary confinement and his father was banned from visiting for weeks. Brian was not given access to schooling during this period, a deprivation of his right to education, and had minimal contact with other children locked in the facility.

18. On April 13, 2007, Brian was transferred to a new site of internment at the Basel Hospital Admission Home, pursuant to a so-called therapeutic protection measure mandated, under article

¹¹ See Rizza, M. G., & Morrison, W. F. (2003). *Uncovering stereotypes and identifying characteristics of gifted students and students with emotional/behavioral disabilities*. *Roeper Review*. 25:73-77; Gierczyk, M.; Hornby, G. (2021). *Twice-Exceptional Students: Review of Implications for Special and Inclusive Education*. *Educ. Sci.* 11, 85: 1-2.

14 of the criminal code for minors (on outpatient treatment) by the general juvenile prosecutor of the canton of Zurich. Brian spent 6 months locked up in the Basel hospital (AH). This facility was reserved for adolescents aged of 16 or older, who have had trouble with the law. But Brian was just 11-years-old. He remained there until 22 September 2007, the day after he turned 12-years-old.

19. At the start of his internment in Basel, reportedly under the effect of sedatives and disturbed by persistent side effects such as sleep disturbances, weight gain, *inter alia*, Brian decided to stop treatment. As a result, he was placed in a single isolation room, under continuous surveillance, 24 hours a day, by two alternating guards. For three weeks, Brian was reportedly confined in "sensory isolation," a term commonly used for the practice of using a straitjacket, and permitted no contact with anyone. After this period, his parents were permitted supervised visits once every two weeks, except when he was held in the "isolation room" and prohibited from any contact. As part of this measure, Brian had access to schooling only as a reward for hospital personnel's determinations of his compliance with the rules, including taking medication and talking to a psychologist. Brian hated the Basel Admission Home and they eventually sought a new placement for him.

20. Brian spent nearly the entirety of his 11th year of life incarcerated or in psychiatric detention, seeing his family only during supervised visits, often far less than once a week. He had virtually no access to education, to other children, or to childhood. The denial of his human rights was consistently stated, as was legally required, as in his best interests despite the extreme and unusual measure of locking an 11-year-old child away from his family without a very serious basis. These experiences of solitary confinement, prolonged "sensory confinement", prohibition of social contact, except sporadic family visits, and deprivation of Brian's rights to education, family, movement, and more have had a traumatic effect on 11-year-old Brian.

Twelve: multiply gifted, inadequately challenged, and proven compliance with targeted, individualized intervention

21. On 22 September 2007, the day after he turned 12-years-old, Brian was placed in a foster placement on a farm in Bavaria run by a pensioner who took in two children at a time. Although homesick for his family, Brian also found he had a gift for caring for animals on the foster parent's farm where he was placed and where he was responsible for feeding some animals, including horses, dogs, and chickens. His family was able to visit for two weeks at one point, the longest time he had spent with them since his false arrest over a year earlier. Brian loved the animals and thrived on the responsibility. He told his family that he "did well with them too," stating, "You know, these are the only living creatures that have never done anything to me and that understand me." Brian was not given access to schooling during this period, a deprivation of his right to education. Brian remained there until 23 January 2008.

22. On 23 January 2008, Brian's foster placement ended unexpectedly and he returned to his family home, where he lived initially just with his father who worked full-time. His mother was in France with relatives and his sister had her own home and children at the time. Brian had private instruction from a teacher daily, which he enjoyed. The tutoring took only a few hours each day, after which his time was unstructured. Brian would spend time outdoors, at his father's office, or with his sister and her family. Even at 12, Brian showed strong executive

functioning and taking of responsibility in this context. Although Brian travelled to the tutoring on his own, he was always on time and engaged. The teacher nicknamed Brian, “Prince Charming,” for his ability to distract her from the lesson with questions or debate but also noted he was easily redirected to the lessons when she set the limit to the distraction. This was the first regular, formal educational instruction Brian had had in years, and he thrived in individual instruction that leveraged his strengths rather than amplifying his social isolation and absence from formal education. This teacher also confirmed Brian was a gifted student.

Thirteen: Ongoing detention

23. Brian was home with his family until shortly after he turned 13-years-old. From approximately 6 October to 1 December 2008 and 1 April to 1 October 2009, Brian was remanded to Horgen Prison, a pretrial and postconviction detention facility that includes juvenile detention for children over 16-years-old. The allegations reportedly involved mischievous misconduct, consistent with adolescence and unstructured time.¹² Reasons cited to justify the incarceration of 13-year-old Brian included claims of “absence of alternatives”, “preventive protective measures” and even his “own protection.”

24. Brian was the first 13-year-old child incarcerated at Horgen in the history of the prison. Reportedly, the warden stated repeatedly, "Brian doesn't belong here - not based on his age, and most importantly, he has no sentence to serve." As the youngest child ever incarcerated there, Brian was placed in isolation immediately upon entering the facility and was in *de facto* solitary confinement continuously. He was allowed to walk for one hour each day in the yard, alone, and saw his parents once per week through a glass partition. He received no schooling until the final 2 months when, after repeated entreaties from his parents, Brian was given 1 hour of instruction per week. Effectively, Brian was deprived of his rights to education, his parents, and his childhood in this period. He recalls this period as particularly traumatic. The sleep disturbances that Brian would have until he was 18 years old started at this time.

25. On approximately 1 December 2008, the federal court sent Brian back to the Basel Admission Home, the facility where he had spent nearly half of the year immediately prior to turning 12-years-old. The prison administration at Horgen Prison, as well as the federal court, had demanded a transfer, as prison was unsuitable for a child, particularly one of Brian’s age. However, the Basel facility was designated for children who had run afoul of the law, but only after they were 16 years of age as well, just like the prison. He had not wanted to return there, resisted whenever he could, and was held in isolation and denied access to his parents and family as a punishment. Brian was not given access to schooling during this period, a deprivation of his right to education, in addition to the deprivations of family, parents, and social isolation. Nevertheless, Brian remained locked in a “therapeutic” ward in Basel for 4 months, until March 31, 2009. At no time did Brian benefit from any medical follow-up to assess the impact of solitary confinement on his behavioural disorder. On 1 April 2009, Brian was returned to Horgen Prison, where he celebrated his 14th birthday in solitary confinement. He remained at Horgen until 1 October 2009. On November 16, 2009, the Zurich Juvenile Court reportedly ruled against 14-year old Brian on a laundry list of criminal mischief charges accumulated over the

¹²See *infra* at ¶¶ 27, 28, 92, 93.

prior three years, between 2006 and 2009, and imposed an 8 months sentence of incarceration detention in Horgen prison.

Punishing adolescence: Brian's acts of adolescence, not acts of crime, have consistently been penalized

26. It appears that few, if any, Swiss officials involved with Brian saw him as a child entitled to care and protection, even at a very young age. His therapeutic or criminal justice interventions suggest experimentation rather than care. The scientific literature suggests that Swiss authorities were punishing acts of adolescence, rather than acts of crime or serious misconduct, in the decisions made about Brian's life. Adolescence is a lengthy process involving children's asynchronous development and maturation cognitively, socially, emotionally and physically.¹³

27. The scientific research on human development in adolescence is relevant across cultures, countries, and regions.¹⁴ Adolescents have less impulse control, less cognitive control, and are less consequence-oriented in their thinking than adults, well into their mid-twenties.¹⁵ Notably, research findings in behavioural science are mirrored by neuroscience research, with respect to the development of the adolescent brain.¹⁶ Adolescents' impulsive reactions, risky behaviours, lack of consequence-oriented thinking, and ability to exert self-control and regulate their responses are developmental and universal as they mature in a staggered manner with their psychological maturity lagging behind their physical and intellectual maturity.

¹³ See B.J. Casey, Kim Taylor-Thompson, et al. *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*. *Annual Review of Law and Social Science*. 16:1, 203-222, 211 (2020) (“[T]here is no one age at which the adolescent reaches maturity in all psychological capacities. Different psychological capacities (cognitive, emotional, social) mature at different ages, and this development extends into the early twenties. A consequence of this type of distinction in developmental trajectories of psychological capacities may be that in some contexts, young people appear to display controlled behavior, but in other contexts their behavior may look out of control, or that in some contexts young people can weigh the costs and benefits of their options, but in other contexts they lack the ability to engage in this type of matured decision making”)

¹⁴ See e.g., Icenogle G, Steinberg L, Duell N, Chein J, Chang L, et al. (2019) *Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: evidence for a “maturity gap” in a multinational, cross-sectional sample*. *Law Hum. Behav.* 43:69-85; Steinberg, L. et al. (2018) ‘*Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation*’, *Developmental Science*, 21(2), at 1; Duell N, Steinberg L, Icenogle G, Chein J, et al. (2018 May); *Age Patterns in Risk Taking Across the World*. *J Youth Adolesc.* 47(5):1052-1072 (“age patterns in risk taking are largely consistent across cultures, at least in the very general sense that risk taking rises in adolescence and subsequently declines in adulthood. This cross-national similarity is consistent with recent reports of cross-cultural comparability in age patterns of sensation-seeking and self-regulation”).

¹⁵ Icenogle, G. and Cauffman, E. (2021), *Adolescent decision making: A decade in review*. *J Res Adolesc.* 31: 1006-1022 at 1012. (“Compared to adults, adolescents evince greater reward sensitivity, impulsivity, and sensitivity to peer influence, and less future orientation. While most laypeople readily accept these development patterns as they pertain to mid- and late adolescence (i.e., youth of high school or college age), it is notable that development in these self-regulatory capacities continue into mid-20s.”)

¹⁶ Icenogle, G. and Cauffman, E. (2021), *Adolescent decision making: A decade in review*. *J Res Adolesc.* 31: 1006-1022 at 1012. (at adolescence, reward regions and certain brain circuitry “develop rapidly, beginning at pubertal onset. Yet, the development and refinement of cognitive control regions (including the prefrontal cortex and its connections) are more gradual.”)

28. Although Brian was the paradigm example of this asynchronous maturation process in adolescence, this was never considered or accommodated in the criminal and “therapeutic” interventions conducted. While Brian was 14-15 years old, different placements outside of his home were tried, many of which failed. These primarily involved “various institutions” selected by child welfare or juvenile justice authorities.¹⁷ At some point he was placed in a school for dropouts, despite his gifted status, and his frustration grew. Although he was a child, the federal court’s description of these failed placements consistently blamed Brian, who was at all times relevant to the matter, a minor child below the age of legal responsibility. Moreover, behaviour fully consistent with Brian’s ADHD and frustration at ineffective interventions was consistently cited as the basis for failed placements.¹⁸

Fifteen: Two attempts at suicide met with torture re-characterized as ‘medical’ interventions

29. On June 15, 2011, 15-year old Brian got into a verbal altercation with two young men 3 years older than him, in Schwamendinger Square. After one of them punched Brian in the face and knocked him to the ground, the other stabbed him in the back. Brian instantaneously jumped up and enveloped his attacker in a bear hug, stabbing him twice in the back, and ran away. Brian was arrested, taken into custody and a lengthy investigation for attempted murder ensued, and Brian was ultimately charged with aggravated assault based on these events. Although he did not initiate the violence, and his actions were in self-defense, his remorse was immediate and evident in the court documents relating to the case. Nevertheless, Brian spent nine months in “precautionary” protective custody in Limmattal prison. During his detention, he was reportedly placed in solitary confinement for 180 days, locked in his cell 23 hours a day, without access to education, work, or physical activity. His parents were reportedly allowed to visit him only for one hour per week, behind a glass wall.

30. Under these conditions, Brian attempted suicide twice at the age of 15. The first time occurred on July 5, 2011, by attempted hanging. After this, he was admitted to the Psychiatric University Hospital of Zurich for one day. His family was not informed of this suicide attempt, and the solitary confinement regime depriving him of all contact with the outside world was not revised in response to his attempted suicide. Brian also did not have a personalized medical follow-up or other medical interventions focused on preventing another suicide attempt. A few months later, in September 2011, Brian tried to commit suicide again, by swallowing a mixture of shampoo, ointments and disinfectant gel. He was again admitted to the Psychiatric University Hospital in Zurich.

¹⁷ See *In re Brian Keller*, Federal Tribunal Judgment of September 14, 2011 (redacted), ¶5.1, at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html

¹⁸ See e.g., *In re Brian Keller*, Federal Tribunal Judgment of September 14, 2011 (redacted), ¶5.1, at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html (“**Because** of the complainant’s uncooperative and (sometimes massively) aggressive behavior towards people and material, the placements in various educational and care facilities had to be broken off again after some time.”) (emphasis added)

31. The same day as Brian's *second* attempt to kill himself,¹⁹ the federal court upheld the legality of continuing to "precautionarily" imprison Brian in Limmatal Prison for his own good, despite the ongoing use of solitary confinement and the lack of any educational or therapeutic resources. Brian's family had challenged the "precautionary placement" detention, but the federal court openly stated its intent to disregard Brian's rights to education, and other rights, in defending the extraordinary imprisonment of a child post-conviction in Switzerland.²⁰ The severe irony of Brian's increasing suicidality in circumstances continually affirmed by courts as being in his "best interests" is only exacerbated by the subsequent actions taken by medical authorities that legally constituted torture.

32. As a result of Brian's second suicide attempt, he was strapped to a bed in 7-point restraints continuously for 13 days, while heavily medicated by doctors at the Psychiatric University Hospital in Zurich. A sedative, promazine, was allegedly given to him by the doctors at a dosage that was three times the usual dose, in addition to other powerful drugs. This intervention was later found to be unreasonable, in conjunction with the concurrent medication of this adolescent, by the High Court. Brian was completely immobilized by a 7-point fixation system, with tight belts, loosened only to permit him to urinate and defecate while strapped to the bed. He was not allowed to use a toilet or take a shower. His hospitalization was not reported to his family. Nor was either suicide attempt. Brian's family was only allowed to visit him for his birthday, 10 days after his admission to hospital. Reportedly, Brian could not remember their visit the very next day, due to the heavy sedative regime.

33. Brian's lawyer reportedly challenged his status of being continuously strapped to a bed, and demanded that he be allowed out of the inhumane and degrading physical restraints. Eventually, he was permitted one accompanied walk, for one hour per day. Given the effects of the ongoing over-medication, he was unable to walk unassisted. After the 13th day, Brian was transferred to the secure wing of the Clinic for Forensic Psychiatry at the Rheinau Psychiatric Centre in Zurich,²¹ where he was weaned off the high doses of medication over the course of two weeks. He remained at that facility for an additional 18 days unmedicated, then was transferred to the youth forensic department at Basel Psychiatric University Hospital and then remanded back to the Limmatal Prison until March, 2012, when he was 16 years old.

34. The State's response to Brian's experience, even after he attempted to kill himself twice, denied the role of his ADHD, his strong intellectual skills, and his adolescence in his frustration and conclusion that there was no hope. As is true in many countries, self-harm and road injury (the precise risky and impulsive actions studied in the literature on adolescent decision-making) account for the top two causes of death for young men in Switzerland (ages 15-24) for most of

¹⁹ The court issued a detailed analysis denying Brian's appeal of a lower court's August 2011 decision but also noting various challenges had been waived by counsel on appeal, as had the right to reply. *See generally In re Brian Keller*, Federal Tribunal Judgment of September 14, 2011 (redacted), at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html.

²⁰ *See In re Brian Keller*, Federal Tribunal Judgment of September 14, 2011 (redacted), ¶5.4-5, at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html.

²¹ Reportedly, the only reason he was not admitted there from the start was that there were no available beds at the Rheinau Psychiatric Centre.

the past two decades.²² Self-harm was the leading cause of adolescent death the year Brian attempted suicide. Yet, the chosen psychiatric interventions in response to Brian degraded rather than affirm his humanity over and over again and, according to one expert, reflected practices and decision-making that were not standard operating procedure in psychiatry. One expert in forensic psychology, retained by the prosecutors in Brian’s case, confirmed it was an unprecedented period of fixation, or physical restraint, particularly given the simultaneous overmedication of Brian.²³

35. Brian’s family lodged a complaint for bodily harm and unlawful confinement in September 2011 against the three doctors in charge at the Zurich Psychiatric University Hospital. The charges were initially dismissed by the Zurich public prosecutor’s office. Not until *ten years later* was an investigation opened, in response to an appeal made by Brian’s lawyer at the time. At that time, the doctors were acquitted in the first and second instance courts, despite clear guidance from the European Court of Human Rights that this constituted “degrading and inhumane treatment” and existing protocols against such actions set in 2006 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.²⁴ Although even the forensic psychology expert retained by the prosecutor testified he had never seen a period of thirteen days of fixation in his entire career,²⁵ the court ruled that the use of restraints and strapping Brian to the bed, i.e., the fixation measures, were proportional and legal, calling Brian’s circumstances an extremely exceptional situation.²⁶ Reportedly, Brian’s lawyer appealed and the decision was initially upheld in August 2020. A subsequent appeal in federal court is pending.

²² World Health Organization (2019). Cause specific mortality (2000-2019) – Top 10 causes of death in Switzerland for males aged 20 to 24 years, Top 10 causes of death in Switzerland for males aged 15 to 19 years (Global Health Estimates). <https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates/ghe-leading-causes-of-death>

²³ The expert opinion came from the Berlin forensic psychiatrist, Werner E. Platz, who stated that in his many years of work he has never experienced a fixation period of thirteen days. Blulle, E., and Hurlimann, B., “*At the limit*”, part 2 - the expert: “*Such a practice is tantamount to abuse*”, The Republik, 4 Jun. 2019, at <https://www.republik.ch/2019/06/04/teil-2-mikes-tortur>

²⁴ In circumstances far, far less egregious than experienced by Brian, the European Court of Human Rights (ECHR) found strapping a man to a bed continuously in State care constituted “inhuman and degrading treatment”, a substantive violation of Article 3 of the European Convention on Human Rights. The ECHR cited existing 2006 anti-torture protocols in this regard, affirming that physical restraints could only be “a measure of last resort” and constituted “an extreme action” that could only be used to “to prevent *imminent* injury or to reduce *acute* agitation and/or violence”. See *Bures v. Czech Republic*, No. 37679/08 (18 October 2012), citing 16th General Report [CPT/Inf (2006) 35] (emphasis added).

²⁵ The expert opinion came from the Berlin forensic psychiatrist, Werner E. Platz, who stated that in his many years of work he has never experienced a fixation period of thirteen days. Blulle, E., and Hurlimann, B., “*At the limit*”, part 2 - the expert: “*Such a practice is tantamount to abuse*”, The Republik, 4 Jun. 2019, at <https://www.republik.ch/2019/06/04/teil-2-mikes-tortur>

²⁶ Oliver Adey, *How much power does Judge Aepli have over Pierin Vincenz and his fate?*, [Get](https://gettotext.com/how-much-power-does-judge-aepli-have-over-pierin-vincenz-and-his-fate/) to text (31 January 2022), at <https://gettotext.com/how-much-power-does-judge-aepli-have-over-pierin-vincenz-and-his-fate/> (“A judge’s personal basic ideas can definitely have an influence on the interpretation of the law,” admits [Martin Schubarth (79), federal judge from 1982 to 2004]”)

Sixteen: Brian thrives in a community-based setting structured around to his needs

36. In 2012, at age 16, Brian was for the first time offered a targeted, holistic intervention that was based on his needs. This included individualized educational and therapeutic interventions that accommodated both his gifted nature and his need for activity and physical outlets as a result of his ADHD. For 13 months, he received educational instruction, honed his Thai boxing practice with a coach at a gym, and followed a structured program, under supervision. As the Swiss federal court acknowledged he “was stable and showed personal and academic progress”.²⁷ In other words, Brian thrived.

37. The community-based program was terminated as Brian became the focus of media attention, political manoeuvres, and public pressure. Over 2700 headlines pertained to young Brian’s situation. In the media, he was described as a monster, racialized and aged by false narratives of criminality and irredeemability. He was renamed Carlos, a pseudonym far less Swiss and less “white” than his given name, Brian.²⁸ A courtroom sketch was published depicting Brian as a wild-looking young Black man wearing boxing gloves. The media depicted Brian as a drain on the taxpayer, rather than a post-suicidal, under-served Swiss child entitled to the care and protection of the State. And public pressure reflected the media narrative.

38. The community-based program was effective. Although Brian had complied with all aspects of the program, he was remanded to prison on or about 30 August 2013. His devastation at sheer injustice of this - the lack of good faith and unfairness as the Swiss court would later call it – was extreme. As usual, Brian was immediately remanded to solitary confinement at Prison Limmattal and then Prison Massnahmезentrum Uitikon. In August 2014, the Swiss federal court confirmed Brian’s view, that an injustice and a violation of good faith had occurred in terminating his community-based program despite his compliance. The court acknowledged that 16-year old Brian had been remanded to prison in response to media attention and growing public pressure.²⁹ Its remedy – release – did not address the consequences of this conduct or repair.

Adolescence: Sword of Damocles awaits every mistake

39. In 2014, Brian was falsely accused again, this time of threatening someone with a knife on the Langstrasse. The court remanded him to Limmattal Prison and he was held in solitary confinement for approximately 176 days. He was socially isolated and denied education. Brian

²⁷ See Judgment of February 18, 2014 of the Swiss Federal Supreme Court (criminal justice department), No. 6B_85/2014 (2 August 2014), ¶A, at https://www.servat.unibe.ch/dfr/bger/2014/140218_6B_85-2014.html

²⁸ See Judgment of February 18, 2014 of the Swiss Federal Supreme Court (criminal justice department), No. 6B_85/2014 (2 August 2014), ¶A, at https://www.servat.unibe.ch/dfr/bger/2014/140218_6B_85-2014.html

²⁹ See Judgment of February 18, 2014 of the Swiss Federal Supreme Court (criminal justice department), No. 6B_85/2014 (2 August 2014), ¶5.4, at https://www.servat.unibe.ch/dfr/bger/2014/140218_6B_85-2014.html (“The abrupt termination of the special setting has no connection with [Brian’s] own behavior The termination of the setting and the associated precautionary admission to the closed department of the [Uitikon Measures Center] was rather the result of critical media reporting and growing public pressure.”)

was eventually acquitted, and compensated, as static surveillance in the area shows his innocence of the charges.

40. In March 2016, Brian had a verbal altercation on the tram with someone he knew from Thai boxing competition, which began with comments about Brian's religious beliefs. It escalated and Brian left the tram at the next stop. The man followed him off the train and Brian felt threatened as the colleague approached in anger from behind. He turned and punched him once, breaking his own finger and, unwittingly, fracturing the man's jaw. He rejected his father's recommendation that he file a complaint with the police and explain he had acted in self-defence. Nevertheless, when he sought medical attention for his broken finger, the hospital notified the police, who interrogated Brian 3 days later and eventually arrested and charged him. He was remanded into custody.

41. During this period of preventive detention (and subsequent sentence), Brian was detained in several prisons (including Limmattal, Zurich, Winterthur, and Pfäffikon), where he was consistently in solitary confinement, locked up 23 hours a day in his cell with an hour's walk alone, family visits only behind a partition, and no access to educational or vocational resources. Notably, in the trial on this matter, in early 2017, Brian informed the Court of his consistent isolation and punishment in conditions of solitary confinement throughout his incarceration, yet the Court did not respond to or investigate the matter of abuses of his human rights or torture clearly implied by these claims. Instead, the Court raised repeated questions about Brian's religious beliefs and his psychology, without even investigating the impact of prolonged solitary confinement on Brian's psychological health. Eventually, the Zurich District Court reportedly sentenced Brian to an 18-month prison term for attempted grievous bodily harm, a sentence he accepted as he had served most of the time already. Nevertheless, in this case as well, Brian's broken finger suggests he acted in self-defence rather than intentionally or with premeditation, particularly in light of his competitive boxing training.

42. The degrading, inhuman, and illegal punitive measures Brian experienced throughout this period were not limited to solitary confinement and violations of his right to education, but included physical and psychological manipulation and punishment. In January 2017, at Pfäffikon prison, Brian was imprisoned in a cold, hypothermia-inducing cell, forced at times to sleep on the floor without a mattress for multiple days at a time. Blankets were given and taken away arbitrarily and subjectively for a week at a time, without stated reason and despite the risk to his health. During this period, he was permitted to wear only a poncho, with no underwear. At one point, he was made by prison personnel to trade his toothbrush for a blanket. He was reportedly not allowed to shower or brush his teeth for several days. In addition, Brian's ankles were continuously shackled throughout this period, for three weeks. In addition, he was strip searched on multiple occasions, denied the right to appear before a judicial authority; all visits with his lawyer allegedly took place through the door of the closed cell; and visits from his relatives were completely prohibited. He was allowed to ingest only bread and water for prolonged periods of time in this period. He was denied reading and writing materials, despite the prolonged periods of punitive solitary confinement.

43. Only on March 11, 2021 did the Zurich District Court reportedly rule that the conditions of Brian's detention during this period, including the deplorable conditions and the frequent use of solitary confinement, constituted inhuman treatment within the meaning of Article 3 of the

European Convention on Human Rights and the Article 10 (3) of the Swiss Federal Constitution. In addition, the director of the Department of Justice of the canton of Zurich, admitted that serious errors were committed, after which the director of the prison allegedly resigned. Interestingly, these findings, as was true previously, occurred on appeal. In the court of first instance, the presiding Zurich justice decided that the conditions in which Brian was detained in Pfäffikon prison did not constitute degrading treatment, without evidence of any intention by the staff to harm him.

44. After the inhumane treatment later found to violate the European Convention on Human Rights, Brian was transferred to JVA Pöschwies prison. His sentence was nearly complete and he was housed with the people who were incarcerated who were elderly or had health conditions. His conduct was exemplary and he was in the general population with open cell doors and common meals during the day. Schooling was promised, but never delivered. Brian worked, spoke with his family, but also spent a lot of time alone each day. On June 28, 2017, JVA Pöschwies personnel informed Brian he would be transferred into solitary confinement in the secure wing of the prison, “for his own safety” as there were reported threats against him. Brian had heard the justification that solitary confinement was “for his own safety” as a basis to keep him in solitary confinement, most recently in Horgen Prison, *see infra* at ¶¶ 23-25, and at Uitkion Massnahme Centre, *see infra* at ¶ 38. He stood abruptly, pushing his chair against the wall, away from everyone in the room. The prison guards reacted by attacking Brian. Brian was beaten severely and emerged from the incident with a black eye and swollen mouth and jaw. One prison staffer claims he suffers bruises. Brian was charged for misconduct and ends up in therapeutic and solitary confinement. He is initially sent to the secure psychiatric detention at Zurich-Rheinau Centre for Inpatient Forensic Therapy at the Psychiatric University Hospital for 20 days and then an additional 251 days in solitary confinement at JVA Pöschwies,³⁰ where the prison administration newly created secure holding areas in advance of his return. In this period, he had limited access to schooling.

45. In March, 2018, Brian was transferred to Thorberg Prison. He spent 15 days there in solitary confinement. He was subject to racist remarks and racial slurs, was deprived food, and was denied yard or recreation time entirely. Next, Brian was sent to Burgdorf Prison where he eventually was mainstreamed onto the general population. Despite what came before, Brian was very successful, once mainstreamed and demonstrated his cooperative intent and his sense of humor. At Burgdorf, he was in contact with others in the general population, he used the gym, participated in sports, and worked on a continuing education program. He also was eventually allowed to see his parents in person, in a room. Nevertheless, Brian was transferred back to JVA Pöschwies on 18 August 2018 and the prosecutor requests secure solitary confinement, which is upheld by the mandatory measures court. He remained there, in solitary confinement and in a specially designed cell designed to socially isolate him entirely, until 20 January 2022, the day after the Working Group visited him at JVA Pöschwies.

46. As soon as he arrived at JVA Pöschwies in August 2018, Brian was reportedly placed in solitary confinement in a cell of approximately 11m², with open toilets. For three months, his

³⁰ Contrary to Swiss law and international human rights guarantees, Brian experienced a string of uninterrupted disciplinary referrals to solitary confinement while at Pöschwies without medical examination or reconsideration. Many, many disciplinary orders, seamlessly strung together, testify to his long solitary confinement.

window was reportedly covered with a paper blanket to prevent him from looking outside. The television was placed behind a mesh window and he could only view the screen while standing and pressing his face against the mesh window. Brian was only allowed to read religious texts and his lawyer's correspondence. He did not have any access to pens or paper to write letters, he did not have any access to receive visitors, with the exception of a few telephone calls to his parents, nor any permission to walk or exercise for periods of sometimes up to 20 consecutive days. Brian was reportedly handcuffed and shackled during walks. In addition, these were completely prohibited during public holidays, as the prison administration cited a lack of resources to effect his rights to exercise and fresh air. In addition, for months, Brian was not allowed to cut his nails, his hair, or shave.

47. As a result of permanent shackling, Brian suffered severe pain in his wrists and ankles, causing him difficulty in walking, but his request to see a doctor was denied repeatedly. Eventually, he was given high doses of painkillers, including cortisone, to ease his pain. He was determined to have massively high blood pressure, very unusual for a healthy young man his age. Reviewers from the International Forensic Expert Group (IFEG), an international body of independent forensic specialists who are recognized as global leaders in the medico-legal investigation of torture, ill-treatment, and unlawful killing, were critical of the medical care Brian received and demanded a report to an oversight authority. Throughout this period, even as his parents were forced to watch Brian experience torture, harassments and provocation, and ongoing violations to his human rights, they paid the prison approximately 400 CHF per month to cover Brian's living expenses and ensure he can make phone calls to them. Only after Brian's January 2022 was Brian granted a proper medical examination at the Institute of Family Medicine, with Dr. Rosenberg.

48. The same guards who denounced Brian just one year earlier, against whom he had already filed a complaint and who had filed charges against him, were responsible for Brian's welfare during this period. He experienced continuous harassment, racial slurs, and provocation. Other people incarcerated at JVA Pöschwies confirm this is standard operating procedure there. Additional incidents of physical aggression against Brian occurred by these same guards. Criminal complaints relating to two of these incidents, on April 9, 2019 and on July 20, 2020, were filed. After being assaulted on 9 April 2019, Brian was examined by the prison doctor, but only behind a partition. This doctor took a photo of his face, believing his nose was potentially fractured. According to the prison medical service, Brian was found to have a swelling and bruising of the left nose, extending towards the left eye; swelling and bruising of both wrists, potentially caused by the handcuffs; a small superficial laceration contusion on the right elbow; and several bruises on both forearms, among others. The report noted these injuries could have been from a physical assault on him, while trivializing the seriousness of his physical after-effects.

49. The prison administration in Pöschwies asked the psychiatric clinic in Rheinau, where Brian was transferred from 11 to 25 April 2019, to report on the state of Brian's mental health. Contrary to the Pöschwies administration's suggestions that he was psychotic, unstable and violent, the Rheinau report instead confirmed that Brian's physical and mental condition were stable, that he was calm, kind, and cooperative, and that he posed no danger to himself or to others. The Clinic recommended an X-ray examination to exclude the possibility of a fracture in the nose. Yet the conclusions of this psychiatric report were not shared in the prison report to the

prosecution, dated November 12, 2019. From there he went briefly to Lenzburg Prison, where he was held in solitary confinement but had some access to educational materials and was allowed into the yard unshackled eventually. He was assaulted in the transport back to JVA Pöschwies and the prison guard was reportedly found guilty of abuse of authority.

50. At JVA Pöschwies, Brian was reportedly kept in solitary confinement for almost three and a half years, subject to disciplinary measures renewed every three months, on the pretext of psychological and behavioural problems. Yet, these can be attributed to the very fact of prolonged isolation. A medical opinion concluded that Brian suffered from depression, sleep disorders, problems of agitation and anxiety, among other psychological symptoms due to his prolonged isolation. In addition, other health problems would have been diagnosed and documented, such as obesity problems; back pain; high blood pressure, and episodes of cardiac arrhythmia, among others, potentially due to lack of physical activity. Notably, despite the documentation of certain anomalies, in the medical reports transcribed by the prison doctors, no doctor ever physically examined Mr. Keller, without the presence of barriers or partitions. Drugs were administered to him in his food and he even received an injection in the knee through the door of his cell, via the opening used to pass meals.

51. On January 20, 2022, Brian was transferred to Zurich Prison, and out of solitary confinement. He was mainstreamed into the general population, allowing him to maintain regular human contact with prison staff, as well as fellow prisoners; to receive visits without barriers or means of constraint; to engage in physical activities, including sport, and to undergo psychotherapeutic treatment. No security concerns have been raised in this new placement. To the contrary, reportedly it has been a positive step for Brian both physically and mentally.

Today: What has Brian Keller survived?

52. What has happened to Brian Keller at the hands of the State is extensive. For prolonged periods of time in his youth and adolescence, he was incarcerated in inhumane conditions, sometimes without charge or conviction. Even where youth detention facilities were available, he was placed in adult facilities. He was often held in solitary confinement, even while he was very young. Even when released from prison, he was often sent to state custodial placements, rather than to live with his family. Brian has been continuously imprisoned for the last 11 years, often with the stated rationale that it was necessary for his protection. The full details of the legal proceedings are available, but a few of the many incidents should be mentioned here.

53. When the Working Group met Brian Keller at JVA Pöschwies, he had been in solitary confinement for approximately three-and-a-half years (since August 2018), since he was 23 years old. There, prison personnel exercised their discretion in ways that further limited his rights. Brian was not allowed family visits, until immediately before the visit of the Working Group, and he was made to wear shackles for walks, transport, and counsel visits. Among other things, Brian experienced numerous incidents of racial slurs and racial harassment by the guards and physical abuse, as well as considerable misconduct on the part of prison staff with respect to the denial of exercise walks for periods of up to twenty days, near-constant provocation and harassment, and the intentional and malicious manipulation of his environment, i.e., his access to light in his cell during the daytime (and darkness at night). Brian Keller was not the only person incarcerated at JVA Pöschwies to report such misconduct on the part of prison personnel. During

its visit to the JVA Pöschwies prison facility, the Working Group was informed that provocation of people who were incarcerated by prison personnel, including physical force, racial harassment, and more, was common.

54. Throughout, Brian has experienced numerous incidents of racial harassment and misconduct by prison personnel that instrumentalized negative racial stereotypes and demonstrated the targeted use of discretion against him in ways that were harassing, degrading and inhumane. Frequently he is told by prison personnel to, “Go back to the bush,” and “When you get out of here go back to Africa.” He reports frequent unprovoked acts of violence by prison personnel when he was being transported to and from his cell.

55. Brian Keller also experienced misconduct with a level of impunity that further reflected racial hierarchy and that diminished credibility pursuant to Brian Keller’s race would protect blatant misconduct and harassment legally constituting torture. For example, he was placed arbitrarily in a “pink cell” and subjected to homophobic slurs. Several times, the water turned on for his showers would only be freezing cold in winter. For a three-day period, he was once given only bread at breakfast time and denied food for the rest of the day. Other times, his food was inedible, burned, or had the labels removed, obscuring his ability to ensure it complied with his religious dietary requirements. He was denied television, a specific punitive sanction, for significantly longer the maximum allowed by policy and at other times allowed to watch only at a distance with no sound. Prison personnel openly stated that they were trying to break him.

THE RELEVANT HUMAN RIGHTS FRAMEWORK CONFIRMS LONGSTANDING AND SEVERE HUMAN RIGHTS VIOLATIONS

56. International human rights law relies on the premise that all persons, by virtue of their humanity, should exercise and enjoy their human rights without discrimination on any grounds, including on the basis of race. Switzerland is State party to several of key treaties, including the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC).³¹ These treaties set forth key rights that are relevant in this context.

The State has an affirmative obligation to remedy racial discrimination under international law

57. The International Convention on the Elimination of Racial Discrimination (ICERD), Art. 1(1), mandates that any distinction, exclusion, restriction or preference based on prohibited grounds must be considered as racial discrimination when it has “the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms [...]”.³² Principles of racial equality and non-discrimination are

³¹ Office of the United Nations High Commissioner for Human Rights, Ratification Status for Switzerland, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx.

³² The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(1) defines racial discrimination in broad terms as:

codified in all core human rights treaties, including the Universal Declaration on Human Rights, and discrimination on the basis of race often constitutes a substantive human rights violation.³³ The Convention on Torture, for example, stipulates that torture includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³⁴ Article 2 of the CRC stipulates that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race...”. A similar right to equality before the law and equal protection of the law is enshrined in article 26 of the ICCPR.³⁵

58. States are obliged to construe their anti-racism and anti-discrimination obligations expansively. In its General Recommendation No. 32, the Committee on the Elimination of Racial Discrimination reiterates that the prohibition of racial discrimination in the Convention cannot be interpreted restrictively.³⁶ Similarly, with respect to the ICCPR, the Human Rights Committee has clarified that the rights set forth under ICCPR, Art. 26 are autonomous from other anti-discrimination provisions, including ICCPR, Art. 2.³⁷ Instead of ensuring freedom from discrimination in the enjoyment of ICCPR rights, article 26 affirmatively “prohibits discrimination in law *or in fact* in any field regulated and protected by public authorities.”³⁸ (emphasis added). Racial equality involves not only ‘formal’ (*de jure*) equality and equal protection of the law, but also substantive (*de facto*) equality in the enjoyment and exercise of human rights. The prohibition of racial discrimination applies to the enjoyment of all civil, political, economic, social and cultural rights.³⁹ Noting that the list of rights protected under article 5 of the Convention is non-exhaustive, the Committee on the Elimination of Racial Discrimination emphasizes that States are required to eliminate racial discrimination and

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

See ICERD, art. 1(1).

³³ See ICERD arts. 1 & 2; see also ICCPR arts. 2(1) & 26; ICESCR art. 2(2); CEDAW art. 1; CRC art. 2(1)-(2).

³⁴ UN Convention Against Torture, Article 1.

³⁵ See ICCPR, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

³⁶ CERD Committee general recommendation No. 32, paras. 6-10.

³⁷ Human Rights Committee general comment 18, para. 12.

³⁸ Human Rights Committee general comment 18, para. 12.

³⁹ ICCPR art. 2; ICESCR art. 2(2); ICERD art. 5; see also Committee on the Elimination of Racial Discrimination (“CERD Committee”) general recommendation No. 20, para. 1.

guarantee the right to equality before the law in the enjoyment of all human rights and fundamental freedoms.⁴⁰

59. In addition, the Committee on the Elimination of Racial Discrimination has set forth important guidance in its jurisprudence that prohibited racial discrimination may exist even in the absence of discriminatory intent. *In re Laurent Gabre Gabaroum*, the Committee recalled that “presumed victims of racial discrimination are not required to show that there was discriminatory intent against them”. To the contrary, the Committee held that the persistence of State institutions “in requiring the petitioner to prove discriminatory intent runs counter to the Convention’s prohibition against any and all behaviour that has a discriminatory effect.”⁴¹ The State has an obligation to investigate and remediate discriminatory effects. To comply with the ICERD, States must take action to combat intentional or purposeful racial discrimination, as well as to combat *de facto* or unintentional racial discrimination.

60. Human rights treaties and treaty bodies have affirmed this directly. ICERD, Art. 5(d)(iii) explicitly obliges States parties to guarantee the right of everyone to equality before the law. In its General Recommendation No. 32, the Committee on the Elimination of Racial Discrimination reiterates that States are required to eliminate purposive or intentional discrimination as well as discrimination in effect⁴² and structural forms of discrimination.⁴³ Expounding on the CRC’s mandates in this regard, the Children’s Rights Committee has stated that “[t]he right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires *appropriate proactive measures taken by the State ...*” in its guidance to Member States.⁴⁴

States must adhere to human rights in the administration of justice and all state action

61. Imprisonment does not mitigate an individual’s human rights, including the rights to childhood, to equal protection, and to racial equality. To this end, the Mandela Rules stipulate that people who are incarcerated shall be treated with dignity and humanity (Rule 1) and that discrimination on the basis of race is strictly prohibited (Rule 2). Prolonged or indefinite solitary confinement is strictly forbidden, as are manipulations of living conditions including light, sound, ventilation, etc. (Rules 43-44). In addition, the prison system should not aggravate the suffering inherent in the deprivation of liberty (Rule 3) and “minimize any differences between prison life and life at liberty that tend to lessen ... the respect due to their dignity as human

⁴⁰ CERD Committee general recommendation No. 20, para. 1.

⁴¹ *Laurent Gabre Gabaroum v. France*, Opinion adopted by the Committee under article 14 of the Convention concerning communication No. 52/2012, ¶ 7.2, U.N. Doc. CERD/C/89/D/52/2012 (June 8, 2016)

⁴² CERD Committee general recommendation No. 32, paras. 6–7.

⁴³ See e.g., CERD Committee general recommendation No. 34, paras. 5–7.

⁴⁴ See Children’s Rights Committee, General Comment No. 14. In defining State obligations to equality and non-discrimination, United Nations treaty bodies mandate that rights enshrined in international human rights treaties must generally be guaranteed to everyone, including persons belonging to racial and ethnic minorities. Even where the restriction of human rights does not involve racial discrimination per se, States must demonstrate the necessity of any restriction made, limit proportionate measures to legitimate aims, and ensure that the essence of the concerned rights are not impaired. See e.g., Human Rights Committee general comment No. 31, para. 6.

beings”. People who are incarcerated should have access to education and vocational programs (Rule 4) and to the outdoors, as well as sport and recreational programs during the period of incarceration (Rule 23). The State’s decision to arrest or incarcerate a child does not mitigate its obligation to ensure that child’s right to healthy development. Article 6 of the CRC mandates, in very strong language, that “States Parties *shall* ensure to the maximum extent possible the ... development of the child” (emphasis added). Further, it is incumbent on Switzerland to ensure that acts legally constituting torture, including in incarceration, are penalized by law.⁴⁵

62. Involvement in the legal system in any manner does not vitiate human rights. Irrespective of parallel state action, the obligation to ensure a child’s development is not adversely impacted. Thus, children’s rights to their parents, family and culture – and parents’ right to their children – do not disappear with the commencement of a criminal case or a finding of delinquency or criminal liability. Article 3, Section 1 of the CRC mandates that “In all actions concerning children, whether undertaken by public or private social welfare institutions, *courts of law*, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” (emphasis added). In Clause 3, Article 3 stipulates that “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities...”. Thus, the best interests of the child standard is not a binary analysis, wherein allegations of misconduct on the part of a child vitiates his rights under the Convention. Instead, the State is charged with guaranteeing *all* existing rights, as these rights together form the best interests of the child. As robustly as possible, the rights to appropriate child development, the rights to family unity, the rights of parents to their children, and the rights of children to their family must be protected even where there exists a pending judicial proceedings. Even in the pendency of criminal or juvenile delinquency matter, the State has the obligation to act in the children’s best interest, including to mitigate trauma of separation, to preserve childhood and identity, and to ensure all rights enshrined under the CRC.

International law recognizes mandates children’s rights as particularly important and sets specific obligations to ensure the best interests of the child

63. Human rights may not be disregarded on the basis of race or for any other reason. For example, the sanctity of childhood, the family, the home, and their importance in effecting the rights of children are well-recognized by international human rights treaties. Article 16 of the Universal Declaration on Human Rights (“UDHR”) and Article 23 of the International Covenant for Civil and Political Rights (“ICCPR”) both secure the international human right to family unity, providing that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 17 of the ICCPR provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” This recognition of the family acknowledges that many human rights are protected and realized via the family, including most rights of children. In the strongest language

⁴⁵ UN Convention Against Torture, Article 4.

possible, these treaties mandate non-interference with the rights of the family unless definitively clear that interference is in the best interests of the child.⁴⁶

64. The Convention on the Rights of the Child defines the best interest of the child via the preservation, not the deprivation of human rights. Article 3 of the CRC sets forth the best interest of the child standard and affirms that “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her...” These rights are substantive, i.e., it is not merely for the state to merely claim it is acting in the child’s best interests. The CRC also affirms the importance of respecting a child’s voice, mandating that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” (Article 10).

65. The best interests of the child standard may only be realized by equal protection of all children under the law. There can be no conflict between the ‘best interests’ standard and the State’s obligation to ensure equal protection under the law. The ‘best interests of the child’ standard may not justify discriminatory practices or tolerance of racial discrimination. Similarly, a State must not overlook the significant human rights harms that these policies may entail. Under ICERD, Switzerland has an obligation to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists,”⁴⁷ as well as to discourage anything that tends to strengthen racial divisions.⁴⁸

NOT A COINCIDENCE: GLOBALLY, RACIAL STEREOTYPES, DISPARITIES, AND ‘LEGACY MINDSETS’ REFLECT THE TRANSNATIONAL ORIGIN STORY OF SYSTEMIC RACISM

66. The origin story of race and anti-Blackness is deeply embedded in social structures and systems globally. As a result, systemic racism is not the abstract operation of social machinery. It is evident in the concrete decision-making of people with discretion to subtly or openly reinforce racialised norms and racial hierarchy.⁴⁹ Systemic racism is a powerful and measurable

⁴⁶ To that end, Article 9(1) of the U.N. Convention on the Rights of the Child (CRC) provides that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

⁴⁷ ICERD art. 2(1)(c).

⁴⁸ ICERD art. 2(e).

⁴⁹ See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶¶ 14-49 (“systemic racism against Africans and people of African descent, including as it relates to structural and institutional racism, is understood to be the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, de jure or de facto discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin. Systemic racism often manifests itself in pervasive racial stereotypes, prejudice and bias and is frequently rooted in histories and legacies of enslavement, the transatlantic trade in enslaved Africans and colonialism.”).

phenomenon that can be verified even without overt racial slurs or overt racial harassment. Consciously or not, racialised decision-making discriminates against people of African descent frequently. It is grounded in a historical context where race is so powerful in the public imaginary that it structures decision-making across society. The ‘legacy mindsets’ of colonialism and the trade and trafficking in enslaved Africans continue to influence instinct, belief, and decision-making today.

67. The UN Working Group of Experts on People of African Descent looked at the link between negative racial stereotyping of people of African descent and current racially biased decision-making in its report to the UN General Assembly in 2019.⁵⁰ The Working Group found the historical use and ongoing prevalence of racial stereotyping in everyday life, including in the media, the justice system and elsewhere, fed ongoing denigration of people of African descent, as well as an impulse to control Black bodies that was licensed by related imagery. The Working Group concluded that:

Ultimately, the perpetuation, tolerance and licensing of racial bias via negative stereotypes that are prevalent in everyday life violates the human rights of people of African descent. The ability to exercise and enjoy key human rights is dramatically curtailed by racial bias in decision-making that is grounded in false beliefs. Racial bias has such systemic impact on the enjoyment and exercise of human rights that in different countries people of African descent face similar challenges.... By dehumanizing people of African descent in the social mindset and the body politic, the impact and injustice of inequality and entrenched racial disparities are neutralized and even justified.⁵¹

I. Race and anti-Blackness were socially constructed to enable an economy of racial atrocity

68. The social construct of race, and its progeny, racism, have been transnational, from their earliest inception as guidelines to exploit new, transnational profit opportunities in the triangular trade between Europe, Africa, and the Americas.⁵² ‘Black’ and ‘White’ did not exist as racialized terms until they became necessary to license the precursors of our modern global economy – the

⁵⁰ See, UN Working Group of Experts on People of African Descent, *The role of negative racial stereotypes and the stereotyping of people of African descent in perpetuating racially biased decision-making, racial disparities and racial injustice*, A/74/274 (2 August 2019) at ¶ 12 (“[Even] abolition of slavery did nothing to overcome the harmful ideas created to defend it These long-standing ideas and prejudices merged with colonial Europe’s desire to exploit the land and labour of indigenous peoples and Africans. At this critical juncture, racial distinctions were reinforced with legal force, as well as philosophical and scientific legitimacy, which demonized colonial subjects. These spurious ideas flourished throughout the early period, spawning false theories that were used to justify the belief in racial hierarchy”).

⁵¹ See *id.* at ¶ 76.

⁵² See e.g., Essed, P., Farquharson, K., Pillay, K., & White, E. J. (Eds.). (2018). *Relating worlds of racism: dehumanisation, belonging, and the normativity of European whiteness*. Springer; MacMaster, N. (2001). *Racism in Europe: 1870-2000*.

trade and trafficking in enslaved Africans and the staggering profits associated with an enslaved labour force that could (and was) worked to death every 5-7 years in order to facilitate the production of commercial products like sugar, cotton, tobacco, and the triangular trade between Europe, Africa and the Americas.⁵³ Some countries, like Switzerland, may not have trafficked enslaved Africans in the Middle Passage, but were nevertheless deeply invested in and reliant upon the economy of racial atrocity, including financial investments in individuals and companies central to the trade and trafficking in enslaved Africans across the Atlantic.

69. Licensing racial atrocity, however, also required normalizing blatant inhumanity in the many communities transnationally that would witness these atrocities first-hand. Globally, social conditioning processes habituated communities to racial atrocity, frequently via education, media, and interpersonal conveyances of racialised norms.⁵⁴ Narratives of racial hierarchy, white supremacy, and necessity were used in science, education, religion, business, employment, housing medicine, the justice system, the child protection system, and most other areas of life to lessen the culpability for racial atrocity by lessening the humanity, and therefore the human rights, of people of African descent. This occurred even as the children, labour, intellectual property, resources, and choices of people of African descent were stolen or instrumentalized. As a result, and as the United Nations High Commissioner for Human Rights has recently reported, in a global analysis, “Systemic racism against Africans and people of African descent affects the enjoyment of human rights in every part of life.”⁵⁵

70. Today, we live with the understanding that racism is a risk to our core values, and that it exists across national, regional, or cultural boundaries.⁵⁶ “Legacy mindsets,” or the legacies of our history of racial atrocity, endure in our social structures today⁵⁷ and in the “psychological

⁵³ See e.g., Nikole Hannah-Jones, *The 1619 Project* (2021).

⁵⁴ Derald Wing Sue, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (2010), at 118-120.

⁵⁵ See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶ 18.

⁵⁶ See e.g., Sautman, B. (1994). EU anti-racism action plan (18 Sept. 2020); *Draft Council conclusions on combating racism and antisemitism*, Council of the European Union, Doc. No. 15222/21 (FR) (22 Dec. 2021); *Speech by President von der Leyen at the European Anti-Racism Summit*, 19.03.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1265 (Commission President von der Leyen referred to the EU motto ‘unity in diversity’, emphasising that the European Union is now more diverse than ever and yet racism is still very much present); *EU Racial Equality Directive* (setting forth prohibitions on direct and indirect discrimination at Article 2(2)(a) and (b) and requiring equal treatment including in the areas of training, education, and social protection, regardless of their racial and ethnic origin). See also, Müller, Carolin (2021) *Anti-Racism in Europe: An Intersectional Approach to the Discourse on Empowerment through the EU Anti-Racism Action Plan 2020–2025*. *Social Sciences* 10: 137. *Anti-Black Racism in Post-Mao China*. *The China Quarterly*, 138, 413-437; Rollo, Toby (2018). *The Color of Childhood: The Role of the Child/Human Binary in the Production of Anti-Black Racism*. *Journal of Black Studies*, 49 (4):307-329.

⁵⁷ Rasmussen, Brian, and Daniel Salhani. *A Contemporary Kleinian Contribution to Understanding*. 84 *Social Service Review* 491 (2010), 492 (“No social structure or domain of social action and interaction is free from racism or impervious to its insidious effects. Racism also finds a home in the psyches of individuals who are socialized into racist environments, which produce and reproduce the naturalness of the concept of race”).

residue” of the enduring moral injury of the involvement in racial atrocity.⁵⁸ There is a growing body of literature discussing how to act on racism, rather than race, as the relevant risk factor in public decision-making.⁵⁹ Many ways in which systemic racism is perpetuated are not cured by adjusting for socioeconomic status or other factors. Anti-Black racism, in particular, has been so foundational to the modern global economy that it continues to animate mindsets. So-called ‘human zoos’ displaying people of African descent as exhibits of interest were popular in Europe, including in Switzerland, until the mid-twentieth century. The transnational legacies of colonialism and the trade and trafficking in enslaved Africans are evident today in airline companies’ flight routes, transnational corporations’ favourable relationships with countries formerly colonized by their governments, longstanding banking and credit relationships, and other transnational relationships that have persisted since that time.

71. In many respects, the wealth of Europe is often traceable to colonialism and enslavement. This includes countries, like Switzerland, that did not directly colonize but which, inter alia, leveraged enormous wealth, power, and privilege toward the financial infrastructure of the slave trade, colonialism, and apartheid, i.e., disregarded racial atrocity in the pursuit of wealth in a budding credit economy.⁶⁰ The legacies of colonialism and the trade and trafficking in enslaved Africans are also evident in legacy mindsets about race, which are measurable nearly everywhere they are studied. There are pervasive racial disparities in education, employment, wealth, health care decisions and the administration of justice that do not reflect ability, aptitude, or preference. The United Nations Office for the High Commissioner of Human Rights has offered important guidance on this within the past year.⁶¹

72. However, systemic racism is not a result of depersonalized systems operating to create structural racial disadvantage. Systemic racism is an aggregation of individual decisions made by people with relatively small amounts of social power within organizational cultures that enforce, justify, and reinforce traditional racial hierarchies and oppressions as a well-established norm.⁶² Systemic racism results from the exercise of power, discretion, and subjectivity in ways that reinforce racial hierarchy and the social conditioning of white supremacy that are introduced and

⁵⁸ See *infra* at nn.123-126, and accompanying text.

⁵⁹ Chokshi DA, Foote MMK, Morse ME. *How to Act Upon Racism—not Race—as a Risk Factor*. JAMA Health Forum. 2022;3(2):e220548. doi:10.1001/jamahealthforum.2022.0548

⁶⁰ See e.g., Noelle Hian, *Banking and slavery: Switzerland examines its colonial conscience*, The Guardian (19 Nov. 2020)

⁶¹ See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶¶ 14-49.

⁶² See e.g., Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 Journal of Personality and Social Psychology 526 (2014) (“Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers.”)

reintroduced via education, media, and community life.⁶³ Individual decisionmakers may not be consciously focusing on race while they exercise discretion in ways that reinforce white supremacy; in fact, a growing consensus holds that the root of systemic racism is privilege, not animus, citing this as “the secret of racial structures and racial inequality the world over. They exist because they benefit members of the dominant race.”⁶⁴ In this respect, an instinct that misconduct, adolescent behaviour, or mischief by an adolescent of African descent poses a risk, rather than a reflection of childhood,⁶⁵ is grounded in the social conditioning of race that labels agency, autonomy, or ambition by people of African descent as a threat. It is born of the social conditioning in racial hierarchy that occurs over the course of a lifetime and is reinforced in professional and educational spaces.

73. As a result, facially neutral policy cannot whitewash, or erase, racial discrimination. International human rights law, as well as national and regional instruments, prohibits absolutely both *de jure* and *de facto* discrimination.⁶⁶ The prohibition of *de facto* discrimination helps to protect individuals from State policies that rely on neutral language that nevertheless operate to discriminate on the basis of race, ethnicity, or colour. “Systemic racism persists, in large part, due to misconceptions that the abolition of slavery, the end of the transatlantic trade in enslaved Africans and colonialism, and measures taken by States to date, have removed the racially discriminatory structures built by those practices, addressed contemporary structures of racial discrimination, inequality and subordination, and created equal societies.”⁶⁷ To this end, the Committee on the Elimination of Racial Discrimination has emphasized that any restriction on human rights will be illegitimate if it involves racial discrimination.

74. Importantly, as set forth *supra*, existing international law and the legacies of history states Switzerland’s obligation to racial equality extends beyond facial equality in the language and text of its law. Instead, the Swiss state, including the courts, must ensure *de facto* or substantive equality. This includes access to rights to family and culture by children and their parents and equal protection under the law, as well as an understanding where racialised

⁶³ See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61 ¶¶ 14-49 (“systemic racism against Africans and people of African descent, including as it relates to structural and institutional racism, is understood to be the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, *de jure* or *de facto* discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin. Systemic racism often manifests itself in pervasive racial stereotypes, prejudice and bias and is frequently rooted in histories and legacies of enslavement, the transatlantic trade in enslaved Africans and colonialism.”)

⁶⁴ Eduardo Bonilla-Silva, *Racism Without Racists* (2003) (“Racial structures remain in place for the same reasons that other structures do. Since actors racialized as “white”-or as members of the dominant race-receive material benefits from the racial order, they struggle (or passively receive the manifold wages of whiteness) to maintain their privileges”).

⁶⁵ See See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61.

⁶⁶ CERD Committee general recommendation No. 32 paras. 6-7; ICERD art. 1(1) (explaining the impermissibility of purposeful discrimination and *de facto* discrimination); Human Rights Committee, general comment No. 18, paras. 7, 9 (same). See also *EU Racial Equality Directive* (setting forth prohibitions on direct and indirect discrimination at Article 2(2)(a) and (b) and requiring equal treatment including in the areas of training, education, and social protection, regardless of their racial and ethnic origin).

⁶⁷ See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61 ¶¶ 16.

narratives exist even without racialised language. For example, narratives of race in Switzerland are routinely recharacterized as integration and migration issues, as observed by the UN Working Group of Experts on People of African Descent in its January 2022 fact-finding visit. Yet, even with racially neutral language, this bespeaks a xenophobia that is not separate from investment and credit practices that turn a blind eye to the origin legality (or human rights compliance) of the assets at issue during the period of apartheid, colonialism, and the transatlantic trade. Notably, here, integration narratives, often deployed in discussing race in Switzerland, are not relevant to Brian Keller, who is Swiss, born in Europe to a white, Swiss father. Neither the circumstances of these cases nor cultural difference can justify the consistent, ongoing failures to treat Brian as one would any other Swiss child.

75. Where data disaggregated by race exists, it is possible to measure racial disparities in the operation of most social institutions, including medicine, law, and public administration, and particularly in the administration of justice. However, in many countries – particularly in Europe – data disaggregated by race is not collected pursuant to post-WWII policy that linked the keeping of data to the Holocaust. Yet, this also has hidden the systematically racialized abuses and violations of human rights and facilitated a culture of denial despite stark racial disparities perpetuated and sustained in education, criminal justice, and elsewhere. Nevertheless, even in places like Switzerland, which does not maintain data disaggregated by race, racial disparities are evident and visible, particularly in the administration of justice. In addition, other analyses, including the recent fact-finding mission by the UN Working Group of Experts on People of African Descent, confirm this remains a serious and prevalent issue in Switzerland.

76. Unpacking and drawing lines between abuses and violations of rights and racism, or even discrimination and race-based reasons is a matter requiring expertise, as a culture of denial has always been a key feature of systemic racism.⁶⁸ However, one important indicator of systemic racism is certain similarities that appear transnationally. Racial disparities in education, employment, criminal justice, incarceration, health care, child protection, the administration of justice, and elsewhere are measurable quantitatively and observable qualitatively. They evidence racialized decision-making, confirmed by research, by police, lawyers, courts, teachers, doctors, and more. Many of these are evident in the circumstances of Brian Keller, from the point where he became subject to the social conditioning of society around race, i.e., when he started school.

II. The harsh exercise of discretion, unusual disregard of human rights, blaming of Brian for his childlike conduct, and inexplicable decisions of Swiss public officials reflect a “legacy mindset”

77. Perhaps the most important site of racialised decision-making is in the unfair or racialised use of discretion by public officials. While public officials may have the discretion to fashion an individual solution to most problems they face, the use of that discretion in punitive ways against people of African descent is a ubiquitous form of systemic racism. Brian is no exception to this.

⁶⁸See See OHCHR, *Conference Room Paper, A/HRC/47/CRP.1*, *supra* at note 61 at ¶ 41 (“some States - especially those with links to enslavement, the transatlantic trade in enslaved Africans and colonialism – continue to deny or have failed to acknowledge the existence and impact of systemic racism, especially institutional racism, against Africans and people of African descent; or its linkages with enslavement and colonialism. As a result, they have not sufficiently examined the disparate impact of their legislation, policies and practices on certain groups of the population, including Africans and people of African descent.”)

Brian was viewed as “other” consistently and the narrative the State and the media have deployed in this regard reflects an expectation that enhanced penalties are necessary, but without any specific or ongoing bases (including the wholesale lack of heinous or atrocious crime) to justify these conclusions. From the earliest days, decision-making with respect to Brian’s situation enjoyed judicial and medical authorization.

78. Almost unbelievably, it appears that few, if any, Swiss public officials saw Brian Keller as a child entitled to care and protection, even at a very young age. By all accounts, he was a hyperactive child who was never treated as a child. Even his attempts at suicide were never seen as coming from severe mental anguish or distress. Brian learned the strategies and resources to channel his energy on his own, as a young adult. Instead, he has become a repository of racialized fears and decision-making based on negative racial stereotype. The decision-making of Swiss public officials, sometimes admittedly referred to as mistakes, with respect to Brian, reflected racialized beliefs and the social conditioning of systemic racism.

79. The courts are not exempt from this. Presumably echoing an argument raised by the prosecutors, the federal court blamed Brian for acting consistently with a disability (ADHD) that should have been accommodated in defending his continued imprisonment at Limmatal Prison, claiming, “the complainant, in view of his years of aggressive and uncooperative behaviour, *is initially responsible* for the fact that it has become very difficult for the juvenile prosecutor to find a suitable therapeutic measure in his case.”⁶⁹ The court also shifted the burden to Brian and his family, justifying its actions by noting that they had not identified a suitable alternative institutional placement with available beds and aggrandizing the charges against Brian to centre the (unproven) allegation that Brian was potentially homicidal rather than the mutually acknowledged facts of the incident between the two boys, i.e., that Brian could be acting under provocation.⁷⁰

80. In court documents, the State’s ongoing obligation at all relevant times to serve a “twice exceptional” child are rarely acknowledged, and minimized where acknowledgment exists. Nor are Brian’s intellectual gifts acknowledged in the judicial analyses. Instead the State’s obligation to the child, Brian Keller, has been displaced to the minor child and recharacterized via the mounting inconvenience of finding suitable institutional placements and the disregard that Brian had already been denied his right to education for years at this point, as well as most other rights codified in the Convention on the Rights of the Child, as well as that Brian was well-served in structured home-based environments where individual instruction fed his appetite for education. In addition, researchers’ public heralding of the prevention and early intervention approach of

⁶⁹ See *In re Brian Keller*, Judgment of September 14, 2011, Federal Tribunal, ¶ 5.5 at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html

⁷⁰ See *In re Brian Keller*, Judgment of September 14, 2011, Federal Tribunal, ¶ 5.5 at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html (“He does not deny that he has repeatedly used violence against people and objects in relevant institutions. Furthermore, no specific suitable educational or treatment facility with free places is mentioned in the complaint. Nor does the complainant deny the urgent suspicion of (attempted) homicide under investigation.”)

the Swiss courts and penitentiary system,⁷¹ as well as Swiss law's prohibition on incarcerating children prior to the age of 15,⁷² suggest that Brian is an outlier and was not seen as a child by decision-makers in his case as he was incarcerated in prisons intermittently since the age of 11.

81. The courts have also minimized the violations of human rights and the stark exceptionality of the circumstances of Brian's detention, even as they acknowledge it in judicial reasoning. The federal court upheld Brian's incarceration in Limmatal Prison, which had a juvenile facility, but acknowledged that Limmatal lacked "specialized educational and therapeutic facilities for young people," i.e., that the court's order openly occasioned a clear violation of Brian's human rights. The court then minimizes the significance of this structural deficiency in the juvenile prisons throughout Switzerland: "Juvenile prisons serve (prior to this court's order) primarily for the execution of pre-trial and preventive detention."⁷³ Even as it tried to normalize its order, the court here acknowledges this order is mandating an unusual and extraordinary course of action for a child who is just 14 years old. Similarly, while the federal court states there is nothing unusual or inappropriate about Brian's age or circumstances in mandating preventive detention while he was 14-15 years old,⁷⁴ it is interesting that there were only 26 juveniles incarcerated in all of Switzerland in 2011.⁷⁵

82. The medical and psychological establishment has also demonstrated similar racialised decision-making. For example, the overmedicating and strapping of teenaged Brian to a bed for thirteen days without respite was conducted under the supervision of medical personnel at Zurich University and deemed humane by a judge despite an independent, renowned forensic psychiatrist's opinion that he had never seen such a lengthy or extreme intervention such as this in his career. For twenty-one days, from 6-26 January 2017, Brian was held in an isolation cell in Pfäffikon naked or dressed only with a poncho in an unheated cell. In this regard, the courts, the prosecutors, the psychologists, and the psychiatrists involved in this case from the very beginning may have functioned more accurately as agents of State control, than as custodians for the physical and mental welfare of a minor child. Even the prison leadership that the Working

⁷¹ Souverein, F., Dekkers, T., Bulanovaitė, E. et al. *Overview of European forensic youth care: towards an integrative mission for prevention and intervention strategies for juvenile offenders*. *Child Adolesc Psychiatry Ment Health* 13, 6 (2019).

⁷² Despite the actions of the State with respect to Brian Keller, Switzerland reports its policies against incarcerating children to human rights bodies, while advocating against a diminution in the age for deprivation of liberty. See e.g., Switzerland's comments on the General Comment No. 24 (201x), replacing General Comment No. 10 (2007) regarding Children's rights in juvenile justice, at: <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/Switzerland.docx> (Children are not deprived from liberty unless they are 15 years and older.... We propose to insert under "Basic principles" the principle that deprivation of liberty should not be used for children under 14 years).

⁷³ See *In re Brian Keller*, Judgment of September 14, 2011, Federal Tribunal, ¶ 5.4 at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html

⁷⁴ See *In re Brian Keller*, Judgment of September 14, 2011, Federal Tribunal, ¶ 5.2 at https://www.servat.unibe.ch/dfr/bger/2011/110914_1B_437-2011.html ("In particular, neither the complainant's age nor the nature of the offenses investigated and previously committed speak against a precautionary inpatient measure.").

⁷⁵ See Eurostat Crime Statistics 2008-2022, at <https://ec.europa.eu/eurostat/web/crime/data/database>. This number doubled the following year, but that proved to be a one-time spike in the data and the numbers of incarcerated juveniles remained in the teens and twenties while Brian was underage.

Group met, including at the JVA Pöschwies prison, held graduate degrees in psychology yet expressed no concern for Mr. Keller’s mental health or at his ongoing incarceration in solitary confinement, high-security contexts.

83. Notably, Brian Keller’s childhood fell squarely at the time a renegotiation on juvenile justice was occurring globally, based on highly racialized beliefs and assumptions. The myth of the superpredator lacked evidence but offered cover to revisit policy initiatives aimed at rehabilitating adolescents.⁷⁶ Black teenaged children were labelled “superpredators,”⁷⁷ a concept used by media and politicians to stoke racial fears, rationalize massive spending bills, and demonize adolescent misconduct when it involved Black children.⁷⁸ This was not limited to news media, but also replicated in the entertainment media, which was exported globally. A generation of young men were impacted by harsh penalties for misconduct more consistent with adolescence than criminality based on policy grounded in fear-mongering rather than fact. In some cases, courts have recognized today the injustices perpetuated on children in the past who were judged under the myth of the superpredator, and responded by vacating sentences or convictions.⁷⁹

BRIAN KELLER’S RACE SHAPED THE DECISION-MAKING MADE WITH RESPECT TO HIS CHILDHOOD, HUMAN RIGHTS, LIBERTY, AND CULPABILITY

84. It is evident, and widely understood throughout Switzerland today, that Brian Keller’s race played a role for the decision-makers in virtually every action taken with respect to his

⁷⁶ Taylor-Thompson, K. 2014. *Minority rule: redefining the age of criminality*. N.Y. Univ. Rev. Law Soc. Change 38:143-200 (Academics “predicted the coming of a generation of ‘temporary sociopaths—impulsive and immature’ who were born of ‘abject moral poverty.’...These explosive labels, more often reserved for children of color who committed crimes, pushed the public to fear a coming tide of ‘elementary school youngsters who pack guns instead of lunches.’ These portrayals at once stigmatized the offender and impressed upon the listener the notion that these sorts of offenders were decidedly more dangerous than the paradigmatic wayward child.”) (citations omitted).

⁷⁷ See B.J. Casey, Kim Taylor-Thompson, et al. *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*. *Annual Review of Law and Social Science*. 16:1, 203-222, 205 (2020) (“By the end of the twentieth century, the political winds shifted, and a second policy phase emerged. Pundits, academics, and the media promoted a new image of children as dangerous, hardened, and remorseless. Academics predicted a tidal wave of violence by a new type of young offender and stoked fears that these “superpredators” would get away with murder in the juvenile system.... the media reserved its most explosive images for children of color, stigmatizing them as offenders who were not delinquent but instead were criminal.”) (citations omitted).

⁷⁸ See B.J. Casey, Kim Taylor-Thompson, et al. *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*. *Annual Review of Law and Social Science*. 16:1, 203-222, 205 (2020) (“the media reserved its most explosive images for children of color, stigmatizing them as offenders who were not delinquent but instead were criminal. This recasting of the child as more sinister enabled a dramatic shift in treatment from the protective environs of the juvenile court to the more punitive approaches in the adult criminal justice system”).

⁷⁹ See e.g., *State of Connecticut v. Belcher*, (USA) SC 20531 (Conn. Jan. 21, 2022) (“[T]he superpredator myth is precisely the type of materially false information that courts should not rely on in making sentencing decisions....The court’s reliance on the superpredator theory, and its view that it had to protect society from a charter member of this remorseless group, dominated its sentencing remarks” was “the prism through which the court viewed this defendant.”)

liberty, care, treatment, and culpability, from a very young age. The effect was to license unusual or atypical treatment (including the repeated incarceration of a child), to recharacterize child-like conduct into criminal behaviour, and to disregard his fundamental rights, including his right to childhood, his right to family, his right to health, and his right to be free from racial discrimination. Although Brian Keller may represent an extreme example, his circumstances clearly and directly reflect an enduring legacy of the historical associations and assumptions relating to race and Blackness globally, which have been subject to considerable relevant study that has transnational implications.⁸⁰ Indeed, there is increasing awareness and understanding inside Switzerland of the role that systemic racism has played to normalize the limitations or denials of human rights to people of African descent currently and historically, and a growing academic literature in this regard.⁸¹ Inside and outside Switzerland, calls for Switzerland to exercise particular caution against systemic racism have highlighted the impact of unexamined, racialized conduct, as set forth in the public narrative, scientific research, and by international human rights bodies

85. In this regard, human rights experts have highlighted the need for particular vigilance against systemic racism and racialized decision-making by public officials in Switzerland. UN treaty bodies and expert groups, and others have also observed forms of discrimination rooted in the failure to centre anti-discrimination efforts around the discriminatory effects of policy and practice, as well as affirmative racial bias, in Switzerland. At the close of the UN Working Group of Experts on People of African Descent’s factfinding visit in February 2022, several specific preliminary concerns were raised, in advance of a September 2022 report to the Human Rights Council.⁸² In December 2021, the Committee on the Elimination of Racial Discrimination (CERD) expressed serious concerns, including in the administration of justice for people of African descent, and offered several recommendations.⁸³ Nine years prior, the Commissioner for Human Rights for the Council of Europe noted that “racism and intolerance appear to be on the

⁸⁰ See e.g., Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *Journal of Personality and Social Psychology* 526 (2014) (“Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers.”)

⁸¹ See e.g., Michel, Noemi (Dec. 2013) *Equality and Postcolonial Claims of Discursive Injury*. *Swiss Political Science Review* 19(4):447-471; Patricia Purtschert, Francesca Falk & Barbara Lüthi (2016) *Switzerland and ‘Colonialism without Colonies’*, *Interventions*, 18:2, 286-302; Boulila, Stefanie Claudine. “Race and Racial Denial in Switzerland.” *Ethnic and racial studies* 42, no. 9 (2019): 1401–1418; Michel, Noémi. *Accounts of Injury as Misappropriations of Race: Towards a Critical Black Politics of Vulnerability*. *Critical horizons : journal of social & critical theory* 17, no. 2 (2016): 240–259, 247 (racializing practices also take place in the most private spaces, such as in the kitchens of European households or in dreams and the imagination). Michel, Noémi, and Manuela Honegger. *Thinking Whiteness in French and Swiss Cyberspaces*. *Social politics* 17, no. 4 (2010): 423–449. See also [Preliminary Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland](#) 17 - 26 January 2022.

⁸² See [Preliminary Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland](#) 17 - 26 January 2022.

⁸³ See Concluding Observations on the tenth to twelfth periodic reports of Switzerland, CERD/C/CHE/CO/10-12, 12 December 2021. Among other things, the CERD recommended that Switzerland “adopt a provision in civil and administrative law prohibiting direct and indirect racial discrimination, covering all areas of private and public life”.

rise in Switzerland” in 2012 and highlighted gaps in anti-discrimination law and policy.⁸⁴ These forms of racial discrimination are impermissible not only when they are the sole basis of discrimination but also when they contribute to forms of “multiple discrimination,”⁸⁵ including based on involvement in the criminal justice system, youth, or other prohibited grounds.

I. But for his race, Brian Keller’s childhood and adolescence would not have been characterized by complex, overlapping deprivations of human rights

86. When Brian Keller was 17 years old in 2012, and on the cusp of legal adulthood, Switzerland was ranked 13th in a comparative study, *Starting Well*, on early childhood education⁸⁶. In other words, although Switzerland is considered a relatively advanced country on early childhood development, Brian Keller, the child, seems not to have benefited from the basic early childhood development provisions given to Swiss children. Alienated in his own country, the birthplace of his father, this was a bewildering experience, as he indicates. The 2021 report for the OECD, *Starting Strong VI*,⁸⁷ outlines many provisions, including for children with special needs, afforded to children living in Switzerland. As set forth herein, it appears that Brian Keller’s childhood developmental challenges were criminalized, and that his situation seriously deteriorated in every way. Any of early childhood interventions outlined in this self-study could have set Brian Keller’s life on a different life-course. Instead, and contrary to Switzerland’s own guidelines and public messaging throughout his childhood, Brian Keller’s basic human rights were not respected and protected in his contacts with law enforcement and the criminal justice system. What oversight existed frequently rationalized rather than questioned the ongoing, extraordinary deprivation of the human rights of a young, Black child.

87. Thus, even if there were good intentions, Brian’s race was clearly a key catalyst in many decisions taken on his behalf. The State has acknowledged no similarly situated white children who have experienced the wholesale deprivation of rights and childhood that Brian has; the misconduct or developmental challenges of white Swiss children has apparently been met with the recognition that they are, in fact, children. In addition, the social stigma attached to the idea of being complicit in systemic racism has often occulted a rigorous examination of the role of legacy mindsets relating to race, colonialism, and Blackness in the minds of key State decision-makers in Brian’s life. Globally, this is a frequent barrier to the understanding and confrontation of one’s own bias, an issue proven to exist even among highly educated social elites, and feeds a

⁸⁴ Council of Europe Commissioner of Human Rights Thomas Hammarberg’s 12 March 2012 Letter to Federal Councillor Didier Burkhalter, Head of the Swiss Federal Department of Foreign Affairs. See <https://rm.coe.int/16806db8ca>

⁸⁵ CERD Committee general recommendation No. 32, para. 7.

⁸⁶ *Starting well - Benchmarking early education across the world. A report from the Economist Intelligence Unit, commissioned by the Lien Foundation.* The Economist (2012).

⁸⁷ Faeh, A and Vogt F. (2021). Quality beyond regulations in ECEC: country background report for Switzerland. St.Gallen: Centre of Early Childhood Education, St.Gallen University of Teacher Education.

“culture of denial.”⁸⁸ This raises serious, ongoing concerns that the “culture of denial,” i.e., a failure to understand the role that race has played in decision-making around Brian Keller, could persist, allowing rationalization, denial, or dismissal of the ongoing injustices Brian Keller faces.

88. In this regard, it is important to recognize that Brian’s situation is not explained by the common excuse, “We just didn’t know back then.” In other words, although there is the hope that there would be very different outcomes with respect to Brian if his case were revisited through the lens of how childhood, adolescence, ADHD, and systemic racism are understood today, the reality is that much of the relevant research was available at the time. Equally important, although Brian is unusual in many ways, he is not unique. In Switzerland, over 6 per cent of all boys receive special needs education services, largely in their regular classrooms.⁸⁹ Approximately 6% of Swiss children and adults have ADHD.⁹⁰ Thousands of children were in the foster care system. Although juvenile prison facilities existed, only 20-30 children in the entire country were detained, and particularly post-conviction, during the entirety of Brian’s childhood, where he was inevitably the youngest person ever held in these facilities. *See infra* at ¶ 24. And yet, as the reports cited *supra* indicate, other similarly situated children were not abandoned so brutally by the State’s protection apparatus. In Brian’s case, race was a catalyst for State-sanctioned torture, abandonment of human rights, and the consistent use of discretion in punitive ways that denied his conduct throughout was that of a twice exceptional child.

89. For these reasons and more, Brian Keller’s situation is a stark example of systemic racism in Switzerland. The exercise of power and discretion at each stage by State institutions, even in the unquestioned adoption of prior claims and conclusions clearly reflecting negative racial stereotypes, reinforced previous human rights violations and abuses by the State, the media, and others. This has resulted in a wholesale deprivation of childhood, in violation of the Convention on the Rights of the Child, a pattern of specific and ongoing violations that implicate the UN Convention Against Torture, and more. With respect to his human rights, each human rights abuse and violation built upon the last, scaffolding the abuse of Brian’s human rights by the State to a truly extraordinary level. In its fact-finding visit, Working Group was able to learn of no white Swiss nationals who have experienced misconduct in the penal system in ways even approaching the scope and magnitude of what Mr. Keller has endured, with the full knowledge, intent, and oversight of medical, judicial, and law enforcement personnel.

90. Moreover, as Brian was a child for most of the relevant period, all international standards are implicated in these circumstances, even as they are accelerated or catalysed by race and systemic racism. Unlike an isolated incident where the harm could be expected to be mitigated over time, the systematic violation of Brian Keller’s human rights only became more harmful during the relevant period. He has experienced a complex and ongoing deprivation of family,

⁸⁸ Compare *See* OHCHR, *Conference Room Paper, A/HRC/47/CRP.1*, *supra* at note 61 ¶ 41 (“some States - especially those with links to enslavement, the transatlantic trade in enslaved Africans and colonialism – continue to deny or have failed to acknowledge the existence and impact of systemic racism, especially institutional racism, against Africans and people of African descent; or its linkages with enslavement and colonialism. As a result, they have not sufficiently examined the disparate impact of their legislation, policies and practices on certain groups of the population, including Africans and people of African descent.”)

⁸⁹ *Almost 5% of children in Switzerland classed as special needs*, [Swiss Info](#) (Nov. 30, 2020).

⁹⁰ *Study finds more adults have ADHD*, [SwissInfo](#), at (5 Mar. 2014).

education, human contact, and more. The racialized nature of the State discrimination and misconduct is only one of several examples that fall clearly within the criteria for torture according to The United Nations Convention Against Torture. In addition, the impact of torture to a child is even greater. Notably, this pattern and practice of conduct by the State is precisely the opposite of what would be expected for a child who was determined to be gifted and talented at a very young age. As Brian Keller himself has stated, “Switzerland is supposed to be the human rights model. But my every right has been violated.”

II. Today in Switzerland, there is understanding that Brian experienced multiple, overlapping injustices that would not have occurred but for his race

91. Today, in Switzerland, there is a widespread acknowledgment that this case represents a miscarriage of justice, and that, but for his race, Brian Keller would not have experienced the complex and overlapping denials of human rights that have occurred, as detailed above. There is recognition that the legacies of the ways race (and Blackness in particular) was defined, socially constructed and normalised continue to impact decision-making in every sector of society.⁹¹ The media and the public, including artists, activists, and scholars, have offered complex interrogations of Brian’s situation and the role race and systemic racism played in the public imaginary throughout the relevant period.⁹² Most importantly, at this point, Brian can finally benefit from the important understanding supported by scientific research and other authority, demonstrating that race, systemic racism, and Blackness, in particular, may complicate or enhance decision-makers’ fear, urgency, or perceived danger with respect to childhood or adolescent misconduct.

a. The understanding that Switzerland is punishing adolescence, not criminality, is well-established in scientific research that suggests long-term impact to Brian’s health

92. It appears that few, if any, Swiss officials involved with Brian saw him as a child entitled to care and protection, even at a very young age. His therapeutic or criminal justice interventions suggest experimentation rather than care. The scientific literature suggests that Swiss authorities were punishing acts of adolescence, rather than acts of crime or serious misconduct, in the decisions made about Brian’s life.

⁹¹ See *supra* at note 81.

⁹² See e.g., “*At the limit*”, The Republik, 4 Jun. 2019, at <https://www.republik.ch/2019/06/04/alle-kennen-carlos-dentaeter-niemand-mike-das-opfer> (4-part series detailing the history of Bria’s case in major periodical with widespread reach throughout Switzerland.); #bigdreams, Neumarket Theater, at <https://www.theaterneumarkt.ch/en/kalender/bigdreams/>;

93. Adolescence is a lengthy process involving children's asynchronous development and maturation cognitively, socially, emotionally and physically.⁹³ The scientific research on human development in adolescence is relevant across cultures, countries, and regions.⁹⁴ Adolescents have less impulse control, less cognitive control, and are less consequence-oriented in their thinking than adults, well into their mid-twenties.⁹⁵ Notably, research findings in behavioural science are mirrored by neuroscience research, with respect to the development of the adolescent brain.⁹⁶ Adolescents' impulsive reactions, risky behaviours, lack of consequence-oriented thinking, and ability to exert self-control and regulate their responses are developmental and universal as they mature in a staggered manner with their psychological maturity lagging behind their physical and intellectual maturity.

94. Thus, the research shows that the impact of this decision-making to Brian Keller is considerable and ongoing. Chronic stress and instability put children at greater risk for serious physical and mental health impairments, including anxiety, depression, post-traumatic stress disorder, lower IQ, obesity, immune system functioning, physical growth, cancer, heart and lung

⁹³ See B.J. Casey, Kim Taylor-Thompson, et al. *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*. *Annual Review of Law and Social Science*. 16:1, 203-222, 211 (2020) (“[T]here is no one age at which the adolescent reaches maturity in all psychological capacities. Different psychological capacities (cognitive, emotional, social) mature at different ages, and this development extends into the early twenties. ***A consequence of this type of distinction in developmental trajectories of psychological capacities may be that in some contexts, young people appear to display controlled behavior, but in other contexts their behavior may look out of control***, or that in some contexts young people can weigh the costs and benefits of their options, but in other contexts they lack the ability to engage in this type of matured decision making”)

⁹⁴ See e.g., Icenogle G, Steinberg L, Duell N, Chein J, Chang L, et al. (2019) *Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: evidence for a “maturity gap” in a multinational, cross-sectional sample*. *Law Hum. Behav.* 43:69-85; Steinberg, L. et al. (2018) ‘*Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation*’, *Developmental Science*, 21(2), at 1; Duell N, Steinberg L, Icenogle G, Chein J, et al. (2018 May); *Age Patterns in Risk Taking Across the World*. *J Youth Adolesc.* 47(5):1052-1072 (“age patterns in risk taking are largely consistent across cultures, at least in the very general sense that risk taking rises in adolescence and subsequently declines in adulthood. This cross-national similarity is consistent with recent reports of cross-cultural comparability in age patterns of sensation-seeking and self-regulation”).

⁹⁵ Icenogle, G. and Cauffman, E. (2021), *Adolescent decision making: A decade in review*. *J Res Adolesc.* 31: 1006-1022 at 1012. (“Compared to adults, adolescents evince greater reward sensitivity, impulsivity, and sensitivity to peer influence, and less future orientation. While most laypeople readily accept these development patterns as they pertain to mid- and late adolescence (i.e., youth of high school or college age), it is notable that development in these self-regulatory capacities continue into mid-20s.”)

⁹⁶ Icenogle, *id.*, at 1012. (at adolescence, reward regions and certain brain circuitry “develop rapidly, beginning at pubertal onset. Yet, the development and refinement of cognitive control regions (including the prefrontal cortex and its connections) are more gradual.”)

disease, stroke, and more.⁹⁷ Further, the effects of traumatic experiences are cumulative, even to the point of impacting lifespan.⁹⁸ Adolescence and puberty are also particularly vulnerable periods of rapid change.⁹⁹ Stressors during adolescence may have lasting impact.¹⁰⁰

b. The understanding that the State failed to take a trauma-informed approach is well-established in the scientific research.

95. There is also deep understanding that many decisions could have been made differently, at the time, given existing research and existing practice.

96. An initial example is the widespread use of foster placements. When Brian was not in prison, he was mandated to different foster placements by the State. The systematic denial of his family from an early age likely increased the trauma to Brian Keller, while also leaving him to develop tools to mitigate it on his own. There are documented, scientific, and far-reaching harms of being separated from family and parenting in childhood, including increased risk for mental health problems, poor social functioning, insecure attachment, disrupted stress reactivity, and

⁹⁷ Effects of early life stress on cognitive and affective function: An integrated review of human literature. *Psychopharmacology*, 214(1), 55-70 (Early adversity associated with deficits in cognitive performance, memory, executive functioning, reward processing, processing of social and affective stimuli, and emotion regulation functions); Shirtcliff, E., Coe, & Seth D. Pollak, S. (2009). Early childhood stress is associated with elevated antibody levels to herpes simplex virus type 1. *PNAS* 106 (8) 2963-2967; (early life stress has lingering effect on immune function); Heim, C., & Nemeroff, C. B. (2001). The role of childhood trauma in the neurobiology of mood and anxiety disorders: Preclinical and clinical studies. *Biological Psychiatry*, 49(12), 1023-1039 (children exposed to early adverse experiences are at increased risk for the development of depression and/or anxiety disorders); Maniam, J., Antoniadis, C., & Morris, M. J. (2014). Early-life stress, HPA axis adaptation, and mechanisms contributing to later health outcomes. *Frontiers in Endocrinology*, 5(May), 73 (same); Pechtel, P., & Pizzagalli, D. A. (2011). Taylor, G. J. (2010). Affects, trauma, and mechanisms of symptom formation: A tribute to John C. Nemiah, MD (1918–2009). *Psychotherapy and Psychosomatics*, 79(6), 339-349.

⁹⁸ Brown, David, et al. (2009). Adverse Childhood Experiences and the Risk of Premature Mortality. *37 American journal of preventive medicine* 389-96 (adverse childhood experiences (ACEs) are associated with premature death during adulthood); Mackenzie, Michael et al. (2017). Separating Families at the Border - Consequences for Children's Health and Well-Being. *The New England journal of medicine*. 10:376 (children traumatically removed from parents, suffer physical and mental health effects— especially in children who have already faced serious adversity —unlikely to be short lived and cumulative adversity can last a lifetime).

⁹⁹ Doom, J. R., & Gunnar, M. R. (2013). Stress physiology and developmental psychopathology: Past, present, and future. *Development and Psychopathology*, 25(4), 1359-1373 (the prenatal period, infancy, and the pubertal transition are the potentially sensitive periods of stress system development in children).

¹⁰⁰ Lupien SJ, McEwen BS, Gunnar MR, Heim C. Effects of stress throughout the lifespan on the brain, behavior and cognition. *Nat Rev Neurosci* 10: 434-445 (Chronic exposure to stress hormones, whether it occurs during the prenatal period, infancy, childhood, adolescence, adulthood or aging, has an impact on brain structures involved in cognition and mental health).

mortality.¹⁰¹ Scientific research also documents the harmful effects of parental separation on child well-being for children in foster care¹⁰² specifically. In addition, research suggests that some adult diseases should be viewed as developmental disorders that begin early in life, suggesting that persistent health disparities could be reduced by the alleviation of toxic stress in childhood.¹⁰³ Children depend on their parents, their primary caretakers, to successfully navigate stressful and traumatic events. Research shows that children's physiological responses to stress are significantly reduced by ongoing access to their primary caretaker.¹⁰⁴ Yet, Brian had extremely restricted access to his family for most of his childhood.

97. Brian's two attempted suicides present another example. Self-harm was the leading cause of death for young men in Switzerland (ages 15-24) at the time 15-year old Brian attempted suicide twice.¹⁰⁵ Switzerland had one of the highest rates of suicide for adolescents at the beginning of the twenty-first century¹⁰⁶ and in 2011, the leading cause of death for adolescents in

¹⁰¹ See e.g., Pesonen, A., & Räikkönen, K. (2011;2012;). The lifespan consequences of early life stress. *Physiology & Behavior*, 106(5), 722-727; Shonkoff, J. P., Garner, A. S., The Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics, Siegel, B. S., Dobbins, M. I., Earls, M. F., Garner, McGuinn, L., Pascoe, J., & Wood, D. L. (2012). The lifelong effects of early childhood adversity and toxic stress. *Pediatrics*, 129 (1), e232-246; Pechtel, P., & Pizzagalli, D. A. (2011). Effects of early life stress on cognitive and affective function: An integrated review of human literature. *Psychopharmacology*, 214(1), 55-70; Maniam, J., Antoniadis, C., & Morris, M. J. (2014). Early-life stress, HPA axis adaptation, and mechanisms contributing to later health outcomes. *Frontiers in Endocrinology*, 5(MAY), 73.

¹⁰² See e.g., Flannery, J. E., Beauchamp, K. G., & Fisher, P. A. (2017). The role of social buffering on chronic disruptions in quality of care: evidence from caregiver-based interventions in foster children. *Social neuroscience*, 12(1), 86–91 (chronic adversity across childhood, including from placement in foster care, disrupts the social buffering children require to avoid chronic stress and associated metabolic impact)

¹⁰³ Shonkoff, J. P., Garner, A. S., The Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics, Siegel, B. S., Dobbins, M. I., Earls, M. F., Garner, McGuinn, L., Pascoe, J., & Wood, D. L. (2012). The lifelong effects of early childhood adversity and toxic stress. *Pediatrics*, 129 (1), 232-246 (early experiences may have lasting effect on the genetic predispositions influencing brain architecture and long-term health, including extensive evidence of the disruptive impacts of toxic stress and causal mechanisms linking early adversity to later impairments in learning, behavior, and physical and mental well-being).

¹⁰⁴ See Hostinar, C. E., Sullivan, R. M., & Gunnar, M. R. (2014). Psychobiological mechanisms underlying the social buffering of the hypothalamic–pituitary–adrenocortical axis. *Psychological Bulletin*, 140(1), 256-282 (from infancy to adulthood, the social buffering of the presence of parents lessens children's stress response to threats).

¹⁰⁵ World Health Organization (2019). Cause specific mortality (2000-2019) – Top 10 causes of death in Switzerland for males aged 20 to 24 years, Top 10 causes of death in Switzerland for males aged 15 to 19 years (Global Health Estimates). <https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates/ghe-leading-causes-of-death>

¹⁰⁶ Rey Gex C, Narring F, Ferron C, Michaud PA. *Suicide attempts among adolescents in Switzerland: prevalence, associated factors and comorbidity*. Acta Psychiatr Scand. 1998 Jul;98(1):28-33.

Switzerland aged 15-19 years old was self-harm.¹⁰⁷ At the same time, Switzerland's suicide prevention initiatives were recognized by the WHO.¹⁰⁸

98. Thus, Switzerland was no stranger to suicidality.¹⁰⁹ In addition, the suicide rate in Switzerland is elevated for persons who are incarcerated.¹¹⁰ Yet, only Brian was strapped to a bed for thirteen days, reportedly nude at times, with seven-point restraints, occasionally loosened to allow him to urinate and defecate in place. He was forcibly medicated against his will with multiple times the standard dosage of a strong psychotropic medication. In the retelling, the disregard of Brian Keller's dignity and humanity is near-complete. Notably, the chosen, torturous psychiatric intervention was inconsistent with the standard of care,¹¹¹ as one expert opined in court. The expert retained by the prosecution confirmed it was an unprecedented period of fixation, or physical restraint, particularly given the simultaneous overmedication of Brian.¹¹² In addition, there was clear guidance from the European Court of Human Rights that this constituted "degrading and inhumane treatment" and existing protocols against such actions set in 2006 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹¹³ The regime was degrading, inhumane, and unprecedented.

¹⁰⁷ WHO, Top 10 causes of death in Switzerland for males aged 15 to 19 years (2011), <https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates/ghe-leading-causes-of-death>. See also Steck, N., Egger, M., Schimmelmann, B.G. et al. *Suicide in adolescents: findings from the Swiss National cohort*. *Eur Child Adolesc Psychiatry* 27, 47–56 (2018).

¹⁰⁸ See e.g., WHO, *Preventing suicide: a global imperative* (2014), p. 61 (citing Switzerland as a case study in suicide prevention activities, including means reduction projects; media monitoring; surveillance; short-term interventions and follow-up of people who have attempted suicide; gatekeeper training; World Suicide Prevention Day awareness-raising activities; self-help groups for the bereaved; and crisis helplines). However, Switzerland was also unable to report its rates of involuntary admission, restraint and seclusion in psychiatric facilities to the WHO in 2008. See WHO, *Policies and practices for mental health in Europe - meeting the challenges* (2008), pp. 163-168.

¹⁰⁹ Existing protocols, including a campaign to prevent suicide, nowhere accredit or predict the decisions taken by medical, judicial, and prison officials in Brian Keller's case. As disturbing is a troubling lack of clear protocols or oversight, a key factor in the reliance on racial bias by decision-makers.

¹¹⁰ See e.g., Seena Fazel, *Suicide in prisons: an international study of prevalence and contributory factors*, 4 *The Lancet* P946-952 (1 December 2017).

¹¹¹ Cf. Ostertag Louise, et al., *The implementation and first insights of the French-speaking Swiss programme for monitoring self-harm*, *Swiss Medical Weekly* (2019).

¹¹² The expert opinion came from the Berlin forensic psychiatrist, Werner E. Platz, who stated that in his many years of work he has never experienced a fixation period of thirteen days. Blulle, E., and Hurlimann, B., "At the limit", part 2 - the expert: "Such a practice is tantamount to abuse", *The Republik*, 4 Jun. 2019, at <https://www.republik.ch/2019/06/04/teil-2-mikes-tortur>

¹¹³ In circumstances far, far less egregious than experienced by Brian, the European Court of Human Rights (ECHR) found strapping a man to a bed continuously in State care constituted "inhuman and degrading treatment", a substantive violation of Article 3 of the European Convention on Human Rights. The ECHR cited existing 2006 anti-torture protocols in this regard, affirming that physical restraints could only be "a measure of last resort" and constituted "an extreme action" that could only be used to "to prevent *imminent* injury or to reduce *acute* agitation and/or violence". See *Bures v. Czech Republic*, No. 37679/08 (18 October 2012), citing 16th General Report [CPT/Inf (2006) 35] (emphasis added).

Although the guidance was there, other factors clearly influenced the Swiss courts and policymakers.

99. Thus, the widespread understanding of today is that many of the behaviours cited as misconduct throughout Brian's life may have been *caused* by the trauma he experienced in educational settings, in detention settings, in health care settings, and in foster care. This has not been a consideration acknowledged by the key decision-makers over Brian's life. Yet, the research underlying the prevalence of "trauma informed" approaches today has been well-established for over a decade.

100. A final example is the consistent pivot to incarceration as a viable option and potential solution for Brian, throughout his entire childhood and adolescence. Yet, contrary to Brian's case, Switzerland is considered [comparatively lenient](#) in the realm of criminal justice. In this context, Mr Keller's punishments seem particularly harsh.

c. The research that children like Brian are 'twice exceptional' was well-established throughout the relevant period, and widely understood today

101. Globally, the field of child development has expanded dramatically in Brian's lifetime, but he has never benefited considerable research into children who were twice exceptional and brimming with potential.¹¹⁴ Internationally, scientific knowledge existed about twice exceptional children, like Brian, since the mid-twentieth century.¹¹⁵ It appears as though Brian never benefitted existing scientific research, including that "twice exceptional" children, like him, were often misunderstood and misdiagnosed,¹¹⁶ as well as particularly receptive to intervention

¹¹⁴ See Amran HA, Majid RA. *Learning Strategies for Twice-Exceptional Students*. Journal of Natural & Applied Sciences. 2018;22(3):954-976 (global survey of research on interventions and effectiveness for twice exceptional children). See also Foley Nicpon, M. et al. (2011) 'Empirical Investigation of Twice-Exceptionality: Where Have We Been and Where Are We Going?', Gifted Child Quarterly, 55(1), pp. 3–17 (comprehensive summary of empirical research from 1991-2011 examining gifted students with specific learning disabilities, Attention-Deficit/Hyperactivity Disorder, or autism spectrum disorders).

¹¹⁵ In 1967, Kazimierz Dabrowski, MD, PhD, a Polish psychiatrist who received his medical degree from the University of Geneva in 1929, published findings on children who would eventually be characterized as "twice exceptional" or 2e. See Dabrowski, K., *Personality-shaping Through Positive Disintegration*, Little, Brown (1967). He studied 80 gifted children aged 8-23 years old and found in each something he termed overexcitability, "which constituted the foundation for the emergence of neurotic and psychoneurotic sets.... [T]hese children also showed sets of nervousness, neurosis, and psychoneurosis of various kinds and intensities, from light vegetative symptoms, or anxiety symptoms, to distinctly and highly intensive psychasthenic or hysterical sets...." He noted the likely cause was "more than average sensitivity which not only permits one to achieve outstanding results in learning and work, but at the same time increases the number of points sensitive to all experiences that may accelerate anomalous reactions revealing themselves in psychoneurotic sets." *Id.* at 253-55. See also Lysy, K. Z., & Piechowski, M. M. (1983). *Personal growth: An empirical study using Jungian and Dabrowskian measures*. Genetic Psychology Monographs, 108(2), 267–320 (correlating overexcitability with giftedness); Piechowski, M., Miller, Nancy (1970). *Assessing developmental potential in gifted children: A comparison of methods*, Roeper Review: A Journal on Gifted Education, 17:176.

¹¹⁶ See e.g., Reis SM. (1995) *Talents in two places: case studies of high ability students with learning disabilities who have achieved*; Schiff MM, Kaufman AS, Kaufman NL. (1981) *Scatter analysis of WISC-R profiles for learning disabled children with superior intelligence*. J Learn Disabil. 14:400-404; Maker, C. J. (1976). *Searching for giftedness and talent in children with handicaps*. The School Psychology Digest, 5: 24-37.

strategies to promote learning and growth.¹¹⁷ Often twice exceptional children are subject to separate interventions that seek to remediate their disability (in this case, ADHD) while ignoring or separately addressing their talents and gifts, i.e., squashing their potential rather than nurturing it in its complexity.¹¹⁸ Instead, research demonstrates that siting special education and gifted education interventions together will optimize twice-exceptional students' potential and learning.¹¹⁹ Yet, Brian was never recognised as a twice exceptional child who required enrichment and stimulation, rather than imprisonment.

102. Thus, no recognition of Brian's double exceptionality appears to have influenced the many psychologists, psychiatrists, courts, law enforcement, and child development experts who evaluated him, endorsed incarceration and isolation for most of his childhood, and medically authorized the multiple deprivations he experiences. His reactions were viewed as intentional, destructive, and fully considered. However, the lack of structured outlets to channel his energy and the lack of guidance on managing his ADHD in the context of his intelligence allowed his strong understanding of the injustices he faced to build his frustration. Although decision-makers in Brian's life should have realized the relevance of this research and knowledge to Brian's situation, it appears they were never considered.

103. Instead of positive interventions, guidance, and targeted enrichment, Brian's behavioural disorder was met with and exacerbated by the imposition of judicial and police intervention and psychological treatment measures. He was first arrested, interrogated without counsel or his parents, and detained in an adult facility at the age of 11 on fabricated charges. Consistently, these decisions failed to adequately account for the best interests of the child, in particular his education, health and family life. This course of treatment was also attributable to racial prejudice and racialized decision-making in construing the best interests of the child and the range of acceptable options for the State. Instead of viewing Brian as a child with developmental needs and twice-exceptional status, he was racialised as criminal and irredeemable.

¹¹⁷ See Baum SM, Owen SV. *To Be Gifted & Learning Disabled: Strategies for Helping Bright Students with Learning & Attention Difficulties*. Prufrock Press Inc (2004); King EW. *Addressing the social and emotional needs of twice-exceptional students*. Teaching Exceptional Child (2005); Winebrenner, S., & Brulles, D. (2012). *Teaching gifted kids in today's class- room: Strategies and techniques every teacher can use*. Minneapolis, MN: Free Spirit Publishing; *Twice-exceptional kids; a guide for assisting students who are both academically gifted and learning disabled*. Reference & Research Book News (Aug. 2008) (includes tips for teachers and parents on meeting the special needs of intellectually gifted students who are challenged by such disorders as attention-deficit/hyperactivity disorder).

¹¹⁸ See Rizza, M. G., & Morrison, W. F. (2003). *Uncovering stereotypes and identifying characteristics of gifted students and students with emotional/behavioral disabilities*. *Roeper Review*. 25:73-77; Gierczyk, M.; Hornby, G. (2021). *Twice-Exceptional Students: Review of Implications for Special and Inclusive Education*. *Educ. Sci.*11, 85: 1-2.

¹¹⁹ Missett, T. C., Azano, A. P., Callahan, C. M., & Landrum, K. (2016). *The influence of teacher expectations about twice-exceptional students on the use of high quality gifted curriculum: A case study approach*. *Exceptionality*, 24, 18-31. Foley-Nicpon, M., Allmon, A., Sieck, B., & Stinson, R. D. (2011). *Empirical investigation of twice-exceptionality: Where have we been and where are we going?* *Gifted Child Quarterly*, 55, 3-17. Nielsen, M. E. (2002). *Gifted students with learning disabilities: Recommendations for identification and programming*. *Exceptionality*, 10, 93-112 (comprehensive summary of empirical research from 1991-2011 examining gifted students with specific learning disabilities, Attention-Deficit/Hyperactivity Disorder, or autism spectrum disorders).

104. Systemic racism also plays an important role. In States where race is considered in academic research, research shows that academic giftedness among young boys and men of African descent males who have behavioural problems is often concealed by biased views of culturally rooted abilities.¹²⁰

105. The harm of the deprivation of parents and family Brian suffered, as well as the protracted periods of incarceration and foster care throughout his childhood, were exacerbated by his twice-exceptional status. For twice exceptional children, research suggests parents play a major (and indispensable role) in their fostering success, first by recognizing children's gifts as well as disabilities and then by assuming the large responsibility for the development of children's potential.¹²¹

d. The fact that Brian's misconduct reflects provocation rather than ill-intent is apparent, given what we understand today

106. Overall, from the time he was a young child, the allegations against Brian reflect reactions to provocation, rather than wilful misconduct or criminality. *See e.g., supra* at 29, 40, 46, 48. Brian has never been arrested for acts of wanton criminality, like robberies or theft. Instead, the allegations resemble each other and read like the adolescence of a child with ADHD. In the narrow opportunities he has had to demonstrate them, Brian has established that he was provoked, rather than inherently inclined to violence or misconduct. Three examples of this, across a ten-year period, stand out. First, when he was in a court-mandated special setting at 15, Brian was successfully living in the community, and complying with the strict setting and requirements of his release at that time, for 13 months. When the special setting was terminated as a result of a media campaign and public pressure, *see supra* at ¶¶ 36-38, and notably not any mistake or misconduct on his part, Brian was summarily re-incarcerated, an abuse by the state and a grave violation of his rights to the fair administration of justice (ICCPR), eventually acknowledged by the Swiss courts.

107. Second, when the Working Group visited Brian in JVA Pöschwies Prison, Brian was a sober young man who was engaging, thoughtful, well-spoken, and kind. Despite the sensory deprivation he has been subject to his entire childhood, he welcomed the entire delegation of six people into the small outdoor area adjacent to his solitary cell. Throughout, he spoke with open body language, consistent eye contact, and offered friendly handshakes to all members of the group. He demonstrated complex and nuanced understanding of his situation, including the racialized nature of the decision-making in his case. He agreed to share the small bench, the only available seating in the outdoor cell, and he sat and spoke with the chair of the Working Group on this small bench for approximately one hour. Even in describing and responding to questions about very disturbing aspects of his treatment by the State, Brian never exhibited any anger,

¹²⁰ See Artiles, A. J., Kozleski, E. B., Trent, S. C., Osher, D., & Ortiz, A. (2010). *Justifying and explaining disproportionality, 1968-2008: A critique of underlying views of culture*. 76 *Exceptional Children*; Chu, S. (2011). *Teacher perceptions of their efficacy for special education referral of students from culturally and linguistically diverse backgrounds*. *Education*, 132(1), 3-14; Valencia, R. R. (2010). *Dismantling contemporary deficit thinking: Educational thought and practice*. New York: Taylor & Francis; Owens, Charissa M., et al. (Aug. 2016). *Shifting paradigms to better serve twice-exceptional African-American learners*. *Behavioral Disorders* 41, 196.

¹²¹ Neumeister, K. S., Yssel, N., & Burney, V. H. (2013). *The Influence of Primary Caregivers in Fostering Success in Twice-Exceptional Children*. *Gifted Child Quarterly*, 57(4), 263-274.

excitement, or dysregulation. Instead, he immediately normalized an apparently unprecedented event, i.e., the welcoming of a delegation of visitors in person and seeing people without being subject to shackles or bullet-proof glass barriers, without any sign of being overstimulated or overwhelmed.

108. Third, the day after the Working Group visit, Brian was transferred out of solitary confinement, after over three years, and into a different prison in Zurich, where he has mainstreamed into the general population and adapted very successfully in the intervening months. Contrary to the negative reports and descriptions furnished by the administration of JVA Pöschwies, Brian has had the opportunity to demonstrate maturity and self-discipline. He has made a strong showing that as he emerges from adolescence, his potential is unlimited. With respect to Brian's current status, on March 1, 2022, the head of the Zurich Remand Prison issued an initial report that Brian Keller had integrated well since entering.¹²² His increased need for exercise was taken into consideration and he has exercise time as well as responsibilities in the prison relating to fitness. He has access to reading material, TV, and recreational materials. The prison reported that Mr. Keller maintains impeccable cell order. He receives weekly visits from the prison doctor from the University Hospital in Zurich and is supported by his health coach, Dr. Seidenberg since February 1, 2022, with an additional medical examinations scheduled. The narrative of Brian set forth by JVA Pöschwies appears nowhere in evidence today.

Provocation and Projective Identification

109. Brian experienced innumerable acts of implicit and explicit racial harassment while in prison, in psychiatric facilities, and in school. While there are considerable specific acts of provocation, the provocation of Brian was not limited to the racial harassment, taunting, beatings, denials of food, and other specific malicious acts by prison personnel. Psychological science also sets forth considerable basis for a self-interested and self-redeeming form of provocation under these circumstances, i.e., the psychological need of prison personnel and others involved in the decisions that violated Brian's human rights. Projective identification, which applies to groups and individuals, involves working out this tension via a vulnerable target, i.e., Brian, into whom the negative feelings may be placed and who may, afterward, be safely loathed, rejected, and made to feel inferior.¹²³ In the context of the prison, torture and the casual denial of human rights can be a "large group dynamic that is fostered and maintained through the defensive use of projective identification".¹²⁴ A defensive, potentially unconscious, "projective identification encompasses a deep interactional, intersubjective, and interpersonal process,"¹²⁵ that erases the prison personnel's involvement in injustice and even atrocity and redeems them, as a group – even in their misconduct. Self-image and self-esteem are redeemed by expelling their own volatility, violence, hatred, and unacceptable traits into Brian. Serious

¹²² Report of the Zurich remand prison of March 1, 2022.

¹²³ Rasmussen, Brian, and Daniel Salhani. *A Contemporary Kleinian Contribution to Understanding Racism*. 84 Social Service Review 491 (2010); See Bryan K. Nichols and Medria L. Connolly, *Transforming Ghosts Into Ancestors*, Other/Wise 12 (May 14, 2020).

¹²⁴ See *id.*

¹²⁵ Rasmussen, *id.* at n. 119, at 497.

costs to the vulnerable recipient, in this case Brian, may range from feeling inferior to vilification to unwarranted violence, all of which have occurred to Brian Keller.

110. The racialised harassment of Brian stems from a need to provoke, to vilify him in order to neutralize their own misconduct – conduct which constitutes torture according to authoritative sources. As Carl Jung has stated, “Everything that irritates us about others can lead us to an understanding of ourselves.” Brian is not alone in experiencing racialized harassment and provocation in the penitentiary system, and at JVA Pöschwies; given this systematic practice, projective identification one tool by which the group may evade identification with being agents of torture, which is what international law labels multiple aspects of Brian Keller’s experience in prisons, including but not limited to the years he had spent in solitary confinement.

111. Thus, there is a racialized provocation in the projection of racialized beliefs and negative stereotypes onto Brian Keller, keeping him separate from the world but recharacterizing him a “monster” and vilifying him in the justice system and the public imaginary. He is never seen as a child or an adolescent who might be struggling emotionally. The projective identification of racialized fears and aggression made Brian Keller into a repository and a symbol for all that is bad. Interestingly, this is consistent with societies that have a culture of denial around racism, where long-held beliefs about race and racial stereotypes are so denied that projection is the chief option, i.e., a therapy doll, for navigating racial fear. For this to be reinforced and reified iteratively by Swiss justice system authorities – rather than questioned or unravelled at any point in the past fifteen years – is a sign of how widespread and how comfortable this projective identification process may be.

112. The process of projective identification is a process of provocation, starting with a false, racialized belief or fear, followed by escalating efforts to make the repository of the projective identification, i.e., Brian, act out and behave in ways that appear to justify the mistreatment and mischaracterization of a child. Once provoked, the eventual reaction confirms a comfortable framing that restores positive self-image and a self-affirming narrative. The false racial belief may even be as complex and historical as the need for distance from the wealth and stability gained via complicity in the exploitation of Black people in the trade and trafficking in enslaved Africans and colonialism. A discomfort so great as to require the creation of a monster out of someone like Brian is also evidence of “psychological residue” of a moral injury, quite a high price indeed for the legacies of a history that is the origin story of systemic racism.¹²⁶ Quite importantly, cases like Brian’s offer powerful psychological evidence of the cost to *all* Swiss, including white Swiss people, of ongoing racialized fears and beliefs that are uncontested in daily life.

¹²⁶ See Bryan K. Nichols and Medria L. Connolly, *Transforming Ghosts Into Ancestors Un-silencing The Psychological Case For Reparations to Descendants of American Slavery*, *Other/Wise* 12 (May 14, 2020).

IT IS NOT TOO LATE: BRIAN IS NOT A THREAT TO COMMUNITY SAFETY & EVIDENCE CONFIRMS HIS HUMAN RIGHTS SHOULD BE RESTORED

113. There is no carceral solution to the dramatic abuses and violations of human rights Brian Keller has suffered on the basis of race, abuses that have stolen his childhood and are vastly disproportionate to any claims of necessity or of criminal misconduct committed by him. Yet, the subtext of the public decision-making in this case is that, irrespective of the reason, Brian is not safe for society. Narratives like those emanating from prisons like JVA Pöschwies, where Brian was kept in specialized cells created specifically to further isolate him from any human contact and subject to torture, implanted ideas in the public imaginary that Brian was a monster (or somehow psychologically unfit) in the public narrative. Brian is not a monster. He never was. He was a twice-exceptional child and now he is a sober and thoughtful young man. Community safety is not at risk from Brian Keller. The suborning of acts of torture, committed with impunity in JVA Pöschwies and elsewhere with respect to Brian, pose a far greater threat to community safety. Brian Keller seeks a real opportunity to contribute and to be free, an opportunity which is his birth right and which is long overdue.

114. In addition, narratives of community safety or risk, regarding Brian Keller, where they exist, strongly reflect the psychodynamic projective identification of racialized fear and the moral injury of racism discussed herein.¹²⁷ Notably, any claims of monstrousness or psychological instability are provably false, including (1) in his successful community-based placement prior to public and media uproar that ended it, (2) his current placement in the general population of a prison subsequent to his transfer from JVA Pöschwies in January 2022, and (3) in the lengthy visit of the UN Working Group of Experts on People of African Descent to Brian Keller in JVA Pöschwies, during which time a UN delegation sat with Brian, sharing the same bench in close proximity for well over an hour. At that time, an entire UN delegation experienced his seriousness, his intelligence, and his maturity, as well as his understanding of the grave injustice he has experienced.

115. Thus, it is not too late for Brian Keller to have his human rights respected and to receive the respect and regard that he was entitled to as a child of Switzerland. Brian Keller has shown tremendous resilience, the most important criterion for good outcomes as an adult.¹²⁸ Adolescence is a remarkably resilient period, including in response to childhood trauma and distress.¹²⁹ There is evidence that adolescents, well into their twenties, have a heightened capacity to learn from mistakes and course-correct misconduct.¹³⁰ In fact, many adolescents rise

¹²⁷ See *infra* at ¶¶ 109-112.

¹²⁸ National Academies of Sciences, Engineering, and Medicine. (2019). *The promise of adolescence: Realizing opportunity for all youth*, p. 127.

¹²⁹ *Id.* at p. xii, 127

¹³⁰ Icenogle, G. and Cauffman, E. (2021), *Adolescent decision making: A decade in review*. *J Res Adolesc.* 31: 1006-1022 at 1014. <https://doi.org/10.1111/jora.12608> (citing Decker, J. H., Lourenco, F. S., Doll, B. B., & Hartley, C.A. (2015). *Experiential reward learning outweighs instruction prior to adulthood*. *Cognitive, Affective, & Behavioral Neuroscience*, 15(2), 310–320 and Silva, K., Shulman, E. P., Chein, J., & Steinberg, L. (2016). *Peers increase late adolescents' exploratory behavior and sensitivity to positive and negative feedback*. *Journal of Research on Adolescence*, 26(4), 696–705).

from adverse circumstances to become very high achievers.¹³¹ Despite the harm and trauma inflicted upon him by many claiming to act in his best interests, scientific evidence confirms that Brian Keller is at an age where immediate release would maximize his ability to make mature decisions, develop agency around his own life trajectory, and determine what productive citizenship looks like for him.¹³²

116. Although incarcerated for years, without formal education or training, Brian Keller has managed to curate skills, talents, and passions on his own and in impossible circumstances uniquely his. He taught himself to read. One of the few kind and caring influences he recalls, outside his family, was a coach who introduced Brian to Thai boxing as a tight “community of misfits,” as he stated, and as a channel for his energy. This coach cultivated Brian’s interest in Thai boxing, initially as a means for a likely ADHD child to channel and focus his physical energy. Brian has a passion for Thai boxing, which he practices and additionally studies academically, and dreams of pursuing professionally.

117. Despite being denied formal education for nearly the entirety of his childhood, Brian also demonstrated significant autodidactic knowledge and intellectual curiosity and capacity. For example, upon hearing a reference to some literature, Brian volunteered that he had read the book and offered a thoughtful analysis *sua sponte*. He listened carefully and attentively and demonstrated adequate English comprehension to immediately correct a mistranslation by one of the interpreters.

118. Thus, if a monster has been created in this process, the monster is not Brian Keller. The monster is the inability of the justice system to course-correct mistakes in decision-making that have increased the harm to Brian Keller exponentially throughout the relevant period. The very science that reminds us that Brian Keller is a still-maturing child throughout the relevant period indicts the behaviour of those who provoked him into violence, legitimized inhumane treatment, and failed to protect his human rights. Brian Keller is not a monster. He is a thoughtful, serious, and engaging young man with extraordinary intelligence and a proven ability to overcome the very worst of circumstances and show maturity and forbearance in his actions.

RECOMMENDATIONS

119. According to international law, human rights, and fundamental fairness, the circumstances suggest that Brian Keller must be released to have his human rights restored. There is no carceral solution for the situation that has been created by racialised decision-making with respect to Brian Keller.

¹³¹ National Academies of Sciences, Engineering, and Medicine. (2019). *The promise of adolescence: Realizing opportunity for all youth*, p. 127 (citing Hoxby, C. M., and Avery, C. (2012). *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*. [Working Paper](#). Cambridge, MA: National Bureau of Economic Research).

¹³² National Academies of Sciences, Engineering, and Medicine. (2019). *The promise of adolescence: Realizing opportunity for all youth*, p. 301 (“The neuroscientific evidence, rather, bolsters the argument that adolescents—including young adults in their 20s—are neurologically less mature than adults. ***This adds strength to the understanding that adolescent wrongdoing is unlikely to reflect irreparable depravity***”) (emphasis added).

120. Brian Keller will need resources and assistance to restore his life to what it always should have been. To the degree these may include professional or psychological resources, these must be self-directed and voluntary. Brian may benefit from working with professionals of African descent, whose expertise, professional interests, and lived experience may offer significant assistance to Brian contextualizing, healing, and future planning. If necessary, and if asked, the State might offer some resources to find professional assistance where he can build trust, ideally with medical and other professionals of African descent.¹³³ However, the significant and coercive use of medical, psychological, legal, and social services throughout Brian’s childhood clearly indicates that any such resources must be strictly voluntary and of Brian’s own choosing.

121. The State should also look to highlight the strengths and potential of Brian Keller in its narratives, including in acknowledging the grave human rights abuses he has survived and the psychological resilience he has retained. Fortunately, the lifetime of constant surveillance of Brian Keller has also revealed him to be a very moral person, whose misconduct is limited to responding to provocation. At no time have there ever been allegations of indiscriminate violence or wanton misconduct. The allegations against Brian consistently demonstrate provocation with other teenage young men or prison personnel. No violence against vulnerable people has ever been alleged. Nor have crimes against society or strangers ever been substantiated, like robbery – even the one allegation of arson when he was very young was entirely discredited and there has never been another similar claim.

122. In addition, the Swiss state should consider embedding the findings in this report into a holistic racial equity audit on public decision-making.¹³⁴ Among other things, the importance of an equity assessment, including racial equity, to inform every aspect of decision-making is increasingly clear. In addition, there is useful guidance on models that seek to identify and mitigate the impact of systemic racism and racialized thinking on key decision-making, service, and assistance, including with respect to boys of African descent, like Brian, whose gifts and talents are accompanied by an emotional or behavioural disorder.¹³⁵

CONCLUSION

123. Switzerland has a protection obligation to Brian Keller. Yet, this has been violated time and again over the past 15 years, including because of his race, as set forth herein. His human rights can only begin to be restored by release and support for him to build a new life. This is an area where intentions cannot be substituted for impact. Regardless of whether the racialized

¹³³ The Working Group of Experts on People of African Descent noted a particular challenge with some Swiss medical professionals to serve distinct medical and psychological needs of people of African descent, and heard multiple reports of tendencies toward denial and complicity with systemic racism rather than meaningfully acknowledging or countering it. *See e.g., [Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland](#)*, Jan. 26, 2022, at ¶¶ 25, 29.

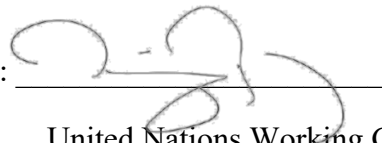
¹³⁴ Chokshi DA, Foote MMK, Morse ME. *How to Act Upon Racism—not Race—as a Risk Factor*. JAMA Health Forum. 2022;3(2):e220548. doi:10.1001/jamahealthforum.2022.0548

¹³⁵ *See e.g.,* Owens, C.M., Ford, D.Y., Lisbon, A.J. and Owens, M.T. (2016) 'Shifting paradigms to better serve twice-exceptional African-American learners', Behavioral Disorders, 41(4), 196 (culturally responsive identification process that focuses on finding, acknowledging, and working with students' strengths will shift the perspective away from a deficit view toward seeing potential in the twice-exceptional abilities in Black students).

nature of the decisions that have operated to deny Brian his human rights over and over were intentional, the situation can only be rectified by a State commitment to repair and to protect.

124. As a particularly intelligent young man, this is something Brian appreciates and articulates in discussing his situation. He refers to the “mistake” in how he is perceived, rather than the design of the Swiss justice system, with respect to his case: “I want them to recognize their mistakes, that they played a part in putting me in this situation. I want them to acknowledge their mistakes. I am twenty-six years old and I have spent 11 years in prison. I missed out on a lot. I want it to be recognized that it is damaging to miss out on childhood. I think this prison is more damaging than anything.”

Respectfully submitted by:

A handwritten signature in black ink, appearing to be 'D. G.', written over a horizontal line.

United Nations Working Group of Experts
on People of African Descent

May 27, 2022