Global Campus of Human Rights

Volume 4 No 2
2020

# Global Campus Human Rights Journal

The *Global Campus Human Rights Journal (GCHRJ)* is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights (see https://gchumanrights.org/research/publications/global-campus-human-rights-journal.html) as an open-access on-line journal. It is supported financially by the European Union Commission and appears twice annually.

This journal should be cited as (2020) 4 *Global Campus Human Rights Journal*

ISSN: 2532-1455

*Headquarters and contact information:*
*Global Campus of Human Rights*
Monastery of San Nicolò, Riviera San Nicolò, 26 I-30126 Venice Lido, Italy
https://gchumanrights.org

# Global Campus Human Rights Journal

Volume 4 No 2 2020

**Global Campus of Human Rights**
**2020**

The *Global Campus Human Rights Journal* (*GCHRJ*) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights as an open-access on-line journal.

**Aim:** The *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspectives, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

**Publication details:** It is published under the auspices of the Global Campus of Regional Human Rights Masters (see https://gchumanrights.org), and is supported financially by the European Union Commission. It appears twice annually, in July and in December.

**Open access:** The *Global Campus Human Rights Journal* is an open-access journal. There are no access charges for readers. Users are free to read, download, copy, distribute, print, search, or link to the full texts of articles published in the journal, or use them for any other lawful purpose.

**On-line:** The *Global Campus Human Rights Journal* is an on-line journal. Its url is https://gchumanrights.org/research/publications/global-campus-human-rights-journal.html

**Submissions:** Submissions may be made at any time. No fees are charged for submission or article processing. Submissions should:

- include an assurance that the article has not been published, submitted, or accepted elsewhere.
- conform to the style conventions on the journal web site.
- be concise.
- be written in UK English, or in French or Spanish. If submitted in French or Spanish, an abstract in English (of between 750 and 1000 words) has to be submitted together with the article.
- for English language style, follow the University of Oxford Style Guide (www.ox.ac.uk).
- be between 6 000 and 8 000 words in length, references included.
- (for submissions in English) include an abstract (summarising the article as a whole, including its aim, a clear description of its findings) of between 250 and 300 words. The abstract should include at least five key words.
- include a brief bibliography indicating academic qualifications and current professional position, and email contact address, as follows: Charles Ntuli; BA (Oxford), PhD (Lund); Visiting Professor, University of Sao Paolo; cntuli@uu.ac.za

**Style guidelines:** Detailed style guidelines are on the *Journal*'s website, https://gchumanrights.org/research/publications/global-campus-human-rights-journal.html

**Layout and typesetting:** Lizette Hermann, Pretoria University Law Press (PULP), Centre for Human Rights, Faculty of Law, University of Pretoria.

## The Global Campus of Human Rights

***Headquarters and contact information***

*Global Campus of Human Rights*
(Monastery of San Nicolò, Riviera San Nicolò, 26 I-30126 Venice Lido, Italy)
https://gchumanrights.org

The Global Campus of Human Rights is a unique network of one hundred participating universities around the world, seeking to advance human rights and democracy through regional and global cooperation for education and research. This global network is promoted through seven Regional Programmes:

- **European Master's in Human Rights and Democratisation (EMA)**
- **Master's in Human Rights and Democratisation in Africa (HRDA)**
- **European Master's Programme in Democracy and Human Rights in South East Europe (ERMA)**
- **Master's in Human Rights and Democratisation in Asia-Pacific (APMA)**
- **Master's in Human Rights and Democratisation in the Caucasus (CES)**
- **Master's in Human Rights and Democratisation in Latin American and the Caribbean (LATMA)**
- **Arab Master's in Democracy and Human Rights (ARMA)**

These Regional Programmes offer specialised post-graduate education and training in human rights and democracy from a regional perspective, with an interdisciplinary content as well as a multiplicity of research, publications, public events and outreach activities. The Global Campus integrates the educational activities of the Regional Programmes through the exchange of lecturers, researchers and students; the joint planning of curricula for attended and online courses; the promotion of global research projects and dissemination activities; the professional development of graduates through internships in inter-governmental organisations; and the strong focus of networking through the Global Campus Alumni Association, as well as support to the alumni associations of the Regional Programmes.

The wealth of human resources connected by global and regional alliances fostered by the Global Campus and its Regional Programmes, offer remarkable tools and opportunities to promote human rights and democracy worldwide.

The Global Campus of Human Rights develops its activities thanks to the significant support and co-funding of the European Union – through the *European Instrument for Democracy and Human Rights* and its partner universities around the world. The Global Campus equally boasts many joint institutional agreements and strategic alliances with inter-governmental, governmental and non-governmental organisations at the local, national and international level.

Volume 4 No 2 (2020)
http://doi.org/20.500.11825/2045

# Contents

**Articles**



**Recent regional developments**

F Viljoen 'Editorial' (2020) 4 *Global Campus Human Rights Journal* i-iii
http://doi.org/20.500.11825/2044

# Editorial

Having first been published in 2017, this is the fourth volume of the ***Global Campus Human Rights Journal***. The ***Journal*** is published under the aegis of the Global Campus of Human Rights, which consists of the seven leading Master's programmes in Human Rights and Democracy, presented in Europe, South East Europe, Africa, the Asia Pacific, the Caucasus, Latin America and the Arab World. These programmes – and this ***Journal*** – are all supported by the European Union. While the ***Journal*** is open to all scholars, it also provides a particular opportunity for the voices of a younger generation – post-graduate students – to be heard, allowing a diversity of regional perspectives.

This volume of the ***Global Campus Human Rights Journal*** consists of three parts.

The first part is a 'Special focus: Selected developments in the area of children's rights'. This is the second occasion on which the ***Journal*** devotes special attention to the rights of children. The special focus is a product of this collaboration between the Global Campus of Human Rights and the Right Livelihood Foundation. In 2019 a cooperation agreement was signed between the Global Campus of Human Rights and the Right Livelihood Foundation. Its purpose is to 'promote the acknowledgment and observance of human and child rights and to strengthen the participation of children in all matters affecting their lives in the present and in the future'. The Right Livelihood Foundation is a Swedish charity organisation, the mission of which is to honour and support courageous people solving global problems. The Foundation is a politically-independent and non-ideological platform for the voices of its Laureates to be heard.

The articles in this part are linked to the UN Global Study on Children Deprived of Liberty (2019). In 2020 the 'Global Classroom 2020', which was presented virtually due to the COVID-19 pandemic, focused on the UN Global Study on Children Deprived of Liberty and the implementation of its recommendations. These Global Classrooms, a feature of the Global Campus since 2013, brings together students and professors from all regional hubs for a week-long conference where a topic of common interest is studied, analysed and discussed. The Global Classroom facilitates interaction among students from the different regional programmes by

organising dedicated activities and providing a forum for discussion and networking.

The articles in this part of the ***Journal*** are all products of collaboration between students and staff working with each of the regional Master's programmes within the framework of the collaboration between the Global Campus of Human Rights and the Right Livelihood Foundation.

The editors of the 'special focus' part of the ***Journal*** are Manu Krishan, Reina-Marie Loader and Imke Steimann. In a separate editorial, they provide a context to the seven contributions – one each from the constituent Global Campus programmes – in this special section.

The second part of the ***Journal*** consists of an article of a general bearing. This article considers the perceptions of Lebanese and non-Lebanese residents of Tripoli and surroundings about the 17 October 2019 wave of protests. At that time, Lebanon had witnessed an unprecedented wave of mass protests and mobilisation spreading throughout the country. The city of Tripoli, Lebanon's second-largest and one of the most deprived cities in the country, was targeted for field research, conducted in January 2020, using a combination of quantitative and qualitative methods.

This study was a veritable team effort of students of the Arab Master's programme in Democracy and Human Rights (ArMA), which is one of the regional programmes comprising the Global Campus of Human Rights. Working closely with the ArMA students, Elias Dahrouge edited the text and directed the writing process.

The third part of the ***Journal*** contains a regular feature of the ***Journal***, a discussion of 'recent developments' in the fields of human rights and democratisation in the regions covered by the Global Campus of Human Rights. In this issue, developments during 2019 in South East Europe and the Caucasus are covered. These two discussions complement similar overviews of recent developments in four other regions (Europe, sub-Saharan Africa, the 'Arab world' and the Asia Pacific), contained in the first issue of the 2020 volume of the ***Journal***.

After four years at the helm, the current editorial team, based at the African hub of the Global Campus, will hand over to a new team, based at the Asia Pacific Master's programme working out of Mahidol University. Mike Hayes, who takes over the convening role, acted as co-editor in this phase of the ***Journal***. It has been our privilege to oversee the fledgling years of the ***Journal***. Our gratitude goes to everyone who contributed to the ***Journal*** throughout these years. A special word of thanks to Lizette Hermann of the Pretoria University Law Press (PULP), who was responsible for layout, and to Isabeau de Meyer for her impeccable editorial assistance.

Best wishes to the new team in propelling the ***Global Campus Human Rights Journal*** into ever-increasing prominence and relevance!

Frans Viljoen
Convening editor (2017-2020)

M Krishan, R Loader & I Steimann 'Editorial of special focus' (2020) 4 *Global Campus Human Rights Journal* 281-284
http://doi.org/20.500.11825/2043

# Editorial of special focus: Selected developments in the area of children deprived of liberty

***Manu Krishan, Reina-Marie Loader and Imke Steimann***

The UN Global Study on Children Deprived of Liberty (2019) unequivocally regards the detention of children as a form of structural violence. It not only leaves children stigmatised and marginalised for life, but also entirely forgotten by those adults who, in fact, should be protecting them. Despite irrefutable evidence of the harm detention inflicts on the physical and mental well-being of children, they continue to be detained in conditions that often leave them vulnerable to abuse and other severe human rights violations. This in turn has a severely negative impact on their development, stability and future prospects. Childhood encompasses the formative years of a human being and constitutes a period during which the personality of children is moulded and their ability to form emotional relationships defined. Depriving children of liberty during these crucially important years constitutes an enormous injustice. Yet, it remains one of the most overlooked violations of children's rights.

Headed by the independent expert Manfred Nowak (Secretary-General of the Global Campus of Human Rights), the ***Global Study*** reveals that more than 7 million children are deprived of liberty per year in different places of detention (including in the administration of justice, immigration detention and institutions). The UN Convention on the Rights of the Child (CRC) clearly states that depriving children of liberty should occur only in exceptional circumstances 'as a measure of last resort and for the shortest appropriate period of time' (article 37(b) CRC). In practice, however, state authorities in many countries around the world still widely place children behind bars as a means to control 'undesirable behaviour' (including for status offences, immigration or involuntary membership in non-state armed groups). Additionally, the research revealed numerous gaps in child justice systems globally, thereby underscoring the need for systemic change, further research and ongoing data collection on the topic.

This volume of the ***Global Campus Human Rights Journal*** continues to add to the Global Study findings by supporting students with the development of their own independent research. This is made possible under the auspices of one of the flagship activities of the Global Campus of Human Rights, notably the Global Classroom. The contributions in this volume developed directly out of the work students delivered as part of the Global Classroom 2020, which focused on the UN Global Study on Children Deprived of Liberty. The intention of this focus in addition was to offer students the opportunity to contribute to the dissemination and follow-up activities of the Study. The articles presented here thus hone in on regional trends identified by students of our seven regional Master's programmes in human rights and democratisation. Moreover, beyond the Global Study findings, the students' research is also heavily informed by empirical engagement with regional experts and stakeholders.

In the first contribution of this issue, students from the Asia Pacific programme investigate the number of children deprived of liberty for migration-related reasons in three transit countries. The article considers the reasons why Indonesia, Malaysia and Thailand routinely detain large numbers of children in so-called immigration detention centres. The authors do so by critically analysing existing legal and administrative practices prevalent in the three countries chosen for the study. Significantly, the article provides insight into a persisting attitude in these countries that sees the migration-related detention of children not as a matter of national concern, but rather as an issue to be resolved by the international community.

In an article entitled 'Armed conflict and national security deprivation of liberty in the MENA region', students from the Arab World Master's programme shine a light on common problems as well as common good practices in the MENA region. As the title suggests, their focus falls on the deprivation of liberty in the contexts of armed conflict and national security – the two areas of the Global Study identified by the authors as primary reasons for the detention of children in the region. By way of a comparative study of Iraq and Syria (ISIS regions), Libya and the Occupied Palestinian Territories (OPT), the article highlights issues related to radicalisation, repatriation, the changing nature of armed conflict and the application of military law to children and its implications for children. Ultimately, the article calls for solutions that promote the rehabilitation and reintegration of detained children by applying international standards of justice.

In Latin America and the Caribbean, the focus falls on the situation facing migrant children who move from North Central America towards Mexico. Although the article isolates El Salvador, Guatemala and Honduras as the main countries from where children migrate, the central focus of the

analysis falls on Mexico as a receiving, issuing, transiting and returning country. Recognising that Mexico's response to migration is both restrictive and punitive, the article highlights the vulnerability of children (as well as adolescents) in such a context. Furthermore, the article reveals that immigration detention and repatriation are the main strategies by which Mexico seeks to contain migration flows. The authors substantiate these observations with information gathered from existing conventions, judgments, laws, theoretical documents, thematic reports, surveys and available statistical data.

Turning the focus on issues related to children with disabilities detained in institutions, the contribution from South-East Europe highlights the progress made in countries with a Socialist/Communist past. While the article indeed reveals positive developments in the selected case study countries (Albania, Bosnia and Herzegovina, Bulgaria and Serbia), it also argues strongly that lingering failings continue to violate the rights of children with disabilities. Emphasising the overrepresentation of children with disabilities in institutions, the authors explore the root causes of this fact – which includes, for example, reasons related to poverty, social stigmatisation and the lack of community-based support for families.

Developments in migration-related detention in Angola, Malawi and South Africa form the focus of the contribution from Africa. The overarching perspective of the article emphasises the responsibility of these countries to honour their international obligations – something all three countries fail to do adequately. The article further highlights that most African countries adopt punitive measures in order to prevent displaced populations from making asylum claims – a fact that has a severe impact on displaced children as well. By way of desk-based qualitative research, the authors find children to be placed in prison for long periods of time (often with adults) while the poor living conditions in which children are routinely kept remain an area of serious concern in the region.

The European-focused article considers the detention of children during immigration proceedings as well as on national security grounds, highlighting the importance of the intrinsic link between these two narratives in the region. The article argues that, due to perceived threats brought on by various terrorist attacks in recent years, migration in Europe has become a 'security problem' that places children in helpless positions. The authors further associate these elements with the importance of non-custodial solutions and child-centred strategies designed to limit the deprivation of liberty. This argument is specifically exemplified by a number of case studies in The Netherlands, France and Greece, while the article also points towards positive practices in Ireland and Cyprus.

The final article brings the special issue to a close by also considering non-custodial measures – this time in the context of the administration of

justice. An intention of the article is to provide the reader with a thorough overview of diversion practices across twelve post-Soviet states in Eastern Europe and Central Asia. By virtue of the desk research conducted, the authors were able to identify that only two of these countries actually implement diversion programmes in practice, notably Georgia and Kyrgyzstan. These two countries are subsequently analysed in greater detail according to a set of principles and criteria delineated earlier in the article. Finally, the authors point towards the need to strengthen diversion programmes across the region so as to more effectively protect as well as rehabilitate children who come in contact with the law.

While the articles cover a wide range of aspects involving the deprivation of children's liberty, migration-related detention is shown to be the ***Global Study*** focus area most relevant across the regions covered by the Global Campus programmes. Four of the seven regions highlight immigration detention as the most pressing issue in relation to children deprived of liberty (Asia Pacific, Latin America and the Caribbean, Europe and Africa). It is, therefore, not surprising that eliminating the immigration-related detention of children is one of the strongest recommendations of the Study. The Arab World and Europe further highlight the impact of armed conflict and national security concerns on a state's willingness to deprive children of their liberty on those grounds. Additionally, the Global Study underscores the importance of investing meaningful resources to reduce inequalities and support families – an issue shown to be especially relevant in the context of children with disabilities in South-East Europe. Finally, although the Global Study calls upon all states to establish effective child justice systems and to apply diversion at all stages of the criminal procedure, many countries still have to improve significantly in this regard. The Caucasus article clearly demonstrates this fact by the overview and analysis provided of the post-Soviet space. Overall, these seven research papers illustrate the value of students' academic engagement to further our regional understanding of the situation children face in detention. Indeed, the articles show a shared commitment to help end violence against children and to leave no one behind and, especially, to leave no child behind bars.

S Try, S Pokharel & S Yutthaworakool 'Two sides of the same coin: Contradictory legal and administrative practices towards children in immigration detention centres in Indonesia, Malaysia and Thailand' (2020) 4 *Global Campus Human Rights Journal* 285-310
http://doi.org/20.500.11825/2042

# Two sides of the same coin: Contradictory legal and administrative practices towards children in immigration detention centres in Indonesia, Malaysia and Thailand

***Sophea Try, Shraddha Pokharel and Saittawut Yutthaworakool****

**Abstract:** *The scale of migration among Asian countries has increased over the decades. Children are also part of this migratory flow as they travel either alone or with their parents. Since much of the migration occurs through extra-legal routes, many migrants and their children face a multitude of legal problems, including incarceration. The number of children deprived of liberty for migration-related reasons in the Asia Pacific region has also increased over the past few years. This study will look at Indonesia, Malaysia and Thailand, as three of the most popular transit countries that routinely detain large numbers of children in immigration detention centres. Despite the fact that the Convention on the Rights of the Child (to which all three countries are party) emphasises the fact that detention does not serve the best interests of the child and, therefore, should only be used as a last resort and for the shortest appropriate period of time (article 37(b)), children nevertheless are routinely detained and then also for long periods of time. This is particularly problematic when children are detained for migration-related reasons, since it never serves the purpose of the best interests of the child (Nowak 2019). This study examines immigration detention centres (IDCs) by analysing from a socio-political perspective existing regulations and practices in the three countries selected. Using secondary data, the study addresses two questions, namely, (a) how existing legal and administrative practices of three Asia Pacific (transit/destination) countries impact children in immigration detention centres; and (b) why these countries fail to uphold international obligations regarding the best interests of children in IDCs. The article argues that adverse administrative*

* Students of MA in Human Rights and Democratisation, Institute of Human Rights and Peace Studies, Mahidol University, Thailand. Research Coordinator: Dr Michael George Hayes, Kritsana Pimonsaengsuriya and Joel Mark Barredo, Institute of Human Rights and Peace Studies, Mahidol University, Thailand. This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

*practices and the absence of domestic legal frameworks on children in IDCs contradict numerous international obligations. Not only does this jeopardise the survival and development of children, but it also creates barriers for these children to access fundamental human rights, social justice and other entitlements.*

**Key words:** *children; best interests; deprived of liberty; detention; immigration law*

## 1 Introduction

The deprivation of children's liberty occurs in various forms for many reasons. The *Global Study on children deprived of liberty* (2019) presents six situations where children are routinely deprived of liberty, including (i) administration of justice; (ii) children living in prisons with their primary caregivers; (iii) migration-related detention; (iv) institutions; (v) armed conflict; and (vi) for national security reasons. In the category of migration-related detention, immigration detention centres (IDCs) have been used for detaining children who are on the move as refugees or asylum seekers either alone or with their parents/families.

The article focuses on those refugee children and children of asylum seekers who have been placed in IDCs in the three countries, namely, Thailand, Malaysia and Indonesia. The researchers acknowledge that the detention of children where migration-related issues are concerned also includes the children of undocumented migrant workers. However, there are a few reasons why we do not discuss the issue of migrants' children in this research.

First, refugees and asylum seekers have no choice but to flee from their countries due to human rights suppressions, prosecution, political instability or war. Refugee children and children of asylum seekers travel with or without their parents to other countries in search of better protection. Migrant workers mostly leave their countries on their own to find new employment opportunities. Migrants are likely to support themselves and their children while they are working in the hosting countries. Second, there is a similar pattern regarding the state's response concerning refugee and asylum populations. The countries offer no support to these marginalised groups. People who cross the border illegally are subjected to detention or deportation. By contrast, as the primary destination countries, Thailand and Malaysia create more holistic policies towards migrant workers and their families since this group fulfils labour shortages and contributes to economic growth. For instance, due to the COVID-19 pandemic, the Thai government allows undocumented migrant workers to register and to continue working in the country.

According to the *Global Trends Report* (2019) issued by the United Nations High Commissioner for Refugees (UNHCR), more than 79,5 million people are forcibly displaced worldwide. Of these, 26 million are refugees and 4,2 million are asylum seekers. Furthermore, 40 per cent of forcibly-displaced persons worldwide are children, of which 75 000 are unaccompanied or separated children (UASC). In the Asia Pacific region, the scale of migration has recently increased, especially due to the Rohingya crisis in Myanmar. By the end of 2019 there were 4 182 400 refugees in the region (UNHCR 2019). Many of these are children who are at high risk of being abused and exploited. Especially vulnerable are unaccompanied children. According to the official statistics, Malaysia alone detained 1 334 asylum seekers and refugee children in 2014, but by 2015 the number had increased to 1 433 (Parthiban & Hooi 2019). In 2017 on one day alone Thailand captured and detained 19 refugee children from Pakistan and Somalia (Fortify Rights 2017).

While many studies have focused on laws and policies of destination countries and their impact on children being held in IDCs, there has been less focus in the context of transit countries. This study comparatively investigates three countries (Indonesia, Malaysia, and Thailand) which often serve as transit countries for refugees and asylum seekers on their way to their final destination – mostly Australia. The article analyses the similarities and differences in treatment of children deprived of liberty in these countries. The aim is to understand the socio-political and administrative factors that hinder the obligation of these states to protect migrant children in the region. The study addresses two questions, namely, (i) how existing legal and administrative practices of three Asia Pacific (transit/destination) countries impact children in immigration detention centres; and (ii) why these countries fail to uphold international obligations regarding the best interests of children in IDCs.

This article uses a comparative case study method drawing from secondary data across the three selected countries of South East Asia, namely, Indonesia, Malaysia and Thailand. Moreover, the article applies a critical analysis of existing regulations and practices in the selected countries with regard to IDCs, drawing upon existing administrative practice and socio-political perspectives. It ends with a discussion of the lessons learned from these particular countries and provides practical recommendations as to a way forward. Since the global pandemic situation of coronavirus disease (COVID-19) has spread throughout the region, the researchers conduct this desk research based on the review of relevant research publications, organisational reports, and legal documents.

## 2 Legal frameworks on child protection in relation to migration

### 2.1 International framework

Relevant international standards protecting children deprived of liberty include the 1951 Convention Relating to the Status of Refugees and its 1967 Optional Protocol. This Convention presents the primary foundation for protecting refugees (Cetinkaya 2017). The Convention lists the state's obligations to ensure that people have the right to request asylum, thus stressing that a fundamental responsibility of all states is not to turn people away. Another key standard is the Convention on the Rights of the Child (CRC). In article 2 CRC stipulates that all member states must ensure the rights outlined in the Convention irrespective of the national, social or ethnic origin of the child, which includes refugee, asylum-seeking and migrant children (as also mentioned in article 22 and in General Comment 6 of the CRC Committee).

Regardless of immigration status, the detention of children in fact is never in the best interests of the child. States are obligated to ensure that all children are taken care of in a family-type environment without being deprived of their liberty. The deprivation of one's liberty falls under very strict circumstances guaranteed under international laws. Articles 37(b) and 3(1) of CRC stipulate that the deprivation of children's liberty shall be used only as a measure of last resort and for the shortest period of time and with the best interests of the child in mind. More importantly, the detention of children for migration-related reasons cannot be considered as a last resort and, therefore, needs to be prohibited (Nowak 2019). Article 37(d) also guarantees the right to challenge the lawfulness of the detention of children. In this sense, the national court has the authority to release a child from detention if it is arbitrary and not in compliance with domestic and international law.

Looking at a framework for the protection of children, mandated by the United Nations High Commissioner for Refugees (UNHCR), it provides six goals, wherein it not only includes some necessary social conditions, but also enhances legal access and their best interests throughout the migrating process. A set of guiding principles and approaches are established in order to guarantee the successful delivery of the six goals. These include state responsibility; a family and community-based approach; urgency; child participation; non-discrimination; the best interests of the child; no infliction of harm; age; gender and diversity; partnership; and accountability (UNHCR 2012). The other UN organ, the United Nations Children's Fund (UNICEF), similarly develops six policies towards the migration of children. One of UNICEF's policies is to end the detention of children seeking refugee status or migrating, as they may risk themselves

encountering violence in the IDCs (UNICEF 2017). Moreover, UNICEF suggests that it is best to keep families together with their children in communities, notably where children find themselves friendly to live in. More importantly, access to healthcare and other social services must be exercised by children and their families. UNICEF (2017) further explains one last point to help end children being detained, which is to call for public opinion to demand the termination of IDCs.

## 2.2 Regional framework

In comparison, the Asia-Pacific region does not have a regional system for human rights protection. However, there has been some developments in the sub-region of South East Asia. In 2009, the Association of South East Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR), the first of its kind in the region. The Commission in 2012 successfully drafted the ASEAN Human Rights Declaration, which was adopted by the ten ASEAN member states. Despite its non-binding nature, the Declaration in article 12 stipulates the importance of protecting people from deprivation of liberty. Furthermore, article 16 recognises everyone's right to seek and receive asylum. Similarly, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was established in 2010 in order to uphold the rights of women and children as guaranteed in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and CRC (both of which are ratified by all member nations of the ASEAN). The sixth thematic area of the ACWC Work Plan 2016-2020 concerns migrant children and children in the juvenile justice system. The Work Plan also urges its relevant strategic measures for the ASEAN Socio-Cultural Community Blueprint 2025 to reduce barriers of quality care and support. Furthermore, it aims to strengthen the protection and promotion of human rights as well as the social protection of children living in at-risk areas (ACWC 2018).

### *2.2.1 ASEAN Declaration on the Rights of Children in the Context of Migration*

ASEAN member states expressed their commitment to protecting children's rights by unanimously adopting the Declaration on the Rights of Children in the Context of Migration during the 35th ASEAN Summit in Thailand (November 2019). The Declaration seeks to ensure the rights of children by acknowledging the need for protection of *all* children, including refugee and asylum-seeking children, while also emphasising the importance of ensuring their access to basic services. Additionally, it accepts the necessity of establishing alternatives to detention so as to secure the best interests of children. This Declaration thus reaffirms the responsibility of states to adopt relevant laws and policies that ensure, within a migration context, that state practices adhere to the best interests

principle as a primary consideration (UNICEF 2019). However, a number of member states issued reservations, citing principles of non-interference in internal affairs of the member states as a priority.

## 3 Unpleasant truth

CRC is considered the most successful human rights treaty as it has the most ratifications. However, it lacks clarity when dealing with issues associated with refugee children and child asylum seekers. Although CRC emphasises the rights of children to seek asylum, states mostly adopt restrictive domestic laws and policies that apply to the unauthorised arrival of accompanied and unaccompanied children, which is inconsistent with the Convention. IDCs have been used as places to detain children who are on the move as refugees or asylum seekers with their parents or families. The detention of children for migration-related reasons is not in their best interests and should never be an option for any state. The Global Study suggests that states must apply non-custodial solutions that prioritise the child's best interests (Nowak 2019). However, each year at least 330 000 children are detained in 77 states due to migratory reasons (Nowak 2019). According to the Global Study (2019), it is found that Lao People's Democratic Republic is the only member country of the ASEAN where children are not detained. There is no reliable data illustrating the accumulating number of detained children for migration-related reasons in the ASEAN. However, Indonesia was recorded as a country where as many as 982 children are detained as a result of migration (Nowak 2019). These children live in places where not only facilities and conditions are sub-standard, but fundamental rights are also taken away. Given these factors, children in IDCs remain in highly-vulnerable situations where they run the risk of being abused and exploited.

The examples of Indonesia, Malaysia and Thailand provide an opportunity to consider how different national contexts impact children in detention centres. Additionally, it helps to understand how national security considerations impact a country's obligation to respect, protect and fulfil the rights of all children within its territory – regardless of their status.

### 3.1 Case study: Detained children in Indonesia

Indonesia is a prominent transit hub for refugees and asylum seekers fleeing from Asia, particularly from Afghanistan, Myanmar, Iraq, Somalia and Sri Lanka. Children with their families and unaccompanied minors stay in Indonesia either before their third country resettlement or their arduous and expensive journey by boat to Australia. Yet, when arriving in Indonesia they also run the risk of being detained. As of 2016, there

are 1 602 migrant children who were kept in IDCs in Indonesia (Save the Children 2017).

The implementation of restrictive immigration policies and activities is noteworthy in the case of Indonesia. The government does not regard refugee children and child asylum seekers (both accompanied and unaccompanied) as legal in their territory. Under Indonesian domestic law, refugees and asylum seekers are subjected to the 2011 Immigration Law. Interestingly, this law makes no distinction between refugees/asylum seekers and other types of foreigners entering the country. The Indonesian Immigration Law allows immigration detention for up to 10 years without judicial review, but this law makes no concessions for children (Human Rights Watch 2013). The law justifies the government's duty to provide immigration services, enforce the law and maintain state security, thereby indicating that the state has no political will and commitment to the protection of these marginalised groups in their territory. The government tries to discourage newcomers by setting high entry requirements rather than expanding the protection to refugee children and child asylum seekers living in its territory. In 2016, President Joko Widodo signed President Regulation 125 on the Treatment of Refugees and Asylum Seekers (Missbach et al 2018). The regulation urges provincial administrations across Indonesia to provide temporary accommodation for asylum seekers and refugees while they wait for their resettlement requests to be processed by the UNHCR. Yet, uncertainty remains as to Indonesia's long-term commitment to its responsibility towards the protection of children.

Indonesia introduced a more tolerant practice towards refugee children and child asylum seekers, which allows them to stay temporarily while waiting for their papers to be processed by the UNHCR. However, they are not allowed to work, travel or study while in Indonesia (Missbach 2014). On the other hand, non-citizens who enter and reside in Indonesia without valid documents, thereby violating Indonesian law, will be placed in one of the 12 IDCs across the country. These centres are referred to as temporary shelters by government officials (Human Rights Watch 2013; Missbach et al 2018). Law enforcement officials only see 'the irregularity and clandestine nature of migrants' mobility and movement' (Missbach 2015: 64). In this regard, the objective of the immigration law is to 'immobilise illegalised travellers' (Weber & Pickering 2011: 17). Schuster and Majidi describe immigration detention as one effective means for 'rendering undesirable people immobile' (Schuster & Majidi 2013: 222). When arrested, migrant children will be sent to the IDCs. The authorities often argue that detention is not considered a punishment but rather as a 'means of protection' since they can ensure that detainees are given access to international organisations (Missbach 2015: 74-75).

Although detaining migrant children is very costly and has a harmful impact on children's well-being, Indonesia continues to maintain this practice. Political and diplomatic pressure from destination countries lead transit states to intensify law enforcement and to crack down on clandestine border entry and exit (Missbach 2015: 154). Destination countries provide financial support and put pressure diplomatically on transit countries to 'control their borders and detain transit migrants' (Kimball 2007: 39). The diplomatic pressure includes cash distribution, aid programmes, training programmes and capacity-building equipment (Nethery, Rafferty-Brown & Taylor 2013). The Australian government, for example, pressures Indonesia to detain transit migrant children. It has been in Australia's political interests, as a final destination country, to encourage the development and fund the expansion of the Indonesian immigration detention system (Nethery, Rafferty-Brown & Taylor 2013).

The geographic dimensions and extremely long coast line make it difficult for Indonesia to control its borders and requires both financial and human resources (Missbach 2015). Indonesian authorities rely on information about the suspected irregular migrant movements from overseas sources, such as the Australian Federal Police (AFP) and the Australian Maritime Safety Authority (AMSA) (Missbach 2015: 72). Australia also funds Indonesian officers to intercept refugees who want to enter Australia by boat as well as providing surveillance equipment and vehicles, supporting police, patrol boats, and fuel costs (Missbach 2015). For example, in 2008 the Australian government provided AUD $7,9 million to further develop Indonesia's border movement alert system (CEKAL) which would improve the detection of people of concern and help prevent people-smuggling and irregular migration (Missbach 2015).

The Australian government also funded the International Organisation for Migration (IOM) in Jakarta to sustain the organisation's activities. Since 2001 the Australian government has provided AUD 338 million to IOM under the Regional Cooperation Agreement, which includes providing care for detainees, community housing facilities and training for local authorities (Missbach 2018). In March 2018, when the Australian government announced the reduction of the fund, approximately 1 600 refugees, including children, were released from the Indonesian immigration detention centres (Missbach 2018).

Over these past years, children arriving in Indonesia with their parents or alone without valid proof of documents have been put in detention centres where there is no special assistance for unaccompanied children (Missbach et al 2018). As a result, these children are discriminated against based on their nationality and ethnicity, primarily for political and security reasons. According to the laws, detained children could be subjected to unlawful, arbitrary detention and can be arrested indefinitely without

proper access to the court. In practice, arrested migrant children are not even treated the same as criminals because they are detained without judicial review or bail, and often for an unspecified period of time. In Indonesia, there is no independent complaints mechanism for detainees to access and no system to check whether officers at the centres adhered to the regulations for the child's best interests. Children are usually kept with their families in the immigration detention centres, while unaccompanied minors are hosted in the same facilities as adult men (Missbach 2015). In Indonesian IDCs the conditions are poor. Children are exposed to the risk of abuse and violence, which can eventually lead to stress disorders or depression (HRW 2013). Such prolonged and indefinite immigration detention, therefore, can cause severe problems for children.

### 3.2 Case study: Detained children in Malaysia

As of June 2020 there were 177 940 refugees and asylum seekers in Malaysia (UNHCR 2020). This figure reflects the fact that Malaysia serves as one of the key host, transit and destination countries in Southeast Asia. The above figure includes many Rohingyas escaping genocide, Pakistanis fleeing religious persecution, and Yemenis seeking safety from war. Among these, 46 370 are children below the age of 18 years (UNHCR 2020), who are either accompanied by their parents or on their own, and face the prospect of indefinite detention after having made a dangerous journey. The non-ratification of the Refugee Convention and its Protocol, the lack of domestic legal framework, and restrictive policies have allowed the Malaysian government to treat undocumented migrants, including refugees and asylum seekers, as 'illegal' and subsequently subject them to criminal prosecution. According to Nah, Malaysia uses IDCs extensively as an integral part of migration management and justifies it on national-security grounds (Nah 2015: 125). Individuals without documents are detained for investigation to determine a course of action, and are subjected to physical punishment to discourage them from returning to Malaysia.

Arbitrary immigration regulations and regressive practices have exacerbated the vulnerabilities of the refugee and migrant population. The Malaysian Government Immigration Regulations (1963-1959) permit the arrest and detention of any person understood to have entered the country unlawfully for up to 30 days without trial under the Criminal Procedure Code (SUARAM 2008). These persons can face judicial caning, incarceration for up to five years, fines of up to 10 000 ringgit and even deportation, as per the Malaysia Immigration Act. Although courts have prohibited judicial caning, the measure is still actively being used by the immigration officers (Amnesty International 2020). The Act also employs a 'prohibitive' category for undocumented immigrants, which does not clarify children's status. In the absence of legal protection, all refugee children are treated similarly to other 'illegal' immigrants.

Since refugee and asylum-seeking children in Malaysia have no legal documents, they are likely to be arrested and detained for extended periods of time without bail. Undocumented individuals, including children, making 'illegal' entry can spend lengthy periods in custody before being transferred to one of the 13 IDCs in Malaysia. The lack of alternative facilities for children also results in them being held in the IDCs. In fact, there were 647 children in the IDCs in Malaysia in 2016 (Save the Children 2017). The number is said to have decreased since 2013, but this has been attributed to the resettlement programme, particularly in the United States (UNHCR 2017).

The Malaysian government also places strict limits on the judicial review of immigration-related decisions, including those relating to detentions (Nah 2015: 125). Once arrested, individuals have no right to contact anyone outside for up to 14 days, including the UNHRC. Moreover, there is a long wait for the investigation of detention cases relating to children, sometimes leading to indefinite detention (Malaysiakini 2019a). The denial of the right to be heard violates the right to an effective remedy and fair trial. Similarly, miscommunication and a lack of coordination between different immigration units have also been reported to obstruct cases relating to children in detention resulting in children's extended detention (Malaysiakini 2019b). Moreover, cases that are not heard are usually those regarding the deportation of children to their countries of origin. This, however, can create problems in relation to refugee children or children whose parents cannot be traced.

Part of the problem lies in Malaysia's selective application of its own laws. For example, although Malaysia has a zero-reject policy regarding the right to education, children under detention have no access to formal education and rely on inadequate educational facilities (APRRN 2019). These children are also barred from receiving public education as the government does not recognise them due to a lack of documentation (Prathibhan & Hooi 2019: 66). Although the Malaysian government considers all under the age of 18 as children and, therefore, is legally mandated to protect them from imprisonment, children are still detained with their parents in IDCs citing a lack of alternatives to detention. Although children below the age of 12 are kept in adult female facilities along with their mothers, once they reach the age of 13, they are placed in adult facilities according to their gender (Parthiban & Hooi 2019). This often results in children facing different kinds of abuses.

Such treatment of children indicates that the government of Malaysia is looking at them merely from a security perspective, and is primarily interested in controlling the influx of undocumented people. It does not approach the situation from a rights perspective by providing effective remedies that are in the best interests of the child. Hundreds of children

have escaped war, hunger and other forms of violence only to end up detained in overcrowded facilities without nutritious food, clean water, proper health care and sanitation. These conditions can put children at risk of sexual abuse and violence (Reuters 2017). According to Arshad (2005), these incarcerated children face traumatic experiences, including severe depression, and are also subjected to physical abuse.

Another challenge has been the Malaysian government's ability to sidestep its international commitments. For instance, despite having ratified CRC, its reservations on various articles of the Convention have permitted the detention of children without trial and judicial review for an extended period. The reservation on article 37, which protects children from cruel treatment and ensures their liberty (regardless of their citizenship status), has allowed the government to justify the detention of refugee children. According to Save the Children (2017), countries such as Malaysia cite the lack of this legal framework to justify their inactions in matters related to refugee children. Although Malaysia has no reservation on article 22 of CRC, which requires that state parties seek appropriate measures for children seeking refuge, their security-centric approach, a lack of legislation and incompatible administrative practices contradict their obligation to the Convention (UPR 2013).

Malaysia also recognises several regional policies that protect refugees, such as the Bangkok Principles and the Bali Process, which provide guidelines for managing refugees and providing them with temporary shelter (Taylor 2018). As an ASEAN nation, Malaysia also adopted the ASEAN Declaration on the Rights of Children in the Context of Migration, which safeguards the rights of children. These declarations, however, are not effective when it comes to refugee children, since they are not legally binding and because ASEAN countries continue to emphasise non-interference. In fact, the Malaysian government has often projected the immigration crisis as an international issue that requires external interventions.

However, given the constraints on international organisations' role in the country, that framing appears more evasive than substantial. Consider, for example, the limited impact of the UNHCR, whose intervention often is essential for refugees and asylum seekers to stay outside of the detention centres. The UNHCR's Refugee Status Determination (RSD) process provides people with either refugee or asylum-seeker cards, which are the only form of legal documentation for such individuals. As a result of UNHCR intervention, some unregistered asylum-seeking children have also been released from the detention centres. This, however, depends on the immigration officers' discretion (Nah 2015). In fact, it has often been reported that authorities have even confiscated or destroyed the POC cards and arrested their holders (Nah 2015). Meanwhile, the waiting time

for registration with the UNHCR is quite long, and especially difficult for children with undetermined nationality who remain in the IDCs indefinitely, as there are no alternative spaces available (SUKA 2020).

The 'cruel, inhumane and degrading situation' of children in detention centres is open to investigation by the law but, in practice, it often is at the discretion of the officer in charge (US Department of State 2018). The centres have substandard facilities that lead to harrowing living conditions but it is difficult to assess the situation and hold the government accountable – especially because there are no monitoring mechanisms and access to oversee that these IDCs are controlled (APRRN 2018). Since August 2019 the government has barred even the UNHCR from accessing the detention centres (UNHCR 2019). This failure of the Malaysian government to treat the situation of refugees as a domestic concern, and instead frame it as a global problem over which they have no control, continues to make the problem intractable (Parthiban & Hooi 2019).

The country's own internal politics have also in recent times shaped and influenced the fate of undocumented children. Despite some momentum in the direction of reforms in the past, as seen in the election manifesto of Pakatan Harapan, the former ruling party which pledged to ratify core international human rights treaties (Human Rights Watch 2019), recent developments have been of concern. The incumbent government, which is pre-dominantly Malay-Muslim, has changed its policies regarding refugees (*The Diplomat* 2020). Top government officials have openly claimed that the Rohingya, the largest refugee population in Malaysia, are illegal immigrants with no rights in the country (*The Star* 2020). In fact, the Malaysian government has declined to accept several incoming boats with hundreds of refugees. Moreover, under the recently-initiated Movement Control Order (MCO), intended for COVID-19 control, many refugees, including women and children, have been detained (*The New Humanitarian* 2020). According to some research, as a result of securitisation of the refugees by the government, the Malaysian public also perceives the presence of refugees as threatening (Zainuddin & Duasa 2012). This has led to an increase in hate speech and xenophobic attitudes towards the Rohingya people, especially online (*Bangkok Post* 2020). In the absence of a changed political and social climate, which is aided by systemic policy reforms, it is unlikely that there will be a significant overhaul in Malaysia's treatment of children of undocumented origin.

### 3.3 Case study: Detained children in Thailand

Thailand is one of the major transit and destination countries for human mobility, ranging from refugees and asylum seekers to migrant workers. However, the country has an infamous reputation in relation to the detention of an unconfirmed number of refugee children and child asylum seekers in its IDCs (Save the Children 2013). These children, regardless

of whether they are accompanying their families or travelling alone, are subjected to the deprivation of liberty as a result of arbitrary arrests and detention sanctioned by the state. As a signatory state to CRC, Thailand has an obligation to ensure the best interests of the child as primary consideration – as informed by the aforementioned articles 3(1) and 37(b). Moreover, for those cases where children arrive for migration-related reasons, research suggests that detention is never in the best interests of the child (Nowak 2019: 12). Yet, Thailand has been reluctant to withdraw its reservation to article 22, which ensures legal protection and humanitarian assistance to refugee children and child asylum seekers. Even though Thailand legislated the Child Protection Act in 2003, none of its clauses addresses the protection of refugee children and child asylum seekers. Since Thailand has failed to apply international standards to its legal and practical measures, children in this category remain marginalised and vulnerable to a multitude of human rights violations.

Refugees and asylum seekers normally arrive in Thailand as tourists with proper identification documents. However, when their visas expire, they are considered illegal migrants and according to the 1979 Immigration Act (Harkins 2019: 19) they can be taken to court after arrest. Due to the absence of a legal framework for dealing with refugees and asylum seekers, Thailand follows customary international norms on *non-refoulement*.[1] As soon as refugees and asylum seekers fail to pay fines, they are immediately detained in IDCs (Save the Children 2017: 27-28). For example, in October 2017 Thai police raided several residences in Bangkok that housed Pakistani and Somali asylum seekers (Fortify Rights 2017). After the raid, all these persons were placed in immigration detention centres. A total of 35 individuals were arrested, 19 of whom were children. Many were in possession of the so-called 'person of concern' document issued by the United Nations High Commissioner for Refugees, but the authorities confiscated each document. Consequently, some of them had to go to court and wait for bail (Fortify Rights 2017; Fortify Rights 2019: 2).

When admitted to the immigration detention centres, all children receive criminal records as they are regarded as illegal migrants (Surapong Kongchantuk et al: 41). According to the Immigration Bureau of Thailand, there are 14 IDCs located nationwide (Immigration Bureau of Thailand 2010). Suan Phlu immigration detention centre is the largest detention centre in Bangkok. It is designed for long-term detainees, while they wait for the UNHCR documentation (Human Rights Watch 2014). The Bangkok centre is small and designed as a short-term detention centre, although many detainees routinely spend up to four to five years there

1 The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. It is applied to all types of migrants. See UN OHCHR (2018).

(Save the Children 2017: 29-30). The number of children detained in Thai IDCs remain unconfirmed. Some reports find that 49 children were detained in the Thai IDCs in December 2015, while the number decreased to 43 at the end of 2016 (Save the Children 2017: 1). It is also reported that 38 and 113 children were out on bail in 2015 and 2016 respectively (Save the Children 2017: 64). However, it is also acknowledged that these numbers do not capture the true extent of the situation. In reality, the number of children deprived of liberty is significantly higher.

Immigration detention centres are overcrowded, thus forcing children to stay in sub-standard living facilities and conditions. They cannot be released, unless their cases are clarified and/or overstay fines are paid (Save the Children 2017: 30). According to article 28 of CRC, children have the right to education regardless of any circumstances. However, children in IDCs are denied this fundamental right (Human Rights Watch 2014). Furthermore, based on the Immigration Bureau Order 148/2010, children older than 12 years are routinely separated from their parents against their will – an act that stands in direct violation of article 9 of CRC. They are allowed to meet one another only once a week (Surapong Kongchantuk et al 2013: 40). In provincial immigration detention centres, all are detained according to gender (Mekong Migration Network and Asian Migrant Centre 2008: 130). Moreover, children in Thai IDCs particularly face difficulties with nutrition and healthcare accessibility due to their family's lack of resources (Human Rights Watch 2014). In terms of recreational facilities, it is impossible for the provincial IDCs to provide such spaces for young children. The only centre that offers such facilities is the Bangkok centre (Save the Children 2017: 31). Finally, freedom of religion or belief among children also becomes problematic, since they find it difficult to practise their religion in the centres (Surapong Kongchantuk et al 2013: 3).

These are only a few reasons why Thailand has failed to uphold its international obligations regarding the best interests of children in IDCs – a fact that has many implications, especially when considering legal, administrative, and socio-political factors. First, Thailand does not *legally* recognise the status of refugees, regardless of age. Additionally, Thailand is not a signatory state to the 1951 Refugee Convention and its Protocol (UNHRC 2020). Consequently, refugee rights and liberties are not guaranteed, while the government is undeterred from delivering refugees back to their countries of origin after a national verification process (Surapong Kongchantuk et al 2013). In order to describe the legal status of refugees in Thailand, the term 'refugee' has also been legally abandoned in favour of the term 'displaced persons or persons who are fleeing from wars'. The Operation Centre for Displaced Persons (OCDP) under the Ministry of Interior was established in 1975 in order to respond to the influx of one million displaced persons escaping from unrest in

Thailand's neighbouring states, including Myanmar, Lao PDR, Cambodia and Vietnam. There are approximately 100 000 displaced persons in the camps along the Thailand-Myanmar border. In general, the conditions in these camps are relatively suitable. Yet beyond these camps, refugee children and child asylum seekers can be arrested and detained in 13 small detention centres across the country which are far worse and do not consider the best interests of the children, as stipulated in article 3 of CRC (Surapong Kongchantuk et al 2013). Currently, the Immigration Bureau of Thailand investigates, arrests and detains immigrants, including adult and child refugees and asylum seekers, instead of the OCDP. Moreover, Thailand's relevant laws to cope with the best interests of children in IDCs are not up to date. For instance, the Immigration Act BE 2522, enacted since 1979, is still in force, despite the fact that the current situation is so different. The Child Protection Act BE 2546, enacted in 2003, also needs reform as the existing law does not specifically refer to 'refugee children' and 'child asylum seekers'. Finally, the Child and Youth Development Promotion Act BE 2550 (legalised since 2007) lacked any meaningful youth participation during the drafting process. This Act was intended to showcase Thailand's pathway to the ASEAN Socio-Cultural Community in child and youth protection (Aek Wonganat et al 2014). Thailand also joined other UN member states in adopting the Global Compact for Safe, Orderly and Regular Migration (GCM) and Global Compact on Refugees (GCR) in 2018 under the 2016 New York Declaration for Refugees and Migrants (Puttanee Kangkun 2019). All these documents highlight the need to consider the best interests of the child when identifying alternatives to detention (UNGA 2018: 11).

Second, the *administrative* process is also inadequate when it comes to children detained in a migratory context. Building new IDCs in Bangkok and other provinces to accommodate more refugees and asylum seekers stands in direct contradiction to the country's refusal to recognise and accept refugee status (Immigration Bureau of Thailand 2010). Therefore, new facilities that could provide family spaces for refugee children or child asylum seekers to stay with their parents or relatives are impossible. In recent years, Thailand has found many refugees and asylum seekers who are Uyghurs of China, Rohingyas of Myanmar, and Africans travelling with children (Human Rights Watch 2014; The Nation Thailand 2019). As both a transit and destination country, Thailand has unfortunately deported many of these to their countries of origin or pushed them away to third countries (Reuters and DPA 2015). Refouling refugee children and child asylum seekers to their original countries would inevitably risk their lives and expose them to harsh punishment and violence. To some extent, the states involved regard deportation as an advantage. On the one hand, Thailand is able to reduce the budget required to care for refugees. On the other hand, China and Myanmar are pleased to prosecute these people

(APF 2013). Sadly, refugee children and child asylum seekers are victims of this cycle.

Third, apart from the legal context, Thailand has never accepted and would never accept refugees as part of its *socio-political concerns*. The country has interpreted refugees and asylum seekers as threats to national security (Yonradee Wangcharoenpaisan 2017). Unlike refugees, this highly developing country has a more open door policy towards migrant workers from its neighbouring countries. This, in fact, has led to a high volume of undocumented workers to cross Thai borders, who ended up working in the fishing and seafood processing industry, into which Thais do not wish to be recruited. However, after the military junta had taken over the administration and started to crack down on 'illegal' migrants, these undocumented workers are registered and documented (Harkins 2019). The combination of globalisation and Thai conservatism has played a major role in shaping this national mindset. As a result, those who come from Islamic countries are more likely to receive unfair treatment, including refugee children and child asylum seekers. Fears and worries shape the state to either deport or detain. More importantly, the Thai National Human Rights Commission (NHRC) is weak. It does not occupy a strong position from where it would be able to exercise pressure on other state authorities. It can only provide useful recommendations (National Human Rights Commission Thailand 2020). As a result, the best interests of refugee children and child asylum seekers in IDCs are not emphasised well.

Thai state authorities unfortunately do not fully understand what appropriate treatment of refugee children and child asylum seekers entails. However, they do understand that articles 9(1), 9(3), 9(4) and 14(2) of CRC require refugee children and child asylum seekers to stay with their families. However, in practice the interpretation of these articles results in a blanket approach, where authorities detain entire families, including children, together in the same cell (Surapong Kongchantuk 2013). Consequently, refugee children and child asylum seekers often find themselves in overcrowded immigration detention centres lacking proper child-friendly facilities. In addition, there are not enough female officers to take care of girls, despite the fact that this need is emphasised in article 3(3) of CRC. The situation is even worse for refugee children or child asylum seekers who arrive in Thailand alone. In most cases, they are simply treated as adults. As a result, many children are placed in vulnerable situations where they receive threats or inappropriate advances from adults. This is in direct violation of article 36 of CRC and illustrates the lack of understanding by Thai state authorities as to the extent of their international obligations with regard to the best interests of children under their care.

Nowadays, various non-state actors, such as the International Organisation for Migration's day-care centre, work with Thai authorities to provide necessary assistance to children in detention. Likewise, some non-governmental organisations (NGOs) run fundraising programmes to help children who need funds for bail. Unfortunately, problems persist at the level of implementation. In January 2019 the Thai government signed a Memorandum of Understanding (MoU) with seven other NGOs on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres. This MoU not only protects children from being detained, but also urges the Thai government to implement standardised measures that would ensure the best interests of the child. This includes, for example, family reunification and privately-operated shelters (Human Rights Watch 2019). Although the MoU stipulates that mothers should receive bail with their children, it fails to do the same for fathers with children. It therefore falls short of completely fulfilling the requirements set out by article 9 of CRC on the separation from parents (Fortify Rights 2019: 1). Refugee children and child asylum seekers in Thailand continue to be routinely deprived of their liberty and encounter many violations of their rights along the way.

## 4 Reflection on the regional situation of migrant children in detention

### 4.1 Similarities and differences among the three countries

Indonesia, Malaysia and Thailand are the three countries in the ASEAN region with the highest number of refugees and asylum seekers. Despite serving as transit countries, none of these states has ratified the Refugee Convention and its Optional Protocol. According to Prathiaban and Hooi (2019), countries such as Malaysia avoid ratification of the UN Refugee Convention and its Optional Protocol as they believe that it will lead directly to an influx of refugees. Moreover, all three countries perceive refugees and asylum seekers as a burden to society while also presenting them as a threat to state security – the latter being one of the main justifications the three states use to detain children (Prathiban & Hooi 2019). As a result, refugee children are exposed to ill-treatment in these transit countries. In Indonesia, for example, the negative attitude of its citizens towards refugees also has a strong impact on the state's policies on children arriving in the country. All three countries lack the required domestic laws and policies to protect refugee children. Significantly also, none of the countries selected for this study make any distinction between refugees/asylum seekers and the broader category of irregular migrants.

Southeast Asian nations mostly regard refugees as an international rather than a domestic issue and, therefore, expect international

organisations to shoulder the responsibility of the refugee population. They therefore view it as an external issue that requires mainly external collaboration with international organisations such as IOM and UNHCR. Even when such collaborations are in place, limited funding has hindered the effectiveness of many international organisations to officially process refugee children and child asylum seekers. Other times, the functions of these organisations are impeded by laws as in the case of Malaysia where organisations including the UNHCR are denied access to the detention centres, thus severely impacting the availability of data on the children as well as the situation of the detention centres. In some extreme cases, this has led refugees to request local authorities to detain them as otherwise they would be left out on the street without any shelter. As a result, children are placed in these centres with their guardians. The governments of Indonesia and Malaysia have been dealing with the crisis in a more rigid way. Children and their families are allowed to stay in the country. However, they are placed in harsh detention centres while waiting for their resettlement requests. On the other hand, Thailand is in a better position to provide friendlier accommodation for children by allowing them to stay with their mothers and by allowing them to stay in alternative camps with their families.

ASEAN member states are more committed to safeguarding principles of non-interference in member states' domestic matters and consensus in policy decision making (Nethery & Louhnan 2019). Jetschke (2019) similarly argues that ASEAN has a long history of following the norm of non-interference in domestic affairs and state sovereignty. While the ASEAN Declaration of Human Rights and the ASEAN Declaration on the Rights of Children in the Context of Migration stress the rights of refugee children, both are non-binding documents (Petcharamesree 2015). This gives governments the opportunity to bypass the issues altogether or to reach a bilateral agreement rather than committing to build effective regional mechanisms. Therefore, there is no guarantee of upholding the human rights principles, leaving no regional protection mechanism to deal specifically with issues related to refugee children and child asylum seekers. In fact, although the AICHR was established to promote and protect human rights in the region, its terms of reference do 'not include the powers of investigation, monitoring or enforcement, or any rights catalogue' (International IDEA 2014), thus limiting its effectiveness. A prevailing non-binding framework as well as a lack of regional commitment to address the problems highlighted in this article have further led to an absence of any monitoring mechanism to ensure the protection of refugee children. In essence therefore, while the regional mechanism recognises the declarations, it has not moved effectively towards implementation (Hara 2019).

### 4.2 Understanding children deprived of liberty in the context of migration

The decision of governments to adopt migration policies that penalise undocumented migrants are driven by complex geopolitical reasons as well as conflicts over resources. Additionally, the role of the media, public perception and inadequate information about refugees also influence the way governments react – particularly with regard to children who are in a more vulnerable position. As mentioned, states generally regard non-nationals as a risk to their security. Governing policies thus tend to control non-nationals with strict immigration laws. Additionally, countries are inclined to adopt restrictive systems, which introduce mandatory and/or indefinite detention as a deterrent dissuading potential refugees and asylum seekers from entering their territories in the first place. Laws and policies of the transit countries create a climate where the detention of refugee children and child asylum seekers (both accompanied and unaccompanied) is the first and only option available. Although CRC emphasises that detention centres do not serve the child's best interests, children are routinely detained – and then also for extended periods.

The chance of refugee children and their families finding resettlement is almost impossible. Signatories of the Refugee Convention, such as Australia, several European countries as well as the United States, have imposed highly-restrictive procedures for entry while significantly reducing the number of people being granted refugee status. This has halted international progress on migration and human rights. On the other hand, in Southeast Asian transit countries, non-state actors (for instance, local NGOs and international organisations such as UNHCR and IOM) have become the primary duty bearers towards refugees. However, the attitude of Southeast Asian governments towards refugees has had negative impacts on the ability of international and local NGOs to be effective and they often work as outsiders. This is primarily due to the fact that they perceive refugees largely as a national threat. In addition, governments remain reluctant to work with international NGOs, while local organisations are kept out of the discussion entirely. This of course presents a significant barrier (Prathiban & Hooi 2019: 74). Moreover, the situation is further exacerbated by the position of the UN and international organisations which are either unwilling or unable to challenge the immigration policies of these governments that were crafted with national security in mind, and this further erodes the accountability of these governments.

State authorities usually refer to article 9 of CRC to argue that, by and large, it is in the child's best interests to remain with their parents in detention. Such an argument is, however, not correct because a proper consideration of the child's best interests does not seek to trade off rights against one another when they in fact are compatible (Human Rights and Equal Opportunity Commission 2004). Family unity, which is considered

a critical and integral right under CRC, cannot be used by states to justify decisions to detain children. Nevertheless, states are willing to disregard a child's right only to be detained as a *last resort*, arguing that maintaining the right to family unity is in the child's best interests (Human Rights and Equal Opportunity Commission 2004). In reality, however, this argument bears little practical relevance. Children are likely to be arrested and placed in IDCs for the same reason as their parents – they are, for example, often arrested upon arrival or shortly thereafter simply for having no valid documents (Human Rights and Equal Opportunity Commission 2004: 163-164). This further implies that governments have no other options available. The recently-published *UN Global Study on children deprived of liberty* insists, however, that there are always alternatives to detention and in the case of 'purely migration related reasons' the detention of children is to be prohibited (Nowak 2019: 7). The immigration detention of children is in clear violation of international human rights law since, in effect, states use detention as a means of punishment for the mere act of seeking asylum. As such, the domestic laws and current practices of these countries do not address the particular vulnerabilities of asylum-seeking children, nor do they afford them any special assistance and protection. Consequently, children remain in detention, where they are abused, both physically and mentally. In this regard, unaccompanied children are also placed in violent and exploitative situations, since they are often detained with random adults. It has even been found that officers routinely abuse and violate the rights of these vulnerable children. Such instances, however, are rarely properly investigated. What is more, without a legal guardian and/or special assistance from the state, unaccompanied children end up being detained indefinitely.

## 5 Conclusion

The world is facing a global refugee crisis. Political, domestic and international agendas have cost children their rights and their freedom. Detaining children is no different from locking away their futures and their talents. For refugee children, fleeing to different countries to seek asylum is never their choice. It is their only option. In the hope of finding a better future, children undergo an arduous journey only to be indefinitely detained in either a transit country or in their destination country. With their futures uncertain, these children are locked up in a place that can never be called home. Most of us are lucky enough to take our rights for granted, yet refugee children are not only at risk of being placed in detention, but also risk their fundamental rights being jeopardised. Children risk, for example, being tortured as well as mistreated by state actors, while forced to live in inhumane conditions. It therefore is crucial that states establish and improve right-based monitoring mechanisms to ensure that they comply with their obligations. Effective coordination between countries of origin, transit and destination paired with close cooperation with non-state

actors are key components for adequately protecting children and, thus, is much needed in countries such as Indonesia, Malaysia and Thailand.

While the three countries will not be signing the Refugee Convention any time soon, these countries remain subject to their obligations under international agreements and particularly to abide by CRC and protect refugee children and child asylum seekers. The state has the right to protect its borders, yet the concept of state sovereignty is not an absolute right. The states need to ensure their obligation to protect all children regardless of their status in its jurisdiction and to ensure that they can enjoy the basic human rights that all nations have agreed to uphold by taking the national approach to respect the rights of children within the state territory. Children should not be criminalised due to migration-related issues. The state should end the detention of the children to ensure that no child is deprived of their liberty. Besides, human rights must be recognised as the obligation of the state, not only as a matter of the humanitarian response. It is essential to prohibit all border measures from being deemed unlawful or a disproportionate restriction or a containment of asylum-seeking people. Shared responsibility, effective coordination, communication, and collaboration among countries of origin or nationality, transit, and destination, as well as other non-state actors, are key essential components toward the protection of children and thus are much needed.

# References

ACWC (2018) *The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Work Plan 2016-2020,* available at https://asean.org/storage/2019/01/37.-December-2018-The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2016-2020.pdf (last visited 9 February 2021)

Aek Wonganant (2014) *Child and Youth Participation Problems in the National Promotion of Child and Youth Development Act 2007*, available at https://gsbooks.gs.kku.ac.th/57/grc15/files/hmo13.pdf (last visited 25 August 2020)

AFP 'Thailand to deport 400 Rohingya migrants after raid' *Bangkok Post* 11 January 2013, available at https://www.bangkokpost.com/world/330350/thailand-to-deport-400-rohingya-migrants-after-raid (last visited 23 August 2020)

Amnesty International 'Malaysia: Rohingya refugees face "vicious" caning sentences (2020), available at https://www.amnesty.org.uk/press-releases/malaysia-rohingya-refugees-face-vicious-caning-sentences (last visited 20 August 2020)

APRRN *Parliamentary Briefing on Legal Framework for Refugees in Malaysia*, available at http://aprrn.info/wp-content/uploads/2020/02/24-Oct-19-APRRN-APHR-Refugee-Briefing-Report.pdf (last visited 15 April 2020)

Arshad AH 'Malaysia's forgotten children: Lacking any meaningful protection, refugee children in Malaysia suffer in silence' *Aliran Monthly* (2005), available

at https://aliran.com/archives/monthly/2005a/5b.html (last visited 22 August 2020)

*Bangkok Post* 'Malaysia's Changing Policy on Rohingya Refugees' (2020), available at https://www.bangkokpost.com/thailand/politics/1949548/malaysias-changing-policy-on-rohingya-refugees (last visited 23 August 2020)

Cetinkaya BL (2019) *Safe zone: A response to large-scale refugee outflows and human suffering* Switzerland: Springer

Child Protection Act of Thailand [2003]

Development Act (2007) The 15th Graduate Research Conference, available at https://gsbooks.gs.kku.ac.th/57/grc15/files/hmo13.pdf (last visited 23 August 2020)

Foreign Affairs Division, Office of the Permanent Secretary Ministry of Interior (2018) Operation Centre for Displaced Persons: OCDP, available at http://www.fad.moi.go.th/images/PTC/OCDP-Slide.compressed.pdf (last visited 23 August 2020)

Fortify Rights 'Thailand: Release asylum seekers detained in raids last week' (2017), available at https://www.fortifyrights.org/tha-inv-2017-11-06/ (last visited 1 March 2020)

Fortify Rights 'Joint statement on the signing of the Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres (2019)', available at https://www.fortifyrights.org/downloads/Joint%20Statement%20-%20MoU%20on%20the%20Determination%20of%20Measures%20and%20Approaches%20to%20Detention%20of%20Children%20in%20Immigration%20Detention%20Centres.pdf (last visited 12 April 2020)

Hara AE 'The struggle to uphold a regional human rights regime: The winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)' (2019) *Revista Brasileira de Política Internacional*, available at https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292019000100211 (last visited 17 September 2020)

Harkins B *Thailand Migration Report 2019*. Bangkok: United Nations Thematic Working Group on Migration in Thailand (2019), available at https://reliefweb.int/sites/reliefweb.int/files/resources/Thailand%20Report%202019_22012019_LowRes.pdf (last visited 12 April 2020)

Human Right Watch 'Barely surviving: Detention, abuse, and neglect of migrant children in Indonesia' 23 June 2013, available at https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia (last visited 14 April 2020)

Human Rights and Equal Opportunity Commission (2004) *A last resort? National inquiry into children in immigration detention* Sydney

Human Rights Watch (2014) *Two years with no moon immigration detention of children in Thailand*, available at https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand (last visited 12 April 2020)

Human Rights Watch (2019) *Malaysia: End detention without trial: New government backtracks on reform agenda*, available at https://www.hrw.org/news/2019/01/02/malaysia-end-detention-without-trial (last visited 15 April 2020)

Human Rights Watch (2019) *Thailand: Joint statement on MoU to end immigration detention of children*, available at https://www.hrw.org/news/2019/01/21/thailand-joint-statement-mou-end-immigration-detention-children (last visited 12 April 2020)

Immigration Act of Thailand [1979]

Immigration Bureau of Thailand (2010) *Immigration Bureau Order 148/2010 on Standards of Immigration Detention Centres* Bangkok: Immigration Bureau

Indonesia Immigration Detention Profiles *Global Detention Project*, available at https://www.globaldetentionproject.org/countries/asia-pacific/indonesia (last visited 13 April 2020)

Indonesian Immigration Law UU6-2011

International IDEA (2014) *The ASEAN Intergovernmental Commission on Human Rights: Evolution and the way forward*, available at https://www.idea.int/sites/default/files/publications/the-asean-intergovernmental-commission-on-human-rights-origins-evolution-and-the-way-forward.pdf (last visited 4 February 2021)

IOM (2019) *Labour Migration*, available at https://thailand.iom.int/labour-migration (last visited 12 April 2020)

Jetschke A 'Does forced migration increase regional human rights commitment? The cases of Malaysia and Thailand in ASEAN' (2019) 25 *Asia Pacific Business Review* 705

Kaur K (2007) *Media reporting on refugees in Malaysia,* UNEAC, available at https://www.academia.edu/1393727/Media_reporting_on_refugees_in_Malaysia (last visited 22 August 2020)

Kimball A 'The transit state: A comparative analysis of Mexican and Moroccan immigration policies' Working Paper 150 (2007) San Diego: Centre for Comparative Immigration Studies, University of California

Kongchantuk S, Raksasiripong D & Kanjanatiwat P (2013) *Preliminary study on situation of children in the detention centre in Immigration Bureau Head Office at Soi SuanPlu, Bangkok* Bangkok: Save the Children International

Malaysia: Immigration Act [1959-1963]

Malaysiakini (2019a) 'Immigration Dept to fast-track cases involving children', available at https://www.malaysiakini.com/news/48246 (last visited 21 August 2020)

Malaysiakini (2019b) 'Two detained toddlers to be deported tomorrow, says Immigration Dept', available at https://www.malaysiakini.com/news/482137 (last visited 21 August 2020)

Mekong Migration Network and Asian Migrant Centre (2008) *Migration in the greater Mekong Subregion resource book: In-depth study: Arrest, detention and deportation* Hong Kong: Mekong Migration Network (MMN) and Asian Migrant Centre (AMC)

Missbach A 'Doors and fences: Controlling Indonesia's porous borders and policing asylum seekers' (2014) 35 *Singapore Journal of Tropical Geography* 228

Missbach A 'Falling through the cracks: The impacts of Australia's funding cuts on refugees in Indonesia' (2018) *Policy Forum*, available at https://www.policyforum.net/falling-through-the-cracks/ (last visited 13 April 2020)

Missbach A et al 'Stalemate: Refugees in Indonesia – Presidential Regulation No 125 of 2016' Policy Paper 14 (2018) Melbourne: Centre for Indonesian Law, Islam and Society (CILIS), Melbourne Law School, The University of Melbourne, available at https://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers/stalemate-refugees-in-indonesia-presidential-regulation-no-125-of-2016 (last visited 12 August 2020)

Missbach A (2015) *Troubled transit: Asylum seekers stuck in Indonesia* ISEAS-Yusof Ishak Institute

Nah AM 'Illegality and its uncertainties: Immigration detention in Malaysia' in A Nethery & SJ Silverman (eds) *Immigration detention: The migration of a policy and its impact* (2015) New York: Routledge 125

National Human Rights Commission of Thailand 'Regulations and Proclamations of the Office of the National Human Rights Commission of Thailand' (2020), available at http://www.nhrc.or.th/AboutUs/The-Office/Announce.aspx (last visited 23 August 2020)

Nethery A, Rafferty-Brown B and Taylor S 'Exporting detention: Australia-funded immigration detention in Indonesia' (2013) 26 *Journal of Refugee Studies* 88

Nethery A & Loughnan C 'Regional responses to refugees: Insights from Asia' (2019) 28 *Asian and Pacific Migration Journal* 123

New Naratif 'Seeking Refuge in Malaysia' (2019), available at https://newnaratif.com/journalism/seeking-refuge-in-malaysia/share/nyyrjryyla/c0ca6023b759911cfd36d3a6f6951f69/ (last visited 15 April 2020)

Nowak M 'The United Nations Global Study on Children Deprived of Liberty' (2019), available at https://childrendeprivedofliberty.info/wp-content/uploads/2020/01/Full-Global-Study-Nov-2019.pdf (last visited 12 April 2020)

Parthiban S & Hooi KY 'Detention of refugee children in Malaysia and Thailand: Are alternatives to detention (ATD) workable?' (2019) 3 *Journal of Southeast Asian Human Rights* 59, available at https://umexpert.um.edu.my/public_view.php?type=publication&row=OTA4NTc%3D (last visited 1 March 2020)

Petcharamesree S 'ASEAN and its approach to forced migration issues' (2019), available at https://www.tandfonline.com/doi/abs/10.1080/13642987.2015.1079021?journalCode=fjhr20 (last visited 21 August 2020)

Prabandari A & Adiputera Y 'Alternative paths to refugee and asylum seeker protection in Malaysia and Indonesia' (2019) 28 *Asian and Pacific Migration Journal* 132

Puttanee Kangkun 'A first step to protect children on the move in Thailand' *The Nation Thailand* 4 February 2019, available at https://www.nationthailand.com/opinion/30363535 (last visited 12 April 2020)

Quayle A, Grosvold J & Chapple L 'New modes of managing grand challenges: Cross-sector collaboration and the refugee crisis of the Asia Pacific' (2019) 44 *Australian Journal of Management* 665

Refugee International 'Still adrift: Failure to protect Rohingya in Malaysia and Thailand' (2016), available at https://www.acaps.org/sites/acaps/files/key-documents/files/rohingyainneighbouringcountries.pdf (last visited 22 August 2020)

Reuters and DPA 'Govt confirms deportation of 109 Uighurs to China' *Bangkok Post* 9 July 2015, available at https://www.bangkokpost.com/thailand/general/618344/govt-confirms-deportation-of-109-uighurs-to-china (last visited 23 August 2020)

Reuters 'Refugee children face "harrowing" detention in Southeast Asia: Charities' (2017), available at https://www.reuters.com/article/us-asia-refugees-children-idUSKBN18Z051 (last visited 15 April 2020)

Sampson R & Mitchell G 'Global trend in immigration detention and alternatives to detention: Practical, political and symbolic rationales' (2013) 1 *Journal on Migration and Humanity Security* 97

Save the Children 'Unlocking childhood: Current immigration detention practices and alternatives for child asylum seekers and refugees in Asia and the Pacific' (2017), available at https://resourcecentre.savethechildren.net/sites/default/files/documents/unlocking_chiildhood.pdf (last visited 12 April 2020)

Save the Children 'Breakthrough in education for migrant children in Thailand' (2018), available at https://campaigns.savethechildren.net/blogs/mam-katerenchuk/breakthrough-education-migrant-children-thailand (last visited 12 April 2020)

Schuster L & Majidi N 'What happens post-deportation? The experience of deported Afghans' (2013) 1 *Migration Studies* 221

SUARAM 'Undocumented migrants and refugees in Malaysia: Raids, detention and discrimination' (2008), available at https://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf (last visited 15 April 2020)

SUKA Society 'Advocating for children affected by detention' (2020), available at http://www.sukasociety.org/advocating-for-children-affected-by-detention/ (last visited 15 April 2020)

Taylor S 'Refugee protection in the Asia Pacific region' Rights in Exile Programme (2018), available at http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region (last visited 22 August 2020)

The Diplomat 'The shifting politics of Rohingya refugees in Malaysia' (2020), available at https://thediplomat.com/2020/07/the-shifting-politics-of-rohingya-refugees-in-malaysia/ (last visited 23 August 2020)

*The Nation Thailand* 'China's Uighurs still caught in jaws of Thai immigration' *The Nation Thailand* 13 February 2019, available at https://www.nationthailand.com/opinion/30364100 (last visited 23 August 2020)

*The New Humanitarian* 'Fear and uncertainty for refugees in Malaysia as xenophobia escalates' (2020), available at https://www.thenewhumanitarian.org/news/2020/05/25/Malaysia-coronavirus-refugees-asylum-seekers-xenophobia (last visited 22 August 2020)

*The Star* 'Hamzah: Refugees have no rights to state demands from Malaysian government' (2020), available at https://www.thestar.com.my/news/nation/2020/05/01/hamzah-refugees-have-no-rights-to-state-demands-from-malaysian-government (last visited 23 August 2020)

The World Bank Group 'The World Bank in Thailand: Overview' (2019), available at https://www.worldbank.org/en/country/thailand/overview (last visited 11 April 2020)

Tubakovic T 'The failure of regional refugee protection and responsibility sharing: Policy neglect in the EU and ASEAN' (2019) 28 *Asian and Pacific Migration Journal* 183

UNGA Convention on the Rights of the Child Geneva: UN General Assembly (1989)

UNGA *Report of the United Nations High Commissioner for Refugees: Part II Global compact on refugees* (2018), available at https://www.unhcr.org/the-global-compact-on-refugees.html (ast visited 12 April 2020)

UNHCR 'A framework for the protection of children' (2012), available at https://www.unhcr.org/50f6cf0b9.pdf (last visited 9 February 2021)

UNHCR 'Durable solutions In Malaysia' (2017), available at https://www.unhcr.org/durable-solutions-in-malaysia.html (last visited 14 April 2020)

UNHCR 'Global trends: Forced displacement in 2019' (2019), available at https://www.unhcr.org/5ee200e37.pdf (last visited 23 August 2020)

UNHCR 'UNHCR Thailand' (2019), available at https://www.unhcr.or.th/en/about/thailand (last visited 12 April 2020)

UNHCR 'Figures at a glance in Malaysia' (2020), available at https://www.unhcr.org/figures-at-a-glance-in-malaysia.html (last visited 14 April 2020)

UNICEF 'Global programme framework on children on the move' (2017), available at https://www.unicef.org/media/62986/file (last visited 9 February 2021)

UNICEF 'UNICEF welcomes ASEAN's continued commitment to children's rights' Press Release 6 November 2019, available at https://www.unicef.org/eap/press-releases/unicef-welcomes-aseans-continued-commitment-childrens-rights (last visited 18 September 2020)

UNOHCHR 'What do we mean by "protection" for migrants?' (2018), available at https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/Protection.pdf (last visited 12 April 2020)

UNOHCHR 'Ratification status for Thailand' (2020), available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN (last visited 12 April 2020)

US Department of State Malaysia 2018 Human Rights Report (2018), available at https://www.state.gov/wp-content/uploads/2019/03/MALAYSIA-2018.pdf (last visited 15 April 2020)

Wangcharoenpaisan Y 'Refugee status determination (RSD) practices in Thailand' (2017) MA Thammasat University, available at http://ethesisarchive.library.tu.ac.th/thesis/2017/TU_2017_5966040015_7036_6596.pdf (last visited 23 August 2020)

Weber L & Pickering S (2011) *Globalisation and borders: Death at the global frontier* London: Palgrave

Zainuddin ZA & Duasa J 'Perception analysis on immigration issues: A case of Malaysia' 2nd International Conference on Arts, Social Sciences and Technology, Penang, Malaysia, 3-5 March 2012, available at https://www.researchgate.net/publication/294682424_PERCEPTION_ANALYSIS_ON_IMMIGRATION_ISSUES_A_CASE_OF_MALAYSIA (last visited 23 August 2020)

AS Lotf, C vd Werf, C Arbi & R Jambi 'Armed conflict and national security depriving children of liberty in the MENA region: Case studies and good practices' (2020) 4 *Global Campus Human Rights Journal* 311-338
http://doi.org/20.500.11825/2041

# Armed conflict and national security depriving children of liberty in the MENA region: Case studies and good practices

***Ahmed Samy Lotf, Charlotte van der Werf, Chiraz Arbi and Reham Jambi****

**Abstract:** *The UN Global Study on Children Deprived of Liberty outlines various pathways to detention in the contexts of armed conflicts and national security. A particular focus of this article falls on a comparative study between three case studies in the Arab region – notably Iraq & Syria (ISIS regions), Libya, and the Occupied Palestinian Territories (OPT). This comparative study is used in order to identify common problems as well as common good practices towards reaching a preliminary regional approach. With the defeat of ISIS, approximately 29 000 children have been detained in the northeast of Syria and in Iraq. Of those, only a limited number of children have been repatriated to their or their parents' countries of origin, highlighting the overall reluctance of states to repatriate jihadist fighters for alleged security concerns. Detained children associated with ISIS are susceptible to radicalisation, aggravated socio-psychological harm and deprivation of the right to a normal childhood. The changing nature of armed conflict from 'traditional' wars to conflicts between non-state armed groups corresponds with an increase in the treatment of children as perpetrators rather than victims (especially in Libya). Children affiliated with terrorist groups are put to trial in circumstances that are contrary to international child justice standards. In the OPT, a high number of arrested children are mistreated, while they are also subjected to military courts and law. While states have the primary duty to prevent any potential security threats (including terrorism), protecting children from all types of violence is an obligation under international human rights law. Recognising the pressing need to liberate children from their precarious situation within detention camps, this article calls for concerted efforts to bring adequate solutions in accordance with international standards of justice for children in a way that promotes their rehabilitation and reintegration.*

* This article is based on a paper prepared for and presented at the Global Classroom, a project of the Global Campus of Human Rights (September 2020). The researchers all hold a Masters in Human Rights and Democracy from the University of Saint Joseph in Beirut. Research coordinator: Ahmed Samy Lotf; MA in International Relations and Diplomacy from the American Graduate School in Paris (Arcadia University in PA, USA) and MA in Human Rights and Democracy from the University of Saint Joseph. Proposing PhD project on state violence and its effect on the Arab Spring.

**Key words:** *children's rights; armed conflict; national security; deprivation of liberty; children deprived of liberty; children in Palestine; children of ISIS; children in Libya; UN Global Study on Children Deprived of Liberty; deprivation of liberty on grounds of armed conflict; deprivation of liberty on grounds of national security*

## 1 Introduction

Due to the political situation in the region, the Arab world has seen the rights of the child violated in many ways. Indeed, as soon as armed conflicts, civil wars and social unrests occur, children's rights are often severely violated given their specific vulnerability when the state and law enforcement are absent in certain geographical areas. Moreover, under the conditions of armed conflict or civil war, children can further be exploited as fighters between different sects or imprisoned in camps. In these situations, children are often displaced with their families, which by extension also leads to the deprivation of other rights such as access to education and health. By using a comparative approach, this study focuses on three case studies so as to determine the best regional approaches for dealing with children deprived of liberty in the context of armed conflict and national security. Israel and the Occupied Palestinian Territories (OPT) offer an exemplary case where children are being detained in the contexts of both armed conflict and national security. The UN Global Study on Children Deprived of Liberty (UN Global Study) found that since the Israeli occupation of the West Bank in 1967, an estimated 46 512 Palestinian children have been arrested and detained by the Israeli military on alleged security grounds (Nowak 2019: 559). According to a 2018 report by the Military Court Watch, children held in military custody are continually subjected to widespread, systematic and institutionalised ill-treatment, including being arrested at night during military raids at their houses, where soldiers would tie, blindfold and transfer them to interrogation centres. In many cases arrested Palestinian children are transferred to prisons outside the West Bank, thus depriving them of their right to family contact. The report also provides that in 97 per cent of child detention cases in 2017, the children lived and were arrested in an area very close to illegal Israeli settlements in the West Bank, suggesting a systematic link between the two (Nowak 2019: 600).

To introduce a second example, the deprivation of children's liberty in Libya occurs in connection to armed conflict in addition to the detention of migrants taking place for reasons of national security. Despite the complexity of the armed conflict in Libya, where armed groups and militias hold considerable power, many European countries have struck deals with Libyan authorities to control the flow of migrants from Africa to Europe. As a result, Libyan authorities arrest and move thousands of migrants to detention centres, detaining children in the same facilities as adults. These

detention centres reportedly are in extremely bad condition, resulting in people dying from a lack of food, clean water and basic medical care (Nowak 2019: 456).

A third example of deprivation of liberty in the context of an armed conflict and on national security grounds is the detention of children associated with the Islamic State of Iraq and Syria (ISIS) in Iraq and Syria. It is estimated that approximately 35 000 children were deprived of liberty in the context of armed conflict in camps in both countries in early 2019 (Nowak 2019: 568). Moreover, this estimation does not include the undocumented cases of children held in camps, military barracks, intelligence facilities, and other centres run by military or government-aligned militias.

The above cases illustrate grave violations of international humanitarian law relating to the protection that ought to be afforded to children in conflict situations. In times of armed conflict, children benefit from the general protection provided to civilians not taking part in the hostilities, including the right to life, the prohibition of coercion, torture, collective punishment and reprisals (article 27-34 GCIV and article 75 API). Given the particular vulnerability of children, the Geneva Conventions of 1949 (GCIII and GCIV) and their Additional Protocols of 1977 (API-II) oblige the parties to the conflict to provide children with special protection pertaining to the care and aid they require, including evacuation, assistance, identification and family reunification.

Although international humanitarian law categorically prohibits the recruitment and participation of children below the age of 15 years in armed groups, children who do directly take part in the hostilities do not lose this special protection. Rather, child combatants are entitled to privileged treatment due to their age-specific status. Although Iraq, Syria and Palestine have all acceded to the Geneva Conventions and ratified their Additional Protocols (which Israel notably has not ratified), the legal vacuum that can exist during a conflict, the enactment of emergency and anti-terrorism laws, and the general lack of child-friendly proceedings, especially in the military justice systems, all make children particularly vulnerable to ill-treatment and abuse.

Therefore, the purpose of this article is to provide a snapshot of the situation of children deprived of liberty in the context of armed conflicts and for national security reasons in the Middle East and North Africa (MENA) region. A synthesis of the common legal, political and social frameworks that contribute to the violation of children's rights, or alternatively provide children with age-appropriate special protections, will be drawn through the analysis of the three above-mentioned case studies in order to articulate an appropriate regional approach.

## 2 Methodology

This article utilises a comparative case study approach to conduct an analysis and synthesis of the similarities, differences and patterns of three cases where children have been deprived of liberty due to an armed conflict or for national security reasons in the MENA region. The aim of this analysis is to understand which common social, legal, structural or policy factors in the MENA region render children vulnerable to a deprivation of their liberty or, alternatively, provide safeguards and protection to children. In so doing, the research will complement the initial findings of the UN Global Study and its chapters related to children in armed conflict and children in national security situations by addressing the following research questions:

- To what extent do the responsible states in the selected three cases fail to ensure the protection of children from the deprivation of their liberty, as per the provisions of international law and national legislation?
- What are the main reasons causing children to be deprived of their liberty in the selected three cases?
- What best practices and recommendations could be proposed at the national level in each of the cases for overcoming these reasons?
- What best practices and recommendations could be proposed at the regional level for overcoming these reasons?

The MENA region is characterised by several protracted armed conflicts, including in Syria, Iraq, Libya, Yemen and in the Occupied Palestinian Territories. Although the region as a whole enjoys immense cultural diversity and richness, its states share certain commonalities in their political history and are situated in a distinct geopolitical reality that make their conflicts interlinked and thus useful to compare. For this reason, the armed conflicts and/or national security situations in Syria, Iraq, Libya and the OPT are selected for closer examination, based on their common features (for instance, the large-scale use of detention of children) and the accessibility of information (for instance, in the case of Yemen there is much less information available about children).

A qualitative multiple-case study methodology is employed for the research, to facilitate exploration of the research questions within the context of the examined phenomenon and using a variety of data sources. Such methodology is appropriate when it is necessary to cover the contextual conditions in the research due to their key relevance to the phenomenon under study (Baxter & Jack 2008: 544-545). The methodology also ensures that the issue is not explored through one lens, but rather through a variety of lenses, allowing for multiple facets of the phenomenon to be revealed and understood (Baxter & Jack 2008: 544-545). Furthermore, the methodology is chosen because it is particularly

useful for evaluating the implications of existing laws and policies and for proposing future interventions that will have a positive impact.

After carefully exploring each of the cases, a comparison of the multiple cases will be made, in order to produce generalised knowledge about how and why particular programmes or policies that share common features have worked or failed to work. Selecting this approach stems from the assumption that despite the differing nature of conflicts and security situations, the three cases share enough common factors that allow for a production of generalisations that can be used as recommendations for regional mechanisms and policies. In order to facilitate the drawing of generalisations, the following conceptual framework will be used when analysing the cases:


***Figure 1: Conceptual framework for analysing cases***

The main information sources used for the research include the data produced as part of the UN Global Study, as well as papers written by other research institutions and reports produced by the United Nations (UN) and international non-governmental organisations (NGOs). The main research strategy involves desk research through an in-depth review of literature. Besides this, two key interviews were conducted, one with an expert from the office of the UN Special Representative of the Secretary-General for Children and Armed Conflict and a second with an expert from Addameer for Prisoner Support and Human Rights Association in Ramallah, to verify the findings gathered from desk research. One limitation faced was a lack of field access, preventing the undertaking of interviews with experts from local NGOs on the Libyan and Iraqi/Syrian

case studies. However, interviews were conducted via zoom meetings to obtain the necessary information.

## 3 Legal framework

### 3.1 International legal framework

International law and standards generally consider children taking part in armed conflicts as victims of these conflicts, rather than perpetrators. In fact, international law prioritises the demobilisation of child soldiers, providing them with the support and rehabilitation needed for them to be able to live normal lives as children again (ICRC 2010).

#### *3.1.1 International humanitarian law*

In war, children benefit from the general protection of international humanitarian law (IHL) as civilians or combatants. There are also provisions recognising their particular vulnerability and needs in armed conflicts (ICRC 2010). Under the 1977 Additional Protocols to the Geneva Conventions, recruitment or participation in hostilities of children under the age of 15 years, by government or non-state armed groups, is prohibited (Additional Protocols 1977). Nevertheless, and in violation of IHL, a significant number of children around the world are actively taking part in hostilities, or in providing forces or armed groups with assistance, such as in carrying supplies to them (ICRC 2010).

State parties in an international armed conflict are allowed to hold civilians, including children, in administrative detention only for actual security reasons. Administrative detention of children should be an exceptional measure, and a measure of last resort in general. Furthermore, it should be solely allowed in cases where the state has a legitimate reason to believe that the child could pose a serious threat to its security. Even in the case where detention of children is allowed, a review of this detention should take place as soon as possible and at least twice a year, and the child detained should have the right to challenge his or her detention (Nowak 2019).

In a non-international armed conflict, the detention of children generally is governed by domestic law, including the state's obligations under international human rights law (Nowak 2019).

#### *3.1.2 International human rights law*

The Convention on the Rights of the Child (CRC), which has achieved almost universal ratification, also included the 15-year age limit in relation to child recruitment in armed conflict. Under CRC, when recruiting

children between 15 and 18 years of age, states should prioritise the oldest. The Optional Protocol to CRC on the Involvement of Children in Armed Conflict (OP-CRC-AC) raised the minimum age for recruitment of children in armed conflict to 18 years. A large majority of states have deposited declarations that they are considering a minimum age of voluntary recruitment of at least 18 years of age (OP-CRC-AC 2000). In addition, OP-CRC-AC highlights the importance of demobilisation, rehabilitation and reintegration of children who have been involved in armed conflict.

International human rights law is applicable at all times, including during an armed conflict. Both the International Covenant on Civil and Political Rights (ICCPR) and CRC apply in times of armed conflict. Following international standards, the right to be free from arbitrary detention and fair trial rights are non-derogable, even in times of armed conflict and national security threats (OHCHR 2013). Similarly to IHL, CRC provides that children's deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time (OHCHR 2019) and as stated in article 37(b) of CRC.

According to article 39 of CRC,

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child (CRC 1989).

International human rights law is applicable to all children, notwithstanding the scale and the seriousness of the committed crime (Nowak 2019). This means that, even when facing a crime that allegedly threatens the national security of a state, international principles governing children's deprivation of liberty must be observed. Even in national security or terrorism-related crimes, the deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time (Nowak 2019). The CRC provisions concerning the right to personal liberty in article 37 and fair trial rights under article 40 are also applicable to a child who may have committed national security or terrorism-related crimes.

International standards provide that 'children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualised approach' (GC 24 2019).

CRC similarly provides that the treatment of children in the context of national security offences must respect the dignity of the child, ensure the best interests of the child, and generally treat the child with a perspective

toward rehabilitating and reintegrating him or her back into society. CRC further encourages resorting to measures alternative to judicial proceedings and detention in cases where a child has actually committed a crime (CRC 1989).

#### *3.1.3 International criminal law*

The definition of the International Criminal Court (ICC) of war crimes includes the conscription, enlistment or use of children under the age of 15 years to participate actively in hostilities (Nowak 2019). Under the Rome Statute, the Court does not have jurisdiction over children who were under the age of 18 at the time of the alleged commission of a crime (Rome Statute 1998).

#### *3.1.4 United Nations Security Council*

The UN Security Council issued several resolutions on children and armed conflicts. Most prominently, Resolution 2427 provides that no child should be deprived of his or her liberty unlawfully or arbitrarily. It also urges states to establish measures to facilitate handing these children over to the relevant civilian protection authorities and to consider alternative measures to judicial prosecution and detention, with a perspective to rehabilitate and reintegrate children who participated with armed forces or armed groups.

### 3.2 Regional legal framework

Regional legal instruments could offer guidelines more tailored to the respective member states in realising the protection of children when deprived of liberty. Various human rights instruments at a regional level exist which could guide improvements in the protection of children in the MENA region. This part will delve into these instruments, their relation to children's deprivation of liberty and the extent to which they are implemented at the national level of the case studies outlined in this article.

#### *3.2.1 African human rights framework*

The African Charter on Human and Peoples' Rights (African Charter) entered into force in 1986 and has been ratified by Libya, among 53 African states. Its commission is established within the predecessor of the African Union (AU), the Organisation of African Unity (OAU) (Bilo & Machado 2018). Although there is no separate section dedicated to the rights of the child, article 18 calls for the protection of the child. Article 18 of the African Charter holds the family to be 'the natural unit and basis of society', and furthermore ensures the protection of the rights of the child 'as stipulated in international declarations and conventions'.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) is a separate instrument of the AU that pays special attention to children's rights in the African context, as well as mentioning the rights of refugee children in particular. Libya also ratified this Charter (Bilo & Machado 2018). In line with CRC, a child is defined as every human being below the age of 18 years. Apart from this, standards relating to non-discrimination and the best interests of the child are defined. The latter is outlined in article 4, which stipulates that 'the best interests of the child shall be the primary consideration in all judicial or administrative proceedings'. Furthermore, article 17 delves into administration of juvenile justice, where all aspects of a child's special treatment are outlined. These include, but are not limited to, the need to ensure that no child 'is subjected to torture, inhuman or degrading treatment or punishment' as well as being 'separated from adults in their place of detention or imprisonment'. Furthermore, reintegration into his or her family and social rehabilitation are seen as an essential aim in the treatment of every child during trial.

### *3.2.3 Arab human rights framework*

The League of Arab States (LAS) adopted the Arab Charter on Human Rights, which entered into force in 2008. Among others, the Charter has been ratified by Libya, Palestine and Syria. This Charter also barely refers to children in specific, apart from article 38 which stipulates that '[t]he State shall ensure special care and protection for the family, mothers, children and the elderly'. A considerable limitation to the rights contained in this charter is the fact that it permits state parties to derogate from their obligations 'in exceptional situations of emergency which threaten the life of the nation' (WHO). Although the Charter has a weak track record in terms of its monitoring and enforcement mechanisms, a treaty body does exist, namely, the Arab Human Rights Committee.

In 1983, the League of Arab States adopted the Charter of the Rights of the Arab Child. This treaty has been ratified by Iraq, Libya, Palestine and Syria, among other LAS member states. While the Charter sets out some basic rights for Arab children, states are obliged to strengthen their legal frameworks in pursuit of those, as the title of the Charter shows these rights do not cover minority children living in Arab states (Osterhaus 2017).

The Arab Framework on the Rights of the Child is a resolution following the Thirteenth Arab Summit in 2001. It aims to incorporate principles such as 'non-discrimination, best interests of the child, and ... the right of the child to life, to development, protection and participation' into LAS member states' legislation (Abdul-Hamid 2008). Hence, it offers a step in between the principles of CRC and integration into national legislation.

Although its status and the number of signatories remain unknown to this day, the Covenant on the Rights of the Child in Islam is the only human rights instrument specifically concerned with Muslim-majority countries as it was adopted by the Organisation of Islamic Cooperation (OIC) in 2005. While it does show a commitment to support children's rights and includes an article on child refugees, the text leaves much room for interpretation. Not only does it lack a defined age limit to be considered a child, but it has also been criticised for lacking provisions referring to how armed conflicts affect children (Mosaffa 2011).

## 4 Main findings

### 4.1 Case study: Detained children in Syria and Iraq

The phenomenon of foreign fighters in Syria and Iraq victimises children in various ways. First, the hostile environment in which rights, such as the right to mobility and movement, are denied causes children physical and mental suffering. In many instances arbitrary detention, mistreatment and abuse follow the alleged association with terrorist groups or the alleged association of family members. Those who have been fortunate enough to be freed from detention, children or others, may suffer from stigma and discrimination, including from their own communities. This manifests itself differently based on gender. Therefore, children associated with the activities of terrorist groups need to be viewed first and foremost as victims. The individual circumstances of each case ought to be taken into account and need to be in line with international juvenile justice standards, in particular having regard to the minimum age of criminal responsibility.

#### *4.1.1 Domestic legal framework*

The Iraqi Federal Government and the Kurdistan Regional Government adopted anti-terrorism laws in 2005 and 2006 respectively. These laws are characterised by a broad definition of terrorism, which increases the number of detained children on national security-related charges, including for association with armed groups, primarily ISIS. This remains a key child protection concern as in 2018, over 900 children were detained in the Kurdistan region (KRI). There have been reports of lack of due process for children allegedly affiliated with ISIS and of ill-treatment and torture of children while in detention (HRC 2019: 9).

While the Iraqi Federal Anti-Terrorism Law is silent on fair trial rights and procedural guarantees, article 13 of the KRI Anti-Terror Law stipulates that accused persons should be treated fairly in accordance with the law during interrogation, including through the provision of a lawyer. Torture and inhuman treatment are also explicitly prohibited. However, contrary to international law, article 13 of the KRI Anti-Terror Law allows

for confessions extracted under duress to be used in court if they are supported by other evidence (UNAMI 2020: 6).

In addition, the Iraqi Juvenile Welfare Law applies to persons under the age of 18 years at the time of the offence. While the law envisages several protective measures for children in the justice system and reduces the maximum penalty to 15 years' imprisonment, the minimum age of criminal responsibility is set very low, namely, at nine years of age (UNAMI 2020: 4).

For the Syrian Arab Republic, the Penal Code was amended in 2013 to outlaw the recruitment of children under 18 for either involving them in hostilities or other related acts such as carrying arms, ammunition or equipment; transporting or placing explosives; manning check-points; conducting surveillance or information gathering; or use as human shields. This comes after the ratification of CRC, yet reports reveal that the Syrian government has continued to use children as soldiers or in government-affiliated militias (HRC 2018: 15).

Following the defeat of ISIS, over 55 000 suspected Daesh fighters and their families have been detained in Syria and Iraq. The majority of these individuals are Syrian or Iraqi. They also include alleged foreign fighters from nearly 50 countries. More than 11 000 suspected family members of foreign ISIS fighters are held at the Al Hol camp in North-Eastern Syria in inadequate conditions. The United Nations Children's Fund (UNICEF) estimates that there are 29 000 children of foreign fighters in Syria – 20 000 from Iraq – most of them under the age of 12 years (OHCHR 2019).

### *4.1.2 Recruitment and use of children in armed conflict*

Children were recruited and used to actively participate in hostilities. Government forces in Syria and associated militias as well as non-state armed groups are responsible for using children under the age of 18 years in hostilities, undermining their protection in armed conflict and exposing them to further risks to their life (UNSC 2018: 4).

Armed groups and terrorist organisations, including Jabhat al-Nusra, Ahrar al-Sham, Jund al-Aqsa, Nour al-Din al-Zinki and Sultan Murad Brigades, as well as Free Syrian Army affiliated groups, recruited and used children, undermining their protection under international humanitarian law (SGCAC 2019: 2). Financial incentives for boys to join their ranks were created, taking advantage of the deteriorating economic situation in areas under their control. Recruited children have been also used in a variety of unarmed roles, including as cooks, informants and porters.

Additionally, ISIS systematically recruited and used children for direct participation in military operations (HRC 2020: 12). It established 'cub

camps' across its territory, where children of various backgrounds were trained for combat roles and suicide missions, for example, Yazidi boys as young as seven who were forcibly transferred from Sinjar in Northern Iraq in August 2014 and brought into Syria for this purpose.

In Iraq, the UN verified the recruitment and use of 109 children (UNAMI/OHCHR 2018: 5). The majority of cases were attributed to ISIS, which used children as combatants and suicide bombers, including in Syria. Many children had been abducted by ISIS for the purpose of recruitment and sexual abuse. The remaining children had been recruited and used by unidentified groups and other parties, including the Kurdistan Workers' Party and other Kurdish armed groups.

According to verified data from 2014, when official monitoring began, until 2019, close to 5 000 children had been recruited into the fighting in both Syria and Iraq (UNICEF).

### *4.1.3 Children in detention*

In North-West Syria, the escalation of the conflict combined with harsh winter conditions on top of an already dire humanitarian crisis has exacted a heavy toll on thousands of children in detention centres. At least 28 000 children from more than 60 countries remain languishing in displacement camps in Syria, deprived of the most basic services. Only 765 children have been repatriated to their countries of origin as of January 2020 (HRC 2020: 15).

In Iraq the detention of children on national security-related charges, primarily for alleged association with ISIS, remained a key child protection concern. In 2017 at least 1 036 children (12 girls), including 345 in the Kurdistan region, had been detained and in 2018, over 900 more children. Several reports point out the lack of due process for children allegedly affiliated with ISIS and of ill-treatment and torture of children while in detention (UNAMI/OHCHR 2018: 22).

The UN in 2019 called for the protection, repatriation, prosecution, rehabilitation and reintegration of children with links to UN-listed terrorist groups (UNCCT 60). Yet, different challenges remain for the implementation of this recommendation.

### *4.1.4 Challenges to repatriation*

First of all, the anti-terrorism legislation adopted by various UN member states plays a role challenging repatriation. Such considerations apply to children whose parents are accused or convicted of being foreign fighters and, therefore, they have their rights infringed upon because of the criminal status of their parents. One of these rights is repatriation, as several states

prevent effective entrance back to the country of origin for the child of a criminal (Van Poecke & Wauters 2021: 2). Therefore, detaining children or otherwise penalising children based on allegations against their parents is discriminatory and is specifically forbidden under CRC (UNCCT 66).

Second, children born in former ISIS-controlled areas also face numerous obstacles to obtain civil registration, since documents provided by armed groups are not recognised by most governments. The situation of displaced children, in particular those persisting in al-Hol or al-Roj camps with familial links to ISIS fighters, is particularly precarious. Of some 45 000 children who were at al-Hol camp, including those born as a result of rape, a large number lack birth registration documents, either due to lost documents or an inability to register. In addition, the denial of the rights of women and girls to confer their nationality upon their children or nationality laws that are discriminatory on other grounds present additional hurdles. This, in turn, jeopardises their rights to a nationality, hinders family reunification processes and puts them at a higher risk of exploitation and abuse. The situation of those born in other camps is also problematic as births were never officially registered with competent authorities, resulting in a lack of civil documentation and rendering children effectively stateless (Amnesty International 2018: 34). Moreover, stripping parents of their nationality has negatively impacted children, including their ability to exercise basic human rights. Proposals by states to repatriate children without their mothers may also run counter to the principle of the best interests of the child.

In addition, a child may be affected by the deprivation of nationality as a counter-terrorism measure. Some states have adopted legislation enabling authorities to revoke citizenship under specific circumstances, such as when the return of a citizen is considered to present a threat to national security or the vital interests of the state. In many states, this measure may only be taken when individuals possess dual or multiple nationalities. Some domestic legislations, however, do not provide protection against statelessness (OHCHR July 2020).

Fourth, most governments do not offer repatriation assistance to citizens in the conflict zones of Iraq and the Syrian Arab Republic, including men and women who are suspected of being foreign terrorist fighters and their children. Some states also lack representation in those areas and are unable to provide effective consular services. For legal, practical and political reasons, some countries offer such assistance only when their nationals manage to appear at their embassies or consulates and their nationalities are established, including through DNA testing. This situation raises questions as to how these states are implementing their obligations to children who, under the law, are entitled to nationality by descent.

When it comes to the responsibility of Iraq and Syria in the repatriation process, data collection and data sharing with relevant countries who seek to repatriate their citizens is central. In this regard, it has been noted that securing data and records and communicating them have presented a real challenge. The repatriation process was greatly affected due to the lack of access to data of who needed to be repatriated. With a substantial number of those detained for not holding official papers (part of it is explained by the notion of the rejection of state building and traditional institutions), correct data on age, citizenship and other details was missing on many occasions. Gender-delineated data was also not always available. Sub-categorisation of minors as infants (0 to four years), children (five to 14 years), and teenagers (15 to 18 years) has an impact on how countries will deal with them but was always mismanaged. These challenges have proven to slow down the repatriation process but, more importantly, to misguide national, regional and global databases used to develop adequate strategies.

A second responsibility is to deal with those who were not repatriated because their countries refused them. As an example, in Iraq there currently are a number of detained French citizens who joined ISIS and whom the French government under Macron's administration refuses to put on trial back home (France 24 2019).

It thus is crucial for all states involved to ensure that their legislation and actions demonstrate their commitment to both effective counter-terrorism measures and protection of human rights, which are not conflicting goals, but are complementary and mutually reinforcing (UN Global Counter Terrorism Strategy 2018: 5).

### *4.1.5 Good practices*

- Some North African states have signed handover protocols following the UN Security Council Resolution 2427 (2018). The Resolution calls for 'standard operating procedures for the rapid handover of the children concerned to relevant civilian child protection actors', transferring children associated with armed forces and armed groups to child welfare centres. The aim is to ensure rehabilitation and reintegration into society (UNGS 2019: 15).
- In Morocco, rehabilitation is prioritised over criminal prosecution, taking into consideration the fact that prosecution itself may further traumatise children returning from conflict-affected areas. The government has devised a rehabilitation programme aimed at eventually releasing the children to their families. The programme also contains reconciliation aspects developed in consultation with religious scholars (UNCCT 76).

- As per the 23 February 2018 Prime Minister's instruction, the government of France prioritises the unity of siblings concerning children returning from conflict areas. Children over 18 months are placed with a foster family with their siblings. Usually, a judge at a juvenile court convenes a hearing to review a foster order and to order a long-term solution to prevent leaving the child in the foster family's care. This comes in application of the CRC provision stipulating that a child cannot be separated from his or her parents against his or her will unless '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' (UNCCT 51).
- The government of Tunisia allows any child to return to Tunisia as long as the mother is established as a Tunisian and the accompanying child is hers. If the child does not have any documentation to prove his or her birth, the mother or the public prosecutor on behalf of the child files a civil case to establish nationality and civil status through civil registration. DNA testing may be used to establish the child's nationality; however, it has to be conducted under the supervision of the judiciary to ensure the best interests of the child. This comes in line with human rights considerations relating to granting nationality and the practice of performing DNA testing on children (UNCCT 45).
- Several states have opted for children associated with non-state armed groups designated as terrorist to be tried in special courts for children. While many states have been reluctant to bring home child nationals associated with such groups from conflict-affected areas, some states have adopted return plans with clear responsibilities for state authorities concerning the necessary steps for the safety, reintegration and rehabilitation of such children (UNGS 2019: 15).
- In order to strengthen the national legal protection system for children in Syria, the Penal Code was amended in under 18 for either involving them in hostilities or other related acts such as carrying arms, ammunition or equipment, transporting or placing explosives, manning check-points, conducting surveillance or information gathering, or use as human shields. In addition, the national criminal procedures law in Syria stipulates that upon the arrest of a child, he or she should be medically examined by a doctor, and the parent of the child should be informed of the right to have the assistance of counsel. According to article 44(b) of the Juvenile Delinquents Act, the parent or guardian of the child has an obligation to provide them with a lawyer when charged with a crime or misdemeanour should the parent or guardian not have the capacity to do so, the juvenile court will appoint them on their behalf.

- The UN Madrid Guiding Principles (2015) recommend to member states to ensure that their competent authorities are able to apply a case-by-case approach to returnees on the basis of risk assessment, the availability of evidence and related factors. Member states should develop and implement strategies for dealing with specific categories of returnees, in particular minors, women, family members and other potentially vulnerable individuals, providers of medical services and other humanitarian needs and disillusioned returnees who have committed less serious offences. Prosecution strategies should correspond to national counter-terrorism strategies, including effective strategies to counter violent extremism.

### 4.2 Case study: Libya

In Libya, various factors enable the deprivation of children's liberty. The year 2014 marked the start of Libya's second civil war following the 2011 Arab Spring. Since then, fighting between the Government of National Accord (GNA), the House of Representatives through the Libyan National Army and various militant groups has been plaguing the country. Children are suffering greatly from the indirect and direct consequences of these hostilities. The Libyan population is increasingly fleeing, while children are dying from indiscriminate attacks or recruited for fighting (UNICEF 2020). On top of this, large-scale migration detention is taking place as child migrants are being detained for reasons of national security. These detention centres already put children in dire conditions, which are further exacerbated by the armed conflict being waged in the country. As such, the reasons for detaining children on grounds of national security or due to armed conflict are highly intertwined.

#### *4.2.1 Deprivation of liberty in relation to national security grounds*

Although Libya is in political disarray, it remains a central migration route (Baldwin-Edwards & Lutterbeck 2019: 2241). During Gaddafi's rule, Libya offered mass employment to mostly African migrants (Baldwin-Edwards & Lutterbeck 2019: 2241). Increasingly, it also came to attract migrants aiming to use Libya's central location at the North African coast as a take-off point for Europe. Law 19 (2010) on Combating Irregular Migration and Law 6 (1987) on Regulating Entry, Residence and Exit of Foreign Nationals to/from Libya outline that 'undocumented entry, stay and exit is punishable by imprisonment, fines and forced labour' (Baldwin-Edwards & Lutterbeck 2019: 2255). These laws do not distinguish between forms of migration, be it a refugee, asylum seeker or human trafficking victim (UNSMIL & OHCHR 2016: 11). No formal procedures exist for judicial recourse when detained (HRW (2019). Contrary to this, international human rights law stipulates that being a migrant 'should not constitute a criminal offence' (UNSMIL & OHCHR 2016: 9). Furthermore, as detention is never in the child's best interests, children should not be

detained based on their parents' migration status (UNSMIL & OHCHR 2016: 9). The minimum age of criminal responsibility in Libya rests at seven years (Nowak 2019: 438). What the Libyan authorities define as a child varies between detention centres, but is always below international law's definition of all persons under the age of 18 years (HRW 2019: 54). Statistics on the numbers of detained migrants are difficult to obtain. Yet, following data shared by the United Nations Support Mission in Libya (UNSMIL), 'children represent about 10 percent of the migrant and refugee population, with more than half of them being unaccompanied' (UNSMIL & OHCHR 2018: 11). Data by UNICEF (2017) on the year 2016 showed similar figures, yet pointed out that the real numbers of migrant children in Libya are at least three times higher. Further data (UNICEF 2017: 4) shows that three-quarters of the migrant children interviewed 'had experienced violence, harassment or aggression'. This includes both verbal and physical abuse, where girls reported a higher incidence than boys (UNICEF 2017: 4).

Out of the 34 detention centres, the Department for Combating Illegal Migration (DCIM) of the Libyan government runs 24 detention centres (UNHCR 2017). Although DCIM is supposedly responsible for migration detention, it seems that centres have fallen into the hands of whichever group holds power in the region in which the centre is located (Baldwin-Edwards & Lutterbeck 2019: 2247). In these centres there are no separate facilities for children (Nowak 2019: 270). Reports illustrate the appalling conditions in which detainees are required to live (GDP 2018: 17; Mangan & Murray 2016; OHCHR 2018). Detainees have reported a lack of 'adequate washing and sanitation' facilities and severely overcrowded cells (Nowak 2019: 596). Furthermore, adequate nourishment is lacking, also for breast-feeding mothers and their new-born children. There is no or insufficient health care for children and adults and 'there are no regular, organised activities for children, play areas or any kind of schooling' (HRW 2019: 2). Moreover, the trauma experienced along the journey to Libya or while detained leaves 'a profound impact on children's mental health' that is not dealt with (HRW 2019: 55). Overall, the lack of effective state oversight of these institutions is one of many factors making the gathering of verified information difficult for organisations working on Libya (Sabarthes 2020).

Human traffickers contribute hugely to the numbers of detained migrant children. Exploitation already starts during the journey to and within Libya (UNICEF 2017). Although 79 per cent of trafficking victims are perceived to be women and children, it is important to note that survivors of sexual exploitation are more likely to be counted than survivors of labour exploitation, which might target more men and boys (UNICEF 2017).

### *4.2.2 Deprivation in relation to armed conflict*

These violations of children's rights occur against a background of a protracted armed conflict and economic crisis in which human trafficking is thriving (UNICEF 2017: 11). Post-Gaddafi Libya is marked by competing actors making claims on the nation's political leadership, namely, the House of Representatives, the General National Congress and the UN-backed Government of National Accord. Children are detained for the purpose of 'intelligence extraction, sexual exploitation, torture or enforced disappearance on the basis of alleged reasons ranging from charges on national security, counter terrorism, association of family members with insurgent groups to unlawful gatherings' (Nowak 2019: 235). Furthermore, the use and recruitment of children as child soldiers in non-combatant and combatant roles has for years been on the rise (RDCSI 2017). The relationship of armed groups or human traffickers to those with political power seemingly has given them impunity for their acts (HRW 2019: 13).

Arbitrary arrest and subsequent detention of children is used as a tactic within the conflict, as is the recruitment of child soldiers. Identity plays a role, exemplified by the mass arrests of men and boys on the basis of their tribal identity by the Libyan National Army (Nowak 2019: 587). Voicing criticism or merely insufficient support to the Libyan National Army have also been grounds for arrest and detention of children ((Nowak 2019: 588). Detention of particularly women and girls by the Libyan National Army 'for the purposes of prisoner exchanges [or] to extort money from the children's relatives' have been reported (Nowak 2019: 589).

### *4.2.3 Good practices*

- Working with the principle of the best interests of the child, Libya indicated that 'children are left in the custody of their parents or with a foster family while awaiting judgment' (Nowak 2019: 267).
- On paper, specialised child courts exist in Libya, although they have not been implemented in practice up until now (Nowak 2019: 294).
- At the local level, municipal leaders have shown a commitment to protecting children from the conflict by establishing reintegration centres providing services for the purpose of rehabilitation and reintegration of children under 18 and adults who were involved when they were still under-aged. This happens in cooperation with UNICEF (SRSG/CAAC 2016).
- In 2019, UNHCR together with LibAid started a psychosocial programme at the gathering and departure facility in an attempt to provide some normalcy and hope for many formerly detained youngsters. Due to worsening security in Tripoli, the psychosocial

programme for children is being put on hold for the time being (UNHCR 2020).

- Multidisciplinary workshops have been organised for Libyan professionals working with children in conflict with the law. Professionals participated in two training workshops on restorative justice and the use of non-custodial measures for children, where they were provided with knowledge on the fundamental principles of juvenile justice with a particular focus on diversion, community-based rehabilitation programmes and probation (UNICEF 2020). The training sessions are part of a planned programme aimed at developing a juvenile justice system in Libya that responds to the needs of children and which is in line with the UN Convention on the Rights of the Child.

### 4.3 Case study: Israel's occupation of the Palestinian territory

Children's deprivation of liberty is one form of the systematic violations to Palestinians' rights in the context of the Israeli occupation. According to the UN Global Study (2019), an estimated 46 512 Palestinian children have been arrested and detained since 1967 by the Israeli military on alleged security grounds. Throughout 2019, the Israeli military arrested around 5 000 Palestinians, including 889 children. Moreover, it has issued around 1 074 administrative detention orders, including four concerning children (Taha 2020).

#### *4.3.1 Military law in the Occupied Palestinian Territories*

Israeli military courts in the OPT were established in 1967 as part of applying military law following the occupation (B'Tselem 2017). The military interrogation centres and courts have since been used to prosecute hundreds of thousands of Palestinians, including children, for 'security offences' and offences that are a 'threat to the public order,' including traffic and criminal offences unrelated to security (B'Tselem 2017). Throwing stones represents a common offence with which Palestinian children are charged and prosecuted before military courts (DCIP 2012: 16).

The judges and prosecutors of the military justice system are military officers in regular or army reserve service, putting into question the independence and impartiality of the judges (DCIP 2012: 15). One common practice for cases before military courts is to keep the accused in detention until the end of the legal proceedings (B'Tselem 2017). This violates international law by which Israel is bound, providing that children should only be detained as a measure of a last resort and for the shortest appropriate period of time (CRC 37(b)).

According to Defence for Children International, an average of 500 to 700 Palestinian children are interrogated, detained and imprisoned every

year under the military law (DCIP 2012: 23). In 2009 (and after 42 years of trying Palestinian children as young as 12 in the same courts as adults) the military juvenile court was created (FCO 2012). The order creating the juvenile court included provisions that stipulate some aspects of protection to the child, but many systematic violations to these provisions were reported. According to information provided by practitioners on the ground, the Israeli authorities do not differentiate between adults and children in the treatment during the arrest and in detention, even if there are separate detention facilities in some cases (Taha 2020).

An Israeli military commander can order the administrative detention of a person without charges or trial, including children (DCIP 2012: 44). A military court judge reviews the process, which is described by monitoring NGOs as 'generally based on secret evidence which the recipient of the order is not entitled to see' (DCIP 2012: 44). Administrative detention could last for up to six months and can be renewed for an indefinite number of times. No child was reported to be held in administrative detention between December 2011 and September 2015 (MCW 2019). However, administrative detention orders resumed to be issued against children since October 2015, where tens of children were and continue to be held in administrative detention (B'Tselem 2020). According to interviewee Suhail Taha, there are cases of administrative detention of Palestinian children in Israeli prisons. In addition, it is a systematic practice by the Israeli military to arrest children for hours for interrogation absent minimum guarantees such as contacting their family and/or a lawyer (Taha 2020).

### *4.3.2 Fair trial rights*

Children held in custody are commonly denied fair trial rights, both pre-trial and throughout the trial. The UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict received testimonies from 166 children reporting ill-treatment and violations of due process by Israeli forces, including physical violence in 2018 (Sabarthes 2020).

Administrative detention for unspecified periods of time and keeping children in custody throughout the entire trial period are both forms of arbitrary detention prohibited by international law. It has also been reported that children are brought in chains before a military court within eight days of their arrest (DCIP 2012: 7). In several cases, it is the first time for them to see a lawyer and/or a parent since the time of their arrest. Access to military courts is heavily restricted and controlled, which affects the ability of families to visit their detained children.

It has been reported that in 29 per cent of cases, detained and interrogated children in the Israeli military court system are shown or forced to sign documents in Hebrew, which they do not understand (DCIP

2012: 37). Also, in cases when a Palestinian child reaches 18 years during the trial, he or she will be considered an adult, including in the judgment (Taha 2020).

### *4.3.3 Ill-treatment during arrest and detention*

Palestinian children arrested by the Israeli army are subjected to widespread, systematic and institutionalised ill-treatment, including being arrested at night during military raids at their houses where soldiers would tie, blindfold and transfer them to interrogation centres (MCW 2019). These children would not be told where they are being taken, neither would their families (Taha 2020).

Reports further show that the majority of detained Palestinian children experience coercive interrogation, physical and verbal abuse, which in many cases lead to confessions. According to a report by Military Court Watch (2019), UNICEF's 2013 conclusion that 'the ill-treatment of children who come in contact with the military detention system appears to be widespread, systematic and institutionalised' was still valid at the time of the report's publication in June 2019. After their arrest and during interrogation, many children (like adults) would be held in solitary dark cells where they lose any sense of time, have access to no proper means of ventilation, exposed to extreme temperatures and loud music at night in some cases (Taha 2020). The UN Committee against Torture expressed concerns of having children kept in solitary confinement in Israeli prisons. In addition, NGOs reported a general absence of effective complaint mechanism to the violations of applicable domestic and international law in detention (Taha 2020). Children could be kept for up to 40 days for interrogation (Taha 2020).

Detained children are systematically transferred outside the West Bank to prisons inside Israel, which is a violation of article 76 of the Fourth Geneva Convention and the Rome Statute of the ICC (GCIV 1949). Practically, this means that many children get either limited, or no family visits, which is also affected by the movement restrictions between different territories. The UN Human Rights Committee noted in its Concluding Observations for its ninety-ninth session in 2010 that Israel's Supreme Court upheld the ban on family visits to Palestinian prisoners in Israel, including for children.

A Bill was introduced to Congress in the United States of America by Congresswoman Betty McCollum to promote human rights for Palestinian children by ending abusive Israeli military detention practices (HR 2407 Act 2019). Her legislation, the Promoting Human Rights for Palestinian Children Living Under Israeli Military Occupation Act HR 2407, aims to amend a provision of the Foreign Assistance Act known as the Leahy Law prohibiting funding for the military detention of children in any country,

including Israel. The Bill also establishes the Human Rights Monitoring and Palestinian Child Victims of Israeli Military Detention Fund, authorising $19 million annually for NGO monitoring of human rights abuses associated with Israel's military detention of children. The fund also authorises qualified NGOs to provide physical, psychological and emotional treatment and support for Palestinian child victims of Israeli military detention, abuse, and torture (HR 2407 Act 2019).

#### *4.3.4 Good practices*

The research team working on this article was not able to identify concrete good practices in this case study through desk research. Furthermore, the experts and practitioners interviewed for this article work on either documenting a limited scope of violations, or on providing assistance to detained victims, and thus they were not in a position to provide information on good practices. Some theoretical aspects were noted in the research, but the extent to which these aspects are observed in practice is unknown to the research team.

It has been reported that children are generally held in detention in separate facilities from adults. This also applies during trial as there is a juvenile military court. However, as mentioned above, there is little difference in treatment of detained adults and children (Taha 2020). Some positive aspects in theory include that the court may order a report by a social worker on the detained child, to help the court to take the specific circumstances of the child into consideration in deciding the appropriate sentence (DCIP 2012: 17). Also, judges in juvenile military courts are asked to receive 'appropriate training' to be able to review cases of children (DCIP 2012: 17).

## 5 Comparative analysis and regional approach

From the case studies delved into in this article it becomes clear that the deprivation of children's liberty does not only have various causes, but also affects different facets of children's lives and future outlooks. When comparing cases in the MENA region, overarching trends appear to be deprivation of liberty due to armed conflict and/or for reasons of national security. Hence the cases discussed aim to showcase the myriad of ways in which this deprivation of liberty occurs. There are many intricacies related to the particular contexts of a specific country, region or conflict that influence the way in which children become deprived of liberty and what recourse is available to them. Besides this, the particularities deriving from a child's identity, legal status or gender ought not to be overlooked.

Nonetheless, from comparing the case studies of Syria and Iraq, Libya, and Israel and the OPT within the MENA region, there are also some

commonalities to be found. The common problems and common good practices are outlined to pinpoint the gaps in the approach through which these countries tackle children's deprivation of liberty in the context of armed conflict and national security, and provide recommendations.

### 5.1 Common problems in the region

An overall problem faced in the region is armed conflict. The change from 'traditional' wars between states to armed conflict involving non-state actors influences the deprivation of children's liberty as it complicates the implementation of legal standards through the lack of accountability of these non-state actors. Partly due to these widespread conflicts, migratory flows span over the region and beyond. These migration flows in many instances are considered threats to national security. Examples include refugees or migrants in Libya, or the children of (foreign) alleged ISIS fighters in Syria and Iraq. Either due to armed conflict or for reasons of national security, the right to movement and mobility of children thus is denied, often by placing these children in detention.

The question of the age at which a child can be lawfully detained is a salient issue in the region. Standards of criminal responsibility of children clash with international law standards in various ways. In Syria and Iraq, children can be detained and put on trial only by virtue of an alleged affiliation of family members with armed or terrorist groups. Similarly, in Libya it is the status of migrant children's parents that leads them to be detained. In Israel, Palestinian children are detained and put to trial in front of military courts for matters that are unrelated to security.

The detention that follows from these aspects above cannot be considered in the best interests of the child. In addition, it clashes with international legal standards against torture and other cruel, inhuman or degrading treatment due to the conditions in which children are held. Furthermore, these children are placed at risk of being exploited even more. As if the events leading up to a child being placed in a detention centre are not traumatising enough, the living conditions in these centres further aggravate the situation. Moreover, it is clear that the region lacks effective juvenile rehabilitation centres that would allow children to not only cope with their traumatic experiences, but to also re-enter society as constructive members.

In general there are little to no child-appropriate proceedings implemented. On the one hand, this is due to different definitions of who is considered 'a child'. On the other hand, this is due to the fact that children who turn 18 at the time of their trial are suddenly considered adults – regardless of their age at the time of the alleged crime. What further complicates this is the absence of complaint mechanisms upon which these children can rely.

### 5.2 Common good practices in the region

While the situation of detained children in the region seems very disturbing, certain common good practices are worth specifically highlighting.

Prioritising the child's best interests has been at the centre of a substantial number of laws, policies, programmes and practices throughout the region and have been implemented in accordance with the international *corpus juris* on the rights of children. Working with this principle is demonstrated when it comes to the importance of enabling children to have a family that is enshrined in article 8 of CRC. In Libya, children awaiting trial are to be left in the custody of their parents or with a foster family. In Syria and Iraq, uniting children with their mothers for the repatriation process is encouraged if the mother does not pose a threat to the child. Some states such as France which absorbed a number of children returnees ensured the unity of siblings and children above 18 months when placed with a foster family. Being in a family environment is seen as key to developing the sense of identity and belonging after having endured ideological indoctrination and conditioning.

Second, juvenile justice was implemented through the creation of juvenile special courts in Palestine and in Libya – where, so far, it exists only on paper. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, also known as the Beijing Rules, define a juvenile as 'a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult'. In the case of Palestine, however, reports reveal that there is no difference in the treatment of detained adults and children.

Another observed good practice is the deliberate choice of certain countries to prioritise rehabilitation and integration of children over criminal prosecution. This is particularly noted in the case of children repatriated from conflict zones in Syria and Iraq. North African countries, notably Morocco and Tunisia, have opted for this strategy. In Libya, reintegration centres were put in place for children who were involved in the fighting by different armed groups. There often is a stigma that children who belonged to armed groups are immoral, untrustworthy or dangerous and, therefore, many individuals are rejected by community members, making reintegration not an option. Reintegration centres thus are an important step as their existence shows that children who took an active part in conflicts are viewed as victims rather than perpetrators, and as a result require psychosocial rehabilitation and social reintegration.

## 6 Conclusion and outlook

A main regional challenge is the way in which children allegedly associated with armed conflict or national security concerns are perceived

by authorities in the MENA region. In many cases these children are viewed as perpetrators and are accused of committing crimes, notably terrorism-related crimes, thus deserving to be detained and punished. As illustrated above, many children in the region are subjected to pre-trial detention without basic fair trial guarantees. According to international law and standards, children who are detained for association with armed groups are victims of grave violations of human rights and international humanitarian law and, therefore, states should prioritise their recovery and reintegration and not punish them. States should ensure to provide the appropriate rehabilitation and reintegration assistance, in the best interests of the child, including to children of foreign fighters.

In addition, according to international law and standards, states must refrain from the arrest or detention of children, except as a last resort and based on specific and credible evidence of criminal activity. States should also prioritise excluding these children from the criminal justice system as far as possible. Torture and other forms of ill-treatment currently existing in the region must be strictly prohibited. States should treat children charged with criminal offences in compliance with international human rights and child justice standards, including ensuring due process guarantees such as access to counsel, contact with the family and the right to challenge their detention promptly and before an independent and impartial judge.

Due to the continuity and complexity of children's deprivation of liberty in the MENA region, establishing an international or regional specialised mechanism is strongly recommended. This mechanism should collect data, monitor the various situations with regard to children's deprivation of liberty, make recommendations and take measures to ensure compliance with the CRC, OP-CRC-AC, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and other international instruments addressing the rights of the child. Moreover, this mechanism should provide capacity building to different stakeholders including members of governments and civil society, on the importance and the procedures required to protect children's rights, especially in the contexts of armed conflicts and national security concerns.

# References

Abdul-Hamid Y (2008). *Child rights situation analysis for Middle East and North Africa region* Save the Children Sweden, available at https://www1.essex.ac.uk/armedcon/story_id/Child%20Rights%20Situation%20Analysis%20for%20Middle%20East%20and%20North%20Africa%5B1%5D.pdf (last visited 16 May 2020)

Amnesty International 'The condemned: Women and children isolated, trapped and exploited in Iraq (2018) Report MDE 14/8196/2018, available at http://tiny.cc/4zmgmz (last visited 2 March 2020)

Baldwin-Edwards M & Lutterbeck D 'Coping with the Libyan migration crisis' (2019) 45 *Journal of Ethnic and Migration Studies* 2241, available at doi: 10.1080/1369183X.2018.1468391 (last visited 26 March 2020)

Bilo C & Machado AC 'Children's right to social protection in the Middle East and North Africa region – An analysis of legal frameworks from a child rights perspective' (2018) Brasília and Amman: International Policy Centre for Inclusive Growth and UNICEF Middle East and North Africa Regional Office, available at https://ipcig.org/pub/eng/RR24_Children_s_Right_to_Social_Protection_in_the_Middle_East_and_North_Africa_Region.pdf (last visited 17 May 2020)

B'Tselem 'Statistics on administrative detention' (2020), available at https://www.btselem.org/administrative_detention/statistics (last visited 3 April 2020)

B'Tselem 'The military courts' (2017), available at https://www.btselem.org/military_courts (last visited 29 March 2020)

Defence for Children International (DCIP) 'Bound, blindfolded and convicted: Children held in military detention' (2012) Defence for Children Palestine, available at https://www.dci-palestine.org/bound_blindfolded_and_convicted (last visited 29 March 2020)

Defence for Children International (DCIP) 'Statement during panel event: "Access to justice for children and young people"' (2019), available at https://defenceforchildren.org/statement-during-panel-event-access-to-justice-for-children-and-young-people/ (last visited 11 February 2021)

Osterhaus J (2017) *The Arab human rights system* Bonn: Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), available at https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/E-Info-Tool/e-info-tool_abc_of_hr_for_dev_coop_the_arab_hr-system.pdf (last visited 16 May 2020)

European Asylum Support Office (EASO) 'Syria security situation: Country of origin information report' (2019), available at doi: 10.2847/267982 (last visited 27 February 2020)

France 24 'Over 400 IS group-linked French nationals detained in Syria, Paris says' (2019), available at https://www.france24.com/en/20190528-syria-isis-france-nationals-detained-hundreds-kurds-le-drian-idlib-terrorism-death-row (last visited 11 February 2021)

Global Detention Project (GDP) Country report immigration detention in Libya: 'A human rights crisis' (2018), available at https://www.refworld.org/docid/5b8802614.html (last visited 28 March 2020)

Human Rights Watch (HRW) '"No escape from hell": EU policies contribute to abuse of migrants in Libya' (2019), available at ISBN: 978-1-6231-36994 (last visited 26 March 2020)

Human Rights Watch (HRW) '"Maybe we live and maybe we die": Recruitment and use of children by armed groups in Syria (2014), available at ISBN: 978-1-62313-1425 (last visited 24 March 2020)

Human Rights Council '"They have erased the dreams of my children": Children's rights in the Syrian Arab Republic' (2020), Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/43/CRP.6, available at http://tiny.cc/ldmgmz (last visited 19 March 2020)

Icrc.org 'Children protected under international humanitarian law – ICRC' (2010), available at https://www.icrc.org/en/doc/war-and-law/protected-persons/children/overview-protected-children.htm (last visited 17 May 2020)

Mangan F & Murray R 'Prisons and detention in Libya' (2016) Peaceworks No 119, available at ISBN: 978-1-60127-619-3 (last visited 28 March 2020)

Military Court Watch 'Monitoring the treatment of children held in Israeli military detention' (2019) Military Court Watch Annual Report, available at http://www.militarycourtwatch.org/files/server/MCW%20ANNUAL%20REPORT%20(2019).pdf (last visited 29 March 2020)

Mosaffa N 'Does the Covenant on the Rights of the Child in Islam provide adequate protection for children affected by armed conflicts?' (2011) 8 *Muslim World Journal of Human Rights*, available at https://doi.org/10.2202/1554-4419.1220 (last visited 11 February 2021)

Sabarthes N 'Interview for Global Classroom paper, children's deprivation of liberty in armed conflicts and on national security grounds in the MENA region' 3 August 2020; Interviewee is a political affairs officer at the Office of the SRSG for Children and Armed Conflict in the UN

Nowak M 'United Nations Global Study on Children Deprived of Liberty' (2019), available at https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562 (last visited 20 March 2020)

Romé Dallaire Child Soldiers Initiative (RDCSI) 'Libya country report: Children and security' (2017), available at https://www.childsoldiers.org/wp-content/uploads/2020/01/Libya-January-2017-Report-1.pdf (last visited 14 April 2020)

Special Representative of the Secretary-General for Children and Armed Conflict (SRSG/CAAC) 'Libyan city commits to protect children from armed conflict' (2016), available at https://childrenandarmedconflict.un.org/2016/04/a-libyan-city-commits-to-protect-children-from-armed-conflict/ (last visited 14 April 2020)

Taha S 'Interview for Global Classroom paper, children's deprivation of liberty in armed conflicts and on national security grounds in the MENA region' 14 July 2020; interviewee works at Addameer for Prisoner Support and Human Rights Association in Ramallah

UK Foreign and Commonwealth Office 'Children in military custody' (2012), available at http://www.childreninmilitarycustody.org.uk/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf (last visited 29 March 2020)

UN General Assembly Rome Statute of the International Criminal Court (last amended 2010) 17 July 1998

UN Global Counter-Terrorism Strategy (2018), available at https://www.un.org/counterterrorism/un-global-counter-terrorism-strategy (last visited 12 February 2021)

United Nations High Commissioner for Refugees (UNHCR) 'Libya: Detention centres' 21 September 2017, available at https://data2.unhcr.org/en/documents/download/61006 (last visited 27 March 2020)

United Nations High Commissioner for Refugees (UNHCR) 'The challenge of helping child refugees in Libya overcome trauma' (2020), available at https://www.unhcr.org/news/stories/2020/1/5e3008ed4/challenge-helping-child-refugees-libya-overcome-trauma.html (last visited 20 August 2020)

UN Office of the High Commissioner for Human Rights (OHCHR) 'Abuse behind bars: Arbitrary and unlawful detention in Libya' (2018), available at https://www.refworld.org/docid/5b5590154.html (last visited 28 March 2020)

Office of the High Commissioner for Human Rights (OHCHR) 'Core human rights in the two Covenants' (2013), available at https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf (last visited 17 May 2020)

OHCHR General Comment 24 – Convention on the Rights of the Child (2019), available at https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf (last visited 17 May 2020)

United Nations Security Council, Resolution 2427, S/RES/2427, 9 July 2018

OHCHR 'UN expert welcomes UK Court of Appeal decision in Shamima Begum case' (2020), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26107&LangID=E (last visited 12 February 2021)

UNICEF 'A deadly journey for children: The Central Mediterranean migration route' (2017), Child Alert, available at https://www.unicef.org/publications/files/EN_UNICEF_Central_Mediterranean_Migration.pdf (last visited 26 March 2020)

UNICEF Regional Conference on Children's Access to Justice Conference Report, 25-27 February 2020, Sarajevo, Bosnia and Herzegovina, available at https://www.unicef.org/eca/media/12831/file (last visited 20 August 2020)

United Nations Support Mission in Libya (UNSMIL) & Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Desperate and dangerous: Report on the human rights situation of migrants and refugees in Libya' (2018), available at https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf (last visited 26 March 2020)

United Nations Support Mission in Libya (UNSMIL) & Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Detained and dehumanised' Report on human rights abuses against migrants in Libya (2016), available at https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last visited 26 March 2020)

UN Human Rights Council: Working Group on the Universal Periodic Review 2020, Iraq, available at http://tiny.cc/vemgmz (last visited 10 March 2020)

UNICEF Handbook: Children affected by the foreign fighters phenomenon: Ensuring a child rights based approach, available at http://tiny.cc/w5mgmz (last visited 15 March 2020)

UNICEF 'Libya: Tens of thousands of children at risk amidst violence and chaos of unrelenting conflict' (17 January 2020), available at https://www.unicef.org/press-releases/libya-tens-thousands-children-risk-amidst-violence-and-chaos-unrelenting-conflict (last visited 23 July 2020)

United Nations Assistance Mission in Iraq (UNAMI) 'Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL, January 2020 report', available at http://tiny.cc/wth0mz (last visited 11 March 2020)

Van Poecke & Wauters 'The repatriation of European nationals from Syria as contested before domestic courts in Belgium and beyond' (2021), available at https://www.researchgate.net/publication/348658530_The_Repatriation_of_European_Nationals_from_Syria_as_Contested_before_Domestic_Courts_in_Belgium_and_Beyond (last visited 11 February 2021)

WHO *Arab Charter on Human Rights* Health and Human Rights Factsheet, available at https://www.who.int/hhr/Arab%20Charter.pdf (last visited 16 May 2020)

UNHCR 'The challenge of helping child refugees in Libya overcome trauma' (2020), available at https://www.unhcr.org/news/stories/2020/1/5e3008ed4/challenge-helping-child-refugees-libya-overcome-trauma.html (last visited 16 May 2020)

United Nations Security Council Counter-Terrorism Committee Madrid Guiding Principles: A practical tool for member states to stem the flow of foreign terrorist fighters' (2015), available at https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf (last visited 16 May 2020)

V Agredo, F Botazzi, N Morales, M José Orué & R Comas 'Migrant children and adolescents from North Central America towards Mexico and their deprivation of liberty' (2020) 4 *Global Campus Human Rights Journal* 339-374 http://doi.org/20.500.11825/2040

# Migrant children and adolescents from North Central America towards Mexico and their deprivation of liberty

***Valentina Agredo,* Florencia Botazzi,** Natalia Morales,*** María José Orué**** and Rocío Comas********

**Abstract:** *A growing number of migrant children and adolescents, mainly from El Salvador, Guatemala and Honduras, embark on a perilous journey to Mexico. This article intends to provide detailed information on and an analysis of Mexico as the receiving, issuing, transiting and returning country. The intention, in turn, is to analyse the countries of North Central America, as the main countries of issuance, transit and return of migrants to and from Mexico. The situation of migrant children and adolescents reveals the violation of international and regional legislation on the protection of children's human rights. The migration process itself involves multiple risks to the security and integrity of migrant children, whose rights are affected at each stage of the process. In this regard, the data collected reflects the deprivation of the freedom of migrant children and adolescents in Mexico, while noting that this*

* BA in Psychology (ICESI University), MA in Human Rights and Democratisation (University of San Martin); valentina.agredos@gmail.com

** BA in Political Science (University of Rosario), MA in Human Rights and Democratisation (University of San Martin); mflorenciabottazzi@gmail.com

*** BA in Law (University of Chile), MA in Human Rights and Democratisation (University of San Martin); natalia.morales@ug.uchile.cl

**** BA in Law (National University of Asunción), MA in Human Rights and Democratisation (University of San Martin); majo.mo218@gmail.com. Research coordinator: Rocío Comas; BA in Law (University of Buenos Aires), MA in Human Rights and Democratisation (University of San Martin); Doctoral Candidate, Faculty of Law (Friedrich Alexander University); fellow scholar for the German Academic Exchange Service (DAAD); Children´s Rights Regional Officer (Global Campus Latin American and the Caribbean Master's Programme); rocio.comas@fau.de. We also wish to extend a special acknowledgment to Andrea Flores Ruilova for her valuable comments and observations. This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

***** BA in Law (University of Buenos Aires) MA in Human Rights and Democratisation (University of San Martin), Doctoral Candidate, Faculty of Law (Friedrich Alexander University), fellow scholar for the German Academic Exchange Service (DAAD), Children´s Rights Regional Officer (Global Campus Latin American and the Caribbean Master Programme), rocio.comas@fau.de. We also wish to extend a special acknowledgment to Andrea Flores Ruilova for her valuable comments and observations.)

*situation proves to be the focal point of all other rights violations that occur in the migration context. The analysis includes the perspectives gathered from international and regional standards for the protection of their rights. The article also examines conceptual definitions used in connection with migrant children in light of their vulnerability and the countries' national context. To address the specific situation of children, the article reviews each country's legislation, as well as outlines the migration flows taking place, in light of the causes identified as a general framework for the migration phenomenon. The article is informed by information gathered through the analysis of conventions, judgments, laws, theoretical documents, thematic reports as well as statistical analysis gathered from reports and surveys by human rights organisations. Finally, the conclusion considers this information alongside existing legal provisions so as to make recommendations aimed at better protecting migrant children and to prevent the violation of their fundamental rights.*

**Key words:** *children and adolescents; migration; North Central American countries; Mexico; deprivation of liberty; international human rights law*

## 1 Introduction

This article addresses the situation of children and adolescents[1] migrating from North Central American[2] countries to Mexico, and their resulting deprivation of liberty, with detention being the latter state's response to immigration flows. Consideration should be given to the fact that children and adolescents affected by migration in North Central America are beset by a number of human rights violations, such as social exclusion, violence, deprivation of education, unemployment, poor medical care and nutritional problems (Musalo & Ceriani 2015).

The position of the United States as the main destination country for migration in the region has positioned Mexico as a 'gateway', receiving large numbers of migrants mainly from the countries of North Central America (Durand & Heredia Zubieta 2018). For instance, the Migration Policy Unit of the Mexican Ministry of the Interior reported approximately 18 300 children and adolescents from Guatemala, Honduras and El Salvador

1 'While there is no formal legal definition of an international migrant, most experts agree that an international migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status.' See UN Refugees and Migrants, available at https://refugeesmigrants.un.org/definitions. In addition, adolescents is defined by the World Health Organisation 'as individuals in the 10-19 years age group', see World Health Organisation, adolescent health, available at https://www.who.int/southeastasia/health-topics/adolescent-health (last visited 17 February 2021).

2 The denomination 'Northern Triangle' – frequently employed to refer to the countries of Honduras, El Salvador and Guatemala – is not used in this article since it is not useful in terms of its analytical purposes. The migration dynamics of Honduras and El Salvador are very different from that of Guatemala, and it ignores intraregional migration. In addition, it is terminology resulting from oversimplification when trying to unify processes that are actually so diverse (Durand & Heredia Zubieta 2018).

in 2017, of which approximately 16 162 were returned to their home countries (UNICEF). In 2019 the highest number of migrant children and adolescents recorded by the National Migration Institute (INM) reached a total of 52 000, mostly from the countries of North Central America. Of the total, 30 453 males and 21 547 females were reported (Unidad de Política Migratoria, México 2020).

Consequently, Mexico's response to migration has been mainly restrictive and punitive (Musalo & Ceriani 2015) with the widespread use of immigration detention and repatriation as the main measures to contain migration flows. In the implementation of this approach, no distinction is drawn between adults and children and adolescents, using detention with the same force (Musalo & Ceriani 2015: 17). For example, in the United States in 2011, 16 056 unaccompanied children and adolescents were detained; in 2012, 24 481 were detained; in 2013, 38 833; and in 2014, 68 631 (Musalo & Ceriani 2015: 282). In Mexico, meanwhile, immigration detention also has broad application, covering unaccompanied migrants, families and children and adolescents (Musalo & Ceriani 2015: 17). According to the National Commission on Human Rights, by 2019 the migration authorities had arrested 38 581 children and adolescents, an increase of 21 per cent compared to the previous year. Of that figure, 8 744 were unaccompanied children and adolescents.

The restrictive approach is also evident from the use of multiple surveillance measures bolstering arrests and repatriations, such as those implemented by Mexico along its southern border with Guatemala (Musalo & Ceriani 2015: 17). In this sense, states often distinguish between good and bad migrants, grouping bad migrants as those who are unacceptable for (a) surpassing the number of employment opportunities; (b) non-assimilation; (c) their association with crime; or (d) having entered the destination country clandestinely (De Lucas 2002: 67). In addition, migration continues to be perceived as a 'question of numbers' where the logic of market benefit is used to determine what number of migrants are acceptable, and it is treated as a security issue, assuming that migration tends to increase the hidden number of crimes and marginality (DeLucas 2002: 61). Thus, the human rights of migrants are not a priority for states, with the migrant – particularly the undocumented migrant – being labelled as a non-subject of law (De Lucas 2002: 65-68).

Additionally, the issue surrounding the deprivation of the liberty of migrant children and adolescents falls within the broader framework of global and regional inequality, questioning the role of states as a guarantor of rights within the framework of democratic systems. This is a problem that requires an effort to change the paradigms through which the migratory phenomenon is understood, while requiring a reassessment of practices developed in this regard. It is also essential to recognise that

the deprivation of the liberty of children and adolescents, in addition to violating their fundamental rights, undermines 'the right to a childhood', that is, to live as children, as Nowak suggests in the *Global Study on Children Deprived of Liberty* (Nowak 2019).

It is essential to consider the relationship between childhood and democracy and to emphasise the primacy of social rights (Baratta 2004). In this context, basic social policies serve a primary and general function and, with respect to the former, all other policies must be subsidiary and residual. Baratta points out that the dynamic interpretation of the Convention on the Rights of the Child (CRC) sets a minimum standard for the norms of the social state and for the regulation of economic development, in order that the criteria of human development are respected. The norms of CRC provide a dynamic view of equality in relation to the rules of the welfare state and international solidarity – signalling a different kind of globalisation than what is known today (Baratta 2004). It is in this context that meaning and strength are lent to the debates around migrant children and its approach from a democratic and supportive perspective.

## 2 Methodological considerations

This article is informed by information gathered through the analysis of conventions, judgments, laws, theoretical documents, thematic reports as well as statistical analysis gathered from reports and surveys of human rights organisations. It also considers data on the subject from specialised press sources.

As a specific analytical variable, the article did not focus on the gender status of children and adolescent migrants deprived of liberty. According to Beloff, there is a 'deficit of a robust *corpus juris* regarding the right of girls, as well as difficulties in the consolidation and strengthening of practices responsive to their characteristics, particularities and vulnerabilities from both an age and gender perspective' (Beloff 2017: 55-81). While this is a central issue in the violation of rights towards children and adolescents, there is no sufficiently updated or categorised information for inclusion in this research. However, this in no way implies the absence of the gender approach in the analyses and reflections undertaken herein.[3]

It is relevant to point out that the present work does not address the detention of children and adolescents on migration grounds in the United

3 The gender approach involves the ideas, methodologies and techniques used to enquire about and analyse the manner in which social groups have built and assigned roles for women and men, the activities they develop, the spaces they inhabit, the traits that define them and the power they hold. Together, these ideas and techniques propose a new focus on reality, defined as a 'gender perspective', as a prism that shows facets that would otherwise remain invisible (Pautassi, 2011: 280).

States, but in relation to Mexico. This does not in any way imply that the human rights violations of children and adolescents are considered more serious in one country than another, nor does it imply that relevant United States action towards this problem should be ignored, mainly in light of its so-called 'zero tolerance' policy.[4] However, the view is that the case of the United States has already been assessed in its essential aspects in the Global Study (2019: 438-443, 451-452, 460-465, 468-471, 475-477). In addition, the failure of the United States to participate in the regulatory instruments governing this analysis makes it difficult to use as a reflection of the regional landscape. In particular, the United States is not a party to CRC, nor to the Convention on the Protection of the Rights of All Migrant Workers and Their Families (CMW). In the Inter-American sphere, while bound to the American Declaration on the Rights and Duties of Man as an integral part of the Organization of American States (OAS) Charter, it has not ratified the American Convention on Human Rights; nor has it accepted the jurisdiction of the Inter-American Court of Human Rights. In any case, it can be scrutinised by the Inter-American Commission on Human Rights, as the organ of application of the American Declaration.

Hence, this work intends to provide detailed information and analysis about Mexico as the receiving, issuing, transiting and returning country. The aim is to analyse the countries of North Central America, as the main countries of issuance, transit and return of migrants to and from Mexico, in the sense that these countries are far from homogeneous with each other, as Durand and Heredia Zubieta (2018) argue. The relevance of addressing the problem by taking Mexico and the countries of North Central America as the fulcrum of this analysis makes it possible to recognise the inadequacies in the attention given to the problems experienced by children deprived of liberty for migratory reasons. At the same time, it highlights the unilateral management of migration flows and the privilege of security controls and security perspectives above all else (Durand & Heredia Zubieta 2018), as already noted above.

Finally, this research 'contour' also involves identifying the tensions and/or relationships between the region's regulatory systems and the practices in fact deployed. Consequently, it is important to remember that, despite the enormous momentum provided by CRC[5] and the progress over the years in the normative and administrative state structures, the protection of children and adolescents continues to conflict with confinement as

4 In this respect, the US Attorney-General's office in April 2018 announced the 'zero tolerance' policy for the control of migration from the country's southwestern border. The federal administration attempted to ban the entry of so-called 'aliens'. To justify the measure, the statement indicated that there was a 203% increase in irregular border crossings from March 2017 to March 2018 and a 37% increase from February to March 2018 (Comas 2018).

5 CRC to date has 196 state parties, making it the world's most ratified international human rights treaty. Mexico, Guatemala, El Salvador and Honduras have been parties to the treaty since 1990.

a measure of protection, and as the strategy most widely used by states (Beloff 2011). This is reflected in the situation of migrant children and adolescents who are deprived of their liberty.

## 3 International and regional legal framework

The vulnerability of migrant children and adolescents has been widely recognised in international human rights law.[6] The various protection bodies have emphasised that, in the context of international migration, children may find themselves in a situation of dual vulnerability: on the one hand, as children and, on the other, as children affected by migration. These are two disadvantaged structural situations with regard to the enjoyment and exercise of human rights, which require prioritisation and the targeted attention of states and international bodies. For example, whether they are in any of the following situations: (a) they are migrants, alone or with their families; (b) they were born to migrant parents in the destination countries; or (c) they stay in their home country while one or both parents have emigrated to another country. Other vulnerabilities may be related to their origin (national, ethnic or social), gender, sexual orientation or gender identity, religion, disability, immigration status or residence, citizenship, age, economic situation, political or other opinion, or another condition. This is also referred to in the Global Study (Nowak 2019: 448, 451).

In this case, one of the most serious violations affecting migrant children is the deprivation of liberty due to migration. In this regard, the minimum standards set in the international *corpus juris* for protection for children and adolescents, as well as in the *corpus juris* of protection for migrants, show that there is a clear consensus on the assessment of immigration detention and deprivation of liberty on grounds of immigration control: These are practices contrary to the human rights of children and adolescents (I/A Court HR, *Case of the Pacheco Tineo Family v Bolivia*, para 216).

The Inter-American Court of Human Rights (Inter-American Court) has emphatically stated that punitive measures in immigration control are inconsistent with the American Convention on Human Rights (American Convention) as they are considered a form of criminalising migration (I/A Court HR, Advisory Opinion OC-21/14, para 147; I/A Court HR, *Case of Vélez Loor v Panama*, para 169). Also, the Inter-American Commission on Human Rights (Inter-American Commission) specified that most states establish custodial sanctions against migrants who violate immigration

6 An example of this is that the supervisory bodies of CRC and CMW have been responsible for the situation of migrant children, and have issued General Comments on the situation separately and jointly. See General Comment 6 (2005); General Comment 1 (2011); General Comment 2 (2013); Joint General Comment 3 (2017) and 22 (2017); Joint General Comment 4 (2017) and 23 (2017).

rules, thereby constituting a violation of personal liberty (IACHR 2015 OAS/Ser.L/V/II. Doc 46/15, paras 381 and 382). The Court has dealt with this issue in detail in order to outline states' obligations with respect to the immigration control of all migrants, regardless of age, by limiting to the maximum the origin and conditions of custodial measures.

The criterion outlined by the system is that detention for a migration offence must be exceptional, and never for punitive purposes (I/A Court HR, *Case of expelled Dominicans and Haitians v Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 August 2014. Series C No 282, para 359). In no case can irregular immigration be a sufficient ground for justifying detention (IACHR 2015 'The thematic report of the Rapporteurship on the Rights of Migrants' para 405). In order to evaluate the legality of any deprivation of liberty in the immigration context, all the requirements laid down by the Inter-American Court in its case law must be strictly complied with. That is to say, the custodial measure must be issued on the basis of a decision in accordance with law, on the basis of pre-existing legislation, and pursue a legitimate purpose in accordance with the principles and rights of the American Convention, and also be appropriate, necessary and proportionate to the purposes it pursues. All of these requirements are co-extensive (I/A Court HR, *Case of Vélez Loor v Panama*, para 166). In addition, the Inter-American Court has also issued criteria concerning conditions of detention, which should be verified in establishments specifically intended for the detention of irregular migrants, and not in prisons (I/A Court HR, *Case of Vélez Loor v Panama,* paras 208 and 209); for the shortest possible period (I/A Court HR, *Case of Vélez Loor v Panama* paras 171 and 208), among other conditions in the implementation of the measure (I/A Court HR, *Case of Nadege Dorzema & Others v Dominican Republic*, para 109).

The Inter-American Commission has been categorical with respect to the use of custodial measures for children and adolescents: States may not resort to deprivation of the liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings. Nor may states base this measure on a failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from his or her family, or on the objective of ensuring family unity, because states can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority (I/A Court HR, Advisory Opinion OC-21/14, paras 160 and 360). The prohibition on the detention of children could even be extended to their parents 'when the child's best interest requires keeping the family together' thereby forcing the authorities 'to choose alternative measures to detention for the family, which are appropriate to the needs of the children' (I/A Court HR, Advisory Opinion OC-21/14, para 158).

The regional case law has drawn clear guidelines on the principles governing the situation of children involved in migration procedures. The Inter-American Court notes that in the design, adoption and implementation of migration policies affecting children under the age of 18,

> the State must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and the protection and comprehensive development of the child. The latter should prevail over any consideration of her or his nationality or migratory status, in order to ensure the full exercise of her or his rights (I/A Court HR, Advisory Opinion OC-21/14, para 68).

The principles that must form the basis of any policy affecting children, including migration, are the same as those enshrined in CRC, namely, the principle of non-discrimination; the principle of the best interests of the child; the principle of respect for the right to life, survival and development; and the principle of respect for the wishes of the child in any proceedings affecting them (I/A Court HR, Advisory Opinion OC-21/14, para 69). It is essential to look closer at the best interests of the child, which must be rigorously applied whenever states take decisions involving any limitation on the exercise of any children's right (I/A Court HR, *Case of Expelled Dominicans and Haitians v Dominican Republic*, para 416). This idea has been reinforced for migration contexts, where the best interests should be the pivotal point of decisions affecting children and adolescents, so that all their rights are guaranteed irrespective of their nationality, their immigration status or that of their parents (I/A Court HR, Advisory Opinion OC-21/14, para 70).

For the proper assessment of the best interests of the child, it is imperative that states provide the means to ensure the effectiveness of the children's right to be heard (CRC Committee, General Comment 12, para 74). The CRC Committee has emphasised the extension of these guarantees to 'all' matters affecting the child (CRC Committee, General Comment 12, para 26) including judicial or administrative immigration proceedings (I/A Court HR, Advisory Opinion OC-21/14, paras 122 and 123). To give effect to this right, it is insufficient merely to listen to the child, but their opinions must be taken into account and given due weight (CRC Committee, General Comment 12, paras 45 and 139). This requires an environment of respect and safety, with consideration for the particular individual and characteristics that the children and adolescents may have. In addition, there is a duty to inform them of the issue at stake, the decisions that could be taken and the consequences that these could bring (CRC Committee, General Comment 12, paras 23-25).

Finally, it should be remembered that the rights involved in the migration process of children and adolescents are multiple and contained

in both CRC and the American Convention.[7] In this regard, the Inter-American Court has stressed that the right of children and adolescents not to be separated from their families also applies in the immigration context. When developing a deportation procedure for one of the parents or relatives, there should always be a reasoned assessment leading to an individual decision in light of the best interests of the child (IACHR, Report 81/10, paras 48-60). Measures involving the separation of parents from children must represent the most extreme exception, be subject to judicial review, in accordance with article 17 of the American Convention and article 9 of CRC, and 'are only admissible if they are duly justified in the best interests of the child, exceptional and, insofar as possible, temporary' (I/A Court HR, *Case of the Pacheco Tineo family v Bolivia*, para 226; I/A Court HR, *Case of expelled Dominicans and Haitians v Dominican Republic*, para 416).

To address the specific situation of children and adolescents in this context, it is necessary to review each country's legislation, as well as to outline the migration flows taking place from North Central America to Mexico, in light of the causes identified as a general framework for the migration phenomenon.

## 4 Overview of the national legal framework of North Central American countries in relation to migration

The immigration legislation of North Central American countries contains important nuances. While Guatemala and El Salvador have more recent regulations covering current conditions in Latin America, the legislation of Honduras is outdated and may be characterised as being focused on immigration control.

In Guatemala, immigration legislation is contained in Decree 44-2016. Upon examination, it is possible to note that it focuses on the human rights of migrants, recognising migration as a right[8] establishing a catalogue of rights for migrants[9] and conforming to the rules of international human rights law (Recital 2nd, DL 44-2016), especially CMW. There is

7 Migrant CHA rights are enshrined in arts 5, 7(1), 8(1), 9(1), 9(2), 10, 20 and 22 of CRC. In addition, the American Convention enshrines their rights in arts 11(2), 17 and 19.

8 'The State of Guatemala recognises the right of every person to emigrate or immigrate, so the migrant may enter, remain, transit, leave and return to the national territory in accordance with national legislation'; art 1.

9 In addition to recognising migration itself as a right, it establishes the right of access to public services, the right to nationality, the right to family, property and investment, work, education, and non-discrimination. It also establishes in art 8 an express rule that incorporates into immigration legislation the rights and guarantees granted by international conventions and treaties ratified by Guatemala. Another important aspect is ch III, which enshrines comparatively advanced rights for migrants with respect to work.

a strong emphasis in the rules on the situation of migrant children and adolescents. Specific rights and protection mechanisms are established for unaccompanied children and adolescents, or those separated from their families (article 11, DL 44-2016), and also for those travelling with them (article 15, DL 44-2016). The law provides enhanced protection for those who have been recognised as refugees (article 48, DL 44-2016); victims of sexual violence (article 49, DL 44-2016); and as victims of human trafficking (article 49, DL 44-2016). Finally, deprivation of liberty is not established as a state response to migration. Even then, what the law calls 'protective and shelter homes' for migrants is regulated with a rights-based approach (article 11, DL 39-2016).

In the case of El Salvador, the regulations are contained in the Special Law on Migration and Alien recently renewed in 2019. This also centres on the human person and the rights-based approach (set out in article 5) and a list of specially-protected rights (set out in articles 19 and 20) and specific guarantees for migrants (set out in article 20 No 4). However, in parallel, an important emphasis on control persists. It defines the control organs and a flexible catalogue of entry impediments (article 40) and grounds for cancellation of regular stay (article 49), which in turn are the basis for the application of a deportation procedure (article 59). It should be noted that according to the Global Study (Nowak 2019), in El Salvador there is a lack of legislation establishing the deprivation of liberty of children for migration-related reasons, which favours avoiding restrictive practices against migrant children. Furthermore, in the country's legislation there is an evident concern about the specific situation of migrant children and adolescents, which is regulated in detail (chapter VI) in accordance with the guiding principles of the best interests of the child (article 72) and the right to be heard (article 74). Specific guarantees are included, and protection for children and adolescent migrants is widened by way of incorporating all the rights recognised by national and international rules, irrespective of their immigration status (article 20 No 6). As protective measures for children and adolescents, immediate referrals to Child and Adolescent Protection Boards for unaccompanied or separated children and adolescents are established (article 75) as is the obligation on any migration official or officer to provide immediate protection and attention to migrant children (article 76). Finally, in regard to detention as a state response, article 5 No 9 establishes the principle of 'non-sanction for irregular entrance by refugees and stateless persons'. Accordingly, as mentioned in the Global Study, there is no legislation establishing the possibility of depriving children and adolescents of their liberty on immigration grounds (Nowak 2019: 462).

Finally, Honduras has the least up-to-date migration legislation[10] with the phenomenon of mobility regulated in the 2004 Law on Population and Migration Policy. This Law takes a demographic, restrictive and control-focused perspective; to the detriment of a human rights approach. This is expressed in numerous provisions: The entry requirements are unclear,[11] there is a broad catalogue of grounds for refusal of entry (see articles 30 and 31(a)) and of expulsion (see article 43). Thus, there is a pronounced difference with respect to the legislation of Guatemala and El Salvador: Migration is not established as a right, nor are there specific rights established for migrants. The section on the rights and obligations of foreigners includes a strong reference to obligations. Only the civil rights of Hondurans are extended, and economic, social and cultural rights are not recognised in their favour (article 37). Another central point is that there is no provision relating to the particularities of migrant children and adolescents. Honduras' immigration law expressly validates deprivation of liberty as a state response to some immigration offences (article 42). Regarding the approach to migration in the state of Honduras, criticism has been aimed at the weaknesses of the regulatory framework, but progress has been made in the care of those returned to Honduras, with the setting up of the Care Centre for Returned Migrants, and Care Centres for Children and Migrant Families (IACHR 2019, paras 323-329).

In light of the aforementioned regulations, the following part analyses the data that accounts for the practices are actually developed and that, repeatedly, affect the human rights of children and adolescents in migratory contexts.

## 5 Situation of migrant children in Honduras, El Salvador and Guatemala

The migration process itself involves multiple risks to the security and integrity of children and adolescents, whose rights 'are affected at each stage of the process: in their countries of origin, during transit, in the destination countries and after their repatriation' (Musalo & Ceriani 2015: 7). Transit through migration routes is undertaken in dangerous contexts, due to climatic conditions, to precarious transport, to the control of certain regions by organised crime, and also by breaches committed by migration security agents, national and border authorities of transit countries (Musalo & Ceriani 2015). Against this background, the repressive responses of

10 The Inter-American Commission, in its 2019 Report on the Situation of Human Rights in Honduras, urged the Honduran state to bring its legislation in line with regional and international human rights norms and standards. IACHR 2019, para 323.

11 The conditions are stated as follows: 1. Satisfying an examination by medical authorities; 2. Providing appropriate identification documents, and where appropriate, proving immigration status; 3. Submitting all reports requested by migration authorities; 4. Meeting the conditions set out in the entry authorisations (art 28).

states and the use of deprivation of liberty represent a radical new violation of the human rights of children and adolescents migrating from their countries in search of better living conditions, and who undergo many dangers to achieve this.

Migration dynamics in these countries can also be understood in historical terms according to different problems such as the upheaval resulting from the articulation of poverty, violence and institutional weaknesses. The reasons why children set out on journeys alone vary greatly and may overlap, with many fleeing to seek asylum from war or civil strife, persecution or situations of mass violence in their own country (National University of Ireland 2019). In terms of the particular situation in each of the transit jurisdictions, in the countries of North Central America violence, insecurity, poverty and family reunification continue to be important drivers of migration (OIM 2020). Specifically, the level of poverty in Honduras, El Salvador and Guatemala is significantly above the Latin American average (the incidence of poverty is 74, 68 and 42 per cent of the population, respectively) (ECLAC 2019). According to the UNHCR (2017), Guatemala, Honduras and El Salvador are countries of origin and return for migration flows. In the case of Mexico, this country is both a transit and destination country, in light of the fact that the United States is the final destination on the migratory route.

The increase in the number of children and adolescents, as the Inter-American Commission points out, is also linked to the intention to flee various forms of violence. This violence refers to the action of organisations such as gangs or *maras*, and drug-trafficking cartels, as well as actions of state agents. These factors have also influenced international mobility, increasing internal displacement (IACHR 2018, para 29) in addition to factors such as poverty, inequality, and various forms of discrimination (IACHR 2015b, para 2). In turn, high levels of violence largely are a consequence of deteriorating socio-economic and security conditions (IACHR 2018, para 5). Furthermore, the Concluding Observations of the CRC Committee (2016, 2018, 2019) to these countries have reiterated its profound concern about the prevalence of the scenarios of poverty, violence, lack of education and discrimination affecting migrant children and adolescents.

Also, the research conducted has found that there is no specific data to show the use of deprivation of liberty as a measure of last resort, supporting what is indicated in the Global Study regarding the view that 'in Central and South America immigration detention of children is considerably less prevalent than elsewhere' (Nowak 2019: 462). However, CMW observed in its recent reports on Honduras (CMW 2016, para 36) and Guatemala (CMW 2019, paras 20, 40 and 41) about the lack of information on the detentions of migrants and their families in detention centres, or

places such as airports. What exists in these countries are 'shelters' for the housing of migrant children and adolescents. However, these mostly concern domestic children and adolescents returned from Mexico and the United States. In Honduras, El Salvador and Guatemala these reception centres operate as children and adolescent shelter institutions and not as detention centres. In this respect, the following part analyses the situation of migrant children and adolescents in the North Central American countries separately while also briefly describing the reception centres to where these children and adolescents have been returned.

### 5.1 Honduras

Honduras is characterised by high levels of poverty, inequality and exclusion, especially impacting women, children and adolescents and migrants, as well as other vulnerable groups. In particular, the lack of opportunities for a large majority of the population affects young people. Other serious structural problems are institutional fragility, structural impunity, and corruption (IACHR 2019, para 17). In addition, the Inter-American Commission stated that there is 'a particularly fragile institutional framework for guaranteeing children's rights, the absence of comprehensive protection, and the lack of access to basic services for children and adolescents' (IACHR 2019, para 221).

A significant percentage of Honduran children and adolescents live in poverty and many of them live on the street. As of 2017, of the 4,1 million children living in Honduras, 36 per cent lived in poverty and more than 10 000 were living on the streets (IACHR, Thematic Hearing on the 'Children's rights in the context of violence in Honduras' 2017). Honduras also has a high rate of infant mortality, a lack of access to decent living conditions such as drinking water or basic sanitation (IACHR (2019) paras 223-225). The Inter-American Commission also observed that children and adolescents are one of the groups most affected by gang activities and organised crime, which is reflected by the number of murders, arbitrary executions and violent deaths of minors (IACHR 2019, para 234). The Committee on Economic, Social and Cultural Rights (ESCR Committee) has also expressed its concern about the situation of children and adolescent street children, emphasising the risk that they will be recruited by gangs or other groups, or be employed in the child labour market, and recommended that the state establish a comprehensive child protection system to prevent these problems (ESCR Committee 2016, paras 37-38).

Also, the CMW Committee has expressed concern about the large number of Honduran migrants who are deprived of their liberty in Mexico and the United States, including children and adolescents, and who are commonly deprived of their due process guarantees (CMW 2016, para 36). For example, in Mexico, between January and May 2019 alone

11 386 Honduran children and adolescents were arrested, of whom 950 were unaccompanied aged between 0 and 11 years, and 1 799 unaccompanied children and adolescents aged between 12 and 17 were arrested.[12] Most of these children are deported, without their procedural guarantees being respected, thus becoming returned migrants (CMW 2016, para 38). The CMW Committee has recommended that the state intensify its consular actions and bilateral talks with transit and destination states such as Mexico and the United States, to ensure that the human rights of Honduran migrant children and adolescents are respected (CMW 2016, paras 36-41). Despite these structural conditions, most migrants from Honduras are often considered economic migrants and often do not obtain the requisite international protection or are deported back to their countries (IACHR 2019, paras 316 and 324).

The majority of actions in connection with migration are concentrated on the attention of returned migrants. The state response consisted of the opening of the Attention Centre for Returned Migrants,[13] and the restructuring in 2016 of the former El Eden Centre that was converted into the Centre of Care for Children and Migrant Families.[14] These measures were highlighted by the Inter-American Commission as a step forward in the protection of returned migrants (IACHR 2019, paras 323-329). According to *Casa Alianza* Honduras,[15] throughout 2014 some 10 800 migrant children and adolescents were deported and received at the El Eden Centre. However, between January and August 2015 this figure was 5 429, according to data from the Returned Migrant Care Centre (CAMR). Currently the Centre for Child Care and Migrant Families 'Belén', administered by the IOM, highlighted overcrowding conditions and a lack of access to basic services in which unaccompanied and returned migrant children and adolescents live. It has urged the state to expand its measures to guarantee the rights of all children and adolescents. According to IOM data, as of 2017, 94.6 per cent of families of unaccompanied migrant children and adolescents lived in urban areas of Honduras, with an average of six people living in each home, of which 50 per cent lack access to sewerage or hygiene. One in ten returned

12 Source https://elpais.com/internacional/2019/07/24/mexico/1563987207_829054.html.

13 According to their official website, these centres provide services such as food, medical care, clothing, housing, and information about government social programs, to support returnees. There are currently two: CAMR-SPS and CAMR-OMOA.

14 The *Centro El Eden* was a reception centre for migrant children returned from the United States. It provides the same services as CAMR, but adapted to CHA whether they are unaccompanied migrants, or have returned with their families.

15 Casa Alianza is a civil society organisation working in the field of migrant children since 2000 and it has supported specific cases regarding the deportation of migrant CHA, mainly on the border of Agua Caliente, in the department of Ocotepeque. As the institution became involved with the issue, it expanded the attention towards this population, due to the increase in numbers of deported CHAs and the institutional vacuum generated by the state. Casa Alianza Honduras Pastoral Human Mobility Catholic Relief Services (2016). Migrant children Expulsion factors and challenges for their reintegration into Honduras.

children and adolescents live in houses with floors of soil and *bahareque* or adobe walls. Also, the Inter-American Commission noted that measures implemented by Honduras relate to migration 'for economic reasons' but fail to provide adequate programmes to identify and care for deportees with protection needs (IACHR 2019, para 330). There is also a lack of specialised protection protocols for the specific risks faced by returned migrant children and adolescents, nor effective implementation of a national comprehensive guarantee system for the rights of children and adolescents, for state organ activities to ensure the protection that these children require (IACHR 2019, para 252). The ESCR Committee has also noted the lack of adequate measures to reintegrate returned migrants to Honduran society and recommends improving living conditions in the returned migrant care centres, in particular to access adequate social, legal and medical assistance services (ESCR Committee 2016, paras 49 and 50). Finally, the Inter-American Commission has warned that the children and adolescents returned to Honduras are exposed to the same conditions and risk factors that forced them to leave the country (IACHR 2019, para 252), thus reflecting the circularity of this problem.

### 5.2 El Salvador

El Salvador, as indicated by the CRC Committee, experiences serious problems in relation to the protection of children, including the high number of murders and disappearances of children and adolescents, committed mostly by *maras*; the high degree of impunity for crimes; the vulnerability of children, from the age of five years, *vis-à-vis* recruitment by the *maras*; the scant attention paid to the structural causes of this violence; and the large number of allegations of torture, extrajudicial executions and enforced disappearances of children and adolescents at the hands of the police and armed forces, in the context of the fight against organised crime (CRC Committee 2018, paras 22-24). The Committee was also concerned that corporal punishment against children is legally and culturally accepted; a high incidence of cases of ill-treatment and neglect of children in the intra-family sphere; and an exceptionally high number of cases of sexual violence against girls (CRC Committee 2018, paras 25-27). Particularly regarding violence against girls, in the first eight months of 2017, 1 029 cases of sexual offence – with rape being the most frequent (769 cases) – were reported to have been committed against girls between the ages of 13 and 17 years. Many girls are also targeted by gangs for sexual exploitation purposes. Impunity affects 90 per cent of these cases (CRC Committee 2018, para 27). It is clear that the situation of violence against children in El Salvador is widespread and structural, being one of the factors that cause the migration of Salvadoran children and adolescents.

Furthermore, in terms of returned children and adolescents, the CMW Committee expressed concern about the increase in the number

of unaccompanied migrant children who had been repatriated to El Salvador and the lack of effective measures to ensure their resettlement and long-term reintegration (CMW (2014) para 48). According to the National Council on Children and Adolescents, 2 598 returned children and adolescents were registered in 2017 – 6 661 fewer than in 2016. There is a large percentage of children and adolescents deported in the destination countries and returned to El Salvador, located in the Centre for the Care of Returned Children and Adolescents. Others await deportation at El Salvador consulates located in transit or destination countries. Some of the children and adolescents that have returned or been deported are unaccompanied. Children of irregular migrant workers are also included, as well as those affected by internal displacements (UNICEF 2014, Child and Adolescent Situation Report in El Salvador).

As a step forward, between 2017 and 2018 El Salvador implemented a series of measures. One of these measures was the development and implementation of action protocols on migration, with an emphasis on vulnerability profiles and the role of each of the institutions in the care of returned migrants, such as the Protocol on the Protection and Care of Salvadoran Migrant Children and Adolescents CHAs (CRC Committee 2018, para 46). The Ministry of Foreign Affairs, in coordination with other government institutions and international agencies, launched two initiatives that serve the returned population. In October 2017 the programme *El Salvador es tu casa* was launched. This programme benefits the returned El Salvador population for a dignified and effective integration into society by coordinating a number of services: psycho-social assistance, academic, employment and entrepreneurship opportunities. The programme has five key areas of work, namely, (i) care and advice; (ii) reception and welcome; (iii) insertion and networking; (iv) follow-up; and (v) project management. Currently, El Salvador has a migrant care and shelter body: the Directorate of Migrant Care, which functions as a comprehensive care centre for returnees. The centre is located in the La Chacra community and receives returnees from land routes from Mexico and air routes from the United States. The Centre for Integral Care for Migrants functions as a shelter for migrants who are in an irregular status and provides them with safe conditions while the return to the country of origin is being processed. Among the focal points the Centre aims to provide comprehensive care with a human rights approach, meeting basic needs and health care, in addition to legal assistance to ensure due process.

### 5.3 Guatemala

The human rights situation in the country remains affected by the internal armed conflict that took place between 1960 and 1996. During the conflict, massive human rights violations were perpetrated, including massacres, forced disappearances, rape and scorched earth operations

aimed at decimating the Maya indigenous people (IACHR 2017, para 33). The reasons giving rise to this conflict persist, such as the concentration of economic power in the hands of a few, state weakness and, in particular, ongoing racial discrimination, social inequality, and lack of access to justice (IACHR 2017, paras 36 and 38). Crimes committed during the armed conflict were not tried after the closure of the International Commission against Impunity in Guatemala (CICIG).[16]

The country's current situation is characterised by the levels of poverty, racism and inequality (IACHR 2017, para 38). In 2018 the CRC Committee also expressed concern about the situation of children, highlighting the situation of poverty and exclusion, reflected in the large number of children under the age of five years suffering from chronic malnutrition and the number of resulting deaths (CRC Committee 2018, para 15). These exceed 46,5 per cent and rises to 61,2 per cent for indigenous children. It was also pointed out that the situation of children's rights in Guatemala leads them to migrate to other countries (CMW Committee 2019, para 44). Furthermore, and to better understand the country's context, between 40 and 60 per cent of the population identifies itself as indigenous, and much of it has historically inhabited rural areas (IACHR 2017, para 37). Also, between 1990 and 2013 Guatemala was the lowest state-grossing country in the region (IACHR 2017, para 38). The country also has one of the highest levels of impunity in the world,[17] the most egregious examples being crimes against women and girls, and violence against indigenous peoples.

In terms of returned children and adolescents' public policies, the Secretariat for Social Welfare of the Presidency of the Republic has a programme for unaccompanied migrant children, which provides specialised care for the repatriation of returned children to the country, as well assistance to migrants in transit who require support for family reunification. The programme operates with the Department of Unaccompanied Children and Adolescents, which has two services: Casa 'Our Roots' Shelter, Quetzaltenango (CNRQ) (its purpose is to care for and protect unaccompanied migrant children returning by land from the United States and Mexico, and the shelter's capacity is for 70 children) and Our Roots Albergue Casa Guatemala which provides protection for unaccompanied migrant children returning on flights from the United States and Mexico. Cases of serious human rights violations are housed in this centre. Both shelters are staffed with social workers and psychology professionals in charge of reporting to the Attorney-General's office. These

16 The CICIG was an international independent body supported by the United Nations that from 2007 to 2019 assisted state bodies in Guatemala both in the investigation of crimes committed by members of illegal security forces and clandestine security apparatuses, as well as dismantling these groups.

17 See more at https://www.cicig.org/cicig/mandato-y-acuerdo-cicig/.

reports summarise information related to an initial interview that focuses on human rights violations and risks to which children are exposed. In turn, the *Quedate* Training Centre has been identified[18] as a prevention mechanism for undocumented migration and at-risk returnees. It is a technical training facility for adolescent returnees requiring training in order to increase employment opportunities. It has post-school leveraged education processes and accelerated training of a technical nature. By 2017 it had 332 participants who were studying in different specialties.

Based on the data collected, the migration of children and adolescents from North Central America is linked to structural conditions that disproportionately affect them. Despite that, most migrant children and adolescents are often deported back to their country due to the deprivation of due process guarantees, among other reasons. Although there are efforts on the part of the states to try to reintegrate children and adolescents back into society, they are still lacking adequate measures in order to protect them. The same conditions that forced them to leave their home countries persist when they are returned. In this respect, the following part analyses the deprivation of liberty of children and adolescents in Mexico as the receiving, issuing, transiting and returning country in order to better understand the specific situation of children and adolescents and the state response towards migration.

## 6 Children and adolescents deprived of liberty on immigration grounds in Mexico: Tension between securitisation logic and comprehensive child protection

The central problem concerning migrant children deprived of liberty arises from the ascendency of immigration policy, especially its securitisation aspects, over the policy of comprehensive protection of migrant children. Comprehensive protection entails the abandonment of the old doctrine of the 'irregular status' which usually focused on assistance or repressive policies, plans and programmes, on those children and adolescents who were 'unprotected' or in a deprived situation, and were therefore (non-participating) targets. Unlike the concept of the 'irregular status', policies, plans and programmes that are based on the doctrine of comprehensive protection, promote, defend and protect the human rights of all children and adolescents. However, the subsidiary role that child protection bodies often play at the local and national levels, as well as the assistance and pastoral nature of the general policy on children, also indicate the lack of a comprehensive protective approach to migrant children and adolescents (Ceriani 2014). In this regard, the obligation to prioritise the status of

18 Secretariat of Social Welfare of the Presidency of the Republic, Government of Guatemala, on the *Quedate* Training Centre: http://www.sbs.gob.gt/centros-de-formacion-quedate/.

children and adolescents over that of migrants implies that policies for children and social protection must identify them as a particularly vulnerable group requiring protection. These policies often register a deficit with respect to the specific needs of unaccompanied and separated children and adolescents in particular (IPPDH 2019).

The situation of migrant children and adolescents from North Central American countries to Mexico as a destination or transit country highlights a series of violations of rights, and reveals the violation of international and regional legislation on the protection of children and adolescents' human rights. In this regard, the data below reflects the deprivation of the freedom of migrant children and adolescents in Mexico, while noting that this situation proves to be the focal point of all other rights violations that occur in the migration context.

In Mexico, according to the Migration Policy Unit, Registration and Identity of Persons, the number of foreign (accompanied and unaccompanied) children and adolescents registered with the National Migration Institute (INM) in 2019 totalled 51 999 (*Unidad de Política Migratoria, Registro e Identidad de Personas* 2019). The following table indicates the demographics of this group according to gender and major countries of origin.

| Flow of foreign children and adolescents submitted to the INM, according to gender and principal countries of origin, January-September 2019 | | | |
|---|---|---|---|
| Country of origin | Men | Women | Total |
| Guatemala | 9,981 (61.4%) | 6,265 (38.6%) | 16,246 (31.2%) |
| Honduras | 14,378 (58.1%) | 10,372 (41.9%) | 24,740 (47.6%) |
| El Salvador | 3,890 (56.6%) | 2,981 (43.4%) | 6,871 (13.2%) |
| Other Countries | 6,871 (13.2%) | 1,929 (46.7%) | 4,132 (7.9%) |
| Source: Migration Policy Unit, Registration and Identity of Persons, based on the Monthly Newsletter of Migration Statistics 2014-2019 | | | |

Immigration facilities in Mexico housing migrants have in law been referred to as Migratory Centres and, more recently, with the setting up of provisional shelters, are classified according to the length of time in which migrants remain detained. The Regulations of the Migration Law (article 3, section XI) and later the 2012 Rules (article 5) include this concept when indicating that they are 'the physical facility that the institute establishes or enables to temporarily accommodate foreigners who have failed to prove a regular migratory status, until their transfer to a migration station, or that their immigration status is resolved' (CNDH 2019). According to the Mexican National Commission on Human Rights (CNDH), 30 migratory centres are currently operating, mostly set up between the years 2000

and 2010 (20 centres). Those with the largest housing capacity are 21st Century (960); Acayucan (836); and Iztapalapa (430), totalling 2 226.[19]

Provisional shelters are classified according to their physical characteristics as temporary shelters A, which allow a maximum stay of 48 hours, and temporary shelters B, which allow a maximum stay of seven days. These latter shelters are necessary to provide space in those states of the Republic that have no, or inadequately existing, migration centres. There are currently 12 temporary type A and 11 type B shelters. The accommodation capacity in some temporary shelters is for up to 120 people, exceeding that of several migratory centres such as the Estancia de Comitán, Chiapas, as well as other Estancias whose capacity is similar to that of migratory centres, such as Hueyate, San Cristóbal de las Casas, La Ventosa and San Pedro Tapanatepec, located in the states of Chiapas and Oaxaca, entities with large migratory flows.

The physical, structural and operational characteristics of immigration centres continue to emulate a prison model where individuals are kept in cells with bars under lock and key, and subjected to routines typical of social reintegration centres, modelled on schemes for national security protection to the detriment of human security and respect for their human rights (CNDH 2019). In 2018 the authorities established temporary shelters where the members of the 'migrant caravans' were housed for a longer period. There were both open and closed-access shelters.

The shelters set up by the National Migration Institute at the Tapachula fairgrounds, in Chiapas, is a closed-access facility, with perimeter security provided by the Federal Police. The National Commission on Human Rights noted during its visits that up to approximately 3 000 people were housed there, including children and adolescents, women, older individuals, persons with disabilities and men, who remained deprived of their liberty, even though they were refugee-status applicants.

The National Commission on Human Rights of Mexico (CNDH) noted that of the 38 581 children and adolescents detained in Mexico in 2019, 8 744 were unaccompanied children and adolescents.[20] For its part, Mexico's National Migration Institute (INM) reported that the detention of Central American migrant children during the first half of 2019 increased by more than 130 per cent compared to the same period in 2018. On the other hand, the federal facilities where the INM detained a greater number of children and adolescents were Chiapas, Veracruz, Tabasco, Oaxaca, Tamaulipas and San Luis Potosí (CNDH 2018). A significant fact is that

19 *Comisión Nacional de los Derechos Humanos, Informe Especial. Situación de las Estaciones Migratorias en México, Hacia un nuevo modelo alternativo a la detención, México*, 2019.

20 Available at https://www.proceso.com.mx/601288/piden-a-la-cidh-supervisar-politica-migratoria-regional-dirigida-a-la-ninez-y-adolescencia.

of the 36 174 children and adolescents detained by the INM in 2015, only 12 414 were processed through the DIF systems (National System for Integral Family Development). This highlights the preponderant policy of immigration control over the policy of child protection, as has already been noted.[21] According to Mexico's CNDH, 86 per cent of children and adolescents were deported in 2016, representing a serious violation of their human rights. This trend continues up to the present day (CNDH 2018, para 160). Another important fact is that in its last visits, the CNDH repeatedly identified accompanied and unaccompanied CHAs at the migratory centres of Iztapalapa, Acayucan and Tapachula, in five provisional shelters, taking into account that the latter are even more precarious than the migratory centres themselves.[22]

Data gathered by the INMM Citizens' Council indicate that the children and adolescents' conditions of detention are a matter of concern.[23] The following aspects may be mentioned:

- Poor diet: Children aged 0 to four years were constantly falling ill due to the food provided to them in the centres – they are only provided with three meals a day, even though they require feeding five times. In addition, milk is distributed to children up to two years of age, while older children remain dependent on this nutrient.
- Lack of medical care: Medical care for infants and young children is poor, as mothers notice that medical staff do not perform basic check-ups before providing medical treatments.
- Staff abuse: Staff mistreatment of mothers with young children consisting of a ban on removing blankets from the rooms, causing minors to sleep directly on the floor throughout the day.
- Lack of recreational and educational opportunities: With the exception of the Acayucan centre, the others do not have educational and recreational spaces or activities for children and adolescents.
- Equivalent procedures for children and adults without contemplating the best interests of the child. The dossiers inspected did not include references to any proceedings followed to determine the best interests of the child.
- Prevalence of institutionalisation and detention over other alternatives. The placement of migrant children in shelters in the DIF (National System for the Integral Development of the Family) is concerning because these shelters are being validated as migratory

21 *Comisión Nacional de los Derechos Humanos (2018). Informe Especial. La problemática de niñas, niños y adolescentes centroamericanos en contexto de migración internacional no acompañados en su tránsito por México, y con necesidades de protección internacional. México.*

22 *Comisión Nacional de los Derechos Humanos (2018).*

23 *Consejo Ciudadano del Instituto Nacional de Migración, Personas en detención migratoria en México Misión de Monitoreo de Estaciones Migratorias y Estancias Provisionales del Instituto Nacional de Migración. México,* July 2017.

centres. Numerous files include summary resolutions providing the corresponding authorisation and ignoring alternatives to detention set out in the immigration legislation itself.

- Prolonged periods of detention. Asylum-seeking children and adolescents remain in detention for long periods. Said periods continue, despite the children and adolescents being transferred to a shelter of the municipal, state or federal DIF system, due to the fact that the vast majority are closed-access shelters, and the periods of accommodation therein are long and create great uncertainty for children.

According to Musalo and Ceriani (2015), the human rights impact on children and adolescents in migratory contexts is based on the view that undocumented migration is a crime. This belief leads to circumstances in which ill-treatment and other human rights violations prevail. In this sense, the regularisation of migration should be considered as a measure of protection for children and adolescents. This involves a change of perspective and also a change in institutional practices and structures.

It is important to note that policies aimed at migrant children and adolescents must consider in the first place the best interests of the child. Migration and protection procedures involving migrant children and adolescents must respect a set of procedural safeguards, with the aim of ensuring that their best interests are a primary consideration. This implies the right to be heard; the right to information; the rapidity of the proceedings; the specialisation of responsible officials; access to legal assistance; the appointment of a guardian in the case of unaccompanied and separated children and adolescents; the right to appeal decisions; the right to consular assistance; and confidentiality safeguards – especially in cases of refugee status determinations (IPPDH 2019).

## 7 Final observations

On the basis of the data collected, it is worth noting that the interpretation and implementation of CRC and the Principles of Comprehensive Protection continue to reveal difficulties, tensions and disputes (Beloff 2014). This is evident in the treatment of migrant children based on a rationale that prioritises national security over the best interests of the child. In this way, the deprivation of liberty of children and adolescents is at the heart of a series of violations that occur in the context of migration. In addition, the problem of children deprived of liberty on immigration grounds necessarily requires to be part of the broader framework of discussions on democracy and the role of states as guarantors of rights, as mentioned at the beginning of this article. The importance of social, economic and cultural rights and related policies is central in this context

(Baratta 2004) and especially in the case of the countries of North Central America.

In consequence of the above, and following the recommendations of the Global Study (Nowak 2019), in order to prevent the detention of children and adolescents on immigration grounds, the following challenges can be identified in the context the deprivation of liberty of migrant children in the countries of North Central America and Mexico: recognising the condition of children and adolescents as superior to other types of categorisation or classification; working on the training of state agents responsible for migration policies on the protection of the rights of children and adolescents; strengthening the creation and continuation of specialised bodies in the area of comprehensive child protection in migration contexts, as well as monitoring and controlling bodies on migration policies and institutions; eradicating the deprivation of liberty of children and adolescents, and in particular those who are detained on immigration grounds as migration-related detention can never be considered a measure of last resort and in the best interest of the child; in the interim, promoting non-custodial measures as protection mechanisms for children and adolescents in migratory contexts with the aim of reducing the number of children in this situation; moving towards a multidimensional and multi-causal approach to the migration issue by focusing on the guarantee of rights, in particular addressing social factors and their structural causes; expanding immigration policies as a protection mechanism for children and adolescents; and including a gender focus in the care of migrant children and adolescents.

The deprivation of children and adolescents' liberty for migratory reasons poses urgent challenges from the point of view of human rights and democracy. These challenges demand concrete action and solid agreements among key stakeholders, beyond mere rhetoric. This also conforms to goal 16.2 of United Nations Sustainable Development Goals as indicated by the Global Study (Nowak 2019). The human rights of migrant children and adolescents should be a priority for the states in order to eliminate their deprivation of liberty. The detention of migrant children should never be considered a measure of last resort as it violates the exercise of their fundamental rights.

# References

Aldeas Infantiles 'Enfoque de Juventudes. Una aproximación desde los Derechos Humanos, las diversidades y el desarrollo de las personas adolescentes y jóvenes' (2017), available at http://redegresadoslatam.org/wp-content/uploads/2017/12/Fasc%C3%ADculo-I-Enfoque-de-Juventudes.pdf (last visited 17 February 2021)

Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) *Situación del Triángulo Norte en Centroamérica* (2017), available at https://www.acnur.org/fileadmin/Documentos/BDL/2017/11040.pdf (last visited 17 February 2021)

Baratta A (2004) *Infancia y democracia. en García* ***Méndez y*** *Beloff* (comp) Infancia, Ley y Democracia en América Latina. Colombia, Temis

Beloff M 'Protección a la niñez en América Latina. Fortalezas y debilidades. Estado de Nuevo León' (2014) *Poder Judicial Estado de Nueva León*, available at http://www.pjenl.gob.mx/Publicaciones/Libros/30/docs/30.pdf (last visited 17 February 2021)

Beloff M 'La protección de los niños y las políticas de la diferencia' (2001) *Lecciones y Ensayos* 405

Beloff M 'La protección de los derechos de las niñas en la justicia juvenil' (2017) *Instituto de Investigaciones*, Ambrosio L Gioja Research Institute, Issue 19, July/December 2017, Buenos Aires, Argentina, ISSN 1851-3069

Ceriani C, García P, Lila & Gómez Salas A 'Niñez y adolescencia en el contexto de la migración: principios, avances y desafíos en la protección de sus derechos en américa latina y el caribe' (2014) 22 *REMHU – Revista Interdisciplinar da Mobilidade Humana* 9-28 ISSN: 1980-8585, available at https://www.redalyc.org/articulo.oa?id=4070/407042019002 (last visited 17 February 2021)

Casa Alianza Honduras Pastoral de Movilidad Humana Catholic Relief Services. (2016) Niñas y niños migrantes Factores de expulsión y desafíos para su reinserción en Honduras, available at https://imumi.org/attachments/2016/MAR/Ninas-y-ninos-migrantes-factores-de-expulsion-y-desafios-para-su-reinsercion-en-Honduras.pdf (last visited 17 February 2021)

Comas R 'Tolerancia cero' en los Estados Unidos: niñez migrante no acompañada a causa de la privación de libertad de sus padres por status migratorio (2018), available at https://diagonalciep.org/tolerancia-cero-en-los-estados-unidos-ninez-migrante-no-acompanada-a-causa-de-la-privacion-de-libertad-de-sus-padres-por-status-migratorio/ (last visited 17 February 2021)

Comisión Internacional contra la Impunidad en Guatemala (CICIG), available at https://www.cicig.org/cicig/mandato-y-acuerdo-cicig/ (last visited 17 February 2021)

Comisión Nacional de los Derechos Humanos 'Situación de las Estaciones Migratorias en México. Hacia un nuevo modelo alternativo a la detención. México' (2019), available at https://www.cndh.org.mx/sites/default/files/documentos/2019-11/Informe-Estaciones-Migratorias-2019.pdf (last visited 17 February 2021)

Comisión Nacional de los Derechos Humanos 'Informe Especial. La problemática de niñas, niños y adolescentes centroamericanos en contexto de migración internacional no acompañados en su tránsito por México, y con necesidades de protección internacional' México (2018), available at https://www.cndh.org.mx/sites/default/files/documentos/2019-04/Informe-Ninez-Adolescentes-Centroamericanos-Migracion.pdf (last visited 17 February 2021)

Consejo Ciudadano del Instituto Nacional de Migración (CCINM) 'Personas en detención migratoria en México. Misión de Monitoreo de Estaciones Migratorias y Estancias Provisionales del Instituto Nacional de Migración' México (2017), available at https://tbinternet.ohchr.org/Treaties/CESCR/Shared

%20Documents/MEX/INT_CESCR_CSS_MEX_28755_S.pdf (last visited 17 February 2021)

Consejo Nacional de la Niñez y la Adolescencia 'Estado de situación de los derechos de la niñez y adolescencia en El Salvador', junio 2017- mayo 2018. Consejo Directivo del CONNA. El Salvador (2013), available at http://www.conna.gob.sv/wp-content/uploads/2016/06/Estado-de-Situacion-de-los-derechos-de-las-NNA-en-El-Salvador.pdf (last visited 17 February 2021)

CMW International Convention on the Protection of the Rights of All Migrant Workers and Their Families, adopted by the General Assembly in its Resolution 45/158 of 18 December 1990, available at https://www.ohchr.org/sp/professionalinterest/pages/cmw.aspx (last visited 17 February 2021)

CMW Committee Committee for the Protection of the Rights of All Migrant Workers and Their Families Concluding Comments on Guatemala's second periodic report of 2 May 2019 CMW/C/GTM/CO/2

CMW Committee Final Comments on Honduras' Initial Report of 3 October 2016 CMW/C/HND/CO/1

CMW Committee Final Comments on El Salvador's second periodic report of 2 May 2014 CMW/C/SLV/CO/2

CMW Committee General Comment No 2 on the rights of irregular migrant workers and their families CMW/C/GC/2 (2013), available at https://www.mre.gov.py/SimorePlus/Adjuntos/Informes/CMW%20N%C2%BA%202.pdf (last visited 17 February 2021)

CMW Committee General Comment No 1 on migrant domestic workers (2011), available at http://old.acnur.org/fileadmin/Documentos/BDL/2012/8447.pdf (last visited 17 February 2021)

CRC – OHCHR *Convention on the Rights of the Child* (1989), available at https://www.ohchr.org/Documents/ProfessionalInterest/crc_SP.pdf (last visited 17 February 2021)

CRC Committee Committee on the Rights of the Child Concluding Comments on the Combined Fifth and Sixth Periodic Reports of El Salvador of 29 November 2018. CRC/C/SLV/CO/5-6

CRC Committee General Comment 12 CRC/C/GC/12 20 July 2009, available at https://www.acnur.org/fileadmin/Documentos/BDL/2011/7532.pdf (last visited 17 February 2021)

CRC Committee General Comment 6 CRC/GC/2005/6 1 September 2005, available at https://www.acnur.org/fileadmin/Documentos/BDL/2005/3886.pdf (last visited 17 February 2021)

CRC Committee and CMW Committee Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Their Families and No 22 of the Committee on the Rights of the Child on general principles concerning the human rights of children in the context of international migration (2017), available at https://www.refworld.org.es/docid/5bd780094.html (last visited 17 February 2021)

CRC Committee and CMW Committee Joint General Comment No 4 of the Committee on the Protection of the Rights of All Migrant Workers and Their Families and No 23 of the Committee on the Rights of the Child on the obligations of States related to human rights of children in the context of international migration in countries of origin, transit, destination and return (2017), available at https://www.refworld.org.es/docid/5bd788294.html (last visited 17 February 2021)

De Lucas J 'La herida original de las políticas de inmigración. A propósito del lugar de los derechos humanos en las políticas de inmigración' (2002) 26 *Isegoría* 59 ISSN: 1130-2097, available at http://isegoria.revistas.csic.es/index.php/isegoria/article/view/571 (last visited 17 February 2021)

Durand Jorge & Heredia Zubieta C 'Los migrantes, los gobiernos y la sociedad civil en el sistema migratorio norte-mesoamericano' *Programa Interdisciplinario en Estudios Migratorios* (CIDE-MIG), Centro de Investigación y Docencia Económicas (CIDE) Ciudad de México (2018), available at https://migdep.colmex.mx/publicaciones/DPM-06.pdf (last visited 17 February 2021)

ESCR Committee Committee of the International Covenant on Social and Cultural Economic Rights Concluding Comments on Honduras' second periodic report, 11 July 2016 E/C.12/HND/CO/2

IACHR Situation of human rights in Honduras, 27 August 2019 OAS/Ser.L/V/II. Doc. 146, available at http://reliefweb.int/report/honduras/situaci-n-de-los-derechos-humanos-en-honduras (last visited 13 August 2020)

IACHR Internal displacement in the North Triangle of Central America. Guidelines for public policy-making 27 July 2018 OAS/Serv.L/V/II, available at http://www.oas.org/es/cidh/informes/pdfs/DesplazamientoInterno.pdf (last visited 17 February 2021)

IACHR Situation of human rights in Guatemala of 31 December 2017 OAS/Ser.L/V/II. Doc.208/17, available at http://www.oas.org/es/cidh/informes/pdfs/Guatemala2017-es.pdf (last visited 17 February 2021)

IACHR (2015a) Thematic Report of the Rapporteurship on the Rights of Migrants 'Human rights of migrants, refugees, stateless persons, victims of trafficking in persons and internally displaced persons: Standards and Standards of the Inter-American System of Human Rights' of 31 December 2015 OAS/Ser.L/V/II. Doc, available at https://www. Cutidh.or.cr/tablas/r37887.pdf (last visited 17 February 2021)

IACHR (2015b) Human rights situation of families, children and adolescents unaccompanied refugees and migrants in the United States of America of 24 July 2015 OAS/Serv.L/V/II.155, available at http://www.oas.org/es/cidh/informes/pdfs/Refugiados-Migrantes-EEUU.pdf (last visited 17 February 2021)

IIDH Instituto Interamericano de Derechos Humanos 'Prácticas relevantes de protección a los derechos de niños, niñas y adolescentes migrantes sin compañía en el triángulo norte y México' (2016) San José: IIDH

Instituto de Políticas Públicas en Derechos Humanos del MERCOSUR (IPPDH) *Protección de niños, niñas y adolescentes en contextos de migración. Manual de aplicación de estándares internacionales y regionales de derechos humanos. Buenos Aires*, IPPDH (2019), available at https://www.ippdh.mercosur.int/wp-content/uploads/2019/06/ManualProteccionNi%C3%B1ezMigrante_web.pdf (last visited 17 February 2021)

Isaacson A, Meyer M & Morales G 'Mexico's other border: Security, migration, and the humanitarian crisis at the line with Central America' Washington, DC, WOLA (2014), available at https://www.wola.org/files/mxgt/report/ (last visited 17 February 2021)

Musalo K & Ceriani P 'Niñez y Migración en Centro y Norte América: causas, políticas, prácticas y desafíos' Buenos Aires: Centre for Gender and Refugee Studies and Universidad Nacional de Lanus (2015), available at https://www.acnur.org/fileadmin/Documentos/Publicaciones/2015/9927.pdf (last visited 17 February 2021)

Nowak M (2019) *Global study on children deprived of liberty*, available at https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/1 (last visited 17 February 2021)

Pautassi L 'La igualdad en espera: el enfoque de género. Lecciones y Ensayos' (2011) 89 279, available at http://www.derecho.uba.ar/publicaciones/lye/revistas/89/pautassi-laura-laigualdad-en-espera-el-enfoque-de-genero.pdf (last visited 17 February 2021)

Ramírez Romero SJ, Hidalgo G, Muñoz Castellanos, RG &y Enciso Cruz PJ Más allá de la frontera, La niñez migrante: Son las niñas y niños de todos, Estudio exploratorio sobre la protección de la niñez migrante repatriada en la frontera

norte citado en 'Niñez y Migración en Centro y Norte América: causas, políticas, prácticas y desafíos' (2009) 339

Unidad de Política Migratoria, Registro e Identidad de Personas 'Niñas, niños y adolescentes en situación migratoria irregular, desde y en tránsito por México' (2020)

UN General Assembly Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty, Manfred Nowak, A/74/136 (11 July 2019), available at https://undocs.org/en/A/74/136 (last visited 17 February 2021)

UNICEF *Informe de Situación de la Niñez y Adolescencia en El Salvador* (2014), available at https://www.unicef.org/elsalvador/sites/unicef.org.elsalvador/files/2018-12/Analisis_de_Situacion_de_la_Infancia_El_Salvador_UNICEF_2014.pdf (last visited 17 February 2021)

# Annexure

| **Guatemala's status of international treaty ratifications**[24] | | |
|---|---|---|
| **Treaty** | **Signature date** | **Ratification date, accession, date (a)** |
| Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | | 5-Jan-1990 (a) |
| Optional Protocol of the Convention against Torture | 25-Sep-2003 | 9-Jun-2008 |
| International Covenant on Civil and Political Rights | | 5-May-1992 (a) |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty | | |
| Convention for the Protection of All Persons from Enforced Disappearance | 6-Feb-2007 | |
| Convention on the Elimination of All Forms of Discrimination against Women | 8-Jun-1981 | 12-Aug-1982 |
| International Convention on the Elimination of All Forms of Racial Discrimination | 8-Sep-1967 | 18-Jan-1983 |
| International Covenant on Economic, Social and Cultural Rights | | 19-May-1988 (a) |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | 7-Sep-2000 | 14-Mar-2003 |
| Convention on the Rights of the Child | 26-Jan-1990 | 6-Jun-1990 |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 7-Sep-2000 | 9-May-2002 |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography | 7-Sep-2000 | 9-May-2002 |
| Convention on the Rights of Persons with Disabilities | 30-Mar-2007 | 7-Apr-2009 |

24 OHCHR, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN

| **Treaty** | **Acceptance of individual complaints procedures** | **Date of acceptance/non-acceptance** |
|---|---|---|
| Individual complaints procedure under the Convention against Torture | Yes | 25-Sep-2003 |
| Optional Protocol to the International Covenant on Civil and Political Rights | Yes | 28-Nov-2000 |
| Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | - | |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women | Yes | 9-May-2002 |
| Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination | N/A | |
| Optional protocol to the International Covenant on Economic, Social and Cultural Rights | No | |
| Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | Yes | 11-Sep-2007 |
| Optional Protocol to the Convention on the Rights of the Child | No | |
| Optional protocol to the Convention on the Rights of Persons with Disabilities | Yes | 7-Apr-2009 |
| **Treaty** | **Acceptance of inquiry procedure** | **Date of acceptance/non acceptance** |
| Inquiry procedure under the Convention against Torture | Yes | 5-Jan-1990 |
| Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | - | |
| Inquiry procedure under the Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women | Yes | 9-May-2002 |
| Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | - | |

| | | |
|---|---|---|
| Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child | - | |
| Inquiry procedure under the Convention on the Rights of Persons with Disabilities | Yes | 7-Apr-2009 |
| **Honduras's status of international treaty ratifications[25]** | | |
| **Treaty** | **Signature date** | **Ratification date, accession, date (a)** |
| Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | | 5-Dec-1996 (a) |
| Optional Protocol of the Convention against Torture | 8-Dec-2004 | 23-May-2006 |
| International Covenant on Civil and Political Rights | 19-Dec-1966 | 25-Aug-1997 |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty | 10-May-1990 | 1-Apr-2008 |
| Convention for the Protection of All Persons from Enforced Disappearance | 6-Feb-2007 | 1-Apr-2008 |
| Convention on the Elimination of All Forms of Discrimination against Women | 11-Jun-1980 | 3-Mar-1983 |
| International Convention on the Elimination of All Forms of Racial Discrimination | | 10-Oct-2002 (a) |
| International Covenant on Economic, Social and Cultural Rights | 19-Dec-1966 | 17-Feb-1981 |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | | 9 Aug 2005 (a) |
| Convention on the Rights of the Child | 31-May-1990 | 10 Aug 1990 |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | | 14-Aug-2002 (a) |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography | | 8-May-2002 (a) |

25 OHCHR, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN

| | | |
|---|---|---|
| Convention on the Rights of Persons with Disabilities | 30-Mar-2007 | 14-Apr-2008 |

| **Treaty** | **Acceptance of individual complaints procedures** | **Date of acceptance/non-acceptance** |
|---|---|---|
| Individual complaints procedure under the Convention against Torture | N/A | |
| Optional Protocol to the International Covenant on Civil and Political Rights | Yes | 7-Jun-2005 |
| Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | N/A | |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women | No | |
| Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination | N/A | |
| Optional protocol to the International Covenant on Economic, Social and Cultural Rights | No | |
| Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | N/A | |
| Optional Protocol to the Convention on the Rights of the Child | No | |
| Optional protocol to the Convention on the Rights of Persons with Disabilities | Yes | 16-Aug-2010 |
| **Treaty** | **Acceptance of inquiry procedure** | **Date of acceptance/non-acceptance** |
| Inquiry procedure under the Convention against Torture | Yes | 5-Dec-1996 |
| Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | Yes | 1-Apr-2008 |
| Inquiry procedure under the Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women | - | |

| | | |
|---|---|---|
| Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | - | |
| Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child | - | |
| Inquiry procedure under the Convention on the Rights of Persons with Disabilities | Yes | 16-Aug-2010 |

**El Salvador's status of international treaty ratifications[26]**

| **Treaty** | **Signature date** | **Ratification date, accession, date (a)** |
|---|---|---|
| Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | | 17-Jun-1996 (a) |
| Optional Protocol of the Convention against Torture | | |
| International Covenant on Civil and Political Rights | 21-Sep-1967 | 30-Nov-1979 |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty | | 8-Apr-2014 (a) |
| Convention for the Protection of All Persons from Enforced Disappearance | | |
| Convention on the Elimination of All Forms of Discrimination against Women | 14-Nov-1980 | 19-Aug-1981 |
| International Convention on the Elimination of All Forms of Racial Discrimination | | 30-Nov-1979 (a) |
| International Covenant on Economic, Social and Cultural Rights | 21-Sep-1967 | 30-Nov-1979 |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | 13-Sep-2002 | 14-Mar-2003 |
| Convention on the Rights of the Child | 26-Jan-1990 | 10-Jul-1990 |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 18-Sep-2000 | 18-Apr-2002 |

26 OHCHR, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN

| | | |
|---|---|---|
| Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography | 13-Sep-2002 | 17-May-2004 |
| Convention on the Rights of Persons with Disabilities | 30-Mar-2007 | 14-Dec-2007 |

| **Treaty** | **Acceptance of individual complaints procedures** | **Date of acceptance/non-acceptance** |
|---|---|---|
| Individual complaints procedure under the Convention against Torture | N/A | |
| Optional Protocol to the International Covenant on Civil and Political Rights | Yes | 6-Jun-1995 |
| Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | - | |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women | No | |
| Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination | Yes | 23-Mar-2016 |
| Optional protocol to the International Covenant on Economic, Social and Cultural Rights | Yes | 20-Sep-2011 |
| Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | N/A | |
| Optional Protocol to the Convention on the Rights of the Child | Yes | 9-Feb-2015 |
| Optional protocol to the Convention on the Rights of Persons with Disabilities | Yes | 14-Dec-2007 |

| **Treaty** | **Acceptance of inquiry procedure** | **Date of acceptance/non-acceptance** |
|---|---|---|
| Inquiry procedure under the Convention against Torture | Yes | 17-Jun-1996 |
| Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | - | |

| | | |
|---|---|---|
| Inquiry procedure under the Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women | - | |
| Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | Yes | 20-Sep-2011 |
| Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child | - | |
| Inquiry procedure under the Convention on the Rights of Persons with Disabilities | Yes | 14-Dec-2007 |

**Mexico's status of international treaty ratifications[27]**

| **Treaty** | **Signature date** | **Ratification date, accession, date (a)** |
|---|---|---|
| Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | 18-Mar-1985 | 23-Jan-1986 |
| Optional Protocol of the Convention against Torture | 23-Sep-2003 | 11-apr-2005 |
| International Covenant on Civil and Political Rights | | 23-Mar-1981 (a) |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty | | 26-Sep-2007 (a) |
| Convention for the Protection of All Persons from Enforced Disappearance | 6-Feb-2007 | 18-Mar-2008 |
| Convention on the Elimination of All Forms of Discrimination against Women | 17-Jul-1980 | 23-Mar-1981 |
| International Convention on the Elimination of All Forms of Racial Discrimination | 1-Nov-1966 | 20-Feb-1975 |
| International Covenant on Economic, Social and Cultural Rights | | 23-Mar-1981 (a) |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | 22-May-1991 | 8-Mar-1999 |
| Convention on the Rights of the Child | 26-Jan-1990 | 21-Sep-1990 |

27 OHCHR, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN

| | | |
|---|---|---|
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 7-Sep-2000 | 15-Mar-2002 |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography | 7-Sep-2000 | 15-Mar-2002 |
| Convention on the Rights of Persons with Disabilities | 30-Mar-2007 | 17-Dec-2007 |

| **Treaty** | **Acceptance of individual complaints procedures** | **Date of acceptance/non-acceptance** |
|---|---|---|
| Individual complaints procedure under the Convention against Torture | Yes | 15-Mar-2002 |
| Optional Protocol to the International Covenant on Civil and Political Rights | Yes | 15-Mar-2002 |
| Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | N/A | |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women | Yes | 15-Mar-2002 |
| Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination | Yes | 15-Mar-2002 |
| Optional protocol to the International Covenant on Economic, Social and Cultural Rights | No | |
| Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | Yes | 8-Mar-1999 |
| Optional Protocol to the Convention on the Rights of the Child | No | |
| Optional protocol to the Convention on the Rights of Persons with Disabilities | Yes | 17-Dec-2007 |
| **Treaty** | **Acceptance of inquiry procedure** | **Date of acceptance/non-acceptance** |
| Inquiry procedure under the Convention against Torture | Yes | 23-Jan-1986 |

| | | |
|---|---|---|
| Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance | Yes | 18-Mar-2008 |
| Inquiry procedure under the Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women | Yes | 15-Mar-2002 |
| Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | - | |
| Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child | - | |
| Inquiry procedure under the Convention on the Rights of Persons with Disabilities | Yes | 17-Dec-2007 |

N Milić, G Rasiti, E Latić, M Kalem & M Fazlić 'Deinstitutionalisation of children with disabilities: Process, progress and challenges in South-East Europe' (2020) 4 *Global Campus Human Rights Journal* 375-402
http://doi.org/20.500.11825/2039

# Deinstitutionalisation of children with disabilities: Process, progress and challenges in South-East Europe

***Nikolina Milić,* Gresa Rasiti,** Esma Latić,*** Melina Kalem**** and Muamer Fazlić********

**Abstract:** *More than a decade since Albania, Bosnia and Herzegovina, Bulgaria and Serbia made a commitment to gradually close their institutions for children with disabilities, the process of exchanging institutional with family-based care seems to be stalling. These countries have an immediate Socialist/Communist past where, as some authors argue, there is a legacy of heavy institutionalisation of persons with disabilities that creates one of the key challenges related to ending disability-based deprivation of liberty of children in South-East Europe. Although some progress has been made, children with disabilities are still overrepresented in institutions, sometimes due solely to poverty and limited community-based support to families who would otherwise be able to take care of their children. This article seeks to explore the root causes of heavy institutionalisation of children with disabilities in South-East Europe while discussing the key challenges in the process of managing the transition from institutional care to community living in Albania, Bosnia and Herzegovina, Bulgaria and Serbia.*

**Key words**: *deprivation of liberty; children; children with disabilities; institutions; deinstitutionalisation; South-East Europe*

* Research Coordinator: Nikolina Milić; Master of Laws (University of Essex), Bachelor of Arts (University of Belgrade), Children's Rights Regional Officer for South East Europe at the Global Campus of Human Rights.
** MA in Human Rights and Democratisation (GCSEE/ERMA).
*** MA in Human Rights and Democratisation (GCSEE/ERMA).
**** MA in Human Rights and Democratisation (GCSEE/ERMA).
***** MA in Human Rights and Democratisation (GCSEE/ERMA).
This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

## 1 Introduction

For decades the isolation and segregation of children with disabilities was a common practice in South-East Europe (SEE), with parents in many cases advised by authorities that their children would be better cared for in an institution. The discovery of gross human rights violations in residential institutions in SEE countries during the 1990s led to massive injections of emergency international aid to temporarily improve the situation (Axelsson et al 2004: 15). However, in most former socialist SEE countries, deinstitutionalisation would not become a policy priority until at least by the first decade of the twenty-first century. Moreover, available data suggests that the deprivation of liberty in residential institutions was even more often exercised in the post-Socialist period, with a sharp rise in the rates of infants and toddlers with disabilities in institutions (Tobis 2000: 24). Almost 20 years later the shift towards family-based alternatives and the commitment to close down institutions have not been realised. Although the overall numbers were reduced in some states, children with disabilities continue to be overrepresented in institutions.

To understand the process, status and challenges of deinstitutionalisation, the article explores comparative case studies of four countries in the SEE region, namely, Albania, Bosnia and Herzegovina (BiH), Bulgaria and Serbia. The United Nations (UN) Global Study on Children Deprived of Liberty revealed that children with disabilities constitute 77 per cent of all children in institutions in Serbia, while the numbers are also extremely high for BiH – 58,1 per cent (Nowak 2019: 190). According to the same source, the situation in Albania and Bulgaria is somewhat improved, with the overall number of children with disabilities being 25 per cent and 10,2 per cent respectively. However, this data should be cautiously scrutinised. For instance, the backbone of Bulgaria's deinstitutionalisation efforts are so-called small group homes, introduced as a community-based model of care. Hence, children placed in these facilities are not considered by the Bulgarian authorities as being institutionalised. On the other hand, these small group homes are far from community-based in the sense of the Convention on the Rights of Persons with Disabilities (CRPD) due to their inherited institutional mindset and institution-like treatment. The situation is similar to the so-called *la casa famiglia* in Albania and other comparable solutions in Serbia and BiH.

Similar Socialist or Communist pasts as well as political and economic turmoil during the transition to democracy have created many common challenges across the states here under review that still have to be addressed. The lack of adequate and available community-based services outside large residential facilities that would enable families to take care of their children, on the one hand, and negative legal and societal attitudes towards disability, on the other, seem to be a common characteristic

throughout the region. While statistical data to measure the reach of efforts aimed at reducing the number of children with disabilities in residential institutions is incomplete, the available sources suggest that children with disabilities in SEE are more likely to be deprived of their liberty in institutions than children who do not live with disabilities. Among children with disabilities, those with mental and intellectual impairments often spend most of their lives in institutions, which usually is the only available option because of a lack of alternatives.

The article first explains the main concepts around deinstitutionalisation and disability-based deprivation of liberty, relying on international and regional human rights standards. Second, it explores the root causes of both the institutionalisation and segregation of children with disabilities by providing an insight into the socio-historical background. Third, the article provides an overview of current legislation and its implementation shortcomings in Albania, BiH, Bulgaria and Serbia. Finally, the article presents an analysis of the deinstitutionalisation processes in these countries. Deinstitutionalisation is not possible without the existence of inclusive community-based services to families in which children with disabilities live. The reach of deinstitutionalisation efforts in this article, therefore, is measured not only by the number of children who were 'removed' from institutions, but also by the availability of community-based services, the number of children placed with families and similar. The conclusions rely on relevant primary and secondary sources. Primary data was obtained from several institutions in Serbia and BiH, the Bulgarian Ministries of Health and Social Care, and the Albanian State Social Services. Information was also acquired from a variety of international and non-governmental sources.

## 2 Replacing disability-based deprivation of liberty with community-based support

Deprivation of liberty occurs when a person is either restricted to a confined space or placed in an institution or other setting without the ability to leave on his or her own volition, by order of a judicial, administrative or other authority (Mendez 2013: para 27; OP-CAT article 4(2)). Hence, it is closely linked to the placement and confinement of children with disabilities in institutions of a social type. Yet, in practice children are not deemed deprived of liberty if their parents or legal guardians consent to their placement in such an institution (Liefaard 2018 in Nowak 2019: 68). Having a disability should not in itself justify deprivation of liberty (CRPD article 14), while necessity and proportionality of such deprivation has to be evaluated by a judicial authority during a periodical review process (CCPR/C/GC/35). As emphasised by Catalina Devandas Aguilar, the first UN Special Rapporteur on the Rights of Persons with Disabilities, disability-based deprivation of liberty is a product of accumulated social

discrimination, which may be traced to inaction in implementing the fundamental rights of persons with disabilities (Devandas 2019: para 86). Due to the excessive use of psychotropic medications and the complete control exercised over their movements from early childhood (Devandas 2019: para 86), children remain unaware of any alternatives and often opt to stay institutionalised – even as adults.

Spending early childhood in an institution has grave consequences for a child's well-being and development. While the authors do not disregard the fact that maltreatment can also occur in a family-based setting, research shows that children with disabilities in institutions are more prone to experience abuse and neglect, the lack of essential services, lack of access to education, and have reduced ability to form meaningful relationships with caregivers (Pinheiro 2006; UN Human Rights Council 2012; Mendez 2015; Human Rights Watch 2016; Ijzendoorn et al 2020). Repeated studies since the 1940s have shown that the disturbance of attachment to a stable caregiver has a devastating effect on children (Ijzendoorn et al 2020). Aside from attachment disorders, institutional living may cause delayed cognitive and physical development, poor cognitive processing and the development of self-harming habits (Ijzendoorn et al 2020: 709-711). Evidence also shows that children living in institutions are 2,8 times more likely to be emotionally neglected than children living with families (UN Department of Economic and Social Affairs 2019: 207). Institutions are found to aggravate or even produce disabilities, leaving numerous harmful effects on a child's mental development and motoric skills (Browne 2009), while smaller group settings also prove detrimental to a child's growth and well-being (Dozier et al 2014: 200). Recent insight into small group homes in Bulgaria showed that while physical conditions of living in smaller settings are improved, the lack of active treatment and social interaction and habilitation persisted even in the most well-equipped facilities (Disability Rights International 2019). Therefore, it is important to emphasise that 'neither large-scale residential institutions with more than a hundred residents nor smaller group homes with five to eight individuals or even individual homes can be called independent living arrangements if they have other defining elements of institutions' (CRPD/C/18/1: 5). In this regard, some of the most usual, general characteristics are isolation and segregation; the rigidity of daily routines irrespective of personal will and preferences; the inability to choose with whom to live; a paternalistic approach in service provision; the supervision of living arrangements; and the obligatory sharing of assistants.

Children who are removed from an institution and placed in family-based care demonstrate a rapid improvement in their overall health condition, intellectual functioning and ability to develop a relationship with the caregivers (Browne 2009). On the other hand, being deprived of liberty in institutions from an early age has a long-lasting impact on

children. A recent study has shown that while replacing institutions with foster or nuclear family care is associated with a significant recovery in growth and cognition, other developmental outcomes such as attention deficit persisted (Ijzendoorn et al 2020). The lack of requisite care for and the use of intrusive measures on children with disabilities in residential institutions were recently recognised by the European Court of Human Rights as contrary to the prohibition of torture, inhuman or degrading treatment or punishment (*LR v North Macedonia*, paras 72-83).

The existing international legal framework provides a solid basis for ending the deprivation of liberty of children with disabilities. The basic right of every child to live with a family and to be included in the community without discrimination based on disability is enshrined in the Convention on the Rights of the Child (CRC) and CRPD. While CRC prescribes that deprivation of liberty could be used in exceptional circumstances, as a measure of last resort for the shortest period of time (article 37), the CRPD provisions imply that no institution is suitable for children with disabilities under any circumstances (CRPD/C/18/1). Disability experts argue that article 37 of CRC provides little or no protection for children with disabilities where community services have not been created for them (Disability Rights International 2017: 3). They repeatedly stress that children are placed in institutions due to the failure of the social service system to provide a more acceptable placement as well as to the failure of the state to establish community-based services for the support of families with children with disabilities. According to Save the Children, '[t]he very existence of institutions encourages families to place their children into care and draws funding away from services that could support children to thrive within families and communities' (Save the Children 2019: 2). In this regard, it is worth mentioning that maintaining residential institutions requires large amounts of funds, whereas it has been shown that it can be up to six times more costly than supporting family-based care (Hope and Homes for Children 2016).

The most commonly used 'justification' for the institutionalisation of children with disabilities stems from the medical model of disability, which suggests the need for 'specialised care' in institutions rather than living in a community (Devandas 2019). Such arguments usually are mistaking the state's failure to establish community-based support to families for the best interests of the child. In other words, the lack of community-based support services for families with children with disabilities does not mean that institutionalisation is in the child's best interests – especially if parents are indeed able and willing to take care of their children. The separation of children from their parents should occur only in extreme circumstances and as a last and temporary resort, when the child, for example, is in imminent danger of experiencing harm by his caregivers. It cannot be a substitute for the failure of states to establish appropriate support. The

Committee on the Rights of the Child (CRC Committee) clearly states that financial reasons cannot serve as a justification for separating children from their parents (CRC/C/GC/14: para 61). However, data acquired in this research will show that poverty is the most usual reason for persisting with the institutionalisation of children with disabilities in SEE.

## 3 Socio-historical root causes for disability-based institutionalisation in South-East Europe

Available data suggests that the placement of children with disabilities in large residential facilities was prevalent in the SEE post-Socialist countries. As many as 10 out of 15 countries with the highest number of institutionalised individuals have a socialist background (Mladenov & Petri 2019). The reasons for this may reside in the Communist perception of social formations that for more than 45 years shaped the reality of SEE countries. With a strong emphasis on productivity, society's attitude towards persons with disabilities was closely related to their (in)ability to work. This unique past has to be considered when seeking to explain the present-day challenges faced by post-Socialist countries.

For decades Albania, BiH, Bulgaria and Serbia relied on an overprotective state system in every sphere of life, including social protection. Socialist universal welfare systems nurtured the legacy of overprotective care for persons with disabilities who were considered ill and non-able objects in need of pity and humanitarian assistance (Dixon & Macarov 1992). In this context, disability was seen as an individual medical condition or pathology which should be cured by medical professionals. Persons with severe or combined impairments needing ongoing individual support were often directed towards institutional care (Axelsson 2004: 18). The institutionalisation of children with disabilities allowed caregivers to enter the labour market and promised to ensure more efficient contributions to the collective economy, thereby fostering a spirit of collectivism more generally (Popivanova 2009). Hence, parents would regularly be 'advised' to place their disabled child in an institution as soon as the child is born, leading them to believe that the child would be better off in an institutional setting (Popivanova 2009).

However, some Socialist countries, such as Serbia and BiH (both at the time part of Yugoslavia) were different from, for instance, Bulgaria and Albania. While social protection systems in the former Yugoslav countries were largely decentralised and relatively well-developed, systems in Albania and Bulgaria were highly centralised and dominated by large residential institutions (Axelsson 2004). However, compared to Bulgaria, Albania did not experience such a high rate of child institutionalisation. For instance, at the beginning of the 2000s Albania officially had approximately 1 200 children in institutions (UNICEF 2002: 3) whereas Bulgaria had 31 102

children (1,93 per cent of the overall child population) in 332 child care institutions (Raycheva et al 2004: 482). This phenomenon seems not to be related to the quality of community-based support in Albania, which was fairly underdeveloped and almost non-existing. Its explanation should be sought rather in the cultural specificity of Albanian society, in which community and family responsibility towards the most vulnerable sections of society is highly developed (Tobis 2000: 16).

Major political changes during the 1990s led to economic collapse in SEE, which took its toll on the provisions for the most vulnerable as social protection systems which collapsed one after the other. In Serbia, a political crisis led to international sanctions and severe inflation, driving the majority of its citizens into poverty. Persons with disabilities and their families were among the worst affected groups. Consequently, children were sometimes placed in institutions solely because of poverty (Ćerimović 2016: 47). The situation in BiH was further aggravated by prolonged war-induced adversities, displacement and poverty. Many children were orphaned or seriously injured by war, while poverty and undernourishment also impacted them severely. Albania and Bulgaria had to deal with both economic collapse and social unrests that marked the end of the Communist regime. Being the last in SEE to denounce Socialism, Albania was in political turmoil while also facing inflation and poverty during the 1990s. Severe economic difficulties led to financial cuts in the social care system while legislation allowed children to be separated from their parents on the grounds of poverty. In 1996 alone, 992 children were placed in Albanian institutions (CRC/C/11/Add.27: para 237) despite reduced funding. Children in Bulgaria were in an even worse situation with hundreds isolated in institutions that had less than one euro per child daily to cover the costs of food, heating, health care and clothes (*Nencheva & Others v Bulgaria* 48609/06). Fifteen deaths in a remote Dzurkovo institution for persons with disabilities during the winter of 1996/97 was a devastating example of how Bulgaria failed to protect vulnerable children from serious and immediate threats, violating the right to life enshrined in article 2 of the European Convention on Human Rights.

During the transition to democracy, social assistance services in SEE were largely transferred to municipalities while the responsibility for residential institutions remained under the authority of the central government and its budget. Ironically, such a system created a financial incentive for municipalities to reduce their expenses by placing vulnerable individuals in residential facilities financed by other levels of government (Tobis 2000: 14) rather than developing community-based services that had to be funded from the municipal budgets. This contributed to the continuation of institutionalisation even during the 2000s despite normative changes that pushed for deinstitutionalisation. Moreover, decades of neglect and segregation caused deeply-rooted discrimination and prevailing social

attitudes stigmatising disability. Due to the non-existence of community-based support coupled with poverty, it is not surprising that many parents still perceive institutions as a viable option for providing care to their children with disabilities.

## 4 Overview of the legal framework for deinstitutionalisation of children with disabilities in South-East Europe

Countries reviewed in this article are parties to CRPD, CRC and most other major human rights treaties, including the European Convention on Human Rights and the revised European Social Charter. These instruments put a strong emphasis on the right of the child to live in a family, since it is the natural environment for the growth and overall well-being of children. The prevention of first-time separation, therefore, should be a priority and families are entitled to support so as to fully assume childcare responsibilities. Only in cases when a family environment is endangering the rights of the child can a child be removed from the family – provided that it is in his or her best interests, a measure of last resort and for the shortest possible period of time measured in days rather than months. Institutional placement should result in more appropriate placement as soon as possible. These obligations are no different for children with existing long-term physical, mental, intellectual or sensory impairments. The constitutions of the four SEE countries reflect their international obligations with ratified international treaties while giving these instruments higher legal strength over domestic legislation.

During the European Union (EU) accession process, SEE countries were pushed to reform their legal frameworks on disability and children's rights while also showing progress in practice. As a candidate and later a member state, Bulgaria relied heavily on the EU structural funds to facilitate its ongoing transition from institutional to community-based care, while its policies were governed by the European Strategy for Persons with Disabilities (2010-2020). The other three countries are still in the accession process: Serbia and Albania are candidate countries while BiH is a potential candidate. Although some work has been done to improve legislative frameworks and bring them in line with the *acquis*, EU reports on the accession progress reveal that persons with disabilities are among the most vulnerable groups for human rights violations in SEE. While supporting the improvement of the rights of persons with disabilities and their inclusion in society, the European Commission is still to ensure that support and funding to candidates as well as member states prioritises family integration, and that funds are not used to enable placement in residential settings (which violates both CRC and CRPD).

### 4.1 Albania

Albania relatively recently enacted legislation on inclusion and accessibility. The country amended its Social Care Services Act in 2016 and adopted the Children's Rights Protection Act in 2017, thereby recognising a child as a rights holder and reiterating the right of every child to live in a family environment. However, both acts were criticised by the Committee on the Rights of Persons with Disabilities (CRPD Committee) for utilising outdated and derogatory language on disability, contributing further to segregation and negative perceptions about disability (CRPD/C/ALB/CO/1: para 6). Most of the secondary legislation still needs to be adopted (European Commission 2019a: 29). The disability assessment system in the country has for a long time been based on an outdated medical model perceiving disability as an illness that should be treated (CRPD/C/ALB/CO/1: para 6). Only recently the authorities initiated a switch towards a bio-psychosocial assessment. However, this is only a pilot project in the municipality of Tirana covering merely around one-third of the Albanian population (European Commission 2020a: 92).

Negative perceptions of disability paired with the non-existence of efficient early identification and support services at the local level that should prevent family separation render the CRPD provisions in Albania without tangible effect (CRPD/C/ALB/CO/1). Some of the established services for the most vulnerable groups in Albania proved to have limited reach. Underdeveloped community-based services on the local level, including the lack of financial and human resources, contribute to critically low social care coverage in the country – only about 10 000 beneficiaries or 0,35 per cent of the population in 2019 (European Commission 2020b: 92). Although the decentralisation process is ongoing, local governments proved to be ill-prepared to undertake the provision of services, which leaves children with disabilities and their families at risk of not receiving any type of service (UNICEF 2018a: 19). The Children's Rights Protection Act stipulates the right of every child to have 'a sound physical, mental, moral, spiritual and social development and to enjoy an appropriate family and social life suitable for the child' (article 6), but it places a heavy burden on parents and legal guardians to follow mandatory procedures to access basic services (article 32). Moreover, as many as one out of three children with disabilities face discrimination in public services, such as health or social services, despite the specific legislative prohibition on discrimination (World Vision Albania 2019).

On the policy level, the National Action Plan for Persons with Disabilities (2016) envisages licensing ten non-state service providers, establishing three types of government-funded services and placing 150 children with disabilities with foster families by 2020 (target 3). A significant number of targets, sadly, were not set due to the lack of baseline data. The National Agenda for Children's Rights (2017-2020) has been criticised

for the absence of a holistic approach in developing community-based services and limited focus on health and education (CRPD/C/ALB/CO/1: para 15). While the real impact of these policies remains to be assessed, the monitoring of legislation and policy implementation in general is hampered by the lack of comprehensive, timely and disaggregated data (European Commission 2019a: 30; CRPD/C/ALB/CO/1; CRC/C/ALB/CO/2-4).

### 4.2 Bosnia and Herzegovina

The complicated post-war political organisation of Bosnia and Herzegovina (BiH) is standing in the way of comprehensive country-level legislation on the rights of the child as well as gatekeeping and the development of community-based support services. Three administrative units (Federation of BiH, Republic of Srpska, Brčko District) have their own set of laws and policies for the realisation of children's rights, while central government only defines the main principles of protection. Although the majority of children are still being placed in institutions by their parents and legal guardians (and neither by a decision nor review of a judicial body) it is important to stress the fact that low-level legislation permits the deprivation of liberty based on impairment, leaving the door open for forced institutionalisation of children with intellectual and psychosocial disabilities (CRPD/C/BIH/CO/1: para 26).

The rights of children with disabilities in BiH to different forms of assistance and support are enshrined in the Fundamentals of Social Welfare Act and more closely regulated by the three administrative units' laws. In the Federation of BiH, the Protection of Civilian Victims of War and Protection of Families with Children offers financial support exclusively to low-income families, leaving many behind this threshold. Those who manage to battle the complicated social system usually do not receive more than €100 per month. Similarly, in the other entity, Republic of Srpska, the Social Protection Act holds the threshold at 70 per cent of minimum disability degree (according to medical assessment) which triggers entitlement to in-home support. It is not surprising, therefore, that families with children with disabilities straddle the line of poverty due to insufficient support (Somun-Krupalija 2017).

The most important policy documents at the administrative unit level are the Federation of BiH's Strategy of Deinstitutionalisation and Transformation of Social Protection Institutions System (2014-2020); the Federation of BiH's Strategy for the Promotion of the Rights and the Position of Persons with Disabilities (2016-2021); and the Republic of Srpska's Strategy for Improving the Social Position of Persons with Disabilities (2017-2026). Similar to Albania, the reach of these documents is difficult to measure due to the non-existence of proper data collection, adequate indicators and benchmarks (CRC/C/BIH/CO/5-6: paras 9-10).

Additionally, the sustainability component of a number of established policies is missing. Many social security measures are project-dependable and limited by the lack of funding, inadequate procedures and a general lack of coordination (European Commission 2019b: 139; CRPD/C/BIH/CO/1: para 34; CRC/C/BIH/CO/5-6: para 33). All strategic documents acknowledge the lack of social support services in general. Nevertheless, rather than focusing on establishing community-based support to families, the 2014-2020 Strategy, for instance, sets the priority for capital investments at the establishment of a network of institutions for 'organised living of children and youth without adequate protection, persons with disabilities and older persons'.

### 4.3 Bulgaria

Children in Bulgaria can be placed in institutions only as a measure of last resort and not for longer than three consecutive years (Social Assistance Act, article 16). Specialised residential institutions for children were formally abolished, but *de facto* they still exist in the form of group homes for up to 15 children with disabilities under the auspices of the Ministry of Labour and Social Policy. Moreover, a significant number of children with disabilities are being placed in 12 institutions for medical and social care for children, which are managed by the Ministry of Health. As a measure of gatekeeping, Bulgarian legislation envisages community-based services to children with disabilities, that is, financial aid and the use of day care social integration, rehabilitation and early intervention centres. The Persons with Disabilities Act (2019) and the Personal Assistance Act (2019), however, link financial support to the poverty threshold which is updated annually, while those whose disability is estimated below 50 per cent are being left behind. It does not come as a surprise that children with disabilities and their families are recognised as one of the social groups most exposed to poverty and exclusion in the country.

The most important policy document guiding the deinstitutionalisation process in Bulgaria is the National Strategy Vision for Deinstitutionalisation of Children in the Republic of Bulgaria (2009) pledging *inter alia* to remove all children from institutions by 2025. The main objectives in the Strategy are related to increasing the child protection system's capacity while establishing a wide range of community-based services, closing down 137 institutions for children below 15 years and establishing a moratorium on placements of children below three years. Measures enlisted in the accompanying Action Plan (2010-2025) aim to prevent the placement of approximately 3 000 children annually in institutions and to develop an adequate legal framework to foster this transition and improve the effectiveness of child protection services. The Plan was criticised by experts for lacking a holistic approach and insufficiency of measures for prevention of primary family separation (National Network for Children

2016). It was furthermore condemned for the lack of a sustainability component for newly-created services and focus on the improvement of infrastructure rather than building the professionals' capacities (National Network for Children 2016).

### 4.4 Serbia

Serbia still does not have a comprehensive children's rights act. Instead, several dozen different, sometimes contradicting, legislative acts tackle the protection of children. An umbrella act, the Social Protection Act (2011), prohibits the institutionalisation of children under three years 'except in extreme and justified circumstances' with the consent of the competent minister (article 52). This deviation leaves a large margin of assessment to the executive power and contributes to the persisting institutionalisation of children with disabilities in the first years of their lives. The same legislative document prescribes that residential institutions for children may not exceed a capacity of more than 50 residents. Yet, five of the largest residential institutions where children with disabilities are placed nevertheless deviate from this provision.

The National Strategy for the Improvement of the Position of Persons with Disabilities and the National Plan of Action for Children both expired in 2015 without new strategies being adopted for the next five years. This indicates the lack of continuity in planning and coordinating services with adequate and sustainable financial support for persons with disabilities. Moreover, available data suggests that Serbia is still unable to systematically apply legislation in protecting persons with disabilities from confinement and deprivation of liberty solely on the basis of disability (Nowak 2019; Social Protection Institute 2020). The state's commitment to preventing institutionalisation by supporting families remained declarative, as the Financial Support to Families with Children Act (2018) failed to improve the situation of, *inter alia*, families with children with disabilities. This legal document should have been the basis of social protection and support to parents of children with disabilities by enabling them to take care of their children while holding a job. In fact, it seems to rather push them deeper into poverty by failing to provide wage compensation to parents who need to take leave to care for children (Fundamental Rights Agency 2020).

## 5 Deinstitutionalisation process: Persisting challenges and recurring patterns

Albania, BiH, Bulgaria and Serbia formally initiated the process of replacing institutional care with community-based support during the 2000s by enacting laws and policies that should have led to the gradual deinstitutionalisation of children. During the early stages, family-based care, gatekeeping, the development of inclusive services and civil society

participation were listed as priorities in this process. At the time there were officially 432 children with and without disabilities in institutions in Albania (CRC/C/11/Add.27: paras 237-239), 927 in BiH (CRC/C/RESP/85: 6), 12 612 in Bulgaria (CRC/C/BGR/2: para 66), and 2 175 in Serbia (CRC/C/SRB/Q/1/Add.1: para 37). The majority were children with disabilities; around 57,9 per cent in Albania (CRC/C/11/Add.27: para 313); 64 per cent in BiH (CRC/C/11/Add.28: para 207); and 54,1 per cent in Serbia (CRC/C/SRB/Q/1/Add.1: para 42). These numbers should, however, be taken tentatively. Due to inconsistent data collection, it is reasonable to assume that there were considerably more children in institutions. For instance, it is estimated that in 2004 alone, the numbers in Bulgaria were even three times higher with approximately 31 000 children placed in institutions (Save the Children et al 2004).

### 5.1 Albania

Statistical data provided by many different sources implies that the number of children living in institutions in Albania is the lowest in the region for years, largely owing to the cultural specificity of Albanian society. Non-consistent data collection and the lack of disaggregated data on the residential institutions' transformation process (piloted in 2015) hampers monitoring and the evaluation of guiding legislation and policies. According to some sources, the share of children with disabilities in Albanian institutions increased from 8,8 per cent in 2017 (CommDH(2018)15: para 26) to 10,2 per cent in 2019 (Nowak 2019). According to other sources, the number of children with disabilities in residential care in 2017 was even higher, at 19 per cent (Rogers & Sammon 2018: 58), thereby significantly decreasing by 2019. Nonetheless, all sources imply that children with disabilities are much more likely to end up in residential care and less likely to be deinstitutionalised to family-based care, usually remaining in institutions for the rest of their lives.

Albania opted to transform existing residential institutions to 'community services', which are simply smaller residential homes for up to ten children (*casa famiglia*) located sometimes within the same institutions that are being transformed. Although the physical conditions in which children reside are indeed improved, *casa famiglia* replicate institutional culture and contribute to the overall failure of closing down the institutions. The experience from other countries implies that such solutions, seen initially as temporary, most often become the ultimate solution and that children eventually do not end up living with their families or in their communities. Children residing in *casa famiglia*, however, are not officially considered institutionalised by authorities and the placement is also usually long-term.

The impact of the strategic documents on actual improvement of the community-based support to both children with disabilities and their families proved to be rather limited in Albania. It has been observed that 'the existing services and structures do not constitute a child protection system, but a *patchwork* of services and dispersed action' (Lai 2016: 11; CommDH (2018) 15: para 12). Poor inter-sectoral cooperation and inadequate financial resources planned for the established services, as well as the lack of clear leadership in the process, are some of the main reasons behind it (Lai 2016: 11; CommDH (2018) 15: para 12). Although foster care and kinship care services were progressively developed since 2012, children with disabilities represent only 4 per cent of children in this kind of alternative care, which constitutes a reduction of half compared to 2015 (Rogers & Sammon 2018: 57). In the period from 1 July 2019 to 1 July 2020, only five children were placed in family-based care, that is, returned to their biological families (State Social Services 2020).

While increasing the number of community-based services, the country failed to make it adequate and available to families and children. One of the main issues is the concentration of services mainly in large cities. The needs assessment in 2019 revealed that 34 per cent of all municipalities provide no social care services and 61 per cent of municipalities do not provide services for persons with disabilities (European Commission 2020: 93). At the same time, only around one-third of municipalities approved and budgeted for social care plans outlining the needs of vulnerable communities and the services that need to be established in response (European Commission 2020: 93). It is, therefore, not surprising that more than half of parents with children with disabilities report that the costs of accessing the services are 'unaffordable' or 'absolutely unaffordable' (World Vision Albania 2019).

The lack of financial and other support continues to be the determinative factor for persisting institutionalisation amidst normative changes. Compared to the EU average, the number of children under three years of age who grow up in formal care is significantly worse in Albania (European Commission 2020b: 24). The majority of children with disabilities in residential institutions in Albania still have one or both living parents. The reason behind their placement in institutions often is due solely to poverty and inadequate support (CommDH(2018)15; CRC/C/ALB/5-6: para 148). Studies have shown that the vast majority of families with children with disabilities (96 per cent) in Albania are generating a low or medium income, with many being near or below the poverty line (Voko & Kulla 2018: 48). Moreover, almost half of the country's population is at risk of poverty or social exclusion, which is more than double the EU average and the highest of any Western Balkan country and Turkey (European Commission 2020: 93).

Access to existing services continues to be a burden for families in the context of limited service provision, extreme poverty, vulnerability, discrimination and stigma (UNICEF 2018a: 108). Persons with disabilities and their families either believe that social protection services in their communities are missing or insufficient to meet their needs, whereas only 28 per cent are satisfied with these services (World Vision Albania 2019: 11). Only 7,8 per cent of children with disabilities benefited from social services, mainly in the cities, while 86,9 per cent of parents find official state support insufficient to meet the basic needs of their children with disabilities (Voko & Kulla 2018: 43). Ironically, the amended Children's Rights and Protection Act places the responsibility on parents and guardians to follow complex legal procedures assisted by (unspecified) child protection bodies only to then access the most basic services (Network of Disability Organisations 2019: 15). Tackling this issue seems to be the unavoidable link towards successful deinstitutionalisation and a family-based life of all children with disabilities.

### 5.2 Bosnia and Herzegovina

The situation in BiH is similar with regard to the availability and adequacy of social services. The country, however, has an even larger backlog in the deinstitutionalisation process due largely to a complicated political structure standing in the way of the successful implementation of its international obligations. Deinstitutionalisation in BiH seems to be a matter of verbal rather than actual commitment. It has been more than a decade of promises resulting only in the expansion of existing institutions some of which commit serious children's rights violations. The blatant example is the Pazarić institution for children with psycho-social and intellectual disabilities. Shocking photos were released showing children being tied to the furniture and radiators as a part of the established procedure at Pazarić (N1 BiH 2019). The public exposure of the case caused wide-range condemnation by both experts and the public (Council of Europe Commissioner for Human Rights 2019; *Sarajevo Times* 2019) although children's rights violations in the same institutions were not a novelty. Over the past ten years, the Ombudsperson's Office in BiH repeatedly stressed that the conditions in residential institutions throughout the country are below the standard of human dignity (Džumhur 2018).

Rather than moving children to family-based care, the number of children in institutions in BiH remained very high, implying systemic problems on many levels. According to the official statistics for 2016 and 2017, there were 1 079 and 1 018 children with disabilities in institutions respectfully (CRC/C/BIH/Q/5-6/Add.1: para 79). By 2018 there were 1 045 children with disabilities in institutions (Agency for Statistics 2019: 20), constituting 58,1 per cent of all children living in institutional settings in BiH (Nowak 2019: 190). The official statistics, however, do not cover

children with disabilities residing in institutions governed by religious and non-governmental organisations, making it impossible to get a clear image of the situation.

Similar to other countries in SEE, the majority of children with disabilities living in institutions in BiH are not orphans. Studies show that 72 per cent of children in institutions in the country have at least one living parent and that 40 per cent are institutionalised solely due to poverty (UNICEF 2017a: 27). Poverty is the most persisting social characteristic that fuels institutionalisation and hampers gatekeeping policies. The poverty rate in the country officially stands at 16,9 per cent (World Bank 2015) whereas even families with higher monthly incomes would find it challenging to cover all expenditures to care for their children with disabilities. Persisting institutionalisation, therefore, is a matter of inadequate or non-existent community-based support to families with children with disabilities. Investments in community-based services, thus, are the key for preventing separation and ending over-reliance on institutional care.

It cannot be said that BiH did not establish community-based services at all, but rather that these are not adequate to meet the basic needs of families and, in most cases, they are not available. For instance, in the two administrative units (Federation of BiH and Republic of Srpska) financial assistance for home-based care is 'reserved' for children whose disability is estimated at more than 70 and 90 per cent. This is according to the outdated medical assessment still in place. In the overall BiH budget for social assistance benefits, only one-quarter is granted based on needs assessment (that is, to persons with disabilities) while others are status-based benefits, reserved mainly for veterans with war-related disabilities (European Commission 2019b: 139). Long-term institutional 'care' for children with disabilities thus remains prevalent in the country. The CRC Committee has stated that the placement of children in institutions is being done without giving primary consideration to the child's best interests despite legislative obligations (CRC/C/BIH/CO/2-4: para 31). Moreover, the prospects for leaving care seem to be extremely low. In most cases, children would be erased from the statistics upon reaching the age of maturity. They are then considered adults and included in the adult statistics despite the fact that they often never leave institutional care despite a reduction in official statistical data.

Essentially, the system seems to leave children with disabilities and their parents without adequate support for community-based living. Without support, gate-keeping policies of preventing children with disabilities from being institutionalised in the first place are not conceivable. National legislation at all levels continues to utilise terminology that is not in line with CRPD, namely, treating disability as an illness requiring medical care. It lacks a human rights-based approach to disability and no efforts

are made to bring the legislation into full compliance with CRPD and CRC (CRPD/C/BIH/CO/1: para 9; CRC/C/BIH/CO/5-6). Furthermore, it aggravates discrimination and segregation in society. Universal and equal access to early childhood recognition and intervention services is not available to children with disabilities (CRPD/C/BIH/CO/1: para 14).

### 5.3 Bulgaria

Of all countries in the region for which data are available, Bulgaria had the highest number of infants in institutional care in 2009 (UNICEF 2012: 24). A series of systemic changes both in legislation and practice was initiated after the country was shamed into action by both media reports documenting serious human rights violations in institutions even during the 2000s. Relying heavily on EU structural funds, by June 2016 the country managed to reduce the number of residential institutions for children by nearly two-thirds (137 to 91). At the same time, the official number of children in institutional care decreased nearly six-fold, from 7 587 in 2010 to 1 232 (Kukova 2019), further decreasing to 633 at the end of 2018 (UNICEF 2018b). This is the reason why Bulgaria is often referred to as an example of good practice with regard to the deinstitutionalisation of children, not only in SEE but also wider. However, these numbers should be carefully scrutinised. While it is beyond doubt that Bulgaria made an enormous effort to close down large residential institutions, often called 'old orphanages', the number of group homes for up to 15 children in turn was sharply increasing. In only six years (2007 to 2013) 140 group homes for up to 12 children were built for 1 845 children with an inadequate effort to place them in family care (ENIL et al 2018). By 2015, 113 new homes were built to make a total of 253 facilities (Child Pact 2016). Similarly, around 65 per cent of children that were moved from institutions in the 2013-2015 period were placed in group homes and only 7,2 per cent were reintegrated into families or placed in foster care (Spirov et al 2015).

Group homes have similar characteristics to institutions despite not being considered by Bulgarian authorities as such. Although the conditions are much better than in large residential institutions, the quality of life of children remain unchanged as they still are not in control of their day-to-day activities and decision making, even when they reach adolescence and despite their capabilities. There is no prospect for them to move to the community and family-based arrangements (Rosenthal et al 2019). The dehumanising and dangerous conditions of children placed in group homes expose them to emotional neglect and physical dangers. This came to the public attention after a Disability Rights International report was published following the visit to several care homes in Bulgaria (Rosenthal et al 2019). The most consistent observation of the expert team in different facilities were the lack of active treatment, social interaction and habilitation even

in the cleanest and most well-staffed facilities. In 2018 the Human Rights Committee expressed its concern about 'continuing reports of violence against children living in institutional care and, in particular, about the 292 deaths of children between the ages of 0 and 7 during the period 2010-2014, which have reportedly not been investigated' (CCPR/C/BGR/CO/4: para 39).

By the end of 2018 there were 2 887 children with disabilities in small group homes (National Network for Children 2019: 37) or approximately 80 per cent more than the number of children with disabilities that Bulgarian authorities consider 'institutionalised' at the time. The official rhetoric is that there are no specialised institutions for children with disabilities in Bulgaria since 2015. Social services, including group homes, are deemed to have a significant role 'in supporting children and families, as well as in realising the process of deinstitutionalisation' (Social Assistance Agency 2020). Increasing numbers of children in group homes, paradoxically, caused the government to negotiate and plan their expansion. In September 2019, for the first time in history, three disability rights organisations initiated the proceedings before the EU Court of Justice against the European Commission for failing to halt funding being used by Bulgarian authorities for building institutions for persons with disabilities instead of financing community-based services (Case T-613/19).

What is more, mostly due to poverty and unavailability or inadequacy of community-based support, 3 800 children in Bulgaria continue to be separated from their families every year, with one-third being below three years old (Kukova 2019: 3). Families of children with disabilities often feel under pressure to place their children in institutions primarily due to economic reasons (Rosenthal et al 2019: 34). Even when children can access the support of a personal, social or domestic assistant, the provision of such services is limited in the sense of project-dependant financing and uneven availability throughout the country. Decisions on the admission often are not based on the individual needs of the child, but on the care that is or is not available in the service system (Rosenthal et al 2019: 27). The prospects of leaving residential care are low for children with disabilities. During the last decade, the number of institutions for medico-social care for children (IMSCC) within the Ministry of Health were reduced from 32 to 12. However, 406 children with disabilities remained in such residential care on 1 July 2020 (Ministry of Health 2019). More than 600 children under three years of age are being placed in IMSCC every year with 90 per cent being children with disabilities and one-fourth being younger than 12 months (Ministry of Health 2019). The National Association for Foster Care stated that at the end of 2018 there were 23,7 per cent of officially-approved foster families that did not have a child accommodated in it (Kukova 2019: 37). Among children in foster care, only 9,3 per cent were children with disabilities (Kukova 2019: 38). In the first six months

of 2020, only 46 children under three years of age were removed from IMSCC (Ministry of Health 2020). However, there is no information on whether they were placed in family-based care or other institutions.

### 5.4 Serbia

As previously stated, incomplete statistical data undermine the possibility to accurately assess the situation in Serbia. However, available data suggests that the country has a significant backlog in deinstitutionalisation, especially with regard to children with disabilities. They are among the most represented groups of children in institutions throughout the country despite efforts made. Serbia initiated the process of deinstitutionalisation in 2009 when the competent authorities, supported by UNICEF and other partners, developed the Comprehensive Social Protection Institutions for Children Transformation Plan (2009-2013). Strategic goals and benchmarks enlisted therein were later incorporated in the legislation governing social protection. Moreover, the Serbian Ombudsperson prepared a Deinstitutionalisation Roadmap in 2014, proposing nine stages for gradual deinstitutionalisation of persons with disabilities generally, including public awareness raising, legislative changes, monitoring as well as results evaluation.

In the initial phase, the overall number of children in institutions was significantly reduced. In 2011 there were 63 per cent fewer children in institutions compared to 2000 (UN Department of Economic and Social Affairs 2019: 207). By 2018 there were 50 per cent fewer children in Serbian institutions compared to 2009 (Social Protection Institute 2019: 14). However, a closer look at the statistical data reveals that children with disabilities were not deinstitutionalised at the same pace as children without disabilities. In 2011 the percentage of children with disabilities in institutions was reduced by only 37 per cent compared to 2000. In 2014 there were 837 children in Serbian institutions (Social Protection Institute 2014: 10) whereas 79,9 per cent of these were children with disabilities (Social Protection Institute 2019: 56). Six years later, at the end of 2019, although the overall numbers were reduced, 73 per cent of 647 children in 17 residential institutions were children with intellectual or physical impairments (Social Protection Institute 2020).

The evidence suggests that children with disabilities are disproportionately institutionalised and appear far less likely to benefit from efforts aimed at the transition from institutional to family-based care than their non-disabled peers. This is a common characteristic throughout the region. The average stay of 131 children with disabilities in one of the largest institutions in Serbia is 12 years, whereas in the last year no child was deinstitutionalised to family-based care (Kolevka 2020). Disability advocates are repeatedly stressing that even when numbers are reducing, this is not due to successful deinstitutionalisation but rather

as a consequence of reaching 18 and becoming a part of adult statistics (MDRI-S 2018). Some even continue to live in the same institutions, often life-long. According to the same source, this life path of persons with disabilities is a result of a poor normative framework, of the preservation of old and outdated attitudes among social care professionals and legislators, as well as low investments in the social protection system (MDRI-S 2018). Once institutionalised, 71 per cent of adults and 40 per cent of children continue to live in an institution for the rest of their lives without any serious review, in clear contradiction of international standards (MDRI-S 2019; A/HRC/40/59/Add.1: para 44).

Looking at the past 20 years, it seems that the achievements are limited and that residential care remains prevalent over family-based care. Similar to other observed countries, many children become separated from their parents and placed in institutions simply because of the lack of community-based support and services by families who are prepared to take care of their children born with disabilities (A/HRC/40/59/Add.1: para 45). During his recent visit to Serbia, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment observed that children with disabilities spend most of their time lying in cribs or metal beds with little or no human contact, except feeding, changing and weekly showering (A/HRC/40/59/Add.1: para 41). He also observed the lack of oversight and enforceable regulations regarding the use of physical restraints in institutions which might be used unnecessarily or disproportionately. A high number of cases of inhuman or degrading treatment in residential institutions indicates that children with disabilities, particularly those with intellectual impairments, are more likely to be victims of physical and sexual violence (CRC/C/SRB/CO/2-3: para 32).

Research into alternative care practices shows that, before separation, in half of the cases, no preventive gatekeeping measures whatsoever were taken (Petrušić 2019: 85). Although it should be the backbone of deinstitutionalisation, community-based support for people with disabilities in Serbia remains inadequate (CRPD/C/SRB/CO/1: para 13), lacking necessary funding and expertise to be effectively implemented (A/HRC/40/59/Add.1: para 46) even in cases when it is envisaged in legislation. In 2019 children constituted only 0,6 per cent of total beneficiaries of home assistance service (Social Protection Institute 2020). On the other hand, the use of personal assistants' service, which is rated as one of the best examples of community-based support, is increasing. Only in 2019, 1 328 children benefited from this service, presenting an increase of 49,7 per cent compared to 2018 (Social Protection Institute 2018: 53; Social Protection Institute 2020). However, community-based services often remain unavailable or insufficient at the local and municipal level (CRPD/C/SRB/CO/1: para 13) with the majority of services being offered exclusively in large cities.

## 6 Conclusion

Although some progress has been made, children with disabilities continue to be disproportionately represented among children in institutions in Albania, BiH, Bulgaria and Serbia. The UN Global Study on Children Deprived of Liberty revealed that Serbia still needs to do much given that children with disabilities constitute 77 per cent of all institutionalised children in the country. The other three countries analysed in this article, based on the Global Study findings, are doing somewhat better, with numbers being reduced to 10,2 per cent (Bulgaria); 24 per cent (Albania); and 58 per cent (BiH). A year since the publication of the Study, none of these countries, however, seem to have managed to significantly reduce the number of children with disabilities in the formal care system, thus depriving them not only of their liberty but also of their childhood and family life. Although overall numbers have decreased in Serbia, BiH and Albania, available data suggests that it was because the majority of children with disabilities simply became adults, thus excluding them from the official statistics on children. They often remained in institutions, usually even in the same institutions.

A common inherited Socialist legacy, political upheavals and economic and social adversities during the 1990s provide a socio-historical context that explains why deinstitutionalisation was so difficult in Albania, BiH, Bulgaria and Serbia. Moving from the legacy of a social welfare system that relied extensively on segregated and protective care system to a system promoting community-living and inclusion proved to be a fairly complex one. While legally committed to deinstitutionalisation, these countries often used funds to maintain or renovate institutions rather than to establish community-based support measures to families in order to efficiently prevent separation and institutionalisation. Moreover, despite the ratification of major international treaties for the protection of children, it seems that all of the observed countries continue to disregard these obligations – a fact that has also been acknowledged by the UN treaty bodies and special mandates, as well as watchdog organisations. The lack of high-quality, timely and reliable statistical data makes the situation even more disturbing.

The variety of both primary and secondary data presented in this article suggests that Albania, BiH, Bulgaria and Serbia have yet to establish adequate mechanisms to prevent the abandonment and institutionalisation of children with disabilities. An extremely high number of children with disabilities in institutions who still have one or both living parents willing to take care of them proves that poverty and inadequate support are among the main reasons behind persisting institutionalisation. Moreover, the lack of resources in the community and family support services seems to be a common characteristic throughout the SEE region. While some

community-based services have been established over the past years, they remain poorly funded, limited and concentrated in the large cities. The segregation and societal discrimination is another pressing issue, which is why these countries still need to engage in wide-range public awareness raising to combat rooted discrimination and stigma around disability in general.

Even though it might seem that Bulgaria is a pioneer in the deinstitutionalisation of children in SEE, available data suggests that the decrease in the number of children in institutions does not necessarily mean that children were placed with families. It rather suggests that they were placed in smaller group institutions that are wrongly presented as community-based formations. To that end, simultaneously with the reported decrease in numbers of children with disabilities in Bulgarian institutions, the numbers of children in group homes rose almost at the same pace. The fact that thousands of children continue to be separated from their parents every year bears evidence to the inefficiency of gatekeeping strategies in the country. The Bulgarian example shows that rather than solely closing down the institutions, the state must eliminate the need for institutions by investing in a family support network. Otherwise, large institutions will be replicated in smaller institution-like settings, failing to respect, protect and fulfil the rights of children with disabilities to live in a nurturing and loving family-based environment in line with their best interests.

Several studies reveal that the institutionalisation of children with disabilities in SEE countries often is not a measure of last resort, but the only option families have. The placement in institutions predisposes children with disabilities to specific forms of violence, and one of the best ways to prevent harm is to do everything possible to ensure that every child is supported to live with a family. In order to prevent initial family separation, targeted support must be given to those families most at risk of being unable to afford health care expenses and manage the constant assistance needed for a child with a disability. This is crucial for preventing institutionalisation, especially because the majority of children with disabilities in SEE countries, in fact, are not orphans. In addition to preventing initial family separation, it is crucial to also enhance the capacity of foster care for children whose best interests are not to remain in the nuclear family. If this is done, Albania, BiH, Bulgaria and Serbia could indeed successfully end institutional caring for children with disabilities. Otherwise, institutions will always remain the most common and optimal option and deinstitutionalisation will remain a never-ending process.

# References


Agency for Statistics of Bosnia and Herzegovina (2019) *Bosnia and Herzegovina in numbers 2019*, available at http://bhas.gov.ba/data/Publikacije/Bilteni/2020/NUM_00_2019_TB_0_EN.pdf (last visited 17 August 2020)

Axelsson C, Granier P & Adams L (2004) *Beyond de-institutionalisation. The unsteady transition towards an enabling system in South East Europe* Belgrade: Disability Monitor Initiative South East Europe

Browne K (2009) *The risk of harm to young children in institutional care* London: Save the Children UK

Bulgarian Helsinki Committee (2017) *Alternative report about the rights of persons with disabilities in Bulgaria under the Convention on the Rights of Persons with Disabilities* Sofia: Bulgarian Helsinki Committee

Bulgarian Helsinki Committee (2018) *Alternative report on the implementation of the International Covenant on Civil and Political Rights in Bulgaria* Sofia: Bulgarian Helsinki Committee

Ćerimović E (2016) *It is my dream to leave this place: Children with disabilities in Serbian institutions* New York: Human Rights Watch

Child Pact 'Bulgaria: Country Fact Sheet' (2016), available at https://www.openingdoors.eu/wp-content/uploads/2016/12/country-fiche-Bulgaria-2016.pdf (last visited 18 August 2020)

Council of Europe Commissioner for Human Rights *Report by Dunja Mijatović following her visit to Albania* CommDH (2018)

Council of Europe Commissioner for Human Rights 'Commissioner urges authorities of Bosnia and Herzegovina to investigate abuses in the Pazaric institution for children with disabilities' Statement 20 November 2019, available at https://www.coe.int/en/web/commissioner/-/commissioner-urges-authorities-of-bosnia-and-herzegovina-to-investigate-abuses-in-the-pazaric-institution-for-children-with-disabilities (last visited 19 August 2020)

Crowther N, Quinn G & Hillen-Moore A (2017) *Opening up communities, closing down institutions. Harnessing the European structural and investment funds* Galway: Community Living for Europe Structural Funds Watch

Devandas CA 'Rights of persons with disabilities: Report of the Special Rapporteur on the Rights of Persons with Disabilities (2019) A/HRC/40/54

Dimitrov M 'Bulgaria still failing isolated disabled children report (2019), available at https://balkaninsight.com/2019/11/21/bulgaria-still-failing-isolated-disabled-children-report (last visited 25 February 2020)

Disability Rights International (2017) *Comments and suggested revisions to the UN Committee on the Rights of Persons with Disabilities, Draft General Comment No 5: On the right of people with disabilities to live independently* Washington: Disability Rights International

Dixon J & Macarov D (1992) *Social welfare in Socialist countries* Abingdon/New York: Routledge

Doichinova M (2018) *From institutions to community living. Drivers and barriers of deinstitutionalisation. Case Study Report Bulgaria 2018* Vienna: European Union Agency for Fundamental Rights

Dozier M et al 'Consensus statement on group care for children and adolescents: A statement of policy of the American Orthopsychiatric Association' (2014) 84 *American Journal of Orthopsychiatry* 3

Džumhur J et al (2018) *Special report on the status of persons with intellectual and mental disabilities in Bosnia and Herzegovina* Banja Luka: Ombudsman for Human Rights in Bosnia and Herzegovina

ENIL, Validity Foundation, Centre for Independent Living, Bulgarian Helsinki Committee 'Petition to the European Parliament concerning the use of the European Structural and Investment Funds to support deinstitutionalisation of people with disabilities in Bulgaria' (2018), available at https://enil.eu/wp-content/uploads/2019/04/CILPetiton_Fin_200918.pdf (last visited 13 August 2020)

European Commission (2019a) *Albania 2019 report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy* Brussels: European Union

European Commission (2019b) *Bosnia and Herzegovina 2019 Commission staff working document: Analytical report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy* Brussels: European Union

European Commission (2020a) *Albania 2020 report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy* SWD(2020)354 final Brussels: European Union

European Commission (2020b) *Commission staff working document: Economic reform programme of Albania (2020-2022) Commission Assessment* SWD(2020) 70 final, 21 April 2020, Brussels: European Commission

Fundamental Rights Agency of the European Union 'National contribution to the Fundamental Rights Report 2020' (2020), available at https://fra.europa.eu/sites/default/files/fra_uploads/serbia-frr2020_en.pdf (last visited 13 August 2020)

Haxhiymeri E (2018) *Community-based services for children with disabilities: Best practices analysis* Tirana: Save The Children

Hope and Homes for Children (2017) *Ending institutional care: Questions and answers* Wiltshire: Hope and Homes for Children

Human Rights Council Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his visit to Serbia and Kosovo (2019) A/HRC/40/59/Add.1

Human Rights Watch 'Children behind bars: The global overuse of detention of children' (2016), available at https://www.hrw.org/world-report/2016/children-behind-bars (last visited 13 August 2020)

Ijzendoorn MHV et al 'Institutionalisation and deinstitutionalisation of children 1: A systematic and integrative review of evidence regarding effects on development' (2020) *The Lancet* DOI: https://doi.org/10.1016/S2215-0366(19)30399-2

Kilkelly U & Liefaard T (2019) *International human rights of children* Singapore: Springer Publishing

Kolevka Home for Children with Developmental Disabilities Reply to the GCSEE/ERMA questionnaire, received on 9 July 2020 via electronic mail (2020)

Kukova S (2019) *Country report on living independently and being included in the community Bulgaria* Brussels: Academic Network of European Disability Experts

Lai A (2016) *Future of an integrated child protection system in Albania* Strasbourg: Council of Europe

MDRI-S 'The recently reported deaths in social care institutions in Serbia are not isolated cases' 11 March 2019, available at https://www.mdri-s.org/press-releases/the-recently-reported-deaths-in-social-care-institutions-in-serbia-are-not-isolated-cases (last visited 18 August 2020)

MDRI-S 'The situation of children and youth with disabilities in the social protection system. Challenges and opportunities' 21 August 2018, available

at https://www.mdri-s.org/press-releases/the-situation-of-children-and-youth-with-disabilities-in-the-social-protection-system-challenges-and-opportunities (last visited 13 May 2020)

Mendez J Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez (2013) A/HRC/28/68

Mendez J Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2015) A/HRC/28/68

Mendez J (2017) *Protecting children against torture in detention. Global solutions for a global problem* Washington: Centre for Human Rights and Humanitarian Law Anti-Torture Initiative

Ministry of Health of the Republic of Bulgaria Reply to the GCSEE/ERMA questionnaire, received on 30 July 2020 via electronic mail

Ministry of Social Welfare of the Republic of Bulgaria (2020) Reply to the GCSEE/ERMA questionnaire, received on 23 July 2020 via electronic mail

Mladenov T & Petri G 'Critique of deinstitutionalisation in post-Socialist Central and Eastern Europe (2019), available at https://www.tandfonline.com/doi/full/10.1080/09687599.2019.1680341 (last visited 13 August 2020)

Mulheir G 'Deinstitutionalisation: A human rights priority for children with disabilities' (2012) *The Equal Rights Review* 9

N1 BiH 'Zastupnica objavila šokantne detalje o tretmanu štićenika u Pazariću' (Parliamentary representative revealed shocking details on the treatment of Pazarić residents) 20 November 2019, available at http://ba.n1info.com/Vijesti/a392432/Zastupnica-objavila-sokantne-detalje-o-tretmanu-sticenika-u-Pazaricu-FOTO-VIDEO.html (last visited 29 March 2020)

National Network for Children 'Bulgaria updates its Action Plan on Deinstitutionalisation' (2016), available at https://www.openingdoors.eu/bulgaria-updates-its-action-plan-on-deinstitutionalisation (last visited 18 August 2020)

National Network for Children (2016) *Report card 2016: What is the average government score for childcare?* Sofia: National Network for Children

National Network for Children (2019) *Report card 2019: What is the average government score for childcare?* Sofia: National Network for Children

National Statistical Institute of the Republic of Bulgaria 'Homes for medico-social care for children' (2019), available at https://www.nsi.bg/en/content/5606/homes-medico-social-care-children (last visited 10 August 2020)

Network of Disability Organisations Alternative Report to the UN Committee on the Rights of Persons with Disabilities on Albanian Government's Initial Report on the Convention on the Rights of Persons with Disabilities (2019), available at https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/ALB/INT_CRPD_ICO_ALB_33892_E.docx (last visited 24 August 2020)

Nowak M (ed) (2019) *United Nations global study on children deprived of liberty* New York: United Nations

Ombudsman of the Republic of Serbia (2014) *Roadmap to deinstitutionalisation in the Republic of Serbia: A possible way of implementing the process of deinstitutionalisation* Belgrade: Ombudsman of the Republic of Serbia

Ombudsman of the Republic of Serbia (2020) *Regular annual report of the Protector of Citizens 2019* Belgrade: Ombudsman of the Republic of Serbia

Petrušić N (2019) *Special report of the ombudsman: Status of children's rights in the Republic of Serbia* Belgrade: Ombudsman of the Republic of Serbia

Pinheiro PS (2006) *Report of the Independent Expert for the United Nations study on violence against children* A/61/299

Popivanova CI 'Changing paradigms in child institutionalisation: The case of Bulgaria' (2009) 48 *Journal of the American Academy of Child and Adolescent Psychiatry* 10

Rama R (2017) *Evaluation report: The rights of the child with disabilities and social inclusion* Tirana: Albanian Disability Rights Foundation

Raycheva L, Hristova K, Radomirova D & Ginev R 'Bulgaria: Childhood in transition' (2004) II *Children's Welfare in Ageing Europe* 469 Trondheim: Norwegian Centre for Child Research

Rogers J & Sammon EM (2018) *We all matter! Situation analysis of children with disabilities in Albania* Tirana: UNICEF in Albania

Rosenthal E, Ćirić Milovanović D & Ahern L (2019) *A dead end for children: Bulgaria's group homes* London: Disability Rights International

*Sarajevo Times* 'Council of Europe Commissioner for HR Dunja Mijatović condemned the way children are treated in the institution for the care of children with mental disabilities' Pazarić' 3 December 2019, available at https://www.sarajevotimes.com/council-of-europe-commissioner-for-hr-dunja-mijatovic-condemned-the-way-children-are-treated-in-the-institution-for-the-care-of-children-with-mental-disabilities-pazaric (last visited 29 March 2020)

Save the Children (2019) *Family strengthening: A collection of best practices from Eastern Europe* Tirana: Save the Children in Kosovo

Save the Children, Inter-Ethnic Initiative for Human Rights, Every Child Bulgaria, Bulgarian Helsinki Committee, Centre for Independent Living NGO Alternative Report on Bulgaria's Progress Towards EU Accession (2004), available at https://issuu.com/bghelsinki/docs/2004_ngoalternativereport_en-1- (last visited 6 August 2020)

Social Assistance Agency of the Republic of Bulgaria (2020) Reply to the GCSEE/ERMA questionnaire, received on 23 July 2020 via electronic mail

Social Protection Institute of the Republic of Serbia 'Children in the social protection system *(Deca u sistemu socijalne zaštite)* Belgrade: Social Protection Institute of the Republic of Serbia (2014), available at http://www.zavodsz.gov.rs/media/1284/deca-u-sistemu-socijalne-zastite.pdf (last visited 24 August 2020)

Social Protection Institute of the Republic of Serbia Work of institutions for accommodation of children and young people in the Republic of Serbia for 2017 (2019) Belgrade: Social Protection Institute of the Republic of Serbia

Social Protection Institute of the Republic of Serbia (2020) Reply to the GCSEE/ERMA questionnaire 340/20, received on 8 July 2020 via electronic mail

Somun-Krupalija L (2017) *Children with disabilities in Bosnia and Herzegovina: I don't think I am different* Sarajevo: World Vision Bosnia and Herzegovina

Spirov B et al (2015) *Ending institutionalisation. An assessment of the outcomes for children and young people in Bulgaria* London: Lumos

State Social Services of the Republic of Albania (2020) Reply to the GCSEE/ERMA questionnaire, received on 14 July 2020 via electronic mail

Tobis D (2000) *Moving from residential institutions to community based social services in Central and Eastern Europe and the former Soviet Union* Washington: The World Bank

UN Committee on the Rights of Persons with Disabilities (2016) Concluding Observations on the Initial Report of Serbia CRPD/C/SRB/CO/1

UN Committee on the Rights of Persons with Disabilities (2017) Concluding Observations on the Initial Report of Bosnia and Herzegovina CRPD/C/BIH/CO/1

UN Committee on the Rights of Persons with Disabilities General Comment on article 19: Living independently and being included in the community (2017) CRPD/C/18/1

UN Committee on the Rights of Persons with Disabilities Concluding Observations on the initial report of Bulgaria (2018) CRPD/C/BGR/CO/1

UN Committee on the Rights of Persons with Disabilities. (2019) *Concluding Observations on the Initial Report of Albania*. CRPD/C/ALB/CO/1.

UN Committee on the Rights of the Child Consideration of reports submitted by States Parties under article 44 of the Convention, Initial report of States parties due in 1994: Albania, CRC Committee (2004) CRC/C/11/Add.27

UN Committee on the Rights of the Child Consideration of reports submitted by States Parties under article 44 of the Convention, Initial report of States parties due in 1999: Bosnia and Herzegovina (2004) CRC/C/11/Add.28

UN Committee on the Rights of the Child Written Replies by the Government of Bosnia and Herzegovina Concerning the List of Issues (CRC/C/Q/BIH/1) Received by the Committee on the Rights of the Child Relating to the Consideration of the Initial Report of Bosnia and Herzegovina (CRC/C/11/Add. 28) (2005) CRC/C/RESP/85

UN Committee on the Rights of the Child Consideration of reports submitted by States Parties under article 44 of the Convention, Second periodic reports of States parties due in 1998: Bulgaria CRC/C/BGR/2 (2007)

UN Committee on the Rights of the Child Written replies by the Government of Serbia to the list of issues (CRC/C/SRB/Q/1) prepared by the Committee on the Rights of the Child in connection with the consideration of the initial report of Serbia (CRC/C/SRB/1) CRC/C/SRB/Q/1/Add.1 (2008)

UN Committee on the Rights of the Child Concluding Observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, adopted by the Committee at its sixty-first session 17 September–5 October 2012 CRC/C/BIH/CO/2-4

UN Committee on the Rights of the Child Concluding Observations the combined second to fourth periodic reports of Albania, adopted by the Committee at its sixty-first session 17 September–5 October 2012 CRC/C/ALB/CO/2-4

UN Committee on the Rights of the Child Concluding Observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, adopted by the Committee at its sixty-first session 17 September–5 October 2012 CRC/C/BIH/CO/5-6

UN Committee on the Rights of the Child General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1) CRC/C/GC/14

UN Committee on the Rights of the Child (2017) Concluding Observations on the Combined Second and Third Periodic Reports of Serbia CRC/C/SRB/CO/2-3

UN Committee on the Rights of the Child (2019) Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Bosnia and Herzegovina CRC/C/BIH/CO/5-6

UN Committee on the Rights of the Child (2019) List of issues in relation to the combined fifth and sixth periodic reports of Bosnia and Herzegovina: Replies of Bosnia and Herzegovina to the list of issues CRC/C/BIH/Q/5-6/Add.1

UN Department of Economic and Social Affairs (2019) *Disability and Development Report: Realising the Sustainable Development Goals by, for and with Persons with Disabilities* New York: UN

UN General Assembly (2010) Guidelines for the Alternative Care of Children, Resolution adopted by the General Assembly on the report of the Third Committee (A/64/434) A/RES/64/142

UN Human Rights Committee (2018) Concluding Observations on the Fourth Periodic Report of Bulgaria CCPR/C/BGR/CO/4

UN Human Rights Council (2012) Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary General on violence against children on prevention of and responses to violence against child juvenile justice system A/HRC/21/25

UNICEF (2002) *MONEE Country Analytical Report 2002: Children and disability in Albania* Tirana: UNICEF

UNICEF (2012) *Children under the age of three in formal care in Eastern Europe and Central Asia: A rights based regional situational analysis* Geneva: UNICEF

UNICEF (2017a) *Annual Report 2017 Bosnia and Herzegovina* Sarajevo: UNICEF Bosnia and Herzegovina

UNICEF (2018a) *Everybody counts: A situation analysis of the inclusion of children with disabilities in the Western Balkans and Turkey* Geneva: UNICEF

UNICEF (2018b) 'Data on the children with disabilities in Bulgaria and around the world: How to overcome the challenges', available at https://www.unicef.org/bulgaria/en/data-children-disabilities-bulgaria-and-around-world (last visited 13 August 2020)

Voko K & Kulla F (2018) *Child disability in Albania: Disability prevalence, access to services and quality of services study report* Tirana: Save the Children, World Vision

World Bank 'Poverty headcount ratio at national poverty lines (% of population) - Bosnia and Herzegovina' (2015), available at https://data.worldbank.org/indicator/SI.POV.NAHC?locations=BA (last visited 29 October 2020)

World Vision Albania, Albanian Disability Rights Foundation (2019) *Monitoring the National Disability Action Plan (2016-2020) Summary* Tirana: WVA/ADRF

G Gadisa, O Sibanda, K Vries & C Rono 'Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa' (2020) 4 *Global Campus Human Rights Journal* 403-423
http://doi.org/20.500.11825/2038

# Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa

***Girma Gadisa,* Opal Sibanda,** Kelvin Vries*** and Carolyne Rono*******

**Abstract:** *This article examines the laws and practices in Angola, Malawi and South Africa regarding the migration-related detention of children in light of international human rights standards. Detaining a migrant child is in conflict with article 37(b) of the Convention on the Rights of the Child, namely, that detention of a child should be used as a the measure of last resort and for the shortest appropriate time, the principle of the best interests of the child and the right to development. At the African Union level, the African Charter on the Rights and Welfare of the Child serves as the primary human rights instrument that comprehensively guarantees children's rights. The countries in the case study have ratified both CRC and the African Children's Charter. Nevertheless, children are deprived of liberty in Southern Africa, with Malawi serving as a transit country and South Africa and Angola mostly as destination countries. While Angola and Malawi lack adequate legal and effective protection of migrant children, South Africa has put in place robust legal guarantees, but in practice migrant children are nevertheless detained. Thus, the article suggests that these countries need to adopt and implement comprehensive child protection policies including alternatives to detention with a view to ensuring improved respect for children's rights. Furthermore, it emphasises the need for enhancing regional cooperation to curb the problems that children are facing in relation to migration and beyond. Most importantly, states must show the political will not only to adopt protective laws but also to effectively implement these laws in order to create a safer world for children.*

**Key words:** *children; migration; detention; liberty; Southern Africa*

* Student on LLM (Human Rights and Democratisation in Africa); girmajm@gmail.com
** Student on LLM (Human Rights and Democratisation in Africa); sibandaopal@gmail.com
*** Student on LLM (Human Rights and Democratisation in Africa); vrieskelvin@gmail.com
**** Student on LLM (Human Rights and Democratisation in Africa); carolrono92@gmail.com. This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

## 1 Introduction

It is a reality that millions of children are living behind bars and in different forms of deprivation of liberty. The United Nations Global Study on Children Deprived of Liberty (UN Global Study) indicates that more than seven million children are deprived of liberty per year (Nowak 2019: XI). According to this study, children are deprived of liberty on national security grounds; for migration-related reasons; in the administration of justice context; in the context of armed conflict; in prisons with their incarcerated primary caregivers; and because of their being kept in institutions.

The deprivation of the liberty of children is a serious violation of children's rights as it not only violates the right to liberty but also affects the enjoyment of a multitude of other rights, the reason being the interdependence and indivisible nature of human rights, including children's rights (Vienna Declaration and Programme of Action 1993: paras 5 and 18). Moreover, the enjoyment of civil and political rights cannot be dissociated from economic, social, and cultural rights (African Charter Preamble, para 8). For instance, children deprived of liberty are prominent due to the high prevalence of physical and mental health problems (Kinner et al 2019: 2). If education facilities are not provided in detention centres where a child is detained, it impedes the right to education of the child. Thus, the deprivation of the liberty of children has many negative ramifications, hence requiring special attention from all the duty bearers.

In 2017 there were approximately 258 million migrants globally of which 30 million were below the age of 18 years. While children thus constitute 12 per cent of this figure worldwide, their percentage is higher in Third World countries. In more developed states children make up approximately 9 per cent of the population, but in 'less developed states', of which African states form part, children constitute 21 per cent of international migrants (UNICEF 2018). West and East Africa have the largest share of child migrants. In 2017 Angola hosted 302 000 while South Africa hosted 642 000 migrant children (UNICEF 2019). In the same year it was also recorded that as regards refugees in Africa, more than half of these are children. These numbers illustrate the magnitude of the phenomenon of child migration in the African context. The drivers of migration may be classified into three broad categories, namely, conflict and insecurity; illegal activities; and economic and social drivers (African Committee of Experts on the Rights and Welfare of the Child 2018: 39-40). In a recent survey conducted by the United Nations Children's Fund (UNICEF), children were asked about some of the reasons why they migrate. The most prevalent reasons were related to fleeing violence, persecution and war. Other drivers included the search for economic opportunities, education, and family reunification (UNICEF 2017: 15). As

long as violence, conflict and poverty are prevalent on the continent, it will give rise to causes of child migration.

Most African countries have adopted punitive measures to prevent displaced populations from making asylum claims, including the incarceration of children in immigration detention facilities. Angola is among the top ten countries in the world hosting the highest number of migrants under the age of 18 years (UNICEF 2019: 1). In Malawi, children can be held in prisons for periods that range between three and eight months, and these children are not always held separately from adults. Similarly, despite government denial, there have been reports that children are detained in South Africa. The detention can last for periods of up to one month, in poor living conditions, and together with adults (Global NextGen Index 2018).

The consequences of child migration are vast and drastic. Children who migrate are vulnerable to violations of their rights as they are often detained in inhumane living conditions, impeding their right to health. Furthermore, such children are often deprived of their right to education, adequate housing, food, clean water, and other basic amenities of life. Depriving children of their liberty for immigration-related reasons thus poses a serious threat to their well-being.

The focus of this article is the situation of children deprived of liberty for migration-related reasons in Southern Africa. It starts by giving an overview of the international and regional legal framework on children's rights to freedom from detention. As case studies, the article focuses on the situation of children in migration-related detention in Angola, Malawi and South Africa. Finally, the article provides some recommendations for stakeholders. The case study region, Southern Africa, and the specific countries in the region (Malawi, Angola and South Africa) are selected based on poor conditions of detention and the high number of children deprived of liberty for migration-related reasons. Malawi and South Africa have a shared English common law legal heritage while the inclusion of Angola represents Lusophone Southern Africa.

The article is the product of desk-based research. The research relies heavily on primary sources of law, including international treaties and soft law, and domestic legislation of the countries selected for the case studies. At this level, the study examines whether states comply with the constitutional and legislative ruling that children may be deprived of their liberty only as a measure of last resort and for the shortest period of time. This research also relies on court judgments and secondary sources such as textbooks. The same applies to General Comments of treaty-monitoring bodies on the general prohibition of the detention of children, which constitute authoritative interpretations of commitments under the respective international and regional human rights instruments. Reports of

non-governmental agencies working in the field of migration are further consulted to augment the findings of the UN Global Study.

## 2 International legal framework governing migration-related detention of children

This part deals with children's rights to liberty as provided for under United Nations (UN) and African Union (AU) human rights instruments. Some of these instruments are of general application and provide for everyone's right to liberty without specific reference to children, including the Universal Declaration of Human Rights (Universal Declaration), the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR). Other treaties are dedicated to children's rights and therefore contain specific provisions that protect every child's right to liberty, such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

### 2.1 Instruments of general application

Everyone has the right to life, liberty, and the security of person (article 4 Universal Declaration; article 9 ICCPR; article 6 African Charter). Thus, the right to liberty guaranteed to everyone is equally applicable to children in the context of migration, especially given that international instruments prohibit discrimination based on many grounds, including age. ICCPR further prohibits arbitrary arrest or detention (Macken 2005: 1). The Human Rights Committee noted that 'children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time' (General Comment 35 para 18). If a state detains a child as a measure of last resort, then it must ensure that the detention takes place in appropriate, sanitary, non-punitive facilities and should not take place in prisons (General Comment 35 para 18). Moreover, in dealing with matters concerning migrant children, it is necessary to take into account the best interests of the child and the extreme vulnerability and need for care of unaccompanied minors (General Comment 35 para 18). Migrant children often spend many days in pre-trial detention. ICCPR specifies that pre-trial detention has to be an exception, not the rule (article 9(3) ICCPR). Pre-trial detention of juveniles should be avoided to the greatest extent possible (General Comment 35 para 18). Furthermore, accused children have to be separated from adults and brought for adjudication as soon as possible, preferably within 24 hours (article 9(2)-(3) ICCPR; General Comment 35 para 33).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) is another important treaty for the protection of children's

liberty in the migration context. It applies to both documented migrants who have complied with the legal requirements of the state of employment and undocumented or irregular migrants. Article 17(4) of the Migrant Workers Convention provides that 'juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status'. Moreover, the Convention urges state parties to pay attention to the problems that imprisonment or detention of one family member causes to the rest of the migrant family (article 17(6) Migrant Workers Convention). One such instance requiring attention is where the mother of a new-born child is arrested or convicted. In such cases, the authorities are expected to refrain from detaining the mother since it is not in the best interests of the child. Although there is no comprehensive protection under the Migrant Workers Convention, the Convention pays attention to the interests of migrant workers' children in matters that affect their liberty and that of their family members.

### 2.2 Child-specific instruments

Child-specific instruments are treaties fully devoted to protecting children's rights, such as CRC and the African Children's Charter. With 196 state parties as of December 2020, CRC is one of the human rights instruments that enjoy near-universal ratification (United Nations Treaty Collection). It is the most comprehensive international treaty pertaining to children and is considered a critical milestone in the legal protection of migrant children (Connelly 2015: 55). Similarly, the African Children's Charter is a comprehensive regional instrument in as far as the rights of children in Africa are concerned. It responds to the realities and unique issues of the children on the African continent. CRC and the African Children's Charter contain provisions that protect children's rights in a migratory context.

The CRC Committee has set out four core principles for the interpretation and implementation of the provisions of CRC. These principles are non-discrimination (article 2(1) CRC); the best interests of the child (article 3(1) CRC); the right to survival and development (article 6(2) CRC); and the views of the child (participation in all matters concerning children) (article 12(1) CRC). The African Children's Charter imitates CRC's four basic principles of children's rights and the same is elaborated in General Comment 5 adopted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) (articles 3, 4, 5 & 7 African Children's Charter). In all matters concerning children, states are required to give effect to these principles.

Article 37 of CRC prohibits unlawful and arbitrary deprivation of the liberty of the child. Further, it provides that arrest and detention of a child should be used as a measure of last resort and for the shortest appropriate period of time (article 37(b) CRC). Detention as a measure of last resort

requires states to adopt more than one other resort (Smyth 2019: 11). In other words, states are prohibited from detaining children without making efforts to use other measures, such as restorative justice and diversion mechanisms (United Nations Secretary-General 2008: 3). States have to use guidance, supervision orders and community-monitoring mechanisms before resorting to detention (General Comment 24 para 19). Detention is permitted only when the other measures are proven ineffective to ensure the best interests of the child in the given circumstances.

The CRC Committee and the UN Migrant Workers Committee in their joint General Comment have clearly stated that in the migration context, the detention of children 'would conflict with the principle of the best interests of the child and the right to development' (Joint General Comment 4 & 23 para 10). In addition, 'detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status' (Joint General Comment 3 & 22 para 3). Thus, no reason can be used as a justification to detain a migrant child. In cases of family migration, the best interests of the child must be determined on a case-by-case basis (General Comment 14 para 32). When it is in the best interests of the child to keep a family together, the authorities are required to use non-custodial alternatives (Joint General Comment 4 & 23 para 11). Furthermore, in the context of international migration, children's double vulnerability as children and as individuals affected by migration has to be taken into account (General Comment 14 para 32).

The African Children's Charter provides that state parties have the obligation to extend appropriate protection and assistance to refugee children or children who are seeking refuge irrespective of whether or not they are accompanied (article 23(1) African Children's Charter). The protection or assistance should be in line with the four fundamental principles. While the African Children's Charter requires state parties to separate children from adults in detention facilities, this should not be construed to mean that the Charter is encouraging the detention of children (article 17(2)(b) African Children's Charter). Furthermore, the African Children's Committee urges state parties to adopt a system-strengthening approach to protect the most vulnerable children, such as (unaccompanied) migrant children, orphaned children and children with disabilities (General Comment 5 sec 6(1)). System strengthening in child protection refers to 'identifying, establishing and strengthening the (coordinated) response to violations relating to abuse, neglect, maltreatment and exploitation' (General Comment 5 sec 6(1)).

In 2018 the African Children's Committee also conducted a study titled 'Mapping children on the move in Africa'. The Children's Committee found that many African states detain children for migration-related reasons (ACERWC 2018: 77-78) and noted the inadequacy of the legal

framework in responding to problems faced by children on the move (ACERWC 2018: 86). The gap in the legal framework has also resulted in institutional weaknesses and ineffective responses to the needs of migrant children (ACERWC 2018: 86). Further, the study underlines the lack of coordination among security services, child protection services and other government bodies (ACERWC 2018: 87). The lack of regional coordination is another difficulty that is exacerbating the problems of migrant children. The African Children's Committee emphasised the need for transit and destination states to set up institutions, comprehensively document information on children on the move and pay special attention to unaccompanied children (ACERWC 2018: 92).

## 3 Case studies: Angola, Malawi and South Africa

### 3.1 Causes of migration-related detention

According to UNICEF, Africa has the largest share of children among its migrant population – more than one in four immigrants in Africa is a child, more than twice the global average (UNICEF 2017). This is aptly reflected in human rights reports, for instance, in Angola where it was reported that in 2017 more than 32 000 Congolese, primarily women and children, fled the Kasai region to the Lunda Norte province in Angola (Human Rights Report 2018: 15). Reports also indicate that South Africa housed 642 000 migrants under the age of 18 in 2017 alone (UNICEF 2017).

Generally, children, whether accompanied or unaccompanied, migrate due to a number of reasons such as the search for better opportunities, reunification with families, while some are escaping violence, a lack of access to health, education and other basic needs, insecurity, natural disasters, or environmental degradation (Nowak 2019: 433). Migration to Angola generally is due to economic reasons as migrants are drawn by natural resources, economic growth, political stability and porous borders (UN Special Rapporteur on the Human Rights of Migrants 2017: 3). In 2018 UNICEF reported that part of the expelled Congolese migrants working in Angola's informal mining sector were children aged 13 and 14 years, an indication of the economic factors that push children to migrate (Schlein 2018).

As far as Malawi is concerned, the route is popular as it reduces the risk of detention compared to a journey through Kenya. The number of persons passing through Malawi has been on the rise because other states such as Mozambique have imposed stricter border control and other regulations governing undocumented immigrants (News 24 2015). Ethiopian immigrants detained in Maula prison testified that they were on their way to South Africa in search of job opportunities (MSF Malawi 2015). Migration to South Africa, on the other hand, is attributed to the

fact that the country is seen as an economic powerhouse in a region that is characterised by high levels of poverty and inequality, thereby becoming a magnet for migrant children (UNICEF 2017). For example, faced by the lack of opportunities in their countries due to protracted conflicts, some children migrate south, mainly to South Africa, in search of a better life or education (ACERWC 2018: 43). Looking at economic and social drivers as key reasons for child migration in Zimbabwe, for instance, the economic crisis, poverty and the lack of basic necessities of life, such as food, have led to a massive influx of children to South Africa, leading UNICEF to equate the situation to a humanitarian emergency (UNICEF 2017).

Countries regulate the terms of entry and residence of people in their territories. However, in their responses particularly to irregular migrants, countries adopt a security-based approach which includes criminalising irregular entry and stay, while using detention to punish immigrants and deter irregular migrants (Nowak 2019: 433). As a result, children are detained for their own migration status or their parents' migration status, contrary to international standards (Nowak 2019: 433). As will be fully discussed in the next parts, Angola, Malawi and South Africa, like other countries, carry out immigration detention as a measure for combating irregular migration, for both adults and children. The migration of children to these countries may result in immigration-related detention as these children travel without documentation. Such an increase in the number of undocumented migrants has resulted in countries wanting to control migration, including the use of detention (International Detention Coalition 2012: 12). Children are not spared in the process. In Angola, for instance, irregular or undocumented migrants are detained prior to deportation (Chico 2020: 239) leading to the detention of undocumented children.

The leading cause of the detention of migrant children in Malawi is because Malawi is a transit country for migrants who are migrating to South Africa from other regions (ACERWC 2018: 63). Nevertheless, the route through Malawi does not guarantee arrival in South Africa and often results in the detention of migrant children in Malawi. This may result in the detention of children, despite the fact that Malawi has put in place laws that prohibit the detention of children for any reason, including migration-related detention. The same applies to South Africa where, despite having in place robust legal measures for the protection of migrant children, particularly the prohibition of detention of migrant children, in practice irregular migrant children are still detained in the process of enforcing immigration laws (Nowak 2019: 457). This indicates the impact of restrictive migration practices in Angola, Malawi and South Africa on migrant children whose rights end up being infringed upon due to a deprivation of liberty.

### 3.2 Legal frameworks relating to migration-related detention

This part assesses the domestic legal framework governing migration-related detention of children and the manner in which said laws are applied to migrant children. It will articulate and point out what guarantees are offered by the Constitution; the Children's Act and the Refugees Act in Angola, Malawi and South Africa.

The Constitutions of both Angola and Malawi contain some provisions that attempt to offer protection to migrant children. This is seen in section 80(3) of the Constitution of Angola which refers to the principle of 'children deserving of attention' and 'special protection' of children who are deprived of a family environment. However, it falls short to provide for the detention of children as a measure of last resort and for the shortest period and or integrating the principle of the best interests of the child. This is in contrast to Malawi's Constitution wherein the rights of children are entrenched in its Bill of Rights (article 23 Malawian Constitution). With regard to the protection of children, article 23(1) of the Malawian Constitution states that 'all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law'. It further provides that legal proceedings should reflect the vulnerability of children while fully respecting human rights and legal safeguards (article 42(2)(g)(vii)). Furthermore, a child may only be detained as a measure of last resort and for the shortest period of time (article 42(2)(g)(iii)) consistent with article 37 of CRC.

Perhaps the most progressive among the two countries with regard to the protection of migrant children is South Africa as most of the rights set out in the Constitution are not exclusively applicable to South African citizens, but extend to all foreign nationals living within its borders, including foreign migrant children (Schreier 2011: 64). Section 9 of the Constitution provides that the state shall not discriminate directly or indirectly against anyone on one or more grounds including social origin or birth. This provision, therefore, prohibits discrimination against migrant children. Section 28(1)(g) offers protection to migrant children by providing that children have a right not to be detained except as a measure of last resort. Thus, if it is necessary for a child to be detained, it should be for the shortest period of time and the conditions under which the child is detained must keep in line with the child's age. It goes a step further by providing alternatives to detention such as finding appropriate alternative care, so that detention should not be undertaken at all. Migrant children are also protected under section 28(1)(b) which provides for every child's right to parental or family care or to alternative care when removed from their parents. Further, they are guaranteed the right to be protected from maltreatment, neglect and degradation (section 28(1)(d) of the Constitution).

The Angolan Children's Act, the Child Care and Protection and Justice Act of Malawi 22 of 2010 (CCPJA) and the Children's Act of South Africa 38 of 2005 all provide for the principle that the detention of children should be used as a measure of last resort. Article 46 of the Angolan Children's Act provides that the detention of children should be a measure of last resort and in line with international standards. However, as it does not specifically make reference to migrant children who might arbitrarily be arrested and detained, one might only infer that this protection extends to migrant children. The CCPJA of Malawi provides that a child shall not be detained prior to a hearing unless certain conditions are fulfilled by the Director of Public Prosecutions and if such detention is authorised, it must be in a safe home (section 95(1)(2) CCPJA). Further, the Act states that following prosecution, children may not be imprisoned for any reason, including migration (section 140 CCPJA). Furthermore, the Act introduces guidelines for the arrest of a child. An arresting officer may not use any physical abuse or harassment and a child in detention must be separated from adults where possible (section 90 CCPJA).

The Children's Act of South Africa in section 9 goes a step further by providing that in all matters concerning a child, the child's interests must be of paramount importance. Section 7 makes provision for a list of factors to be considered when determining the best interests of the child, which include the need for the children to remain in the care of their parents and/or maintain a connection with their family. Furthermore, section 150 of the Children's Act points out that a child is in need of protection if he or she has been abandoned or orphaned and has no visible means of support. However, there is no specific mention of migrant children, who are most in need of care and protection by the state. Fortunately, the Department of Social Development has contended that specific mention of migrant children was not necessary because the legislation applies to all children.

The Law on the Legal Status of Foreigners (Foreigners Law) in Angola provides for immigration control including grounds for immigration-related detention. It makes detention compulsory when foreign nationals are denied entry or when they are subject to judicial expulsion after being found to be undocumented. This is stipulated in articles 30(2) and 33(1) which provide for the detention of foreigners at the detention centre for illegal foreigners pending the enforcement of an expulsion order. The same applies to undocumented foreigners (article 104(3)). In all cases, irregular migrants are detained prior to their removal from Angola to their country of origin or of habitual residence. It is important to note that this law does not protect children from detention. Furthermore, article 29(3) guarantees refugees the most favourable treatment under the law or international agreements to which Angola is a state party. Although this law does not explicitly mention the expulsion and treatment of children, the provisions

can be interpreted to mean that children, as vulnerable groups, should not be expelled from Angola as their lives might be in danger.

In Malawi, the Refugee Act of 1989 of Malawi specifically prohibits the expulsion of refugees from Malawi where their lives or freedom may be threatened. This protects migrant children who may be fleeing from their home country for conflict-related reasons. It also allows migrants to apply for refugee status, which in turn provides for better protection under the law. Further, Malawi is a state party to the 1951 UN Convention Relating to a Refugee's Status (1951 Refugee Convention) and, therefore, has assumed certain obligations towards refugees. This includes that persons identified as refugees are entitled to rights and protections afforded under the 1951 Convention including the right not to be returned to a country where they face threats to their lives or freedom, the right to education, work and housing. In South Africa, the Refugees Act (Act 130 of 1998) provides for the definition of who qualifies to be a refugee under sections 3(b) and (c). Further, section 3(c) of the Refugees Act is relevant to migrant children as it allows these children to obtain refugee status if the person on whom the child is dependent is granted refugee status. This provision gives effect to the principle of family unity and allows for the refugee family to seek protection together in South Africa (Ackermann 2016: 11). More importantly, the decision in ***Mubake v Minister of Home Affairs*** has extended this definition to include separated children in the care of other asylum seekers such as relatives who are not their parents.

Section 32 of the Refugees Act of South Africa goes further to provide that a child who qualifies to be a refugee as per section 3 and is found in circumstances that indicate that he or she needs care, can be brought before the Children's Court in the district where he or she is found. The Court may then order that the child be assisted in seeking asylum (Refugees Act section 32(2)). Although section 32 does not mention the aspect of unaccompanied children, it draws attention to the care aspect of children seeking asylum. Further, the Refugees Act seeks to ensure that children are not separated from their parents by the mere fact of granting a refugee status to one of them. In other words, it prefers granting a refugee status to the family as a unit rather than granting it to the child alone and separating him or her from parental care.

### 3.3 The practice in Angola

Angola is among the top ten countries in the world that have the highest number of migrants who are under the age of 18 years (UNICEF 2019). As of 2017, Angola hosted 302 000 migrant children (UNICEF 2019). Angola is among other states that are adopting increasingly punitive measures to prevent displaced populations from making asylum claims, which may include the incarceration of children in immigration detention facilities (Fazel et al 2014: 313).

According to the Angolan Immigration Detention Profile, the country has put in place a policy of deporting undocumented migrants. The justification is that such deportation is done for security reasons as the number of illegal migrants is high and these are part of a silent invasion (Immigration Detention Profile 2016: 1). As a result, Angola has set up several immigration detention facilities where migrants are detained in harsh conditions awaiting deportation. Children form part of the number of detained migrants although there are currently no statistics on the number of children detained in Angola.

According to a report of the UN Special Rapporteur on the Human Rights of Migrants, undocumented migrants, asylum seekers and refugees, including children, are usually harassed by police officers in Angola. During operations in search of undocumented migrants, violence, intimidation and the destruction of valid identity documents are common. Immigrants and asylum seekers, including pregnant women and children, are regularly arrested and detained in large numbers without access to legal information or assistance (UN Special Rapporteur 2017: 11). It has also been indicated that in some areas such as the Trinta Detention Centre, children are detained in large groups. In some instances, young children are kept with their mothers while older male children are placed with adult males (UN Special Rapporteur 2017: 12).

In 2018 UNICEF reported that more than 80 000 children were among the Congolese migrants expelled by the Angolan government (Schlein 2018) in violation of article 29(4) of the Foreigners Law. These children were sent back to their country where ethnic tensions had led to conflicts. They had to walk for long distances, with little or no access to water and food and were prone to abuse.

The widespread detention and expulsion of migrants were also noted by the African Commission on Human and Peoples' Rights (African Commission) in the case of ***Institute for Human Rights and Development in Africa v Angola*** ((2008) AHRLR 43 (ACHPR 2008)) brought by Gambians, in which a large number of migrants were arrested and detained before expulsion. The Commission held that Angola had infringed legal provisions of the African Charter by arresting, detaining and expelling the migrants. It is also important to note that in delivering its judgment, the Commission highlighted the fact that this was not the first case in which the Commission found similar human rights violations of foreigners. This is an indication of the continuous detention of migrants before expulsion which also affects migrant children in Angola.

### 3.4 The practice in Malawi

The UN Global Study found patterns of Malawi detaining children for immigration-related reasons (Nowak 2019: 456). While the number of

children detained in Malawi is relatively low, Malawi has received a low score of 32 (out of 100) on the Global NextGen Index with regard to the protection of the liberty of children (Global NextGen Insex 2018: 2). Statistics related to migrant children in Malawi are rarely published and, therefore, it is difficult to measure the extent of the problem (Global NextGen Insex 2018: 3). The available data, however, is testimony to horrific living conditions for immigrants, including children, detained in Malawi.

Children detained in Malawi can be held in prisons for periods that range between three and eight months and these children are not always held separately from adults. The country report of Malawi on human rights practices by the United States Department of State showed that 'several hundred irregular migrants as young as 13 were held with the general prison population even after their immigration-related sentences had been served' (US Department of State 2018: 3). There have also been reports that the Malawian government does not have sufficient funds to deport children back to their countries of origin. In 2015, for example, the government was unable to deport some 40 children held in Kachere Juvenile Prison due to financial constraints (***Sunday Times*** (2016)). The consequence is that these children are detained indefinitely in centres in inhumane and degrading conditions deprived of their rights to liberty, education, health facilities, and adequate food and housing.

The Child Care, Protection and Justice Act provides that children may not be imprisoned for any offence including migration-related offences. However, there is a lack of implementation in this regard. 'Courts continue to issue orders to transfer children to reformatory centres for the purposes of immigration detention' (Global NextGen Index 2018: 2). Furthermore, the same Act provides for conditional placement of children and families including migrants. There are, however, barriers to the full realisation of this measure. As a result of insufficient infrastructure and a lack of state resources, conditional placement is often limited and cannot accommodate all the cases (Global NextGen Index 2018: 3).

Access to education and health facilities for migrant children in detention is severely limited in Malawi. The juvenile prison of Kachere has an in-house school. However, due to language barriers and large scales of detention, migrant children are denied the right to education. As a result of barriers such as transportation, referrals and language, access to health facilities is limited (Global NextGen Index 2018: 3). Yet, there have been improvements in the treatment of migrants especially for those with medical conditions (US Department of State 2018: 5).

Care plans are an essential element in ensuring that the best interests of children are considered while detained. Every child should have a care plan that caters for their individual needs throughout their placement and

these should include migrant children. Malawi has regulations that require a regular review of care plans. However, this is rarely adhered to with only 9,2 per cent of children having care plans, and only 2,3 per cent of children having their care plan reviewed (Nowak 2019: 534-535).

### 3.5 The practice in South Africa

According to the UN Global Study questionnaire, South Africa submitted that it has national legislation prohibiting immigration-related detention of children and, as such, they do not detain children for migration-related reasons (Nowak 2019: 457). However, according to a report by Doctors Without Borders (MSF) it was revealed that dozens of children are still being illegally detained at South Africa's repatriation centre in Lindela (South African Human Rights Commission 2017). However, the exact statistics of detained migrant children are unknown. This is attributed to the fact that there is a lack of proper documentation of children who migrate to South Africa. Predominantly, immigrants hail from Zimbabwe, Mozambique, the Democratic Republic of the Congo (DRC), Angola, Somalia, Rwanda and Malawi, many of whom come to South Africa in search of economic opportunities or have fled conflict and persecution in their countries or regions (Alexandra 2017: 1).

Despite the comprehensive legal protection of migrant children, South Africa has continued to use detention as the primary tool of enforcing immigration law, including the detention of migrant children (Lawyers for Human Rights 2008). The South African Human Rights Commission found the persistent occurrence of arrest and detention of unaccompanied minors at police stations (whether or not classified as places of detention) and at Lindela (South African Human Rights Commission 2017). Further, the police do not exercise caution when arresting and detaining persons who may appear to be minors, although they are classified as children in terms of South African law (South African Human Rights Commission 2017).

In practice, the detention of children normally occurs at a military base near Musina, commonly known as SMG, and the infamous Lindela repatriation centre. The Lindela detention facility was established in 1996 as an immigration detention facility and is administered on behalf of the Department of Home Affairs (DHA) by a private company, Bosasa (Pty) Ltd (Alexandra 2017). Doctors Without Borders (MSF) found that unaccompanied minors are being illegally detained at Lindela in terms of current age-determination practices, which are insufficient and inappropriate (Alexandra 2017: 8). Further, arresting and immigration officers only request the Department of Social Development to conduct age assessments when civil society organisations or the South African Human Rights Commission intervenes (Alexandra 2017: 8). This situation of children at Lindela centre was further elucidated in the case of ***Centre***

***for Child Law v Minister of Home Affairs & Others*** as a result of several unaccompanied foreign children being detained together with adults for lengthy periods of time at the facility facing deportation. On the recommendation of the curator ***ad litem***, who was appointed on behalf of the children, the children were transferred to a place of safety pending finalisation of their Children's Courts inquiries. The Court firmly held that South Africa has a direct responsibility to protect unaccompanied foreign children. The Court further stated that a crisis existed in the handling of unaccompanied foreign children in South Africa since they were treated in a horrific manner, exacerbated by insufficiency of resources, inadequate administrative systems and procedural oversights (***Centre for Child Law v Minister of Home Affairs*** 2005).

In addition, there are no regular, systemic monitoring and oversight mechanisms in place to ensure that authorities actually comply with the regulatory framework on the protection of migrant children. The South African police further experience institutional challenges such as lack of training, knowledge and understanding of the relevant regulatory framework on how they should deal with migrant children. This hinders their efforts to comply with human rights standards when it comes to dealing with migrant children. Moreover, the Lindela detention centre has no complaints mechanism by which detained children can lodge complaints for being detained for long periods or with adults not related to them (Alexandra 2017: 12).

## 4 Alternatives to detention

An alternative to detention is a principle that applies not only to children but generally to all people in migration contexts. It refers to 'any law, policy or practice that allows people to live freely in a community setting while waiting for their immigration status to be resolved' (International Detention Coalition 2015: 7). Alternatives to detention provide children with non-custodial measures which include 'a range of options such as supported community placement, including placement with host families, bail schemes to ensure compliance with immigration proceedings or reporting requirements or schemes whereby guarantors or sponsors agree to support the care and supervision of a migrant family in the community' (UNICEF 2019: 1).

The importance of alternatives to detention is heightened in the context of migration-related detention of children because of the principle of last resort. In accordance with this principle, the detention of children can never be justified. As indicated in the previous part, despite the legal frameworks that provide for alternatives to detention in all three jurisdictions, the detention of children persists. In Malawi, for example, courts continue to transfer children to reformatory centres for the purpose

of migration-related detention (Global NextGen Index 'Malawi' 2018: 2). Sending children to reformatory centres is based on the assumption that they need to be reformed, when the reality is that children on the move are victims of the system that need utmost protection.

Implementing alternatives to immigration detention requires, among other things, diverting resources dedicated to detention to non-custodial measures and institutions so that the latter are capacitated for engaging with children and responding to the needs of children on the move (Joint General Comment 4 & 23 para 12). Moreover, in the process of placing children in non-custodial settings, it is imperative to take into consideration 'the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions' (Joint General Comment 4 & 23 para 12). Therefore, it is necessary for Angola, Malawi and South Africa to invest more in alternatives to detention for a better realisation of the rights of children on the move.

## 5 Conclusion

There are several similarities and differences in the way in which Angola, Malawi and South Africa have responded to the detention of children for migrated-related reasons. To begin with, the countries are all state parties to child-specific UN and AU human rights instruments such as CRC and the African Children's Charter, and are thus required to protect the rights of migrant children. Therefore, all three states are bound by identical obligations under international law. These instruments provide for the four core principles that must guide the treatment of children in all circumstances, including detention.

The extent to which Angola, Malawi and South Africa comply with their obligations differ due to the circumstances that prevail in the respective countries. Notably, a high number of migrant children are detained in Angola and this can be attributed to the non-implementation of laws that protect children from detention, and the lack of alternatives to detention of children. Further, there is no law specifically protecting migrant children and prohibiting their detention. Although national laws make reference to the protection of children, in practice, authorities exploit and oppress migrant children by placing them in detention. There is, therefore, a need for Angola to enact laws that explicitly prohibit the detention of migrant children and protect their rights. Such laws must be effectively implemented to ensure the protection of migrant children.

Malawi has ratified many of the international treaties that protect migrant children (see Table 1 for case study countries' ratification status of some of the relevant human rights instruments). The country should further look towards ratifying the Migrant Workers Convention. As seen

with the treaties Malawi has already ratified, however, mere ratification is unlikely to be enough. Malawi must adopt strong mechanisms that ensure the proper implementation of international obligations and domestic law relating to the prevention of migrant child detention. This can be achieved through the greater investment of resources into the child welfare system as well as the child justice system. Malawi has specifically undermined the importance of the Child Care, Protection and Justice Act, which prohibits the detention of all children under the age of 18 years for any reason, including migration-related reasons. Migrant children still find themselves detained and the state should take all measures to ensure that children are not detained arbitrarily. The country can achieve this by implementing alternatives to detention, including community placement and foster care as well as prioritising children in budget allocations (Global NextGen Index 2018: 3). The government can further formulate national development plans that clearly aim to significantly reduce the number of children deprived of liberty.

South Africa has an adequate constitutional and legislative framework for the protection of migrant children. However, the Children's Act does not explicitly mention migrant children as being in need of care and protection owing to the vulnerabilities that accompany migration. The lack of implementation of national and international laws that bind South Africa is one of the gaps that have to be addressed if children deprived of liberty for migration-related reasons are to enjoy their rights. As demonstrated above, migrant children continue to be detained together with adults for lengthy periods of time and in deplorable conditions. Consequently, South Africa needs to ensure that law enforcement officials comply to the maximum extent possible with the laws that are meant to protect migrant children.

As is evident from the article, the reasons for detention differ in each country. In Malawi the primary cause for detention is its status as a transit country, while in South Africa and Angola detention is used as a tool for enforcing immigration laws. Furthermore, the principle of detention of children as a measure of last resort has been domesticated in the Constitutions of Malawi and South Africa, and through legislation in Angola. Ordinarily, constitutional inclusion of a particular right provides better protection because of the principle of constitutional supremacy. The evidence in this article suggests that the detention of children for migration-related reasons in Angola is far more prevalent than in Malawi and South Africa. While there is a range of explanations for this, one such reason can be tied to the lack of constitutional protection of children against detention. Although all three countries have substantive legislation on the protection of children against detention in general and migration-related reasons in particular, the lack of implementation mechanisms acts as a nullifier.

## 6 Recommendations

Against this background the article suggests the following recommendations for Angola, Malawi and South Africa to realise their state obligations concerning children deprived of liberty in the context of migration.

Angola should draw on experiences from Malawi and South Africa and expressly provide for the prohibition of detention of children in its Constitution. Malawi should intensify efforts to protect, respect and fulfil the rights of all children, including the rights of migrant children as provided for in the Malawian Constitution. It should develop strong mechanisms to ensure compliance with international obligations, domestic law and the policies that protect the rights of children, specifically those deprived of liberty. South Africa should enforce compliance with the rights that are entrenched in its Constitution as well as international and regional instruments that protect migrant children. South Africa should further ensure proper documentation of migrant children who enter the country. This would be more useful for record-keeping purposes and also to ensure better protection of migrant children by providing more resources and facilities for their alternative care.

As state parties to CRC, Angola, Malawi and South Africa should take steps to ensure that the detention of children is used only as a measure of last resort. They should also ratify the Migrant Workers Convention to protect migrant children from immigration-related detention. All three states must provide alternatives to detention such as foster care and community placement. They should also formulate national development plans that aim to reduce the number of children deprived of liberty. All three states should invest more in alternatives to immigration detention of children.

***Table 1: Case study countries' ratification status of some of the relevant human rights instruments***

| International Treaty | Malawi | South Africa | Angola |
|---|---|---|---|
| Convention on the Rights of the Child | Ratified | Ratified | Ratified |
| International Covenant on Civil and Political Rights | Ratified | Ratified | Ratified |
| International Covenant on Economic, Social and Cultural Rights | Ratified | Ratified | Ratified |
| Convention relating to the status of Refugees (1951 Refugee Convention) | Ratified | Ratified | Ratified |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families | No Action | No Action | No Action |
| African Charter on Human and Peoples' Rights | Ratified | Ratified | Ratified |
| African Charter on the Rights and Welfare of the Child | Ratified | Ratified | Ratified |
| Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa | Ratified | Ratified | Ratified |

# References

African Committee on the Rights and Welfare of the Child 'Mapping children on the move within Africa' (2018)

Chiwaula L, Dobson R & Elsley S *Drumming together for change: A child's right to quality care in sub-Saharan Africa* (2014), available at https://strathprints.strath.ac.uk/68548/1/CELCIS_etal_2014_Drumming_together_for_change_report.pdf (last visited 25 March 2020)

Connelly H 'Seeking the relationship between the UNCRC and the asylum system through the eyes of the unaccompanied asylum-seeking children and young people' (2015) 23 *International Journal on Children's Rights* 52

Consortium for Refugees in South Africa 'Refugees protection, asylum seekers and immigration in South Africa (2009), available athttps://www.cormsa.org.za/resources/cormsa-reports/ (last visited 20 March 2020)

Fazel M, Karunakara U & Newnham EA 'Detention, denial and death: Migration hazards for refugee children' (2014) 2 *Lancet Global Health Journal* 313

Global Detention Project 'Angola Immigration Detention Profile' (2016), available at https://www.globaldetentionproject.org/countries/africa/angola (last visited 27 March 2020)

Global Detention Project 'South Africa immigration detention' (2009), available at https://www.globaldetentionproject.org/countries/africa/south-africa (last visited 30 March 2020)

Global NextGen Index 'Malawi' (2018), available athttp://next-gen-index.org/wp/en/scorecards/malawi/ (last visited 15 March 2020)

Global NextGen Index 'Global NextGen Index 2018', available at http://next-gen-index.org/wp/en/scorecards/south-africa/last visited 29 March 2020)

'Govt too broke to deport 40 Ethiopian children' *Sunday Times* 8 May 2016

Hiropoulos A 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' (2017), available at http://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf (last visited 7 March 2020)

'Horrific conditions for 100s detained in Malawi en route to SA' ***News 24*** 4 August 2015, available at https://www.news24.com/Africa/News/Horrific-conditions-for-100s-detained-in-Malawi-en-route-to-SA-20150804 (last visited 11 March 2020)

Human Rights Council 'United Nations Special Rapporteur on the Human Rights of Migrants, Angola (2017), available at https://reliefweb.int/report/angola/report-special-rapporteur-human-rights-migrants-his-mission-angola-ahrc3525add1 (last visited 18 March 2020)

International Detention Coalition (IDC) (2015) ***There are alternatives: A handbook for preventing unnecessary immigration detention*** Melbourne: IDC

Kinner SA et al 'The health of children deprived of liberty: A neglected human rights issue', available at http://eprints.whiterose.ac.uk/154507/3/Comment%20v3.2.pdf (last visited 10 April 2021)

Lawyers for Human Rights 'Monitoring immigration detention in South Africa (2008)', available at http://cmr.jur.ru.nl/cmr/docs/South%20Africa.pdf (last visited 30 March 2020)

Macken C 'Preventive detention and the right of personal liberty and security under the International Covenant on Civil and Political Rights, 1966' (2005) 26 ***Adelaide Law Review*** 1

MSF Malawi 'Malawi: Detained for a dream', available at https://www.msf.org.za/msf-publications/malawi-detained-a-dream (last visited 26 March 2020)

Nielsen JS & Mandlate A 'A preliminary appraisal of the normative gains for children's rights in the Angolan Children's Act' (2013), available at https://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1302/Sloth-NielsenMandlateAPliminary%282013%29.pdf? (last visited 27 March 2020)

Nowak M 'The United Nations Global Study on Children Deprived of Liberty' (2019)

Schlein L 'UN: Congolese children deported from Angola face humanitarian crisis' (2018), available at https://www.voanews.com/africa/un-congolese-children-deported-angola-face-humanitarian-crisis (last visited 29 March 2020)

Smyth CM 'Towards a complete prohibition on the immigration detention of children' (2019) 19 ***Human Rights Law Review*** 1

South African Human Rights Commission 'Annual Report' (2017), available at https://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202017%20HR.PDF (last visited 30 March 2020)

South African Human Rights Commission 'Children illegally detained under Bosasa's watch at Lindela as healthcare crumbles' (2017), available athttps://www.sahrc.org.za/index.php/sahrc-media/news/item/1075-children-illegally-detained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles (last visited 29 March 2020)

Tal S 'Critical challenges to protecting unaccompanied and separated children in the Western Cape: Lessons learned at the University of Western Cape' (2011) 28 ***Journal on Refugees*** 61

United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited 28 February 2020)Hillier L 'Children on the move: Protecting independent migrant children in South Africa, South Africa' (2007) https://resourcecentre.savethechildren.net/node/2665/pdf/2665.pdf (last visited 29 March 2020).

UN Global Report on Children Deprived of Liberty (2019), available at https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf (last accessed 1 March 2020)

UNHCR 'The 1951 Convention relating to the status of refugees and its 1976 Protocol', https://www.unhcr.org/afr/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html (last visited 29 March 2020)

UNHCR Refugee Agency 'States parties, reservations and declarations (2019)', available at https://www.unhcr.org/5d9ed32b4 (last visited 26 March 2020)

UNICEF & International Organisation for Migration 'Harrowing journeys: Children and youth on the move across the Mediterranean sea, at risk of trafficking and exploitation' (2017), available at https://www.unicef.org/publications/files/Harrowing_Journeys_Children_and_youth_on_the_move_across_the_Mediterranean.pdf (last visited 26 March 2020)

UNICEF 'African Action Agenda for #UprootedChildren', available at https://www.unicef.org/sites/default/files/2019-02/African-Action-Agenda-for-Children-Uprooted.pdf (last visited 18 March 2020)

UNICEF 'Alternatives to immigration detention of children' (2019) 1, available at https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf (last visited 7 April 2021)

UNICEF 'Children on the move: Unaccompanied children migrant in South Africa' (2017), available at https://www.unicef.org/southafrica/SAF_resources_unaccompanied.pdf (last visited 29 March 2020)

UNICEF 'Data snapshot of migrant and displaced children in Africa' (2019), available at https://data.unicef.org/resources/data-snapshot-of-migrant-and-displaced-children-in-africa/ (last visited 29 March 2020)

UNICEF 'Data snapshot of migrant and displaced children' (2017), available at file:///C:/Users/OMEN/Downloads/Data-Snapshot-of-Migrant-and-Displaced-Children-in-Africa.pdf (last visited 29 March 2020)

United Nations High Commissioner for Refugees 'Universal Periodic Review: Angola' (2014), available at https://www.refworld.org/docid/5541d7954.html (last visited 27 March 2020)

United Nations Secretary-General 'Guidance note of the Secretary-General: UN Approach to Justice for Children' (2008), available at https://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf (last visited 1 April 2020)

United States Committee for Refugees and Immigrants, World Refugee Survey (2008) Angola, available at https://www.refworld.org/docid/485f50c0c.html (last visited 29 March 2020)

United States Department of State 'Angola Human Rights Report' (2018), available at https://www.justice.gov/eoir/page/file/1145256/download (last visited 27 March 2020)

United States Department, Country Report on Human Rights Practices: South Africa (2017), available at https://www.refworld.org/docid/58ec89c911.html (last visited 29 March 2020)

US Department of State Country Reports on Human Rights Practices: Malawi (2018), available at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/malawi/ (last accessed 7 March 2020)

C Altafin, H Balnaves, N Ninnin, M Storbeck & V Voziki 'Children's deprivation of liberty as a tool of immigration and national security control in Europe? Unlocking captured childhoods by means of child-centred strategies and non-custodial solutions' (2020) 4 *Global Campus Human Rights Journal* 424-460
http://doi.org/20.500.11825/2037

# Children's deprivation of liberty as a tool of immigration and national security control in Europe? Unlocking captured childhoods by means of child-centred strategies and non-custodial solutions

*Chiara Altafin,* Hugo Balnaves,** Noémie Ninnin,*** Majsa Storbeck**** and Vassia Voziki******

**Abstract:** *This article explores children's detention on immigration or national security grounds as affected by European states' contemporary security rationale neglecting children's rights. Attention is given to how non-custodial solutions and child-centred strategies could avoid the systemic deprivation of liberty for these reasons. In acknowledging the range of contemporary threats against the right to liberty and security of children, it is crucial to investigate the link between detention and security narratives, as children – a particularly vulnerable group – are affected disproportionately. The focus is placed on the situations in The Netherlands, France, Greece, Ireland and Cyprus. Concluding remarks are based on the case studies and the regional perspective taken beyond these cases, to draw arguments for law and policy changes at both levels.*

* Master's Degree in Law (Roma Tre University) Master's in Rule of Law, Democracy and Human Rights (LUISS University) LLM in Comparative, European and International Law (European University Institute) PhD in International Law (European University Institute); Research Manager, Global Campus Headquarters, Venice; chiara.altafin@gchumanrights.org.

** Bachelor of Commerce (University of Commerce) LLB in Laws (University of Adelaide) MA in Human Rights and Democratisation (Global Campus Europe) LLM in European Law (Paris II Panthéon Assas Sorbonne), balhug01@gmail.com.

** BA in Law (Paris 1 Panthéon-Sorbonne) BA in History (Paris 1 Panthéon-Sorbonne) MA in International Law (Paris 1 Panthéon-Sorbonne) MA in Human Rights and Democratisation (Global Campus Europe); Trainee lawyer affiliated to the Paris Bar Association Legal Training Centre, noemieninnin@gmail.com.

*** BSc (Erasmus University College) MA in Human Rights and Democratisation (Global Campus Europe), majsa@storbeck.nl.

**** BA in Law (Aristotle University of Thessaloniki) MA in Human Rights and Democratisation (Global Campus Europe) LLM (International Hellenic University); Trainee at EUDEL to the CoE, Legal Unit, vassiavoziki@gmail.com.

This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

**Key words:** *children's rights; migration; national security; repatriation; detention; security rationale*

## 1 Introduction

The perception of complex security threats has arisen across European countries. Following the 2016 and 2017 terrorist attacks, a sense of crisis has been amplified by the departure of nationals joining foreign armed groups (Baker-Beall 2019: 2). Migration has become a 'security problem' in the prevailing political discourse (Moreno-Lax 2018: 4; Mustaniemi-Laakso et al 2016: 19). This has created fertile soil for illiberal and populist forces, testing states' capacity to find appropriate normative and policy responses. The use of detention has particularly been questioned, with their strong reliance on detention under a security rationale (Bello 2020; Bosworth & Turnbull 2017; Menjívar, Cervantes & Alvold 2017; Kaloteraki 2015). In this context, the findings and recommendations deserving special attention are those articulated on children deprived of liberty on national security grounds or for immigration reasons in the United Nations Global Study on Children Deprived of Liberty (UNGSCDL 2019: 430-495, 616-653). These represent critical areas resulting in multiple violations of children's rights and require further investigation. First, many European children allegedly associated with non-state armed groups continue to be stranded in detention or displacement camps in Northern Syria under hazardous conditions. A connected issue is the way in which children charged with or convicted of terrorism-related offences are detained in criminal justice systems across Europe. Second, an alarming number of children on the move are deprived of liberty in various settings, such as 'hotspots', 'transit zones', 'waiting zones' or 'reception centres'. Countries of Southern Europe have received the largest proportion of asylum seekers since 2015, with a huge spike in the number of unaccompanied or separated foreign children (UACs or UASCs) and accompanied children, thus increasing the pressure on national migration management and child protection systems. However, other European states have not accepted relocation for alleged security risks (CTK 2020) or for a sense of suspicion (Lower House 2020; Musch 2020) which is a key concept of the securitisation theory (Bigo 2002).

The urgency of how to deal with these two types of deprivation of liberty cannot be underestimated in Europe, even considering the COVID-19 pandemic. This article explores children's detention on immigration or national security grounds as affected by states' contemporary security rationale neglecting children's rights. Attention is paid to the way in which non-custodial solutions and child-centred strategies could be adopted to avoid such systemic deprivation of liberty. In acknowledging contemporary threats against the right to liberty and security of children, it is crucial to

investigate the link between detention and security narratives as children – a particularly vulnerable group – are affected disproportionately.

The first part of the article examines the situation of children deprived of liberty on national security grounds in relation to The Netherlands and France to showcase practices reflecting states' failure to recognise children primarily as victims. Dutch approaches to the repatriation of children allegedly associated with non-state armed groups are explored, while attention is given to the French anti-terrorism strategy regarding children charged with or convicted of terrorism-related offences. Case law and non-custodial solutions are considered. The second part analyses the situation of children ***de jure*** or ***de facto*** deprived of liberty for immigration reasons in Greece to showcase controversial practices, also considering regional case law, while highlighting promising practices in Ireland and Cyprus. The two parts start by looking at key challenges about the selected types of deprivation of liberty, followed by a review of international legal and policy frameworks. This serves to elaborate the third part where concluding remarks are based on the case studies and the regional perspective taken beyond these cases, to draw arguments for law and policy changes at both levels.

## 2 Children's deprivation of liberty on national security grounds

### 2.1 Causes and magnitude of key challenges

The combination of terrorist attacks on European soil and citizens' departures to join foreign armed groups has pushed terrorism to the top of states' agendas, leading to multiple counter-terrorism strategies and security measures (UNGSCDL 2019: 620). Their proliferation raises questions about compliance with the rights of children involved. Two case studies are used to confront their adequacy and effectiveness towards the deprivation of liberty.

The possible influence on children by terrorist groups has resulted in divergent concerns of protection and national security in addressing the repatriation issue. Many children of European Foreign Terrorist Fighters (FTFs) are confined in camps in Northern Syria under the authority of the Syrian Democratic Forces (SDF) (CGP 2020: 4; CJAG 2020: 1; Weine et al 2020: 1). Estimates indicate that at least 700 European children entered Syria or were born there, mostly French, followed by Germans, Belgians and Dutch (Coolsaet & Renard 2019: para 5). The largest camp is Al-Hol housing 75 000 residents (UN News 2020), of whom 94 per cent are women and children (CGP 2020: 7). They are confronted with violence, death, diseases, malnutrition, infections and infant mortality (WHO 2019: paras. 6-7). Ideological indoctrination is ongoing while military training

is given from the age of nine (AIVD 2017: 9; CGP 2020: 8; Speckhard & Ellenberg 2020: 1). For the Dutch Intelligence Service, approximately 75 Dutch children live therein, of which around 10 per cent are nine years old or older, and more than 50 per cent are four years old or younger (AIVD 2020: para 4).

A related question is how to deal with children suspected of or being involved in terrorism-related activities on European soil. Their number is relatively low (Sheahan 2018: 9) but they are seen among the perpetrators. Extended pre-trial detention periods and disproportionately lengthy sentences have been criticised (PNI 2017: 7). France has struggled with the 'radicalisation' phenomenon and the ability to take care of 'its' children recruited. Recently, 471 children followed by the Youth Judicial Protection Service (PJJ) were identified through the ***Astrée*** software (DPJJ 2020: 12-13). The number of children tried in terrorism-related cases increased from one in 2015 to 18 in 2018 (CNCDH 2018: 32). The introduced state of emergency and anti-terrorist laws have strengthened national security measures and pressured the judicial system (CNCDH 2018: 32; DPJJ 2018; Gruenenberger 2016: 2).

## 2.2 International legal and policy frameworks

### *2.2.1 Children allegedly associated with non-state armed groups*

Should states' jurisdiction be accepted in this context, the Convention on the Rights of the Child (CRC) provides primary safeguards in articles 2, 3(1), 6 and 12. Children allegedly associated with non-state armed groups returning to their home countries (child returnees) cannot be discriminated against, by law or practice, even when their caregivers are FTFs as it would be 'collective punishment' (UNCCT 2019: 28). The best interests of the child must be a primary consideration in all decisions concerning them. Potential conflicts with others' interests require a case-by-case approach, attaching serious weight to them (CRC/C/GC/14: paras 28, 39). They may have an interest and wish (besides a right) to return. Children's right to life, survival and development should be understood broadly (CRC/GC/2003/5: para 12), implying physical and psychological recovery and social reintegration (article 39). Article 37(c) reinforces their right to be treated with 'humanity' and 'dignity'.

Children associated with FTFs were recently considered by the UN Security Council, urging states to ensure consular access to detained nationals under applicable domestic and international law, and to consider gender and age sensitivities when developing rehabilitation and reintegration strategies (S/RES/2396(2017): paras 6, 31). It urged states to pay attention to these children's treatment, primarily as victims, and consider alternatives to detention for rehabilitation and reintegration (S/

RES/2427(2018): paras 19-21). The Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to UN Listed Terrorist Groups provide guidance in designing and implementing policies (UNOCT 2019: 4). A handbook supports a children's rights approach (UNCCT 2019).

UN High-Level Advocates reminded states of their obligation to take necessary steps to intervene through repatriation, guided by the principle of best interests of children (OSRSG-SVC 2019). For two Special Rapporteurs, states have 'a positive obligation to take ... steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law', including detention at odds with standards of humanity (OHCHR 2020: para 3). States should 'undertake individualised assessments ... based on multi-agency and multidisciplinary approaches' (para 6). Essentially, 'the states of nationality for citizens have the only tenable legal claim to protect their citizens, and the capacity to make such claims materialize' (para 35). In attaching a crucial (but perhaps arbitrary) role to nationality, they concluded that

> states that have ***de facto*** control over the human rights of children [in such camps] have positive obligations to prevent violations ... Relevant factors [for such control] include the proximity between the acts of the state and the alleged violation, the degree and extent of cooperation, engagement and communications with the authorities detaining children ... the extent to which the home state is able to put an end to the violation ... by exercising or refusing any positive interventions ... and the extent to which another state or non-state actor has control over the rights (para 36).

The Council of Europe (CoE) has considered child returnees through the Counter-Terrorism Committee overseeing the 2018-2022 strategy (CM (2018) 86-addfinal). Recommendation 2169 (2020) advocated the integration of a child-rights perspective into counter-terrorism efforts and urged the Committee of Ministers to invite the Steering Committee for the Rights of the Child (CDENF) for advice (PACEa: paras 3, 4.1, 4.2). Resolution 2321 (2020) called on states to repatriate, rehabilitate and (re) integrate, as 'a human rights obligation and a humanitarian duty' child returnees whose parents are citizens; noting 'highly-polarised opinions', parliamentarians recalled children's non-responsibility for parents' actions or life circumstances (PACEb: paras 2, 6).

The EU responded to the FTFs phenomenon by a 2015 amendment of the Framework Decision 2002/475, but among EU institutions less consensus exists on repatriation. At the Radicalisation Awareness Network experts debated whether and how children hold dual identities as victims and perpetrators (European Commission 2016: 2). The High-level Commission Expert Group's proposal of needs-and-risks assessment (European Commission 2017: 13-14) was not clearly defined. The

Parliament called to prioritise children's rights, emphasising repatriation, rehabilitation and reintegration policies (P8_TA(2016)0502: para 120; 2019/2876(RSP): para 61).

#### *2.2.2 Children charged with or convicted of terrorism-related offences*

Besides the guiding principles, other safeguards of CRC are particularly relevant. Deprivation of liberty must be lawful, non-arbitrary, as a measure of last resort and for the shortest time (article 37(b)). Non-custodial measures should be targeted while, if unavoidable, children in pre-trial detention should go to court within 30 days, and a final decision should be taken within six months (CRC/C/GC/24: paras 86, 90). They must be treated consistently 'with the promotion of the child's sense of dignity and worth', considering their age, reintegration and constructive role in society (article 40(1)). States shall promote special laws and desirable measures for dealing with them without resorting to judicial proceedings (article 40(3)), with a consideration of alternatives (article 40(4)). The reaction should be proportionate to the gravity of the offence, personal circumstances, and long-term societal needs (CRC/C/GC/24: para 76).

The CoE Child-Friendly Justice Guidelines (2010) require applying the urgency principle to protect the best interests of the chlid (para 4). EU Directive 2016/800 on procedural safeguards highlights children's vulnerability when deprived of liberty and difficulties in reintegration (para 45). It reiterates detention as a last resort, for the shortest time, with due account to children's situations (article 10), and requires the treatment of related criminal proceedings with urgency and due diligence (article 13).

### 2.3 Case of The Netherlands

#### *2.3.1 National legal and policy framework*

Child returnees fall under the Dutch Child Care and Protection Board's responsibility if they are unaccompanied or separated and in The Netherlands (Vriesema 2019: paras 4-5). It may investigate with an advisory body of remedial educationalists, psychiatrists and psychologists, with expertise in radicalisation, jihadism and trauma (Ministry of Justice and Safety 2018: 2). It may request the juvenile court to take different measures: a family supervision order if the child's development is seriously threatened (article 1:255 DCC, Dutch Civil Code); placement in a care facility if necessary for the child (article 1:265b DCC); placement in closed facilities (with strict legal safeguards) if the child's development is threatened or to prevent withdrawal from state supervision (article 6.1.2, Youth Act).

The placement of child returnees will be highly age-dependent (according to 0-9 years, 9-12 years and 12-18 years old). For national security services, they 'can pose a risk upon return' as jihadist training is given from the age of nine years (AIVD 2017: 16). Childcare services prefer placement with extended family or foster parents (Vriesema 2019: para 8). Children of 12 years or older can be held responsible under juvenile criminal law (Tak 2008: 80), and generally courts decide on alternatives to detention (De Vries 2016: 36). Adolescents over 16 years of age can be prosecuted under adult criminal law for terrorism (article 77b Youth Act). The 2016 and 2017 legal amendments allow the revocation of Dutch nationality of dual nationals (of 16 years or older) who are convicted of terrorism-related crimes or who are abroad yet have participated in organisations whose activities are a threat to national security. However, child returnees are mostly below the age of nine years (AIVD 2020).

Once repatriated, children's best interests will be considered on an individual basis, with their views heard and weighted in accordance with age and maturity. A multidisciplinary consultation will determine the care package. Adequate medical, psychosocial and educational support will be provided to assist recovery and reintegration (Vriesema 2019: paras 11-15). Justice, care and security actors are involved collaboratively, while the Board oversees proper care. Consultations at the municipal level allow for individually-tailored plans (Sheahan 2018: 48). Children will be allowed to visit their mothers in prison (Vriesema 2019: para 13). Thus, in theory the Dutch multi-agency case management forms a promising practice in responding to child returnees.

### *2.3.2 Practice of repatriation*

Despite calls for proactiveness (HR Deb 2019a), for the government 'neither FTFs nor the women or children will be actively repatriated' (Parliament 2019a). It invoked article 9(1) of CRC prohibiting the separation of parents and children; child repatriation would be impossible because it would later lead to family reunification (HR Deb 2019b; Ministry of Justice and Security 2018: 3). The statement by members of Parliament that there is no wish for 'ticking time-bombs' (Brouwers 2019) illustrates the misleading consideration that child returnees pose a potential threat to national security.

In 2019 only two orphans of two and four years, in 'pitiful conditions' without parental authority, were repatriated, but this 'unique case' of custody granted to The Netherlands did not imply changes to its repatriation policy (Parliament 2019b). Despite its denial of enforcement jurisdiction in Syria, the government has exercised legislative jurisdiction, or at least influenced children's legal position, by choosing a passive policy towards their right to return (article 10(1) CRC) given their ties to The Netherlands (Sandelowsky-Bosman & Liefaard 2020: 148). Through its

narrow interpretation of jurisdiction, it abets children's exposure to risks to their lives which it could minimise (even without having caused them) by assisting them in proving their nationality or accepting external aid. Apparently the 'Kurdish question' affects such passivity: The Kurds would help in repatriation but demand recognition in Northern Syria, which would upset NATO ally Turkey (Boon, Alonso & Versteegh 2019: para 7).

### *2.3.3 Case law*

The government's position was challenged when 23 Dutch women requested repatriation with their 56 children from Al-Hol. The Hague district court ruled that The Netherlands is bound to help repatriate these children, 'find a way to protect them' and 'do everything within reasonable limits'; only if repatriation was impossible without their mothers, the obligation would be extended (ECLI:NL:RBDHA:2019:11909: 1, 7, 9). The Hague Appeal Court overturned the decision: Repatriation of this group is a 'political choice', the interests in national security and foreign affairs can justify the government's possible refusal to act to repatriate the children (ECLI:NL:GHDHA:2019:3208: 6, 10-12). For both courts, these children could not directly invoke CRC against The Netherlands as it lacks jurisdiction in such camps (without diplomatic ties with Syria), but CRC influences the scope of the applicable due diligence standard of Dutch tort law (article 6:162, Civil Code). The ***Advocaat-Generaal*** acknowledged that 'whether the promotion of repatriation is a state's duty should be assessed on a case-by-case basis', and 'many arguments are in favour of children's repatriation', but the claimants chose to claim the state's duty to repatriate them as a group and also exclusively together with their mothers (2020: paras 1.4, 1.8). Nonetheless, mothers' culpability reviews would protract legal proceedings and children's precarity, at odds with their best interests (Van Ark, Gordon & Prabhat 2020). The Supreme Court confirmed that The Netherlands is not legally obliged to repatriate them (ECLI:NL:HR:2020:1148). The 'nods towards individual and case-by-case assessments' suggest openness to other conclusions in future cases under different requests and circumstances, such as mothers coerced to go to ISIS-held territories without evidence of wrongdoing (Van Ark 2020).

## 2.4 Case of France

### *2.4.1 National legal and policy framework*

Ordinance 45-174/1945 on juvenile delinquency (amended by Ordinance 950/2019) sets forth principles including the priority of the educational approach over punishment, the special nature of juvenile justice, and the age-based attenuated responsibility. The PJJ may propose for children at risk immediate appearance before the court, alternatives to judicial proceedings, and educational measures, to protect and integrate them for

combating recidivism. For children over 13 years sanctions are possible and can be non-custodial, including at the pre-trial stage (article 10). Pre-trial detention for children aged 13 to 16 is allowed if they incur a criminal sanction or have voluntarily evaded the obligations of judicial control or electronically monitored house arrest; for children over 16 years of age it is also possible if they incur a correctional sentence equal to or greater than three years. It is allowed up to one year for children over 13 years of age and up to two years for those over 16 years of age (article 11).

However, terrorism-related acts are prosecuted under derogatory procedures. Pre-trial detention can last up to one year for children aged 13 to 16 (Mayaud 2018), while it is increased up to three years for children over 16 years suspected of involvement in a terrorist act (article 706-24-4 CPC as amended by Act 2016-987). The anti-terrorist section of the Paris Regional Court has almost exclusive jurisdiction over adults and children (Sheahan 2018: 20). Critically, under article 706-17 CPC children prosecuted for terrorism-related offences are subject to a dual procedure where investigations are conducted by common investigative judges and trials by juvenile courts or assize courts (CNCDH 2018: 33).

### *2.4.2 Practice of terrorism-related deprivation of liberty*

No child has been convicted of attempted or actual terrorist attacks in France. As of April 2018, statistics show that 60 youths were prosecuted for 'criminal conspiracy with a view to committing a terrorist act' (AMT); 31 for 'apology for terrorism'; three for habitual consultation of jihadist sites; and 15 for unspecified motives. Girls represented slightly more than one-third of those prosecuted (DPJJ 2018: 1). A disturbing qualification regarding the practice of detention is AMT (article 421-2-1 CC). Among the 80 adolescents involved in AMT since 2012, 63 have been tried (DPJJ 2020: 13). Children prosecuted for AMT were reduced from 27 in 2017 to six in 2018, and to five in 2019. The issue is how their deprivation of liberty was implemented as a systemic response. Some were given suspended sentences and others prison sentences, but pre-trial detention was almost always applied (Sheahan 2018: 20). The latter often lasted a significant time, at least one to two years (CNCDH 2018: 33).

States should not detain or prosecute a child solely for membership or association with a prohibited group. Yet, AMT has been used to detain and prosecute children participating in terrorist groups when only material elements of preparation occurred. This ambiguous offence may include many types of involvement. Recruitment processes or involvement in terrorist activities are often based on the exploitation of children's personality and identity under construction (Baranger, Bonelli & Pichaud 2017). Thus, charges for AMT can lead to detention for being associated with terrorists while the system should treat children as victims

of calculated indoctrination by their recruiters (CRIN 2018). Moreover, many youths who joined ISIS during childhood can be tried at the age of majority with difficulties in highlighting recruitment specificities.

Procedurally, the 'juxtaposition' of the anti-terrorist and juvenile justice systems has influenced the practice of detention. Investigation judges have focused more on criminal facts (than on the child's age, maturity and personality) and mostly opted for indictments of children rather than educational measures (CNCDH 2018: 20-35). Juvenile judges have relied on procedures dominated by a counter-terrorism rationale and applied more severe sentences (Baranger, Bonelli & Pichaud 2017), regarding alternative measures as too risky because the accused or defendants adhere to violent extremist ideologies and represent a danger to society (UNODC 2017: 107). Such a trend is nurtured by an 'exacerbated precautionary principle' impacting children's treatment (CNCDH 2018: 33).

Professionals' training on terrorism-related cases has been considered by the National School of Magistrates, apparently one of the first in Europe to implement them for juvenile judges, assessors of juvenile courts, clerks and educators of the PJJ (ENM 2017). Another promising practice regards cross-cutting training for investigative judges to implement child-sensitive measures in terrorism-related cases. These steps are beneficial but insufficient to resolve the inconsistencies of the cited juxtaposition and mitigate the use of deprivation of liberty.

Children charged with or convicted of terrorism-related offences fall within a worrying trend of detention measures, qualified as 'overpenalisation of juvenile behaviour' (CNCDH 2018). COVID-19 has led to addressing prison overcrowding, and the number of detained adolescents sharply decreased from 816 in January 2020 to 680 in April 2020, demonstrating France's ability to explore alternatives (Syndicat de la Magistrature 2020). However, the increased number of detained children over recent years has entailed congestion, incidents and more 'radicalisation' (FNAPTE 2019). Children are held in a specialised juvenile penitentiary facility, or juvenile section of adult prisons where the separation is not tight. This can lead to adults' 'grip' on them (Defenseur des droits 2019: 51) or accentuate radicalisation trends (Khosrokhavar 2018). Children convicted of terrorist offences cannot be placed in solitary confinement, but are moved to different cells to avoid 'contamination', further impacting on socialisation (CNCDH 2018). When leaving prison, some may renounce violence; others may be comforted in the feeling of exclusion and stigmatisation to which prison can lead, maybe the same feeling of society marginalisation grounding their affiliation to terrorist groups (Khosrokhavar 2018). When a child's status is not sufficiently considered, the use of detention can become an irony whereby their situation may be worsened and force them into crime, although criminal policy supposedly aims to avoid this.

### *2.4.3 Case law*

Some examples are noteworthy. A Juvenile Assize Court sentenced four youths to four to six years' imprisonment for AMT, having targeted a police station and sought to acquire weapons and make explosives, which did not concretise, when they were 17 and 19 (*20minutes* 2018). A juvenile court sentenced an adolescent to four years' imprisonment for having reached Syria when he was 15, with terrorism-related documents and messages showing his training to shoot (De Sèze 2018). A juvenile court sentenced two adolescents to six months of suspended imprisonment for AMT, for having joined al-Nusra for three weeks when they were 15 and 16. According to their lawyer, they were unaware of joining a terrorist group and 'not at all aware of the complexity of the situation in Syria at the time'. The prosecutor's appeal request of two years' imprisonment deviated from the court's approach not to stigmatise them as terrorists for facts of 2014 as they built their new lives and pursued studies since then (*Franceinfo* 2020).

The question about these adolescents' detention arises when the repatriation of French nationals is debated. The European Court of Human Rights (European Court) accepted a case against France, following the *Conseil d'Etat* rejection of the requests for repatriation of a national detained with her children aged four and five in Al-Hol camp. The applicants claim that France allows their exposure to inhumane and degrading treatment, violating article 3(2) of the European Convention of Human Rights (European Convention) and article 3(2) Protocol 4, along with article 13 of the European Convention as they could not access local remedies while in the SDF camp (*HF and MF v France,* 24384/19). Ultimately, the European Court might determine whether the fate of child nationals detained abroad is linked to European states. Indeed, a state's responsibility may be engaged for acts with sufficiently proximate repercussions on the rights enshrined in the European Convention, even if they are outside its jurisdiction (*Soering v The United Kingdom* 1989; *Drozd and Janousek v France and Spain* 1992). The European Court even acknowledged a state's positive obligations under article 1 to take those diplomatic, economic, judicial or other measures 'in its power' and in line with international law to secure the rights enshrined in the European Convention (*Ilascu & Others v Moldova and Russia* 2004: paras 317, 330-31).

The CRC Committee recently found that France had jurisdiction over child nationals detained in Kurdish-controlled camps in Syria because of their parents' involvement with ISIS, notwithstanding the fact that they are under effective control of a non-state armed group (*LH & Others v France*). In applying a 'functional approach', it observed France's duty to protect the rights of these children since it in fact is able to do so under contextual factors including their nationality and Kurdish authorities'

willingness to cooperate and release them to France, where at least 17 children were repatriated since March 2019 (CRC/C/85/D/79/2019–CRC/C/85/D/109/2019: para 9.7). On these grounds, a duty of the states of nationality to repatriate child nationals from the camps would be argued, but the questionable role played by nationality in such legal reasoning, leading to the potential for arbitrariness, has been criticised (Milanovic 2020; Duffy 2021).

## 3 Children's deprivation of liberty on immigration grounds

### 3.1 Causes and magnitude of key challenges

In some European countries children are detained for reasons related to their or their parents' migration status, or for other official justifications (including identity verification, health and security screening, facilitated deportation, age assessment procedures) or even for claimed protection purposes, or because of a declared state of emergency (UNGSCDL 2019: 441-443). There is international consensus that such practice violates international law (Smyth 2019). It is emphasised that 'deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including UASCs is prohibited' (UNWGAD 2018: para 11, citing A/HRC/30/37: para 46; E/CN.4/1999/63/Add.3: para 37; A/HRC/27/48/Add.2: para 130; A/HRC/36/37/Add.2: paras 41-42) (see also CMW/C/GC/4-CRC/CGC/23: paras 5 & 10).

Although conceived as a temporary measure to address exceptional inflows, the controversial hotspot approach has been implemented since 2015 under the European Agenda on Migration, spiralling the securitisation of migration (Léonard & Kaunert 2020). It entails highly-criticised support to national authorities from European Agencies to quickly conduct the operations of identification, registration and fingerprinting of migrants. Within this framework and following the 2016 EU-Turkey Statement, reception centres on Aegean islands (Lesvos, Chios, Samos, Leros and Kos) have been transformed into ***de facto*** closed facilities, espousing a policy of geographical restriction. This has been exacerbated by COVID-19 measures. Thousands of children are stranded in 'reception camps' in dreadful, unsanitary conditions. Being generally large accommodation centres (or makeshift shelters in the external, unlit and non-serviced areas) with minimal oversight and support, most are exposed to grave psychological distress sometimes leading to sexual and other abuses (UNHCR 2019: 7, 12). This, alongside the lack of medical services, legal and educational assistance, highlights the need for the adequate protection of the rights of children.

Some types of alternatives to detention are foreseen in European states' laws but in practice are either unused or applied restrictedly (CDDH(2017)

R88add2: 5). For legal, cultural, socio-economic reasons a small number of UASCs can benefit from quality alternative care, while the majority are in institutional reception facilities. Data and expertise on how to provide and effectively implement such measures need to be shared and spread across states.

### 3.2 International legal and policy frameworks

Article 37(b) of CRC sets a high standard, but immigration detention can never be considered a measure of last resort, regardless of accompaniment, and is never in the child's best interests. UN treaty-monitoring bodies jointly concluded that 'child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice' (CMW/C/GC/4-CRC/C/GC/23 2017: para 12). The CRC guiding principles must underpin all decisions and actions regarding these children. Their best interests must be upheld as a primary consideration (for instance, to determine the nature, quantity and quality of reception conditions) (CRC/C/GC/14 2013: para 23). They must not be discriminated against in their access to rights. Existing threats to their rights to life, survival and development should be addressed. The right to have their views heard (and weighted in line with age and maturity) should be enacted. The UN Guidelines for the Alternative Care of Children strengthen these standards, also clarifying that children arriving in a country should not be deprived of their liberty 'solely for having breached any law governing access to and stay within the territory' (A/RES/64/142 2010: para 143), and providing standards on identification, representation, reception and placement (paras 145-152).

The promotion and protection of children's rights are part of the EU's objectives, both internally and externally (article 3(3)(5) TEU). Children's rights to the protection and care necessary for their well-being, with the best interests of the child as a primary consideration in all related actions, shall be guaranteed by European Union (EU) institutions and member states in implementing EU law (article 24 CFR). However, EU secondary law provides only certain constraints regarding immigration detention.

Under the Reception Conditions Directive (2013/33/EU), UACs shall be detained in exceptional circumstances and only if less coercive measures cannot be implemented (article 11). The BIC shall be a primary consideration for states when implementing the provisions on children (article 23). In addition, UACs seeking international protection must be granted suitable reception conditions, including placement with adult relatives or foster families, accommodation centres with provisions for children, or other appropriate facilities such as supervised independent settings for juveniles (article 24(2)).

The Return Directive (2008/115/EC) allows for the detention of children and families as a last resort and for the shortest time, requiring related conditions (article 17). These include separate accommodation for families detained pending removal; leisure activities befitting children's age and access to education; UACs' accommodation with personnel and facilities befitting their age; and the best interests of the child as a primary consideration for their detention pending removal. Article 10 requires providing UACs with 'assistance by appropriate bodies' and verifying their return to family members, nominated guardians or adequate reception facilities. The 2018 incomplete recast proposed by the European Commission was followed by the 2019 proposal by the European Parliament (EP) Research Service of the prohibition on detention of children and families, and safeguards on child return (EP Briefing 2019).

The European Commission (COM(2017)211final) addressed gaps and the need for adequate reception capacity and support services to safeguard migrant children's well-being and the best interests of the child. This includes access to health care, psychological support, education, leisure and integration measures. Given 'the negative impact of detention on children', states were encouraged to work towards ensuring and monitoring effective alternatives to their administrative detention and alternative care options for UACs (COM(2017)211final: 8, 9).

The European Parliament emphasised the best interests of the child principle in all decisions affecting migrant children regardless of their status, and the access to dignified accommodation, health care, education for their integration, calling for prioritised relocation of UACs from Greece and Italy (P8_TA(2018)0201: paras 4, 8, 10). States were urged to fully implement the Common European Asylum System (CEAS) to enhance children's conditions, work towards ending immigration detention across the EU, aligned with the 2016 NY Declaration for Refugees and Migrants, and elaborate community-based solutions (2019/2876(RSP): para 35). Noting the number of children detained as part of return procedures, it called on states 'to provide adequate, humane and non-custodial alternatives' (2019/2208(INI): para 34).

At the CoE political level, for the Committee of Ministers, children 'should, as a rule, not be placed in detention' and 'in those exceptional cases ... should be provided with special supervision and assistance' (CM/Rec(2003)5: paras 20-23). Besides concluding that no detention of UACs should be allowed (Resolution 1810 (2011): para 5.9) the Parliamentary Assembly called on states to legally prohibit it and adopt 'alternatives ... that meet the [best interests of the child] and allow children to remain with family members or guardians in non-custodial community-based contexts' (Resolution 2020(2014): para 9.2). It launched the 2015 campaign to end such detention. An Action Plan of Protecting Refugee and

Migrant Children (2017-2019) aimed at ensuring rights, child-friendly procedures and integration (on its implementation, see SG/Inf(2020)4: 10-12). A 'practical guidance' on alternatives synthesises key principles and findings (CDDH(2019)R91Addendum5: 7-8, 10, 18, 20). Regarding UASCs' guardianship (CM/Rec(2019)11: appendix), some principles are provided to ensure access to justice and effective remedy. 'Implementing guidelines' advocate the adoption of comprehensive national frameworks for appointing qualified guardians supported by a competent authority and protect children from harmful practices. Related enactment is monitored by the CDENF.

## 3.3 Case of Greece

### *3.3.1 National legal and policy framework*

Greek legislation does not prohibit the detention of migrant and asylum-seeking children, providing certain restrictions. Under article 32 L 3907/2011 on pre-removal procedures, UACs or accompanied children can be held, as a measure of last resort and for the shortest appropriate period of time, only when no other adequate and less coercive measures are usable. IPA (International Protection Act, L 4636/2019 as amended by L 4686/2020) stipulates the possibility of asylum-seeking children's administrative detention. They can be detained as a measure of last resort and when no non-custodial or less restrictive measures are implementable, up to 25 days until their referral to appropriate accommodation facilities (article 48(2)(a)). They can be detained exceptionally and separately from adults, but educational and leisure activities befitting their age must be available (article 48(2)(b)).

A ground of ***de facto*** detention can derive from the instrument of 'protective custody' although article 118 PD 141/1991 was not intended for UACs and did not establish time limits. Under article 118(4) persons should not in principle be held in police cells, unless no other way can avoid the risks that they might cause to themselves or to others. Under the pretext of protection, it is an onerous type of detention imposed regardless of whether or not children are asylum seekers (Greek Ombudsman 2019: 26). It further endorses the security rationale governing migration policies, although it cannot deter people from coming to Europe (PICUM 2019: 5). Only the recent law L 4760/2020 exempts UACs from this regime (article 43).

For the connected aspect of reception capacity and conditions, a vulnerability assessment is provided (article 58(2) IPA). UACs are legally regarded as a vulnerable group and procedural guarantees must be applied, such as 'special needs care' and priority for asylum applications (articles 39(5)(d), 39(6)(1)(a) IPA). The Reception and Identification Service (RIS)

is responsible to protect UASCs (article 60(2)(a)), while the related Special Secretary refers them to appropriate accommodation facilities (article 60(3) IPA).

In theory, JMD 9889/2020 regulates methods and conditions of age determination within the asylum process, even setting out the guardians' appointment (GCR 2020: 112). The foreseen interdisciplinary approach involves paediatricians and psycho-social services, with possible referrals to hospitals for wrist bone X-rays or dental examinations as last steps. In case of doubt for an alien or stateless person, an age assessment shall be undertaken and until the decision the person is presumed to be a child (article 74(3)(e) IPA). If uncertainty persists the presumption remains (article 75(4) IPA).

L 4554/2018 on the guardianship scheme for unaccompanied 'alien or stateless persons under the age of 18' entered into force in March 2020. Only at the end of December 2020 the state assigned (through a programme co-financed by the European Commission) the representation of UACs to ***METAdrasi*** by signing an agreement with the National Centre for Social Solidarity (EKKA). The juvenile prosecutor or the prosecutor at the local first instance court shall take all appropriate measures for UACs' legal representation and appoint a permanent, professional guardian selected from the EKKA registry (article 16(1)(2)). The Directorate General for Social Solidarity shall take the necessary steps for UACs' representation by guardians or organisations (articles 32, 60(4) IPA). Any authority detecting UASCs' entry shall inform the closest Public Prosecutor's office, EKKA or other competent authority (article 60(1) IPA).

### *3.3.2 Practice of immigration detention*

Greece's immigration detention practices of children have attracted wide disapprobation for several reasons, especially because of inappropriate living conditions and policy actors' reluctance to implement non-custodial measures, such as foster care families (article 60(4)(d) IPA). A preliminary consideration is that the reception capacity for UACs is scarce, protection standards in shelter facilities are not harmonised, while temporary care options prevail (for instance, 'safe zones' or children's sections in RICs, 'safe zones' in open accommodation sites and hotels on the mainland). These aspects preclude 'holistic' responses to UACs' protection needs (ECSR 2019b: 4). As of February 2020, children accounted for 37 per cent of the monthly arrivals on Aegean islands, of whom over 60 per cent were younger than 12 years (UNHCR 2020). From January to October 2020, there were approximately 4 253 UACs, but only 1 873 places in long-term accommodation facilities and 1 681 places in temporary settings were available; 148 were placed in reception and identification centres (RICs); 187 in open temporary accommodation facilities; 166 were under

'protective custody'; and 1 028 in insecure housing conditions (EKKA 2020a).

The majority of children have been detained until their referral to appropriate facilities or reunion with those responsible for them. This is due to reception incapacity, but also erroneous implementation of 'protective custody', which often amounts to ***de facto*** detention of children in pre-removal facilities or police stations, sometimes in hospitals under police supervision (UNWGAD 2019). Approximately 257 children were in 'protective custody' in November 2019 while 193 UACs in July 2020 (EKKA 2020b). For the UNWGAD, EKKA has prioritised 'UACs in administrative detention for placement in alternative emergency accommodation or proper shelters'. Reportedly some children were held 'for prolonged periods (from a few days to more than two months) in conditions similar to criminal detention, especially in police stations', alongside adults, in dark cells, even deprived of care, education and healthcare services, without information on what would happen to them (UNWGAD 2019).

Regrettably, following Turkish President Erdogan's abrupt instigation of third country nationals' mass influx in the EU in February 2020, the Greek government used highly-contested measures (for instance, heavily-armed national border guards) and suspended the Asylum Law for one month for those arriving irregularly, including children (Emergency Legislative Order, Gov Gazette 45/A/02.03.2020), on the occasion of extraordinary circumstances and unforeseeable necessity to confront an asymmetrical threat to national security. It announced to develop 'closed refugee centres', albeit open facilities (with deplorable living conditions) exist on the eastern Aegean islands (Jones, Kilpatrick & Pallarés Pla 2020: 5, 7).

The administrative detention conditions of children have been exacerbated by COVID-19. The Asylum Service suspended receptions from mid-March to mid-May (GCR 2020: 16), with most children stuck in RICs or other temporary facilities without registered applications and interviews. Juvenile protection failed since the proportionality and necessity of the containment measures applied to RICs and refugee centres were not substantially examined. Restrictions on freedom of movement in and out of camps amounted to unmitigated confinement, allowing residents (including children) to leave exceptionally (MD 20030/2020). MD 48940/2020 prolonged such constraints until August, with higher virus exposure. Orwellian euphemisms have been employed to feign compliance with international standards and alleged security policies. In January 2021 migrants, including numerous children in the Sparta Inn on the mainland, were prohibited from exiting the accommodation to prevent a further spread of the virus (GDP 2021), showcasing claimed public health security responses.

Even age assessment legal provisions have not been properly implemented (UNWGAD 2019). It lacks adequacy being usually based on X-ray and dental examinations without accurate medical determination. Asylum-seeking children often are not represented or informed in an understandable language during the assessment, risking their treatment as adults and further violating their rights. UACs in 'protective custody' have not been subjected to age assessment. Such practice has resulted in additional, unnecessary confinement of the so-called 'alleged minors' ('treated as and detained with adults'), with side effects on asylum procedures.

### 3.5 Case law

Systematic detention and absence of adequate facilities where children can fully enjoy special care and protection were considered among the most blatant infringements of the rights of migrant children by the European Committee of Social Rights in ***ICJ and ECRE v Greece*** 173/2018 (ECSR 2019a). It has since ruled on immediate measures against Greece in May 2019, requiring it to provide them with appropriate shelter, water, food, health care and education, to remove UACs from detention and from RICs at the borders, to place them in suitable accommodation for their age, and to appoint effective guardians. However, these prescriptions have not been fully implemented.

The deprivation of liberty and the lawfulness of detention of UACs have been challenged before the European Court. For instance, an Afghan minor's detention in Lesvos adult centre (for two days) violated article 5(1) of the European Convention as Greek authorities had not considered the best interests of the child or his status, besides not examining the necessity of such measures and possible less drastic action to secure deportation (***Rahimi v Greece*** 2011). His practical inability to contact a lawyer and to understand available remedies written in an unknown language, thus exercising these rights violated article 5(4) (see also ***Housein v Greece*** 2013). Even a juvenile Iraqi's arrest and detention at the Soufli border post irrespective of his status, with an extension of such detention after having reached adulthood, without any further consideration towards his removal, violated article 5(1) (***Mohamad v Greece*** 2014).

Conditions of detention have also been examined. For instance, those of nine UACs in various Greek police stations (held between 21 and 33 days) amounted to 'degrading treatment' under article 3, because they could have made them feel 'isolated from the outside world', with negative effects on physical and mental well-being. Article 5(1)(4) was violated as the public prosecutor (temporary guardian) had not enabled them to communicate with a lawyer and lodged an appeal to discontinue such detention to accelerate and facilitate their transfer to appropriate shelters (***HA & Others v Greece*** 2019). The living conditions of three Afghan

UACs under 'protective custody' in two Greek police stations violated article 3 for identical reasons, but such placement also amounted to unlawful deprivation of liberty under article 5(1) as the government had not clarified why they had not been placed in an 'alternative temporary accommodation' (***ShD & Others v Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*** 2019).

Further violations have been found regarding accompanied children. For instance, the detention conditions of an Afghan family (an eight-months pregnant woman, her husband and four children in the Pagani detention centre on Lesvos, with unrelated adults, without access to medical care and specific supervision, and very limited outdoor activities) amounted to inhuman and degrading treatment under article 3 (***Mahmundi & Others v Greece*** 2012). Their material impossibility to take any action before domestic courts pending their deportation violated article 13.

Relevant interim measures have been granted to ensure compatibility with the European Convention and children's status. The European Court ordered to timely transfer five UACs to an appropriate facility, as the conditions in Somos RIC (due to a lack of medical and psychological services, difficult hygienic conditions and access to food) allegedly exposed them to inhuman or degrading treatment (GCR 2019). Greek authorities were also ordered to release two UACs from a police station without outdoor spaces and transfer them to suitable arrangements (RSA 2019). Interim measures were granted for 20 UACs in Kolonos police station, mostly in 'protective custody', without guardians or information about reasons for and length of detention (ARSIS 2019).

### 3.6 Promising practices

Two practices deserve particular consideration: alternatives to administrative detention of children in migration; and alternative care options for UACs to include suitable accommodation (outside traditional reception institutions) and assistance, adapted to individual needs, besides facilitating access to health care and education. Attention is drawn to two case studies.

#### *3.6.1 Case of Ireland*

In Ireland, the detention of migrant children is prohibited in all circumstances (International Protection Act 2015, sec 20(6); Immigration Act 2003, sec 5(2b); Immigration Act 1991, art 5(4a)). This is for any applicant to international protection under the age of 18, which can be determined by two members of the national guard or immigration officers or via an age assessment test. Therefore, minors without valid visas are exempt from arrest and detention (sec 14) per secs 20(6) and (7).

If children arrive accompanied by a parent or guardian, the family is placed in one of the Direct Provision accommodation centres (Ireland 2015: 44) which do not constitute places of detention (Global Detention Project 2020: 2.5). Necessary expenses of the family (food, water, laundry, television, heating and so forth) are covered by the Irish Reception and Integration Agency (RIA 2010). Nonetheless, such centres are run by private companies and have been criticised for not having been covered by national standards (CRC/C/IRL/CO/3-4 2016: 65).

UACs' arrival is notified to the Child and Family Agency (Tusla), which assigns a social worker to place them in foster care if under 12 years of age or a child-friendly residence if over the age of 12. Risk-and-needs assessments are carried out, besides a mental health assessment to best determine the care needed, often due to traumatic circumstances (Tusla 2020). Social workers receive training on how to work with UACs, help create a statutory care plan, and assist with their asylum applications performing as representatives.

However, the lack of the benefit of the doubt when UACs' age is unknown has been criticised. If they arrive without appropriate identification, they can be treated as adult migrants and moved into custodial centres when the officer reasonably so believes (Irish Refugee Council 2018: 40). A person can even be detained in such centres if the age is unknown and he or she refuses age assessment. Concern was expressed regarding the complaints procedures available, whereby the Ombudsman for Children is legally prevented from investigating complaints from children in a refugee, asylum-seeking or irregular migration situation (CRC/C/IRL/CO/3-4 2016: 5). Some concern was even expressed regarding the aftercare and education services for UACs accepted into the Irish child welfare system, and the uncertainty around the decision on their asylum application before the age of 18 (Groarke 2018).

### *3.6.2 Case of Cyprus*

In Cyprus, article 9ΣΤ(1) of the Refugee Law prohibits the detention of asylum-seeking children. In the Aliens and Immigration Law no provisions relate to children's detention, except for those transposing the EU Return Directive under which it is possible as a measure of last resort and the shortest appropriate period of time; but in practice children and families are not detained (Cyprus Refugee Council 2019: 97). Cyprus introduced community-based reception for accompanied children and family members (FRA 2017: 35). In 2016, the European Programme on Integration and Migration funded the pilot project Community Assessment and Placement (CAP) Model, which since 2018 has been implemented by the Cyprus Refugee Council. It aims to promote 'individualised and holistic case management, encouraging trust, engagement and collaboration with the system, working towards case resolution and contributing to reduce the

use of detention'. The Civil Registry and Migration Department (CRMD) is responsible for overseeing the community residence, where measures (for instance, regular appearance before authorities, deposits or financial guarantees, obligations to reside at specific addresses or supervision) are implemented to prevent absconding. However, towards the end of 2019 and beginning of 2020 the CRMD ceased issuing residence permits for family members regardless of their refugee status, leaving them (including children) without full access to their rights (Cyprus Refugee Council 2020: 16).

Since April 2020 the International Organisation for Migration (IOM) has managed and implemented the programme Creating Semi-Independent Housing Structures for Hosting Unaccompanied Children over 16 Years, funded by the Cypriot Ministry of Labour, Welfare and Social Insurance. It aims at easing the difficult transition to adulthood for UACs through integrated support and appropriate care. With most accommodation facilities previously operating at close to capacity and exposed to mental health, physical, financial and social risks, seven unaccompanied Somali boys were newly housed 'feverish with joy' (Alexandropoulos 2020). Therein children have access to psychological support, vocational training and education, besides clean water, hygiene kits, information and health care (in response to COVID-19).

## 4 Concluding remarks

The findings on case studies cannot be readily generalised, but common problems may be extracted to elaborate solutions to controversial practices and counter underpinning justifications. The analysed use of deprivation of liberty on immigration or national security grounds appears affected (although to different degrees) by states' contemporary security rationale, thus confirming what earlier studies started to explore (Kaloteraki 2015; Amnesty International 2017). Such a rationale has led to a strong erosion of children's rights, which is a critical area of concern and deserves more consideration. Various recommendations can be made from both national and regional perspectives.

### 4.1 National security-related deprivation of liberty

#### *4.1.1 Recommendations at national level*

Indisputable grounds for The Netherlands to actively engage in repatriating child nationals exist. The children are extremely vulnerable, mostly below the age of four, facing sustained violations of their non-derogable rights under international law. The establishment of good (if not perfect) multi-agency care systems undermines the argument that repatriation would be too difficult and suggests that this is a political argument. The perceived

'security threat' evidently trumps repatriation, but the child's best interests should be established for each individual case. It cannot be argued that young children act on their own ideology, as they largely imitate their surroundings. Emblematically, seven child returnees were repatriated to Sweden and reportedly recovered in an incredible way (ICSVE 2020: 1).

The repatriation is also justified from a security perspective. The Dutch approach is not resolving any perceived threats. It can cause children's feeling of abandonment, openness to further indoctrination, or experience of further traumatisation, which can turn into a desire for revenge. It is based on a short-sighted attempt to prevent children's return in exchange for a feeling of short-term security.

The empirical evidence-based model of Rehabilitation and Reintegration Intervention Framework, which defines a multi-level approach to identify levers of change (Weine & Ellis 2020: 1) could be followed. A holistic and intersectional perspective is crucial to consider children's traumas and experiences. When neglect and abuse is absent, repatriation with mothers should be allowed, in line with intelligence services' approach that a 'controlled' repatriation is the safest way to ensure long-term monitoring, and that strengthening family bonds can increase resilience against extremism.

In France, a change of narrative is needed towards children involved in terrorism-related offences. By implying a political and emotional burden, they have altered usual practices of the juvenile justice system over children's rights, both legislatively and judicially. Derogatory procedures undermine the system. Children should be prosecuted under the latter and child-sensitive anti-terrorism legislation, so as to support a better understanding of their vulnerability and encourage non-custodial options. Moreover, the provision of three years' pre-trial detention for 16 year-old children (in breach of international and EU law) must be connected to the judicial system's inefficiency, as terrorist cases are subjected to complex and time-consuming investigations. The average of 18 months for a youngster to be judged (Hantz 2019) facilitates long-term pre-trial detention. If the justice system cannot speed up procedures, it should invest in non-custodial options. The burden of systemic fragilities cannot be put on the suspected children.

Adolescents have not been directly involved in acts of terrorist violence. The use of detention due to AMT should be regarded cautiously, especially for (repatriated) young adults recruited before turning 18. Whether used preventively or punitively, the deprivation of liberty neither addresses the root causes of recruitment not protects national security. It solely fights symptoms for realising short-term security. The clearly repressive approach is ineffective, counterproductive, and threatens children's health, well-being and development.

Criminal policies should go beyond detention as a 'quick-fix' solution to terrorism. They should prioritise children's rights and rehabilitation as more responsible choices and acknowledge such children as victims (instead of 'security threats'). Anti-terrorism strategies should trump preventive and repressive tools and be designed according to human rights law.

Child protection and educational assistance institutions are decisive in promoting these children's reintegration, even via non-custodial options. However, their variable effectiveness should be accepted, as terrorism and traditional crime share problems (family break-ups, failures at school, a desire to restore a failing fatherly image, questioning life, and so forth). Solid coordination mechanisms are advisable considering the multidimensionality of the needed care, combined with the urgency and perceptions of terrorism.

### *4.1.2 Recommendations at regional level*

Broad and vague counter-terrorism legislation fails to differentiate between children and adults, thereby undermining the special status of children and international children's rights standards, and supporting the detention of children perceived as 'security threats' (and perpetrators). European counter-terrorism agendas should strongly include a child rights-based approach as complementary objective of public security for long-lasting peace and security. In this vein, they should uphold juvenile justice to avoid punitive approaches fuelling discrimination, stigmatisation and secondary victimisation. They should also promote and facilitate active repatriation, rehabilitation and (re)-integration of child nationals with due account to their specific needs and rights, and against their re-victimisation by communities, law enforcement officials and policy makers. Prevention, counter-radicalisation and rehabilitation efforts should be coordinated among states, for a deeper understanding of a good ***modus operandi*** and possible launch of successful programmes. A 'holistic counter-terrorism strategy' to address children's needs should be proposed regionally and include experts on counter-terrorism, foreign affairs, humanitarian aid, child protection and rights, to be consulted by state officials in view of states' obligations to uphold CRC, serving the wider security goal. UNOCT 2019 Key Principles provide guidance.

European states should work out concrete modalities for repatriating child nationals as a matter of priority, which would respond to the general due diligence obligation to prevent flagrant human rights abuses of which a state is aware, and additionally to the particular obligations under (***inter alia***) articles 3(1) and 2(2) of CRC. Governments' and courts' restrictive interpretation of jurisdiction under article 2(1) of CRC critically confines these children to a 'legal vacuum' where state parties bear no responsibility towards them and leave them tremendously vulnerable. Effective

consular assistance for nationals detained or held in SDF camps remains problematic. The French case before the European Court might contribute to a progressive approach that does not assess prospective repatriation through purely national security lenses, but acknowledges that these children have their own rights and interests, and have not chosen to live in such circumstances/territories.

## 4.2 Migration-related deprivation of liberty

### *4.2.1 Recommendations at national level*

Child-friendly reception options, alternative care arrangements and non-custodial solutions must be reconsidered or foreseen to protect migrant or asylum-seeking children's rights in law and practice, without fuelling security narratives. Greek law is not fully in line with international standards and consensus towards ending children's detention solely on the basis of migration status. It should prohibit it totally and related provisions should be implemented without any delay, deviation or misuse of existing instruments. However, the crucial problem of ***de facto*** detention cannot be solved without appropriate reception, protection mechanisms and capacities as tailored on a needs-based approach to respond to the changing trends of arrivals. Safeguards for children should not be compromised for alleged state security interests, including security responses against COVID-19.

Accurate age assessment procedures serve as catalysts for genuine protection and should be guaranteed alongside other procedural safeguards in light of the best interests of the child. Decisive components such as physical, psychological, cultural or gender-related aspects of the child should be examined when applying the 'benefit of the doubt' principle. As recommended by the CRC Committee for Italy (2019), a multidisciplinary, science-based, child rights-respectful 'uniform protocol on age determination methods' should be implemented and used only in case of serious doubts, ensuring access to effective appeal mechanisms. Regular and up-to-date training should be granted to qualified professionals to conduct child-sensitive examinations, and non-medical methods should be emboldened to diminish the physical or psychological intrusiveness of the entire (already strained) process.

The appointment of competent guardians in every stage of the asylum procedure should be effective and facilitate UACs' referral to child-friendly accommodation facilities to prevent detention and identify durable solutions. The Greek guardianship instrument should become fully operative, including the rules on the best interests assessment, which remains crucial before undertaking any decisions (EASO 2018: 60-62). Accordingly, reception conditions should grant legal assistance,

psychosocial services and educational activities, alongside foster care solutions within an integration scheme.

Engagement-based alternatives to detention should be applied and framed by coordinated actions, through case management, advocacy, communications and best practices exchange between states (as done by the Greek NGO HumanRights360). Case management should be promoted at all levels involving children, as a holistic, cost-effective and efficient response to migration policy (PICUM 2020a: 2). Under a structured social work approach, individuals are supported and empowered in achieving community-based case resolution. In the Revised CAP model, the decision making, placement and case management compose a multi-faceted, child-oriented approach. However, a guardian stands at the forefront of case resolution for UASCs, whereas a social worker (as the case manager) should be assigned with such responsibilities for children with families. In the intervention process, the best interests of the child should be a guiding tool for assessing needs and choosing durable solutions (PICUM 2020a: 5).

Critically looking at promising practices in Ireland and Cyprus, there is room for improving non-custodial solutions. It is timely that other states legislate the abolition of children's immigration detention. For accompanied children the family unit must be safeguarded and states should implement community-based living arrangements, but holding them to a national standard instead of outsourcing to private companies. States should also legislate to direct authorities to integrate UACs into national child protection systems where they can be kept in appropriate accommodation pending assignment to a guardian or foster family. Semi-independent housing solution for UACs over 16 years, with appropriate support in their transition to adulthood, is also positive.

Well-managed alternative care systems can be more beneficial to the well-being and harmonious development of children, and also less costly than institutional reception facilities. The benefits of non-custodial practices (as highlighted in the 2016 CAP report of Cyprus) should be taken seriously. They are more humane in treating children as victims and fulfilling their rights, thereby improving individual well-being and self-sufficiency. They are more effective in increasing confidence in immigration systems, therefore achieving 'up to 95% appearance rates and up to 69% independent departure rates for refused cases'. They end up being significantly cheaper – up to 80 per cent cheaper – as detention has very high operational costs and potentially expensive legal costs if it is later considered wrongful (IDC 2015: 3).

### *4.2.2 Recommendations at regional level*

The European Court jurisprudence highlights protection gaps in European states' policies in relation to migrant children in detention, mainly regarding Greece, France, Belgium, Bulgaria, Hungary and Poland. Violations concern detention conditions, the children's rights to liberty and to a speedy decision on the lawfulness of a detention measure, and their right to respect for private and family life. Although the Court's interpretation of the European Convention does not place an absolute ban on such detention, violations involve children whose best interests must be prioritised due to their 'extreme vulnerability'. This should be a driving force to the states required to reform practices from a child rights-based approach.

At the CoE and the EU political levels, children's immigration detention has been addressed by laying down partial safeguards, but more consistent measures should tackle it. The reference to children's detention as a 'last resort and for the shortest appropriate period of time' in EU secondary law (for instance, Reception Conditions Directive, Return Directive) should be amended with a clear prohibition. With the EU Pact on Migration and Asylum (COM(2020) 37 final: 8), the EU should be engaged in promoting and protecting children's rights, including their right to liberty, by establishing an unconditional legislative ban on children's immigration detention and by ensuring that the best interests of the child is central to asylum, return and border procedures (PICUM 2020b: 4). Regrettably, the Pact has launched a policy of systemic returns under which their immigration detention is promoted, especially within the increasing use of asylum border procedures (COM(2020)610 final). As COVID-19 constitutes a further critical juncture, the Pact should become a turning point in how the EU and its member states deal with persisting protection gaps by making joint efforts to release children in administrative detention, corroborating strategies respectful of their rights, which should always prevail over states' interests.

The EU should promote effective European cooperation and solidarity by recalling member states to implement the Commission's plan on the relocation programme (of March 2020) for UACs' transfer from the hotspots to other EU countries capable of accommodating them, and which should not claim 'security risks'. Critical components (for instance, identification, best interests of the child assessment, preparation for transfer and relocation funding) require member states to agree on how to better accomplish *a* practical and comprehensive relocation scheme (FRA 2020). Between April and July 2020, approximately 120 UACs were relocated from Greece to other states, with the support of the EASO, IOM, UNHCR and UNICEF (European Commission 2020), proving that actions follow political will.

Non-custodial care and reception solutions are only softly addressed by the CoE and the EU. Given the benefits and otherwise grave implications, European institutions should consistently advance their use via fresh policies strengthening child protection. In identifying existing solutions, the UN Special Rapporteur on the Human Rights of Migrants (2020) concluded that 'immigration detention of children is effectively avoidable' and recommended states 'to shift away from a focus on enforcement and coercion towards providing human rights based alternative care and reception for all migrant children and their families'. Against inhumane, expensive and ineffective detention, European states should rely more on the successes of non-custodial practices, instead of prioritising securitisation policies of border control and integration procedures, particularly regarding national identity concerns or welfare services demand. However, even a positive process fuelled by the implementation of promising practices can just as easily be eroded with populism within a government, which is a risk requiring regional attention to safeguard the rights of children.

# References

Advocaat-Generaal (2020) Arrest Hoge Raad: ECLI:NL:HR:2020:1148, Gevolgd, ECLI:NL:PHR:2020:412

Algemene Inlichtingen- en Veiligheidsdienst (AIVD) (2017) 'The Children of ISIS The indoctrination of minors in ISIS-held territory', available at https://english.aivd.nl/publications/publications/2017/04/26/the-children-of-isis.-the-indoctrination-of-minors-in-isis-held-territory (last visited 12 April 2020)

Algemene Inlichtingen- en Veiligheidsdienst (AIVD) (2020) 'Uitreizigers en terugkeerders', available at https://www.aivd.nl/onderwerpen/terrorisme/dreiging/uitreizigers-en-terugkeerders (last visited 12 April 2020)

Alonso S 'Blok wil met Koerden praten over berechting Syriëgangers' ***NRC*** 7 February 2020, available at https://www.nrc.nl/nieuws/2020/02/07/blok-wil-met-koerden-praten-over-berechting-syriegangers-a3989726 (last visited 10 March 2020)

Amnesty International (2017) Report 'Dangerously disproportionate: The ever-expanding security state in Europe', available at https://www.amnesty.org/en/latest/campaigns/2017/01/dangerously-disproportionate/ (last visited 12 March 2020)

Baker-Beall C 'The threat of the "returning foreign fighter": The securitisation of EU migration and border control policy' (2019) 50 ***Security Dialogue*** 437, available at https://journals.sagepub.com/doi/pdf/10.1177/0967010619857048 (last visited 12 March 2020)

Baranger T, Bonelli L & Pichaud F 'La justice des mineurs et les affaires de terrorisme' (2017) 2 ***Les Cahiers de la Justice*** 253

Bello V 'The spiralling of the securitisation of migration in the EU: From the management of a "crisis' to a governance of human mobility?' (2020) ***Journal of Ethnic and Migration Studies*** 1

Bigo D 'Security and immigration: Toward a critique of the governmentality of unease' (2002) 27 ***Alternatives*** 63

Boekestein TL 'Deprivation of nationality as a counter-terrorism tool: A comparative analysis of Canadian and Dutch legislation' (2018) 5 ***Transnational Human Rights Review*** 23

Boon F, Alonso S & Versteegh K 'Is het beleid gewijzigd, of was terughalen IS-wezen een "uniek geval"?' ***NRC*** 2019, available at https://www.nrc.nl/nieuws/2019/06/11/is-het-beleid-gewijzigd-of-was-terughalen-is-wezen-een-uniek-geval-a3963270 (last visited 10 March 2020)

Bosworth M & Turnbull S 'Immigration detention, punishment and the criminalisation of migration' in S Pickering & J Ham (eds) ***The Routledge handbook on crime and international migration*** (2017) London: Routledge 121

Brouwers A 'Coalitie ziet geen heil in terughalen IS-kinderen: We hebben geen behoefte aan tikkende tijdbommen' ***Volkskrant*** 3 April 2019, available at https://www.volkskrant.nl/nieuws-achtergrond/coalitie-ziet-geen-heil-in-terughalen-is-kinderen-we-hebben-geen-behoefte-aan-tikkende-tijdbommen~b065e319/ (last visited 1 June 2020)

Centre for Global Policy (CGP) 'The children of ISIS detainees: Europe's dilemma' 18 June 2020, available at https://cgpolicy.org/wp-content/uploads/2020/06/CGP-Children-of-ISIS-June-2020.pdf (last visited 1 July 2020)

Centre d'Analyse du Terrorisme (CAT) & Counter Extremism Project (CEP) 'Compte rendu de la conférence internationale sur le terrorisme, Quelles menaces et quels enjeux après la chute du califat?' 7 November 2019, available at https://f-origin.hypotheses.org/wp-content/blogs.dir/2725/files/2020/01/CAT_conf7nov2019.pdf (last visited 12 March 2020)

Child Justice Advocacy Group (CJAG) 'Bringing children home: A children's rights approach to returning from ISIL' 2020, available at https://cdn.penalreform.org/wp-content/uploads/2020/01/Child-Returnees-Position-Paper-January-2020.pdf (last visited 1 July 2020)

CRIN-Child Rights International Network 'Caught in the crossfire? An international survey of anti-terrorism legislation and its impact on children' 2018, available at https://archive.crin.org/sites/default/files/caughtinthecrossfire.pdf (last visited 8 March 2020)

Commission Nationale Consultative des Droits de l'Homme (CNCDH) 'Avis sur la privation de liberté des mineurs' 27 March 2018, available at https://www.cncdh.fr/sites/default/files/180327_avis_sur_la_privation_de_liberte_des_mineurs.pdf (last visited 6 March 2020)

Coolsaet R & Renard T (2018) Security Policy Brief 'Children in the Levant: Insights from Belgium on the dilemmas of repatriation and the challenges of reintegration', available at https://biblio.ugent.be/publication/8569049/file/8569052.pdf (last visited 3 August 2020)

Coolsaet R & Renard T (2019) Research note 'New figures on European nationals detained in Syria and Iraq', available at http://www.egmontinstitute.be/new-figures-on-european-nationals-detained-in-syria-and-iraq/#_ftn1 (last visited 3 August 2020)

Council of Europe (CoE) SG/Inf(2020)4 '"Refugee and migrant children in Europe" – Final report on the implementation of the Action Plan (2017-2019)'

Council of Europe (2015) 'Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism'

Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures, H/INF(2009)4

Council of Europe Committee of Ministers Recommendation Rec(2003)5 to member states on measures of detention of asylum seekers

Council of Europe Committee on Counter-Terrorism (CDCT), CDCT (2019) 9

Council of Europe Counter-Terrorism Strategy (2018-2022), CM(2018)86-addfinal

Council of Europe Steering Committee for Human Rights CDDH(2019) R91Addendum5 'Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results'

Council of Europe Steering Committee for Human Rights CDDH(2017)R88add2 'Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration'

Council of Europe Venice Commission (2014) 'Report on the Protection on Children's Rights: International Standards and Domestic Institutions'

CTK Czech News Agency 'The Czech Republic will not accept child refugees from Greece, says Interior Minister' 21 January 2020, available at https://news.expats.cz/weekly-czech-news/the-czech-republic-will-not-accept-child-refugees-from-greece-says-interior-minister/ (last visited 7 April 2021)

Cyprus Refugee Council (2019) 'AIDA 2019 update: Cyprus' Asylum Information Database, available at https://cyrefugeecouncil.org/aida-2019-update-cyprus/ (last visited 26 March 2020)

Cyprus Refugee Council (2020) 'Country report: Cyprus', Asylum Information Database & European Council on Refugees and Exiles 20 March 2019, available at https://www.asylumineurope.org/reports/country/cyprus (last visited 26 March 2020)

Défenseur des droits (2019) 'Childhood and violence: The part played by public institutions: Annual report on the rights of the child 2019', available at https://www.defenseurdesdroits.fr/fr/rapports-annuels/2019/11/rapport-annuel-sur-les-droits-de-lenfant-2019-enfance-et-violence-la-part (last visited 15 March 2020)

De Sèze 'Terrorisme: un jihadiste mineur revenu de Syrie condamné à quatre ans de prison' ***RTL*** 19 October 2018, available at https://www.rtl.fr/actu/justice-faits-divers/terrorisme-un-jihadiste-mineur-revenu-de-syrie-condamne-a-quatre-ans-de-prison-7795252257 (last visited 15 March 2020)

District Court of the Hague ECLI:NL:RBDHA:2019:11909, 11 November 2019, available at https://www.uitspraken.nl/uitspraak/rechtbank-den-haag/civiel-recht/civiel-recht-overig/kort-geding/ecli-nl-rbdha-2019-11909 (last visited 17 March 2020)

DPJJ (2018) 'Directrice de la Protection judiciaire de la jeunesse, Note relative à la prise en charge éducative des mineurs radicalisés ou en danger de radicalisation violente' ***Bulletin officiel du ministère de la Justice,*** available at http://www.justice.gouv.fr/bo/2018/20181031/JUSF1821611N.pdf (last visited 16 March 2020)

DPJJ (2020) 'Rapport d'activité Mission Nationale de Veille et d'Information 2019', available at https://www.cnape.fr/documents/dpjj_-rapport-annuel-mnvi-2019/ (last visited 16 March 2020)

De Vries AJ ‚Onze kinderen uit het kalifaat' Master's thesis, Universiteit Leiden, 2016, available at https://www.student.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-arjan-de-vries-onze-kinderen-uit-het-kalifaat.pdf (last visited 20 March 2020)

Duffy H 'Communications No 79/2019 and 109/2019 ***LH et al v France*** and 77/2019 ***FB et al v France***. French children in Syrian camps: The Committee on the Rights of the Child and the jurisdictional quagmire' Leiden Children's Rights Observatory, Case Note 3/2021 (2021) Leiden Law School, available at https://childrensrightsobservatory.nl/case-notes/casenote2021-3 (last visited 8 April 2021)

Dworking A (2019) Beyond good and evil: Why Europe should bring ISIS foreign fighters home, European Council on Foreign relations

EKKA 'Situation update: Unaccompanied children (UAC) in Greece' (October 2020a), available at http://ekka.org.gr/images/ΣΤΑΤΙΣΤΙΚΑ_2020/EKKA%20Dashboard_20201031.pdf (last visited 31 October 2020)

EKKA 'Situation update: Unaccompanied children (UAC) in Greece' (July 2020b) available at https://reliefweb.int/report/greece/situation-update-unaccompanied-children-uac-greece-31-july-2020-enel (last visited 28 August 2020)

ENM (2017) 'Mineurs et affaires terroristes: l'ENM forme les juges pour enfants'

European Asylum Support Office (EASO) (2018) 'Practical Guide on age assessment, 2nd ed, EASO Practical Guides Series'

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2020' (COM(2020)37 final) 29 January 2020

European Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' (COM(2020)609 final) 23 September 2020

European Commission Relocation of unaccompanied children from Greece to Portugal and Finland – Questions and Answers – Press release 7 July 2020

European Commission (2017) Communication to the European Parliament and the Council, The protection of children in migration (COM (2017) 211 final)

European Commission for Democracy through Law (Venice Commission) 'Report on the Protection of Children's Rights: International Standards and Domestic Constitutions' 3 April 2014

European Committee of Social Rights (ECSR), Complaint No 173/2018, 23 May 2019a

European Committee of Social Rights (ECSR), Case Document No 5, 'Submission by the Office of the United Nations High Commissioner for Refugees in the case of International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece (Complaint No 173/2018)', 16 August 2019b, available at https://rm.coe.int/cc173casedoc5-en-observations-by-the-unhcr/168096c416 (last visited 28 March 2020)

European Court of Human Rights, Factsheet 'Unaccompanied migrant minors in detention', May 2020

European Court of Human Rights, Factsheet 'Unaccompanied migrant minors in detention' June 2020

European Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals

European Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

European Parliament (2016) P8_TA(2016)0502 Resolution of 14 December 2016 on the Annual Report on human rights and democracy in the world and the European Union's policy on the matter 2015

European Parliament (2018) P8_TA(2018)0201 Resolution 'Protection of children in migration'

European Parliament (2019) 2019/2876(RSP) Resolution, children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child

European Parliament (2019) Briefing 'EU legislation in progress, recasting the return directive'

European Union Fundamental Rights Agency (FRA) (2017) 'European legal and policy framework on immigration detention of children'

European Union Fundamental Rights Agency (FRA) (2020) 'Relocating unaccompanied children: Applying good practices to future schemes'

Federal Office for Migration and Refugees (2018) 'Unaccompanied minors in Germany'

Fédération Nationale des Assesseurs Près les Tribunaux pour Enfants (FNAPTE) 'L'incarcération des mineurs' ***Huitième numéro du Flash-infos des magistrats de la jeunesse*** 2 January 2019, available at http://fnapte.fr/lincarceration-des-mineurs/

Ferri F & Massimi A 'Scenari di frontiera: il caso Lampedusa', ***ASGI - ActionAid - CILD***, October 2018, available at https://www.asgi.it/wp-content/uploads/2019/02/2018-Lampedusa_scenari-_di_frontiera_versione-corretta.pdf (last visited 7 April 2020)

Franceinfo 'Ados toulousains partis en Syrie: le Parquet de Paris fait appel de la condamnation' 11 June 2020, available at https://france3-regions.francetvinfo.fr/occitanie/haute-garonne/toulouse/ados-toulousains-partis-en-syrie-le-parquet-de-paris-fait-appel-de-la-condamnation-1037695.html (last visited 10 July 2020)

Giesen P Kinderombudsman Kalverboer: 'IS-kinderen terughalen is een risico, maar niets doen is nog riskanter' ***Volkskrant*** 2019, available at https://www.volkskrant.nl/mensen/kinderombudsman-kalverboer-is-kinderen-terughalen-is-een-risico-maar-niets-doen-is-nog-riskanter~ba2ea414/ (last visited 3 March 2020)

Gender Equality Commission (GEC) (2020) 17th meeting Strasbourg, 8-9 July 2020 Via video Conference, Council of Europe, available at https://rm.coe.int/gec-2020-report-july/16809f0570 (last visited 27 August 2020)

Global Detention Project (GDP) (2019) 'Immigration detention in Greece: Stranded in Aegean limbo', available at https://www.globaldetentionproject.org/greece-stranded-in-aegean-limbo (last visited 3 March 2020)

Global Detention Project (GDP) (2021) 'Overview – 20 January 2021', available at https://www.globaldetentionproject.org/countries/europe/greece (last visited 8 April 2021)

Greek Council for Refugees (GCR) 'Country Report: Greece 2019 update' 2020, available at https://www.asylumineurope.org/reports/country/greece (last visited 8 July 2020)

Greek Council for Refugees (GCR) 'Country Report: Greece 2018 update' 2019, available at https://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2018update.pdf (last visited 25 June 2020)

Greek Ombudsman & UNICEF (2019) 'Rights of children on the move: Annual report 2018', available at https://www.synigoros.gr/resources/docs/annual_report_2018-rights_of_children_on_the_move.pdf (last visited 3 June 2020)

Groarke S & Arnold S 'Approaches to unaccompanied minors following status determination in Ireland' ESRI 83/2018, available at https://www.esri.ie/system/files/publications/RS83.pdf (last visited 4 April 2020)

Gruenenberger V 'ENM***info*** No 47: La lettre de l'École nationale de la magistrature' December 2016, available at https://www.enm.justice.fr/sites/default/files/kiosque/Enm_info_47.pdf (last visited 18 March 2020)

Hantz N 'Au coeur du dispositif pénal des mineurs: rencontre avec la directrice de la protection judiciaire de la jeunesse' ***Village de la Justice*** 22 October 2019, available at https://www.village-justice.com/articles/directrice-pjj,32677.htm (last visited 19 March 2020)

HC Deb (16 October 2019), available at https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail/3b092ff9-6e9b-4ae6-85bd-e613c8c16cba (last visited 10 March 2020)

HC Deb (20 November 2019), available at https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail/e65d6bed-7044-4c2c-8b20-ab501b418f12 (last visited 14 March 2020)

Human Rights 360, 'Community-based alternatives to detention in Greece', available at https://www.humanrights360.org/community-based-alternativesto-detention-in-greece/ (last visited 15 September 2020)

HRW 'NGOs open letter to the Prime Minister of the Hellenic Republic Mr Kyriakos Mitsotakis' 25 February 2020, available at https://www.hrw.org/news/2020/02/25/ngos-open-letter-prime-minister-hellenic-republic-mr-kyriakos-mitsotakis (last visited 18 March 2020)

HRW (2019) 'Greece: Unaccompanied children at risk' 18 December 2019, available at https://www.hrw.org/news/2019/12/18/greece-unaccompanied-children-risk (last visited 18 March 2020)

International Crisis Group (ICG) Report 'Women and children first: Repatriating the Westerners affiliated with ISIS' 18 November 2019, available at https://d2071andvip0wj.cloudfront.net/208-women-and-children-first.pdf (last visited 11 March 2020)

International Detention Coalition (IDC) (2015) 'There are alternatives: A handbook for preventing unnecessary immigration detention' (revised edition), available at https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf (last visited 18 March 2020)

Ireland (2015) Working Group to Report to Government on Improvements to the Protection Process, Including Direct Provision and Supports to Asylum Seekers, 'Final Report', Government of Ireland, June 2015

Kalir B & Rozakou K '"Giving form to chaos": The futility of EU border management at Moria hotspot in Lesvos' (2016) Society and Space Essay Series, available at https://www.societyandspace.org/articles/giving-form-to-chaos-the-futility-of-eu-border-management-at-moria-hotspot-in-lesvos (last visited 12 May 2020)

Kaloteraki L 'People in between: The criminalisation of migration detention in Europe' Master's thesis, Lund University, 2015, available at http://lup.lub.lu.se/student-papers/record/7513460/file/7513487.pdf (last visited 18 March 2020)

Kalverboer M, Beltman D, Van Os C & Zijlstra E 'The best interests of the child in cases of migration assessing and determining the best interests of the child in migration procedures' (2017) 25 ***The International Journal of Children's Rights*** 114

Khosrokhavar F 'Terrorisme, radicalisation, que peut la prison? Interview by Martin de Lalaubie and Anne de Mullenheim' ***Revue Projet*** 2018, available at https://www.revue-projet.com/prod/file/ceras/projet_article/generated_pdf/terrorisme-radicalisation-que-peut-la-prison.pdf (last visited 12 March 2020)

Kouwenhoven A & Alonso S 'OM wil drie keer zoveel IS'ers ophalen' ***NRC*** 23 October 2019, available at https://www.nrc.nl/nieuws/2019/10/23/om-wil-drie-keer-zoveel-isers-ophalen-a3977875 (last visited 12 March 2020)

Léonard S & Kaunert C 'The securitisation of migration in the European Union: Frontex and its evolving security practices' (2020) ***Journal of Ethnic and Migration Studies*** 1

Lower House Debate 15 May 2020, available at https://zoek.officielebekendmakingen.nl/kst-32317-616.html (last visited 12 March 2020)

Mayaud Y (2019) Terrorisme – Poursuites et indemnisation, Répertoire de droit pénal et procédure pénale, Dalloz

Menjívar C, Gómez Cervantes A & Alvord D 'The expansion of "crimmigration", mass detention, and deportation' (2018) 12 ***Sociology Compass*** e12573.

Milanovic M 'Repatriating the children of foreign terrorist fighters and the extraterritorial application of human rights' (2020) ***EJIL:Talk!***, available at https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-

and-the-extraterritorial-application-of-human-rights/ (last visited 14 November 2020)

Ministry of Safety and Justice (2017) Actieprogramma Integrale Aanpak Jihadisme, available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/08/30/actieprogramma-integrale-aanpak-jihadisme/a5-nctvjihadismedef3-lr.pdf (last visited 12 March 2020)

Ministry of Justice and Safety (2018) Brief aan de Tweede kamer: Nederlandse inzet in EU besprekingen over ISIS-vrouwen en kinderen, 10-04-2018 2242633, available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2018/04/10/tk-nederlandse-inzet-in-eu-besprekingen-over-isis-vrouwen-en-kinderen/tk-nederlandse-inzet-in-eu-besprekingen-over-isis-vrouwen-en-kinderen.pdf (last visited 12 March 2020)

Moreno-Lax V 'The EU humanitarian border and the securitisation of human rights: The "rescue-through-interdiction/rescue-without-protection" paradigm' (2018) 56 *Journal of Common Market Studies* 119

Musch S 'Nederland neemt 100 vluchtelingen op uit vluchtelingenkamp Moria' *NRC* 10 September 2020, available at https://www.nrc.nl/nieuws/2020/09/10/nederland-neemt-100-vluchtelingen-op-uit-vluchtelingenkamp-moria-a4011522 (last visited 17 September 2020)

Mustaniemi-Laakso M et al (2016) 'The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration' FRAME Work Package No 11 – Deliverable No 3

NGOs Open Letter to the Prime Minister of the Hellenic Republic Mr Kyriakos Mitsotakis, 25 February 2020

Netherlands Council for the Judiciary 'Reactie PG bij Hoge Raad op blog in NJB over uitspraak Hof aangaande kinderen in IS kampen' 13 December 2019

Netherlands, Hague District Court, ECLI:NL:RBDHA:2019:11909, Judgment of 11 November 2019, Case No C-09-581588-KG ZA 19-999

Netherlands, Hague Court of Appeal, ECLI:NL:GHDHA:2019:3208, Judgment of 22 November 2019, Case No 200.269.321/01

Netherlands, Supreme Court, ECLI:NL:HR:2020:1148, Judgment of 26 June 2020, Case No 19/05666

Oberverwaltungsgericht Berlin-Brandenburg (OVG) 'OVG Bestätigt: Bundesrepublik Deutschland Muss Minderjährige Kinder Aus Dem Lager Al-Hol Im Nordosten Syriens Zusammen Mit Ihrer Mutter Nach Deutschland Zurückholen - 34/19', *Berlin.de* 7 November 2019, available at https://www.berlin.de/gerichte/oberverwaltungsgericht/presse/pressemitteilungen/2019/pressemitteilung.863104.php (last visited 9 March 2020)

OHCHR 'Extra-territorial jurisdiction of states over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic: Legal analysis' 14 February 2020

OHCHR 'Submission by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism and the UN Special Rapporteur on Arbitrary, Summary and Extra-Judicial Executions in the case of *HF and MF v France* (Application No 24384/19) before the European Court of Human Rights'

Parker S 'The UK continues to detain children, a year after the coalition's pledge to end it' *Open Democracy* 11 May 2011, available at http://www.opendemocracy.net/ourkingdom/simon-parker/uk-continues-to-detain-children-year-after-coalitions-pledge-to-end-it (last visited 9 March 2020)

Parliament, The House of Representatives (2019a) Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden, HR 2018-2019 (142), available at https://zoek.officielebekendmakingen.nl/ah-tk-20182019-142.pdf (last visited 5 March 2020)

Parliament, The House of Representatives (2019b) Brief Van De Ministers Van Buitenlandse Zaken En Van Justitie En Veiligheid, HR 2018-2019 29754 (506), available at https://www.eerstekamer.nl/behandeling/20190610/brief_regering_overbrenging_uit (last visited 3 March 2020)

Parliament, The House of Representatives (2019c) Brief Van De Ministers Van Buitenlandse Zaken En Van Justitie En Veiligheid (HR 2018-2019 29754 (524)), available at https://zoek.officielebekendmakingen.nl/kst-29754-524.html (last visited 4 March 2020)

Parliamentary Assembly of the Council of Europe (PACEa) Recommendation 2169 (2020) on international obligations concerning the repatriation of children from war and conflict zones

Parliamentary Assembly of the Council of Europe (PACEb) Resolution 2321 (2020) on International obligations concerning the repatriation of children from war and conflict zones

Pax for Peace Policy Brief 'ISIS-only tribunal: selective, politicised justice will do more harm than good' 31 October 2019

Penal Reform International (PNI) Briefing 'Children and violent extremism: International standards and responses from criminal justice systems' 2017

PICUM 'Implementing case management based alternatives to detention in Europe' March 2020a, available at https://picum.org/wp-content/uploads/2020/04/Concept-Paper-on-Case-Management_EN.pdf (last visited 4 June 2020)

PICUM 'Statement on the upcoming EU Pact on the Asylum and Migration', 26 May 2020b, available at https://picum.org/statement-on-the-upcoming-eu-pact-on-asylum-and-migration/ (last visited 5 June 2020)

Raad van State (Council of State) 'Voorstel van rijkswet tot wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid, met memorie van toelichting' 2015, available at https://www.raadvanstate.nl/@63769/w03-15-0191-ii/ (last visited 4 June 2020)

Refugee Council of Ireland 'Country Report: Republic of Ireland, 2018 update', available at http://www.asylumineurope.org/reports/country/republic-ireland (last visited 5 March 2020)

Reuters (2019) 'Court orders Belgium to take back woman and children from Syria' 31 October 2019, available at https://uk.reuters.com/article/uk-syria-security-belgium/court-orders-belgium-to-take-back-woman-and-children-from-syria-idUKKBN1XA2BC (last visited 5 March 2020)

RSA 'Comments on the International Protection Bill' October 2019, available at https://rsaegean.org/wp-content/uploads/2019/10/RSA_Comments_IPA.pdf (last visited 6 March 2020)

RTL-verkiezingsdebat (2015) [TV programme] RTL4

Sandelowsky-Bosman C & Liefaard T 'Children trapped in camps in Syria, Iraq and Turkey: Reflections on jurisdiction and state obligations under the United Nations Convention on the Rights of the Child' (2020) ***Nordic Journal of Human Rights*** 141

Sarantou E & Theodoropoulou A 'Children cast adrift – The exclusion and exploitation of unaccompanied minors (UAMs) in Greece' Report, Rosa Luxemburg Stiftung (2019), available at https://rosalux.gr/en/publication/children-cast-adrift- greece (last visited 26 August 2020)

Sheahan F 'Children, the judicial system, violent extremism and terrorism: An overview of the laws, policies and practices of six European countries' International Juvenile Justice Observatory, October 2018, available at http://www.oijj.org/sites/default/files/en_regional_report.pdf (last visited 5 March 2020)

Smyth C 'Towards a complete prohibition on the immigration detention of children' (2019) 19 ***Human Rights Law Review*** 1

Speckhard A & Ellenberg M 'Perspective: Can we repatriate the ISIS children?' ***Homeland Security Today*** 7 July 2020, available at https://www.hstoday.us/subject-matter-areas/counterterrorism/perspective-can-we-repatriate-the-isis-children/ (last visited 3 August 2020)

Spronken T '56 kinderen in IS-kampen' *NJB - Nederlands Juristenblad* 9 December 2019, available at https://www.njb.nl/highlights/56-kinderen-in-is-kampen.34307.lynkx (last visited 10 March 2020)

Stoffelen A 'Adviseur Hoge Raad: staat hoeft IS-vrouwen en kinderen niet te repatriëren' ***Volkskrant*** 24 April 2020, available at https://www.volkskrant.nl/nieuws-achtergrond/adviseur-hoge-raad-staat-hoeft-is-vrouwen-en-kinderen-niet-te-repatrieren~b1045c29/ (last visited 1 May 2020)

Syndicat de la Magistrature 'Quand on veut, on peut! Une autre justice des enfants' *Communiqué de presse rédigé en commun avec le SNPES PJJ-FSU, le SAF, la CGT, l'OIP, la ligue des droits de l'homme, Solidaires, le SNUASFP-FSU, SNUTER-FSU, Sud Santé Sociaux, Sud collectivités territoriales*, 2020, available at http://www.syndicat-magistrature.org/Quand-on-veut-on-peut-Une-autre-justice-des-enfants.html (last visited 20 June 2020)

Tak PJ (2008) *The Dutch criminal justice system* 3rd ed Wolf Legal Publishers

Tusla Child and Family Agency 'Separated children seeking asylum' 2020, available at https://www.tusla.ie/services/alternative-care/separated-children/ (last visited 5 August 2020)

UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child (2017) CMW/C/GC/4-CRC/C/GC/23, Joint General Comment No 4 (2017) and No 23 (2017) on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return

UN Committee on the Rights of the Child (2017) CRC/C/DNK/CO/5, Concluding Observations on the Fifth Periodic Report of Denmark

UN Committee on the Rights of the Child (2016) CRC/C/IRL/CO/3-4, Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland

UN Committee on the Rights of the Child (2019) CRC/C/ITA/CO/5-6, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy

UN Committee on the Rights of the Child (2019) CRC/C/GC/24, General Comment No 24 on children's rights in the child justice system

UN Committee on the Rights of the Child (2020) CRC/C/85/D/79/2019-CRC/C/85/D/109/2019, ***LH & Others v France***, Communications 79/2019 and 109/2019

UN News '"Foreign children" in overwhelmed Syrian camp need urgent international help, says top UN official' 19 April 2020, available at https://news.un.org/en/story/2019/04/1036901 (last visited 20 June 2020)

UN Office of Counter-Terrorism (UNOCT) (2019) *Key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups*

UN Office of Counter-Terrorism Centre (UNCCT) (2019) Handbook *Children affected by the foreign-fighter phenomenon: Ensuring a child-rights-based approach*

UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (OSRSG-SVC) 'Joint Statement on Human Rights and Humanitarian Concerns Related to Conflict Affected Women and Children in Syria and Iraq' 11 November 2019, available at https://www.un.org/sexualviolenceinconflict/press-release/joint-statement-on-human-rights-and-humanitarian-concerns-related-to-conflict-affected-women-and-children-in-syria-and-iraq/ (last visited 12 July 2020)

UN Security Council Resolution 2178 (2014) on threats to international peace and security caused by foreign terrorist fighters, 24 September 2014

UN Security Council Resolution 2427 (2018) on children and armed conflict, 9 July 2018

UN Special Rapporteur on the Human Rights of Migrants 'Report on ending immigration detention of children and seeking adequate reception and care for them', A/75/183, 20 July 2020

UN Working Group on Arbitrary Detention (UNWGAD) 'Preliminary findings from its visit to Greece' 2-13 December 2019, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25421&LangID=E (last visited 15 March 2020)

UN Working Group on Arbitrary Detention (UNWGAD) 'Revised Deliberation No 5 on deprivation of liberty of migrants' 2018, available at https://www.refworld.org/docid/5a903b514.htm (last visited 16 March 2020)

UNHCR 'Desperate journeys, refugee and migrant children arriving in Europe and how to strengthen their protection' October 2019, available at https://data2.unhcr.org/en/documents/details/71703 (last visited 18 March 2020)

UNHCR (2020) Factsheet, Greece, Aegean Islands, Monthly Snapshot, available at https://data2.unhcr.org/en/documents/download/74693 (last visited 20 March 2020)

UNICEF (2019a) Working Paper on Alternatives to Immigration Detention, available at https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf (last visited 18 March 2020)

UNICEF (2019b) Press Release 'More than 6 100 unaccompanied refugee and migrant children in Italy in need of community and family-based care' 5 December 2019, available at https://www.unicef.org/press-releases/more-6100-unaccompanied-refugee-and-migrant-children-italy-need-community-and-family (last visited 18 March 2020)

United Kingdom Home Office - Lane M et al 'Evaluation of the New Family Returns Process' Research Report 78, December 2013, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264658/horr78.pdf (last visited 20 March 2020)

United Nations Global Study on Children Deprived of Liberty (UNGSCDL) (2019), available at https://www.refworld.org/docid/5a903b514.htm (last visited 2 March 2020)

United Nations Human Rights Committee (HRC) (1982) CCPR General Comment No 8: Article 9 (Right to Liberty and Security of Persons) 30 June 1982

United Nations Human Rights Committee (HRC) (1989) CCPR General Comment No 17: Article 24 (Rights of the Child) 7 April 1989

United Nations Human Rights Committee (HRC) (2015) Concluding Observations on the 4th periodic report of Cyprus, CCPR/C/CYP/CO/4, 30 April 2015

United Nations Human Rights Office of the High Commissioner (OHCHR) (2020) 'Call for submissions on ending immigration detention of children and seeking adequate reception and care for them'

United Nations Interregional Crime and Justice Research Institute (UNICRI) (2016) Children And Counter-Terrorism

UNODC (2017) Handbook on children recruited and exploited by terrorist and violent extremist groups: The role of the justice system

Van Ark R & Paulussen C '[Analysis] Dutch Supreme Court rules on the group repatriation of the families of IS fighters' 26 June 2020, available at https://www.asser.nl/about-the-institute/asser-today/analysis-dutch-supreme-court-rules-on-the-group-repatriation-of-the-families-of-is-fighters-we-expect-that-more-individual-court-cases-will-now-be-started/ (last visited 28 July 2020)

Van Ark R, Gordon F & Prabhat D (2020) 'Repatriating the forgotten children of ISIS fighters: A matter of urgency' ***Global Governance Programme***, available at https://globalcit.eu/repatriating-the-forgotten-children-of-isis-fighters-a-matter-of-urgency/#_ftn1 (last visited 18 June 2020)

Van der Heide L & Geenen J 'Children of the Caliphate: Young IS returnees and the reintegration challenge' Research Paper ***ICCT*** 28 August 2017, available at https://icct.nl/publication/children-of-the-caliphate-young-is-returnees-and-the-reintegration-challenge/ (last visited 20 October 2020)

Van Spaendonck R 'To school or to Syria: The foreign fighter phenomenon from children's rights perspective' (2016) 12 ***Utrecht Law Review*** 41

Vriesema I 'Jeugdzorg heeft plan IS-kinderen klaar' ***NRC*** 19 February 2019, available at https://www.nrc.nl/nieuws/2019/02/19/jeugdzorg-heeft-plan-is-kinderen-klaar-a3654653 (last visited 2 April 2020)

Weine S, Brahmbatt Z, Cardeli E & Ellis H 'Rapid review to inform the rehabilitation and reintegration of child returnees from the Islamic State' (2020) 86 ***Annals of Global Health*** 64, available at http://doi.org/10.5334/aogh.2835 (last visited 20 October 2020)

Weine S & Ellis H 'Rehabilitating and child returnees from Isis' ***Just Security*** (2020), available at https://www.justsecurity.org/71021/rehabilitating-and-reintegrating-child-returnees-from-isis/ (last visited 20 October 2020)

International Centre for the Study of Violent Extremism (ICSVE) (2020) 'Can we repatriate the ISIS children?' Panel discussion, available at https://www.icsve.org/can-we-repatriate-the-isis-children/ (last visited 23 August 2020)

World Health Organisation (WHO) 'Situation reports on Al-Hol camp, Al-Hasakeh' Issue 17 (25 October–7 December 2019), available at http://www.emro.who.int/syr/syria-infocus/situation-reports-on-al-hol-camp-al-hasakeh.html (last visited 16 March 2020)

***20minutes*** 'Mulhouse: Quatre jeunes condamnés de 4 à 6 ans de prison pour association de malfaiteurs terroriste)' 16 November 2018, available at https://www.20minutes.fr/justice/2373439-20181116-mulhouse-quatre-jeunes-condamnes-4-6-ans-prison-association-malfaiteurs-terroriste (last visited 15 June 2020)

M Muradyan, A Askarbekov, A Arushanyan, M Koltsova & S Abuladze 'Overview of measures applied to children in conflict with the law in post-Soviet countries: Non-custodial measures and diversion programmes' (2020) 4 *Global Campus Human Rights Journal* 461-487
http://doi.org/20.500.11825/2036

# Overview of measures applied to children in conflict with the law in post-Soviet countries: Non-custodial measures and diversion programmes

***Mariam Muradyan, Aibek Askarbekov, Anna Arushanyan, Maria Koltsova and Salome Abuladze****

**Abstract:** *This article seeks to identify where non-custodial measures are applied in the post-Soviet space and where, in particular, diversion is used as a non-custodial measure in child justice systems. To this end, the article reviews the legal contexts and practices of 12 post-Soviet countries based on existing theoretical frameworks. As such, the article first defines the goals and needs of applying non-custodial measures to children in conflict with the law. Second, it addresses definitions, principles and the types of diversion directing children away from criminal justice proceedings. An analysis of the best practices in the region revealed that only two of the countries reviewed (Georgia and Kyrgyzstan) apply diversion programmes. Consequently, the article specifically considers these diversion programmes according to their general principles, criteria and the type of diversion applied. Given the fact that children in the regions are often detained in various types of facilities, mostly for rehabilitation purposes, the article highlights the serious need for post-Soviet states to urgently develop non-custodial measures in order to divert children away from the criminal justice system.*

**Key words**: *children; non-custodial; diversion; deprivation; justice*

* Students of MA in Human Rights and Democratisation 2019-2020, Centre for European Studies, Yerevan State University; Aibek Askarbekov Askarbekovaibek@gmail.com, Anna Arushanyan anna.arushan@gmail.com, Maria Koltsova marriakoltsova@gmail.com, Salome Abuladze salome.abuladze.97@gmail.com). Research Coordinator: Mariam Muradyan; MA in Human Rights and Democratisation, MA in European Interdisciplinary Studies, Child Rights Officer of Global Campus Caucasus, Centre for European Studies, Yerevan State University. This article is based on a paper prepared for and presented at the 2020 Global Classroom, a project of the Global Campus of Human Rights (September 2020).

## 1 Introduction

International human rights law urges states to use custodial measures only as a last measure. The Global Study on Children Deprived of Liberty (Global Study) highlights that worldwide 7,2 million children are deprived of liberty in many forms of detention; 1,4 million of these children are exclusively detained in the context of the criminal justice system – a million of which, in turn, routinely find themselves in police custody. Additionally, 5,4 million children are deprived of liberty per year in various types of institutions (Nowak 2019). The latter figure is highly relevant, as this article will illustrate the non-custodial practices in the context of post-Soviet countries. Paulo Sergio Pinheiro (the Independent Expert leading the Global Study on Violence Against Children) notably refers to the countries of Central and Eastern Europe and the Commonwealth of Independent States as the region with the highest occurrence of institutions (Pinheiro 2006). In addition, the World Prison Brief provides that the regional imprisonment rate of children in Central and Eastern Europe is 5,81, while in Central and Southern Asia the rate stands at 4,78 (Walmsley 2018).[1] While on the service, this rate may not appear to be high, which is due to the fact that children are first placed in other types of institutions before considering any form of non-custodial solution. In its recommendations, the Global Study urges countries to prioritise non-custodial solutions and diversion in order to protect children from the criminal justice system and, as the paper argues, by extension also other forms of deprivation (Nowak 2019).

Article 2000 and – more actively since 2006 – the European Union (EU) and the United Nations Children's Fund (UNICEF) have promoted a number of initiatives for reform in the region starting with harmonising legislation with international standards. While most post-Soviet countries followed the recommendations by amending their criminal legislations, practical implementation was halted for various reasons. The findings of the Global Study clearly highlight that within the administration of justice in the post-Soviet space, more research is needed in order to understand the obstacles to effective implementation. Overall, diversion is considered a crucial non-custodial measure in order to direct children away from the criminal justice system. The preliminary review revealed that generally there exists a positive political will to apply diversion mechanisms in the post-Soviet region. Yet, practical implementation of these measures in national justice programmes remains sorely lacking.

From this perspective, the article isolates and reviews the non-custodial measures and diversion programmes applied in 12 former USSR states

1 The rate is calculated for the imprisonment of children in pre-trial detention and prisons per 100 000 children ranging from 60,00 to 0,00.

in Eastern Europe and Central Asia. In Eastern Europe, the focus falls on Armenia, Azerbaijan and Georgia, while in Central Asia five countries are selected for a comparative reflection, namely, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Despite the common legislative heritage and practices among these countries, their criminal laws and proceedings have been developing in very diverse ways. To understand the main directions and strategies applied in relation to various child justice systems in these countries, an analysis of the provisions concerning children in criminal legislation is a focal point of this study. First, the article considers the minimum age of criminal responsibility, while also identifying the types and nature of the measures applied to situations where children find themselves in conflict with the law. The article considers the detail as well as the application procedures of diversion cases in the region before ending with a number of recommendations for more effective application of diversion measures. The measures are analysed according to the principles, thresholds and minimums standards as stipulated in international human rights law. Moreover, diversion programmes are reviewed in light of theoretical frameworks, specifically considering the nature, type and the underlining principles informing these programmes.

## 2 Research methodology

The article seeks to identify where non-custodial measures are applied in the post-Soviet space and where, in particular, diversion is used as a non-custodial measure in child justice systems. To this end, the article reviews the legal contexts and practices of 12 post-Soviet countries based on existing theoretical frameworks. As such, the article first defines the goals and needs of applying non-custodial measures to children in conflict with the law. Second, it addresses definitions, principles and the types of diversion directing children away from criminal justice proceedings. The research applied both qualitative and quantitative methods. The overview of the 12 selected countries is predominantly conducted via desk research, while the analysis of specific diversion case studies is focused on evaluating reports published by UNICEF, the EU and other international and/or local organisations. The desk review additionally includes an analysis of the legislations, criminal codes as well as the criminal procedural codes of the 12 selected countries in order to understand the various provisional approaches to children in conflict with the law. The desk review also identified which countries actively apply diversion in their child justice systems, the results of which are further augmented by two diversion-specific case studies informed by ten expert interviews (five in Georgia and five in Kyrgyzstan).

The study uncovers which post-Soviet states demonstrate the best application of non-custodial measures through existing diversion procedures. The overview of all 12 criminal systems revealed that only

two countries apply diversion measures, namely, Georgia and Kyrgyzstan. The effective application in these two countries was assessed in the study through an analysis of both national legal provisions and practical provisions. The other case studies were based on an analysis of the respective constitutions and legislations. Where they exist, the various laws on children were considered, which included government decrees, national strategies (with a focus on diversion programmes) and the criminal justice system in general. Additionally, the recommendations and special reports issued by the UN Committee on the Rights of the Child also informed the study, while shadow reports of the selected countries were studied as far as they connect to the topic of non-custodial measures and diversion. The case studies also consider various institutional frameworks of diversion programmes and describe key actors, programmes and services (both on a governmental and non-governmental level). Data was collected through desk reviews, taking into consideration statistics, ombudsperson reports, cases and reports of local civil society organisations (CSOs). Moreover, diversion programmes were studied and evaluated through research and expert reviews. Independent expert interviews with social workers, specialised prosecutors and inspectors in child justice system, as well as anonymous interviews were conducted through questionnaires considering the principles described above. Several representatives of civil society organisations were also consulted during the course of this regional study.

## 3 Theoretical framework

### 3.1 Use of non-custodial measures

Article 37(b) of the UN Convention on the Rights of the Child (CRC) limits children's deprivation of liberty, stipulating that the arrest, detention or imprisonment of a child is to be used only as a measure of last resort and for the shortest appropriate period of time. This means that, in light of the nature of the offence committed by children, states should apply non-custodial measures and that deprivation of liberty of children should only occur in exceptional cases. The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) stipulate that the goal of these measures is 'to provide other options, to reduce the use of imprisonment, and to rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender' (Tokyo Rules para 1.5). The rules are to be applied without any discrimination, including age (Tokyo Rules para 2.2). These measures have to be prescribed by law, and in order 'to provide greater flexibility with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should

provide a wide range of non-custodial measures' (Tokyo Rules para 2.3). Furthermore, the Guidelines of Action on Children in the Criminal Justice System (Vienna Guidelines) highlight the importance of preventing the overreliance on criminal justice measures, and suggest the development, application and constant improvement of non-custodial measures and reintegration programmes (Vienna Guidelines para 42). Article 40(4) of CRC additionally provides a list of non-custodial measures to be available for children to make sure that the nature of measures applied complies with the circumstances of the offence and the well-being of the child. Thus, CRC recommends to keep children in conflict with the law out of the criminal justice system (Nowak 2019). Non-custodial measures should also be applied 'to pregnant woman or a child's sole or primary caretaker' (Bangkok Rules para 9), where it relates to both preventive detention and sentencing detention (UNGA Res.64/142, 2009, para 48). The Global Study reemphasises that the detention of children should occur only after all other options, including all non-custodial measures, have been exhausted (Nowak 2019). The Global Study regards the lack of non-custodial measures as one of the principal reasons for children's deprivation of liberty – especially in dysfunctional and repressive justice systems (Nowak 2019: 33). Diversion is considered a highly effective measure to channel children out of the criminal justice system – as is evidenced by the fact that it forms a core part of the Global Study's recommendations (Nowak 2019).

### 3.2 Diversion and its types

There is no universally-recognised definition of diversion or diversion programmes. A brief description, however, is provided in the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, Rule 11). According to Rule 11 measures should be taken by any agency to avoid the enrolment of child offenders into formal child justice proceedings. The rule promotes community engagement 'such as temporary supervision and guidance, restitution, and compensation of victims. Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems' (UNGS Res 40/33, 1985 Rule 11.4). The Commentary on rule 11 further explains that diversion is a formal and informal intervention, or no intervention, meaning that the children remain outside of the child justice system. It further emphasises that it is to be applied with the consent of the child and his or her legal representatives 'to minimise the potential for coercion and intimidation at all levels in the diversion process' (Commentary). Byrum and Thompson define diversion as an attempt to channel children out of the child justice system (Byrum 1996). Meanwhile, it should be noted that diversion programmes still hold the child responsible for the offence, but grant possibilities to avoid the negative consequences of entering the

formal justice system. According to labelling theory, diversion primarily helps children to avoid being labelled as 'delinquents' and, thus, also the consequences of such labelling in society (Klein 1986).

According to social learning theories, diversion may expose children to more children who are in conflict with the law (Cressy 1952). Therefore, it is argued that diversion programmes should have a very specific goal 'to prevent youth with minimal delinquent involvement from becoming more heavily involved in delinquency due to their association with and learning from peers with greater justice system involvement' (Farrell 2018). In this sense, negative aspects of diversion are deemed to be (a) the widening of a net of children who are in conflict with the law; and (b) an unintentional increase of recidivism and other negative consequences arising from unequal access and use of diversion programmes (Mears et al 2016). However, diversion programmes are mostly viewed positively as ways of channelling children out of the child justice system. The Global Study considers diversion as an early intervention before the child may associate with formal legal proceedings (Nowak 2019). Early interventions are considered the most effective approach of diverting children away from the justice system. Yet, applying diversion at the various other stages of the process (pre-arrest, pre-trial and post-trial) also prevents children from entering the criminal justice system (Vienna Guidelines para 15). The Vienna Guidelines further point out that among the goals of diversion programmes are the prevention of recidivism, promoting social rehabilitation, strengthening social assistance and improving the application of non-custodial measures (Vienna Guidelines paras 15 & 42). From this perspective, pre-arrest diversion best complies with the goal of diversion, since children in conflict with law will be prevented from further exposure to the formal justice system. Post-arrest or pre-trial diversion takes place after the arrest, but the child is still prevented from progressing further into the formal proceedings based on the assumption of not constituting a threat to public safety (Farrell 2018).

The types of diversion measures vary from country to country. However, the most popular are informal warnings by the police, community service, trainings, education programmes, medical and psychological treatment, counselling, community programmes, and so forth (Nowak 2019). Broadly, diversion can be divided into two categories, namely, (i) non-interventional or unconditional diversion; and (ii) diversion with conditions.

***Non-interventional or unconditional diversion*** considers the gravity and circumstances of the offence, thus formally or informally cautioning the child after he or she admits to the crime (Goldson 2016). Depending on the gravity and circumstances of the crime committed by a child, ***diversion with conditions*** is used as an alternative to detention and is employed specifically for rehabilitation purposes (Nowak 2019). When

non-interventional or unconditional diversion measures are not feasible or have been exhausted, the Global Study considers ***diversion with conditions*** as the best alternative to custodial approaches, for instance, police warning instead of detention in police custody, no charges in cases of minor criminal offences and non-custodial solutions instead of prison sentences (Nowak 2019).

Based on the responsible actors, the nature of the crime and the services provided, the following types of diversion may be identified:

| **Police-led** |
|---|
| **Caution and warning programmes**: formal caution (generally at the pre-trial stage), further referral to service and restorative caution |
| **Civil citation programmes:** avoiding arrest records usually by community service hours or in intervention services |
| **Service coordination** |
| **Case management:** linking children to external services, eg, social work, NGO services |
| **Wraparound services:** a team of experts and stakeholders is gathered to best comply with families' and children's needs |
| **Counselling/skill-building** |
| Individual-based treatment |
| **Family-based treatment** |
| **Mentoring:** pairing the child and an adult who will serve as a positive role model |
| **Skill-building programmes:** employment training, truancy interventions and other educational services |
| **Restorative justice** |
| **Victim-offender mediation** |
| **Family group conference:** including other important family members, friends of the victim and the offender, can be led by school officials, police officers and other experts |
| **Teen court:** simulation of courts carried out by volunteer youth to utilise positive peer influence |

***Table 1: Types of youth diversion programmes*** (Farrell 2018)

When applying diversion, various aspects need to be considered. These include gender sensitivity, accessibility without discrimination to minority children, children with fewer socio-economic opportunities as well as children with disabilities and developmental issues (Ericson 2016). In its Toolkit on Diversion and Alternatives to Detention, UNICEF brings an expanded list of criteria to be fulfilled when applying diversion

programmes.[2] Although the list is non-exhaustive, these criteria convey the most general principles applied in all types of diversion programmes:

- the inclusion of the child in diversion programmes does not result in a criminal record;
- elements of caution or warning, an apology to the victim or survivor are included for rehabilitation purposes;
- a non-residential approach as a must of diversion programmes, avoiding any forms of institutionalisation and deprivation of liberty (including rehabilitation schools and special schools;
- competent multi-expert committees, or any other mechanisms to ensure the intensity, duration and compatibility of the crime with the programme;
- activities considering the needs of the child to obtain new knowledge and skills;
- compatibility with the religious and cultural background to prevent further offence;
- consideration of social, psychological and other needs of the victim (element of restorative justice);
- monitoring mechanisms should be in place to assess both the quality of the programme as well as follow up on drop-out children who fail the diversion programme.[3]

## 4 Administering justice for children in post-Soviet countries: Popularity of non-custodial measures

Generally, the post-Soviet space may be described as following a conventional justice system rather than developing innovative justice responses. The criminal codes and criminal procedural codes of 12 post-Soviet countries were studied for the purposes of this article in order to assess the measures taken in the criminal justice system when it comes to children and the use of non-custodial measures. Out of the countries investigated, only half of the civil citation programmes applied to children (Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova and Ukraine). Arrest, restrictions and deprivation of liberty are not exercised in relation to status offences for children, but are only applied to criminal cases.

### 4.1 Minimum age of criminal responsibility

All countries designate a separate chapter in their criminal codes to the criminal liability of children (except Tajikistan, which nevertheless

2 UNICEF, Toolkit on Diversion and Alternative to Detention, 2010, available at https://sites.unicef.org/tdad/index_56037.html.
3 As above.

includes specific provisions on children in their Criminal Code). The lowest minimum age of criminal responsibility among the countries is 14 years of age, with Moldova not specifying a minimum age. Moldova developed a detailed procedural code on engagement of children in legal proceedings, and their criminal code specifies paragraphs of general application where the measures are mentioned for those under 18 years of age. The Criminal Code of Ukraine points out the lowest criminal responsibility age for each crime and preventative measure (Criminal Code of Ukraine article 100).

As mentioned above, none of the countries has a lower age threshold than 14 years. However, for some countries the age of the child may be lowered with consideration of the crime committed. For instance, article 111 of the Criminal Code of Belarus mentions that repeated minor offences (that is, those that do not inflict harm on life, physical well-being and health) are not sentenced to detention. Repeated offences, however, which include at least one murder, can result in a prison sentence. For children aged between 14 and 16 years such a sentence may not exceed more than 12 years, while children between the ages of 16 and 18 years can receive a maximum sentence of 17 years (the latter rule being similar in Georgia).

Correlation of the gravity of the crime and age in criminal offences also varies. Article 79 of the Criminal Code of Kazakhstan states that children may only be deprived of liberty for 10 years if the offences involve aggravated circumstances, while the sentence may be higher (12 years) in the event that one of the offences is murder. For all other offences (that is, minor or medium offences) that are committed for the first time, detention should not be applied. In Moldova, in turn, there are two categories that determine whether a child can be deprived of liberty, notably offences that are extremely grave (10 years) and offences that are exceptionally grave (12,5 years). Article 60 of Moldova's Criminal Code further prohibits the imprisonment of children for more than 15 years regardless of the crime committed. In Russia, imprisonment is applied only to children older than 16 years (Criminal Code of Russia article 88 para 6).

### 4.2 Measures applied for children in conflict with the law

The main types of measures exercised in the region are fines, community service, correctional labour, restriction of certain activities, restriction of liberty (in some legislations including a transfer of the child under the strict supervision of the caregiver) and imprisonment/detention for a determined period of time. The language of legislations varies from country to country, which makes it difficult to draw similarities between legal provisions. Pre-trial detention is not exercised in any of the countries with the exception of Ukraine, where child suspects over the age of 16 can be isolated in a special institution for a period of 15 to 45 days (Criminal Code of Ukraine article 101). Fines are imposed on children who have their own sources of income. Belarus underlines the need to cover the

damage in a way that fits the children's capabilities. Thus, if the child does not have an income, the fine should be converted into community work (Criminal Code of Belarus article 111).

Life imprisonment is not applied to children in any of the selected countries. Revocation practices are also indicated in most legislations. However, these cases are rather dependent on the attitude of individual police officers or other specialists involved. The procedures of revocation thus remain self-led and do not entail argumentation or specific characteristics.

All legislations specify a fixed time and frequency of community service for children. In official Russian translations these services are often referred to as 'correctional labour' (*ispravitelnie raboty*) which are deemed to emphasise the rehabilitative nature of the measure, although the term 'correctional labour' in itself may lead to misunderstanding. Analysing the criminal codes of each country, it is clear that the average length of community service varies significantly, with 30 and 120 hours (Ukraine and Kyrgyzstan); 160 hours (Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan); 180 hours (Belarus); 240 hours (Uzbekistan); and 320 hours (Georgia). In Georgia, community service is the measure most frequently applied. 'Correctional labour' may have a duration of up to three years with four hours of work per day for those under 15 years of age, while the daily hours may go up to six hours for children above the age 15 of years (article 86 para 1). In the case of Moldova, community service for children is the same as for adult offenders (two hours). In Uzbekistan, it is possible to replace 'correctional labour' with a prison sentence – for instance, three days of correctional labour can be replaced with one day's imprisonment (Criminal Code of Uzbekistan article 83). Most legislations stipulate that the nature of the labour should comply with the capacities of the child, including their physical and health condition as well as their psychological and mental development. It should also take place in hours free of education, main employment or hours required for rest. The shortest term for this measure is two months and the longest may take up to three years (Armenia and Georgia).

The least frequently applied measures in the region are (a) offering an apology to the victim; and (b) requiring the offender to attend sessions with specialists (such as psychologists or psychiatrists). The most common measures include warnings; placement under the supervision of parents or caregivers; repair of damage; participation in educational programmes (Moldova, Georgia, Kazakhstan); as well as custodial measures.

### 4.3 Use of custodial and non-custodial measures

In most legislations, custodial measures result in the child being placed in an institution. Although the average length of prison sentences differs only

slightly among the examined countries, the reasons for depriving a child of liberty vary (that is, placement in special educational or correctional institutions). Restriction of liberty usually is defined as a correctional measure, limiting the child's movements (for instance, in relation to visiting places, driving vehicles, restrictions on out-of-house hours and restrictions on leisure). Such restrictions may take no longer than four years. In some cases these restrictions are realised by placing children in special institutions. The mechanisms and monitoring bodies for the aforementioned restrictions are poorly or not at all defined. Generally, the restriction is applied only to children who committed minor crimes for the first time and to children who do not pose a danger to society. The restrictions are envisaged to take place in institutions, so-called 'reformatory institutions' (Ukraine and Armenia); 'open type institutions' (Belarus); 'institutions of general type' (Kazakhstan and Russia); or 'educational colonies' (Uzbekistan). Data on children residing in these institutions is stored on a database that is used by the police. The child can only be placed in these institutions until the age of maturity (that is, 18 years). The average duration in each country is as follows (Table 2):

| **Country** | **Duration** | |
|---|---|---|
| | **Minimum** | **Maximum** |
| Armenia | None | 3 years |
| Azerbaijan | None | 10 years |
| Belarus | 6 months | 3 years |
| Georgia | None | 4 years |
| Kazakhstan | None | 10 years |
| Kyrgyzstan | 6 months | 10 years |
| Moldova | None | None |
| Russia | 2 months | 2 years |
| Tajikistan | None | None |
| Turkmenistan | None | none |
| Ukraine | 6 months | 10 years |
| Uzbekistan | 6 months | 10 years |

***Table 2: Duration of the placement of children in institutions referred as other than prison***

The deprivation of a child's liberty strongly depends upon the individual decisions of courts. However, detaining a child upon court order cannot always be interpreted as a measure of last resort, while the duration of sentences vary from country to country (Table 3):

| **Country** | **Categories of Offences** | | | | |
|---|---|---|---|---|---|
| | **A minor criminal offence committed for the first time** | **Repeated minor offences** | **A medium grave offence** | **A grave offence** | **An especially grave offence** |
| Armenia | 1 year | Not defined | 3 years | >7years | > 10 years |
| Azerbaijan | 1 year | Not defined | 3 years | >7years | > 12 years |
| Belarus | No deprivation | Not defined | 3 years | >7years | > 10-12 years |
| Georgia | No deprivation | Not defined | Not defined | Not defined | > 10-12 years |
| Kazakhstan | No deprivation | Not defined | Not defined | Not defined | > 12 years |
| Kyrgyzstan | No deprivation | 1-6 months | Not defined | Not defined | > 8-10 years |
| Moldova | 1 year | Not defined | 2.5 years | >7.5 years | 10-12.5 years |
| Russia | 2 months - 2 years | No deprivation | Not defined | >6 years | > 10 years |
| Tajikistan | No deprivation | Only for male offenders | Not defined | >7 years | > 10 years |
| Turkmenistan | No deprivation | Not defined | >10 years | > 15 years | - |
| Ukraine | No deprivation | 1-6 months | >4 years | >7 years | > 15 years |
| Uzbekistan | No deprivation | Not defined | 6 months – 2 years | >6/7years | > 10 years |

***Table 3: Duration of prison sentences for offences in 12 states of the post-Soviet region***

The Criminal Code of Moldova does not define certain terms for children who committed crimes in a special provision. Article 60 of the Criminal Code defines the terms of offences in all categories of crimes to be applied to children with half of the term. However, article 93(1) indicates the importance of exempting children from imprisonment 'if the goal of the sentence can be achieved in special educational or re-educational institutions or by applying other coercive measures of an educational

nature'. In some of the cases, such as those in Turkmenistan, no deprivation of liberty is considered. However, it is mentioned only 'if appropriate', thus relying on the decision of the authority (Criminal Code of Turkmenistan article 88). Meanwhile, article 87(6b) of the Criminal Code of Tajikistan envisages criminal liability only for young male offenders who committed repeated crimes. Article 85 of the Criminal Code of Uzbekistan separated the criminal liability for two age groups: offenders of 13 to 15 years of age and 16 to 18 years of age. In the case of particularly grave offences, the terms are the same (10 years), whereas for medium grave offences the maximum term is six years for the 13 to 15 age group and seven years for the 16 to 18 age group.

As mentioned above, the majority of countries allow for the institutionalisation of children in special closed facilities since these are deemed distinct from prisons. Article 90 of the Criminal Code of Russia reads that such measures might be used 'if it is found that this reformation can be achieved by applying compulsory measures of educational influence'. In Russia, during the first half of 2019, 8 285 children were found guilty and convicted for committing criminal offences. Among those, obligatory educational measures were applied to 340 cases and 140 children were placed in closed educational institutions. According to official statistics in 2019, 37 953 cases of criminal offences where children were considered suspects were detected by the police in Russia (Ministry of Internal Affairs of Russian Federation 2019). Placement in special schools (compulsory educational measures) is a measure provided for by Part 2 of article 92 of the Criminal Code. It is used 'to correct a child who needs special conditions for education and training and requires a special pedagogical approach'. As these institutions are closed, there are no opportunities to receive more information about the conditions inside. The placement of a child in a special institution can be decided after applying the compulsory educational measures provided for in Part 2 of article 90 of the Criminal Code, as mentioned above. It can also be applied instead of the above measures, if the court comes to the conclusion that it is necessary to place a child in a special institution (for instance, by repeatedly committing criminal acts before the age of criminal responsibility, a lack of control by parents, ignoring generally accepted rules of behaviour, consumption of alcoholic beverages or drugs, and so forth).

Article 91 of the Criminal Code of Republic of Armenia provides that a child is exempted from criminal liability if the court finds that 'correction is possible by employing coercive educational measures' (Criminal Code of the Republic of Armenia article 91). The same article recalls the importance of applying non-custodial measures where possible. Article 37 of the Code of Criminal Procedure of Republic of Armenia provides for discretion to renounce prosecution in some cases set out by articles 72, 73, and 74 of the Criminal Code, including the victim's consent, regret, and the prosecutor's

belief that 'the accused or the suspect is capable of correction without imposing any measure'. Children are also exempted from prosecution if the offence causes insubstantial damage and/or when pre-trial measures 'seem to be sufficient in terms of having the guilt redeemed'. This article applies regardless of the age of the accused. Investigators may also take this decision in certain cases, subject to the approval of the prosecutor, while the police may also decide not to proceed with the investigation 'in the event of reconciliation of the injured party and the suspect' (Code of Criminal Procedure of the Republic of Armenia 1998 articles 35(1)(5), 35(3) & 36). Based on separate provisions in the legislations of countries in the post-Soviet space, one may observe the general inclination to apply non-custodial measures. However, the understanding on non-custody is viewed in a narrower meaning, that is, custody is viewed only for prisons or incarceration facilities under the administration of justice. In contrast, the terms 'correctional' and 'educational' institutions are not viewed as such.

Status offences are not indicated as causes of detention. With the exception of Moldova and Russia (Title 2), minor criminal cases are neither considered for detention or imprisonment. However, concerns arise when considering different types of institutions. As explained, they come as alternatives to prisons for children in conflict with the law. However, these institutions deprive children of their freedom of movement and engagement in certain activities. It also often results in children being labelled 'delinquents', due to the fact that the data of children mostly remains stored in particular databases.

Georgia and Kyrgyzstan committed themselves to fostering the implementation of justice reforms. Since 2010, for example, Georgia developed separate legislation on child justice, which specifically establishes diversion mechanisms. In 2012, as a result of criminal code reforms, Kyrgyzstan undertook the responsibility to develop a child-friendly justice system through probation mechanisms. However, Georgia and Kyrgyzstan were the only two among the 12 selected countries that have child justice reform programmes, which were first launched in the region in 2000 and then implemented since 2006 (UNICEF 2015). The EU and UNICEF have initiated a number of reforms in the region starting with harmonising legislation processes with international standards. No other countries in the region have a specially structured strategy on child justice or particular provisions to divert children in conflict with the law. The alternatives to charges and custodial measures are compulsory educational measures, community services or the like.

## 5 Application of diversion in post-Soviet countries: Overview of best practices in Georgia and Kyrgyzstan

### 5.1 Georgia

In 2015 UNICEF published a study on the equitable access to justice for children in countries including Albania, Georgia, Kyrgyzstan and Montenegro. The study raises a number of obstacles for children accessing justice, such as children depending on adults to receive information about their rights, to navigate and understand available remedies and to access justice forums and mechanisms (UNICEF 2015). One of the major recommendations of the study on Georgia was to support children in the realisation of their rights – specifically their rights to freedom, decisions concerning the deprivation of liberty and participation in legal proceedings (UNICEF 2015).

As of 1 January 2016, the Juvenile Justice Code entered into force, regulating the various child justice mechanisms contained in articles 38 to 48. This change allows programmes in Georgia to come close to the principles of restorative justice, therefore paving the way to apply diversion between the ages of 18 and 21. Consequently, the number of diversion programmes has significantly increased, thereby following a recommendation of the 2013 EU report Georgia in Transition (Hammarberg 2013).

In its 2017 Observations the CRC Committee expressed concern about the report of arbitrary detention, torture and ill-treatment of children at police stations, including child participants of the diversion programmes (CRC Committee CRC/C/GEO/CO/4 para 20). In this Observation the Committee recalls the necessity to –

- investigate all allegations of torture and ill-treatment of children committed by public officials and police officers so as to bring them to justice;
- provide essential reparation, rehabilitation and recovery for the victims of abuse;
- strengthen monitoring mechanisms in the detention centres, secure the accessibility of existing mechanisms for receiving complaints on behalf of children (CRC Committee CRC/C/GEO/CO/3 para 30).

In 2019 the follow-up report of UNICEF on Georgia highlighted the necessity of introducing certain amendments in order to fully apply a child-friendly justice approach. The observations include the importance of –

- the establishment of specialised units and professionals who work with children in conflict with the law;

- the need to sensitise mid-level management on child rights to assist professionals in applying the child-friendly approach;
- providing all child witnesses of crime with legal assistance at any stage of contact with the justice system (Georgia 2019).

It is worth noting that the Juvenile Justice Code directly highlights the fact that the detention of children who committed a crime should be applied only as a measure of last resort. It specifically stipulates that '[t]he arrest, detention, and imprisonment of a child shall be admissible only as a measure of last resort which must be applied for the shortest term possible and be subject to a regular review' (Law of Georgia: Juvenile Justice Code article 9 para 2).

If there is reasonable evidence indicating that a child has committed a less grave criminal offence without having a prior criminal record, the prosecutor may decide to divert the child from criminal prosecution. The prosecutor should take decisions on diversion prior to pre-trial hearings. Diversion may also be applied after the court hearings. When applying diversion, the court may deliver a reasoned decision at a pre-trial hearing or at a hearing on the merits in a court of first instance and return the case to the prosecutor. The court can do this on its own initiative or on the basis of the reasoned motion of a party. The prosecutor would then offer diversion to the accused child and shall decide on applying diversion in the event of the child's consent (Law of Georgia: Juvenile Justice Code article 38).

Article 40 of the Juvenile Justice Code reads:

> Diversion may be imposed on a minor if all the following circumstances apply:
>
> (1) there is sufficient evidence for probable cause that the child has committed a minor or serious crime;
>
> (2) the child has no previous convictions;
>
> (3) the child has not participated in a diversion-mediation programme before;
>
> (4) the child confesses to the crime;
>
> (5) in the belief of the prosecutor/judge and taking into account the best interests of the child, there is no public interest in initiating criminal prosecution or continuing an already initiated criminal prosecution;
>
> (6) the child and his/her legal representative have given an informed written consent to the application of diversion.

Before a decision is made, the lawyer and the legal representative of the child as well as the child must be provided with detailed information about the nature of diversion, the procedure for diversion, its duration, and the

consequences of failure to comply with the conditions and measures of diversion. It must be explained to the minor verbally and in writing that consent to diversion is voluntary and he or she may refuse diversion at any stage. The confession to a crime by a child in the course of diversion and any information gained about the child in the course of diversion may not be used against him or her in court (Law of Georgia: Juvenile Justice Code article 41).

Diversion (for instance, in the form of a diversion agreement) may provide for the following measures: (a) a written warning; (b) a restorative justice measure, including involvement in a diversion programme; (c) the full or partial compensation for injury or damage caused; (d) the transfer to the state of property obtained by illegal means; (e) the transfer to the state of the weapon of crime and/or object withdrawn from civil circulation; (f) the imposition of obligations on the child; and (g) the placement of the child in foster care. In the Georgian language, the contract to diversion is also called a 'mediation contract', which shows that the victim to offender mediation is an inherent part of the diversion programme.

Several diversion measures may be simultaneously applied to the child's circumstances. Diversion measures shall be determined on the basis of an individual assessment report, as established by the legislation of Georgia. Diversion activities shall be reasonable and proportionate to the crime committed. No obligation may be imposed on the child in the course of diversion, which infringes on his or her dignity and honour, excludes him or her from regular educational processes and basic work, or causes harm to his or her physical and/or mental health. It shall not be permitted to impose stricter diversion measures than the minimum sanctions provided for by law for the committed crime (Law of Georgia: Juvenile Justice Code article 42). As mentioned previously, the MACR is 14 years where the highest age threshold for diversion applied in Georgia is 21 years.

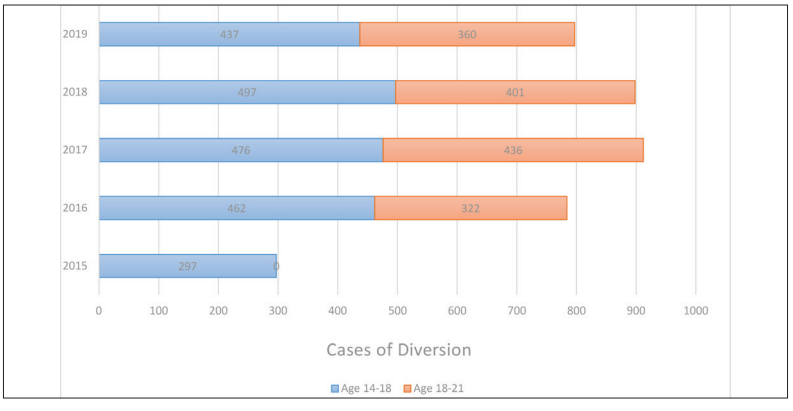


***Figure 1: Cases in Georgia in the period of 2015 to 2019 (LEPL, 2017)***

As the graph displays, the number of diversion cases increasingly grew in 2017, since diversion has been actively applied in practice in 2017. As UNICEF Georgia mentioned, this year was also significant for a number of reasons: the decrease of the initiation of prosecution against minors; their detention and imprisonment; the shortening of the terms for taking final decision on the cases of minors; and the low record of repeated offences by the diverted minors (only 9 per cent had been reported to commit repeated crimes) (UNICEF 2017).

When a decision on diversion is made, the prosecutor contacts a social worker and passes on the child's case file. The social worker must then formulate a bio-psycho-social portrait of the child and, bearing in mind the child's mental, physical and social conditions, will draw up a contract. Subsequently, the contract must be signed by the child, his or her parents/legal representatives, the prosecutor, social worker and the victim of the crime. The victim is invited to participate in a conference with the child. Additionally, the diverted child must be provided with all needed services, while the child is also given the responsibility to fulfil certain obligations and carry out a set of concrete actions. Diversion programmes do not result in a criminal record, though information on participation can be used for statistics or in the case of new offences.

Article 48 of the Juvenile Justice Code provides that

> where the child fails to comply with diversion measures intentionally, a social worker shall notify the prosecutor, and the prosecutor, based on this and other circumstances, after hearing the views of the child, his/her legal representative and the social worker, shall cancel or keep in force the decision on imposing diversion, or shall change the diversion measures and/or shall extend the duration of the diversion agreement. Where the decision on imposing diversion is cancelled, a prosecutor may, with a reasoned resolution, cancel the decision, not to initiate a criminal prosecution or to terminate an already initiated criminal prosecution, or initiate or resume a criminal prosecution with a new reasoned resolution.

While analysing the provisions of the diversion programme, it is evident that no efficient monitoring mechanisms exist to assess the programmes. The rate of recidivism among diverted children may remain, which could be rectified through a detailed study of the diversion agreement, an analysis of individual cases, and the strengthening of relevant conditions. The engagement of the victim is not specified. Another concern is the division of criminal offences into categories when evaluating a diversion programme. Statistics have shown that the diversion programme is mostly used for less serious crimes, indicating that the state avoids taking on extra responsibilities in cases where the application of the diversion programme involves serious offences, based on individual assessment.

### 5.2 Kyrgyzstan

At present the legislative framework of the Kyrgyz Republic concerning children in conflict with the law consists of the following regulatory legal acts: the UN Convention on the Rights of the Child; several codes and laws that govern the implementation of protection and child justice; and the Constitution of the Kyrgyz Republic 2010 (Constitution of the Kyrgyz Republic adopted by referendum (popular vote) on 27 June 2010), which enshrines the rights and freedoms of all citizens across the country.

The Concluding Observations of the CRC Committee remain the main guidepost for Kyrgyzstan in relation to the implementation of its children's rights obligations. Kyrgyzstan also received periodic recommendations from the CRC Committee in 2000, 2004, 2007 and 2014. Studying the 2000 report, the Committee highlighted the following serious issues:

- ill-treatment and use of torture against detained children;
- a lack of separate consideration of cases and special procedures in relation to children within the framework of judicial proceedings;
- a lack of physical and psychological rehabilitation for children who committed crime.

Despite the changes undertaken since then, the 2014 report still points towards serious issues in the child justice system. The 2014 Concluding Observations of the CRC Committee highlighted the following issues:

- a lack of an integrated child justice system;
- the detention of children in prison-like conditions, often for homelessness, vagrancy and truancy;
- keeping children in temporary detention centres with adults with a very limited number of allowed visits with their family members.

According to the law of the Kyrgyz Republic on probation, people in custody also have the opportunity to apply for parole in the form of probationary supervision (Law of Kyrgyzstan: About Probation article 5). According to the annual report of the Ombudsman Institute in Kyrgyzstan in 2017 (Akylkatchy of Kyrgyz Republic 2017) 325 cases of torture were recorded in penal institutions for children.

To date, there have been efforts to mitigate the mistakes and progressive steps have been taken in the gradual eradication of the system of imprisonment of children as a preventative measure. The progressive measures resulted in the adoption of –

- the Child Code of the Kyrgyz Republic in 2012;
- the Law of the Kyrgyz Republic on Probation in 2017;
- the new version of the Criminal Code of the Kyrgyz Republic in 2017.

The main prerequisite for the creation of the child justice system was the adoption in 2012 of the Child Code. Chapter 11 of the Code is devoted to child justice and contains rules and principles for the administration of child justice. Gradually, all the norms of the Child Code began to apply to other types of criminal laws in relations to children.

In an interview, Deputy Minister of Justice of the Kyrgyz Republic, Marat Kanulkulov, outlined the economic problems of Kyrgyzstan in the full implementation of the probation law. In this regard, it was decided that probation would be introduced only in the process of trial (Baremoter.kg 2019). According to article 83 of the Criminal Code of Kyrgyzstan, probation can be applied to a child who has committed a crime, the measure for which may not exceed five years in prison (crimes of minor gravity) (Law of Kyrgyzstan: Criminal Code article 83).

In 2018, among the total number of convicted children, the main share belonged to the conditionally sentenced to imprisonment measure and correctional labour (approximately 58 per cent) as well as to imprisonment (approximately 24 per cent) (National Statistic Committee 2019). Compared to 2010, there have been major changes in the use of imprisonment. In 2010, more than 50 per cent of those convicted children were sentenced to imprisonment, while in 2018 only 23 per cent of the total number received this sentence. It is vital to note that it is not the number of convictions that plays a part here, but the number of reported crimes. This may be clarified by the fact that the number of sentences undertaken, as of now, is the ultimate choice of the judge. If one compares the number of those sentenced to imprisonment to the number of registered crimes, the picture becomes clearer. That is, out of 1 176 offences committed in 2010, approximately 180 were sentenced to imprisonment, whereas in 2018, out of 1 432 offences committed, only 42 children were sentenced to imprisonment. It is critical to note that the types of offences committed have not changed much over the eight years. In cases of crimes that were classified as 'grave' and 'especially grave', these children were mainly sentenced to imprisonment. This has not changed between 2010 and 2018, as set out in Table 4 below:

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|---|---|---|---|
| **Sentenced total** | 358 | 439 | 324 | 231 | 201 | 191 | 162 | 193 | 161 |
| **Detention** | 51.4 | 53.5 | 65.4 | 32.5 | 34 | 24.1 | 30.9 | 25.4 | 23.2 |
| **Parole** | 36.0 | 31.4 | 23.5 | 56.7 | 53.2 | 61.8 | 50.6 | 59.6 | 57.8 |
| **Fine** | 7.3 | 5.2 | 5.2 | 6.5 | 5.0 | 7.9 | 9.9 | 6.7 | 5.0 |

***Table 4: Distribution of children convicted according to the sentences imposed by the court, in percentage (National Statistic Committee, 2019)***

In 2018, out of the total number of children sentenced to imprisonment by judicial authorities, almost 32 per cent of the detention sentences were between three and five years (see Figure 2 below). A further 24 per cent were capped between six and eight years, while more than 18 per cent of the number of children sentenced received one or two-year terms. Almost 16 per cent of the children convicted received sentences as high as none and ten years.[4]

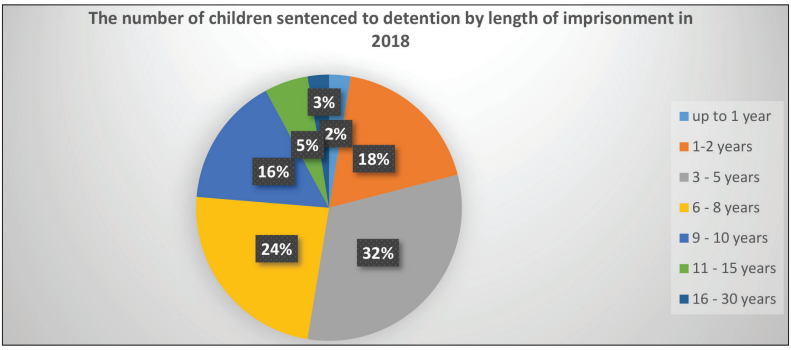


***Figure 2: The number of children sentenced to detention by length of imprisonment in 2018 (National Statistic Committee, 2019)***

In 2017, imprisonment was used in 25 per cent of the total number of sentences (see Figure 3 below). In 2018 this figure went down to 23 per cent. In this regard, however, it should be noted that the number of sentences passed in 2018, were fewer than in 2017. In the latter year, 193 children were sentenced, while in the following year 161 cases are noted.

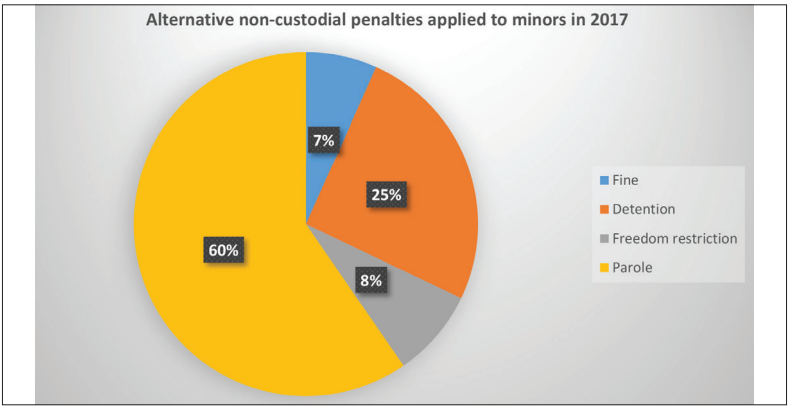


***Figure 3: Alternative non-custodial penalties according to minors in 2017***

4 Prosecutor office of Kyrgyzstan: Overview of Child Offences and violence against children, 2018 6-13, available at https://www.prokuror.kg/files/docs/2019/overview-of-juvenile-delinquency-as-well-as-violence-against-children-in-2018.pdf.

At present the Criminal Code and the Criminal Procedure Code of the Kyrgyz Republic provide special chapters on the implementation of child justice. Chapter 17 of the Criminal Code contains norms defining the types of educational measures applied in relation to children. According to article 102 of the Criminal Code, measures of an educational nature may be applied for a less serious crime committed. In turn, the Criminal Procedure Code of the Kyrgyz Republic identifies a special type of child justice in chapter 54. The chapter describes in detail the investigative measures and court procedures applied to the case involving a child. In addition, article 458 provides for the removal of a child from the criminal justice system and the termination of pre-trial proceedings, that is, this article presupposes the possibility of resolving the case before trial.

Summarising the above, the following conclusions may be drawn:

- The severity of the crime committed is the main determinant of the application of diversion measures.
- The criminal law provides for the possibility of applying diversion in the form of compulsory educational measures.
- A child may be released from criminal offence in pre-trial proceedings by the decision of the investigator.
- Diversion is applied only by the decision of a judge.

There is no separate diversion programme in Kyrgyzstan. Diversion is considered part of the responsibility of the probation service. During probation an enforcement agency works with the child to come up with suggestions whether the child can be included in a diversion programme. Upon receipt of the case, the judge sends a request for the preparation of a report to the probation authority (Law of Kyrgyzstan: Criminal Code article 30). The judge then evaluates the personality of the accused child as well as his or her socio-psychological profile, which is drawn up by the probation rapporteur. After that, the judge has the right to apply probationary supervision over the child in question. According to the regulations of the probationary institution, for each convicted person serving an alternative sentence in the form of probation, various educational measures are used depending on the psychological profile (Law of Kyrgyzstan: Criminal Code article 83). A child works directly with three people: a social worker, a psychologist and a probation officer, for a specified period of time, after which the child may enter a rehabilitation programme.

Probation does have its drawbacks, which may not correspond to the principles of the service and, therefore, may also not meet the needs of the diverted child. One such example is a criminal conviction, where a child will be given a mark for a crime. This measure is decided in court in criminal proceedings and cannot be used in pre-trial proceedings, which in itself aggravates the situation of the child in the future. At this stage in

the establishment of the probation institute, the annual report for the past year has not yet been published to track the results of the work of the body.

There are also non-governmental organisations in Kyrgyzstan that work with children in conflict with the law. Such organisations often work with children who are registered with schools and with the child inspector, that is, children at risk of committing offences. Consequently, organisations support diversion measures in order to reduce the cases of recidivism among children. Among non-governmental organisations, the Adilet Legal Clinic stands out, which provides free legal assistance to all persons who have been subjected to torture and other offences. This includes support for children in conflict with the law, who were maltreated in police stations.[5] One of the main international organisations that have contributed significantly in this area is UNICEF. According to recommendations from the CRC Committee in 2000, Kyrgyzstan needed to establish cooperation with international agencies (Committee on the Rights of the Child 2000). Since then, UNICEF has been a direct partner in the process of building up the child justice system in Kyrgyzstan.

When considering the development of diversion in Georgia and Kyrgyzstan, it should be noted that non-conditional diversion is applied in neither of the two countries. The description of the type of diversion applied stipulates certain conditions. For instance, in Georgia civil citation programmes and mentoring are conditions mentioned when considering the placement of a child in foster care. Individualised treatment as part of a counselling programme is also applied when social workers consider the needs of the child in order to determine the appropriate diversion programme. In the case of Kyrgyzstan, a confusion between what constitutes 'probation' and what constitutes 'diversion' can clearly be identified. This confusion arises from the placement of diversion programmes under the liability of the country's probation services. Probation itself is a newly-developed service in the country, thereby placing all the reformative measures related to child justice under the responsibility of this department in the prosecutor's office.

## 6 Conclusions and recommendations

The Global Study considers diversion one of the most effective ways of ensuring liberty for children in the administration of justice. As suggested, states should reconsider the entire system that leads to the deprivation of liberty, by focusing on systemic rather than individual failures. In this way, states could effectively prevent children from entering the criminal justice system (Nowak 2019). To this end, the Global Study suggests to avoid the

5 The Adilet Legal Clinic website is available at http://www.adilet.kg/en/.

unnecessary criminalisation of children by increasing the minimum age of criminal responsibility to at least 14 years, to decriminalise status offences and behaviour related to morality, invest in early prevention strategies and to ensure that children deal with a functioning protection system. These changes may lead to the establishment of specialised justice systems for children, which allows for the application of diversion, informal justice systems, non-custodial practices during the pre-trial and trial stages as well as for the development restorative justice approaches. This research concurs with the Global Study findings in that it shows the necessity of non-custodial measures and specifically also diversion. Analysing the 12 post-Soviet countries selected for this research notably revealed an overreliance on arrest. As mentioned in the theoretical framework, diversion is considered an effective measure of channelling children away from the formal justice system, thus mitigating the negative impact detention can have on their lives and development.

Thus, considering the main findings of the article, the following recommendations are put forward:

(1) The legislation and practices of countries that apply custodial measures should be changed in favour of non-custodial measures. The institutions referred to as 'reformatory institutions', 'educational colonies' or the like generally are regarded as 'rehabilitation centres' for children in conflict with the law. These centres, however, deprive children of both their liberty and their enjoyment of many rights. It is necessary, therefore, to replace these institutions by applying non-custodial measures.

(2) Minor or repeated minor offences should not be considered for detention. Any type of diversion should rather be applied as an alternative. For instance, considering the popularity of community services in most countries in the post-Soviet space, police-led service coordination and skills-building initiatives could be applied as diversion alternatives.

(3) The deprivation of a child's liberty strongly depends on the individual decisions of courts. All the legislations (except those of Georgia and Kyrgyzstan) apply pre-trial detention, thus associating children with the formal justice system at the earliest stage. It is recommended that the countries selected for this study should refrain from pre-trial detention and provide alternative solutions.

(4) The study found that little cooperation exists between professional services that deal with children in conflict with the law. Decisions strongly rely on the police, the prosecutor's office as well as on judges. Although in Kyrgyzstan children work closely with social workers, psychologists and other specialists, the decision to divert them is exclusively made by the court or prosecutor. Inter-agency cooperation in relation to children in conflict with the law should thus be strengthened in order to best consider the needs and characteristics of children.

(5) In Kyrgyzstan and Georgia, diversion is not considered for children with previous convictions. The legislations of neither provide prevention mechanisms, while a gap still exists in the protection of children with minor criminal offences. The division of crime into categories when evaluating a diversion programme should be applied. Statistics in Georgia revealed that the diversion programme is mostly used for less serious crimes, indicating that the state avoids taking on extra responsibilities when it comes to serious crimes. It therefore is recommended that diversion programmes should also become a viable option for children who committed serious crimes – based, of course, on individual assessments. Additionally, both Kyrgyzstan and Georgia should regularly monitor and evaluate the effectiveness of their diversion programmes.

(6) Despite the increased use of diversion in Georgia, the rate of recidivism remains at the same level. This could be rectified through a detailed study of the diversion agreement, the analysis of individual cases, and the strengthening of relevant conditions. In this regard, the role of the victim should be strengthened in the diversion process, thus applying aspects of restorative justice during the diversion process. Once a prosecutor decides to apply a diversion measure, the victim should also be notified. Currently, however, victims do not have the means to oppose this decision. This may cause serious distress and/or harm to the victim, which may in turn also lead to a certain distrust towards law enforcements and even the development of the so-called 'impunity syndrome' often experienced by victims.

(7) In Kyrgyzstan, legal and strategic changes should be made in order to improve diversion services. The confusion between 'probation services' and 'diversion' should be clarified urgently by separating these two services. It is also recommended that pre-trial diversion should become standard practice so as to limit the child's exposure to lengthy criminal procedures. Similar to Georgia, Kyrgyzstan should also include serious offences when considering diversion since, the intention should be for diversion to benefit as many children in conflict with the law.

# References

Akylkatchy of Kyrgyz Republic (2017) Annual report, available at https://ombudsman.kg/images/files/news/2018/specdokladi/ejegod2017.pdf (last visited 1 May 2020)

Akyikatchy (Ombudsman) of the Kyrgyz Republic (2017) Annual report on the observance of human and civil rights and freedoms in the Kyrgyz Republic, available at https://ombudsman.kg/index.php?option=com_content&view=article&id=462:ежегодный-доклад-акыйкатчы-омбудсмена-кр-о-соблюдении-

прав-и-свобод-человека-и-гражданина-в-кр-в-2017-году&catid=18&lang=ru&Itemid=330, (last visited 10 March 2020)

Baremoter.kg (2019) Interview with the Deputy Minister of Kyrgyzstan, available at https://barometr.kg/probaciya-vmesto-nakazaniya-shans-na-ispravlenie (last visited 10 April 2020)

Barometr.kg Interview with the Deputy Minister of Justice for the media (2019), available at https://barometr.kg/probaciya-vmesto-nakazaniya-shans-na-ispravlenie (last visited 20 April 2020)

Byrum T (1996) Juvenile delinquency: A sociological approach Boston

Committee on the Rights of the Child (2000) Concluding Observations of Kyrgystan, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (last visited 10 May 2020)

Committee on the Rights of the Child (2014) Concluding Observation, Kyyrgyzstan, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (last visited 10 April 2020)

CRC, Concluding Observations of the Committee on the Rights of the Child, Kyrgyzstan (2000), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (last visited 10 July 2020)

CRC, Concluding Observations of the Committee on the Rights of the Child, Kyrgyzstan (2014), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (last visited 10 July 2020)

Cressy DR (1952) 'Application and verification of the differential association theory' (1952-1953) Journal of Criminal Law, Criminology and Police Science 43

Mears DP, Kuch JJ, Lindsey AM & Siennick SE 'Juvenile court and contemporary diversion' (2016) Criminology and Public Policy

Economic and Social Council Resolution 1997/30, Guidelines for Actions on Children in the Criminal Justice System (Vienna Guidelines) Resolution 21 July 1997

Ericson RD 'Racial disparity in juvenile diversion: The impact of focal concerns and organisational coupling' (2016) 6 Race and Juvenile Justice Journal

Georgia U Press release (2019), available at https://www.unicef.org/georgia/press-releases/unicef-calls-protect-childrens-rights-juvenile-justice-system?fbclid=IwAR21kURBzc9QzYW0p39klA_JHdwF7xvvLW3gTrMapNpKmfpocgv0f5Z6Xg4 (last visited 10 May 2020)

Goldson B 'Beyond formalism: Towards "informal" approaches to youth crime and youth justice' in T Bateman & J Pitts (eds) The Russell House companion to youth justice (2016) Dorset: Russell House 236

Hammarberg T 'Georgia in Transition' (2013), available at http://eeas.europa.eu/archives/delegations/georgia/documents/human_rights_2012/20130920_report_en.pdf (last visited 10 June 2020)

Farrell J 'Best practices in youth diversion' (2018) Institute for Innovation and Implementation, University of Maryland School of Social Work

Klein W 'Labelling theory and deliquency policy: An experimental test' (1986) 13 Criminal and Justice and Behaviour

Legal Entity Under Public Law (LEPL) (2017), Ministry of Internal Affairs of Georgia, available at http://nbe.gov.ge/index.php?lang_id=ENG&sec_id=643&info_id=4965 (last visited 10 April 2020)

National Statistic Committeeof Kyrgyzstan 'Sentences and crimes committed by children according to the sentences of the courts' (2019), available at

http://www.stat.kg/media/publicationarchive/74e01990-418c-4399-ad79-b235790fc8b7.pdf (last visited 10 June 2020)

Nowak M Global Study on Children Deprived of Liberty (2019), available at https://omnibook.com/Global-Study-2019 (last visited 10 June 2020)

Pinheiro P 'World report on violence against children' United Nations Digital Library (2006), available at https://digitallibrary.un.org/record/587334 (last visited 10 June 2020)

Prosecutor Office of Kyrgyzstan 'Overview of child offences and violence against children' (2018) 6, available at https://www.prokuror.kg/files/docs/2019/overview-of-juvenile-delinquency-as-well-as-violence-against-children-in-2018.pdf, (last visited 10 June 2020)

UN Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules), adopted by General Assembly Resolution 40/33 of 29 November 1985

UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), adopted by General Assembly Resolution 45/110 of 14 December 1990

UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules), adopted by General Assembly Resolution 65/229 on 21 December 2010

UNICEF 'Children's equitable access to justice in Albania, Georgia, Kyrgyzstan and Montenegro', available at https://www.unicef.org/eca/reports/childrens-equitable-access-justice-central-and-eastern-europe-and-central-asia (last visited 10 June 2020)

UNICEF Regional Office for Central and Eastern Europe and Central Asia (2015), available at https://www.unicef.org/evaldatabase/files/MCE2_Final_CEECIS_2015-005.pdf (last visited 10 June 2020)

UNICEF 'Toolkit on diversion and alternative to detention' (2010), available at https://sites.unicef.org/tdad/index_56037.html, (last visited 10 July 2020)

UNICEF 'The rate of committing a crime by juveniles has considerably dropped as a result of restorative justice and diversion' 2 November 2017, available at https://www.unicef.org/georgia/press-releases/rate-committing-crime-juveniles-has-considerably-dropped-result-restorative-justice (last visited 10 November 2017)

UNICEF Regional Office for Central and Eastern Europe and Central Asia (2015), available at https://www.unicef.org/evaldatabase/files/MCE2_Final_CEECIS_2015-005.pdf (last visited 13 May 2020)

UNICEF 'Review the last year's achievements and challenges in the implementation process of diversion and mediation programme' 29 November 2019, available at https://www.unicef.org/georgia/press-releases/review-last-years-achievements-and-challenges-implementation-process-diversion-and, (last visited 10 July 2020)

Walmsley R World Population Prison List 12th edition (2018), available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (last visited 10 June 2020)

E Dahrouge, J Nammour, AS Lotf & 2019-2021 ArMA Programme students (Saint-Joseph University, Beirut, Lebanon) 'The 17 October 2019 protests in Lebanon: Perceptions of Lebanese and non-Lebanese residents of Tripoli and surroundings' (2020) 4 *Global Campus Human Rights Journal* 488-516
http://doi.org/20.500.11825/2035

# The 17 October 2019 protests in Lebanon: Perceptions of Lebanese and non-Lebanese residents of Tripoli and surroundings

***Elias Dahrouge,* Jihad Nammour,** Ahmed Samy Lotf,*** and 2019-2021 ArMA Programme students (Saint-Joseph University, Beirut, Lebanon)*******

**Abstract:** *Starting from 17 October 2019, Lebanon had witnessed an unprecedented wave of mass protests and mobilisation across its territory. This so-called Thawra came to question the state's social contract, which is built on a peculiar political system: sectarian con-sociationalism. Characterised by institutionalised clientelism and systemic corruption, coupled with an unprecedented economic crisis, the system recently showed its limits. Tripoli is Lebanon's second-largest and most deprived city. Yet, it hosted the largest protests across the country, aptly referred to as the 'bride of the revolution'. To better understand the city's dynamics in this respect, field research was conducted there in January 2020. Using a combination of quantitative and qualitative methods, the study reflects on Tripoli's residents' perceptions about the protests. Beyond focusing exclusively on the city's Lebanese residents, it gives some important insights into its vulnerable Syrian and Palestinian refugee*

* BA (Saint-Joseph University, Beirut), Master's (Corvinus University of Budapest); Lecturer (Corvinus University of Budapest); ArMA Programme's Field Research coordinator (Saint-Joseph University, Beirut, Lebanon); eliasdahrouge@hotmail.com. This study was realised under the patronage and sponsorship of the Saint-Joseph University of Beirut's Arab Master's programme in Democracy and Human Rights, part of the regional programmes of the Global Campus of Human Rights. The fieldwork research was conducted under the direction and supervision of Jihad Nammour (ArMA Programme Coordinator), while the research design, the data collection and analysis were organised and coordinated by Ahmed Lotf and Elias Dahrouge, with the help of local actors and NGOs. The preparatory work with the students was delivered by Zeina El Helou and Rim Haydar. This study was written by the ArMA students and Elias Dahrouge, who also supervised and directed the writing process.

** ArMA Programme academic coordinator and lecturer (Saint-Joseph University, Beirut, Lebanon).

*** ArMA Programme coordinator (Saint-Joseph University, Beirut, Lebanon).

**** Karim Abualroos; Lasmin Ait Youssef; Eman Al Burbar; Azal Al-Salafi; Rana Alsheikh Ali; Chiraz Arbi; Khawla Benyahya; Sarah Bhatti; Francesco Cavalluzzo; Elena Comaro; Elise Daniaud; Jamal El-Zein; Asmaa Fares; Elena Hosta Cuy; Solene Lavigne Delville; Nouha Maaninou; Lamiaa Mahmoud; Andrea Olea Corral; Marta Pannunzio; Adel Ramdani; Hazar Salloum; Charlotte Van Der Werf; Nedaa Yousef.

*inhabitants. The study also demonstrates that, surprisingly, Tripoli's citizens have nuanced perceptions about these protests. It reveals through charts how divergence in some of these perceptions depends on conditions such as employment, sex, age and nationality. Finally, it gives some tangible insights into Tripoli's level of mobilisation, engagement, and inclusion of women in the wave of protests.*

**Key words:** *Middle East; Lebanon; mobilisation; protests; refugees*

## 1 Introduction

Since 17 October 2019 Lebanon has been witnessing a turning point in its modern political and social history. Starting from this date, an unprecedented wave of mass protests and mobilisation has spread throughout the country's cities and regions. Many described these events as a 'revolution'. Nevertheless, it is the first time that the country's social contract is being seriously questioned. This social contract for decades has been based on a consociational political system, which was put in place in order to guarantee the sectarian *status quo*. However, this system derived progressively towards an institutionalised clientelism that resulted in systemic corruption driven by its elites. Recently, this political setup showed its limits due to the deterioration of the country's economy. The accumulation of these factors pushed the Lebanese to the streets.

Yet, the highest rates of mobilisation and participation in the wave of protests were recorded in Tripoli, Lebanon's second-largest and most deprived city in terms of income and development. For a better understanding of the causality of the city's dynamics in this respect, field research was conducted in Tripoli in January 2020. Using a combination of quantitative and qualitative methods, the study reflects on the perceptions about the ongoing protests of Tripoli's Lebanese and non-Lebanese residents. In this regard, it is important to note that, apart from its Lebanese inhabitants, the city hosts a number of Syrian and Palestinian refugees whose opinions also had to be taken into consideration.

After a short review of the relevant literature, this article presents in detail the used research methodology. It subsequently analyses the results that were filtered out from the survey conducted in Tripoli's diverse neighbourhoods. These results are illustrated by the relevant featured charts and diagrams. An additional part goes beyond these quantitative findings, and focuses on the qualitative observations gathered on the field through the organisation of focus groups and interviews. Beyond focusing only on Tripoli's Lebanese residents, the work also targets its Syrian and Palestinian populations. The analysis gives some tangible insights into

Tripoli's level of mobilisation, engagement, and the inclusion of women and refugees in the ongoing wave of protest.

## 2 Literature review

With 18 recognised religious sects, Lebanon is a unique example of interaction between politics, demography and religion (Faour 2007). This interaction has been institutionalised in a power-sharing model that attempted to balance the role of the different sects while guaranteeing political representation and group autonomy regarding personal status, education and cultural affairs (Fakhoury 2014). However, this model led to a fragmented society characterised by deep internal divisions, weak institutions and a lack of loyalty to the country (Haddad 2009; Barakat 1973). In practice, it translated into a political system composed by former warlords and businessmen from different sects where a small political elite appropriates the core of the economic surplus and redistributes it through sectarian clientelist affiliations (Baumann 2019; Cammett 2015). The result is a failed system run by corrupt elites responsible for the Lebanese economic shortcomings (Baumann 2019; Traboulsi 2007). The pervasive corruption caused a crumbling infrastructure, almost non-existent public services, and an economy in permanent deficit where public debt is equivalent to more than 150 per cent of its gross domestic product (GDP) (World Bank 2019). All of these built up on increased social inequalities and high unemployment rates, especially among the youth.

In this context, the government's proposal on introducing a tax on WhatsApp calls was only the straw that broke the camel's back. It triggered mass protests that started on 17 October 2019. This so-called *thawra*, or 'revolution' in Arabic, came in the midst of an aggravated recession. It soon turned into a generalised uprising against the endemic corruption of the entire sectarian political establishment that had been profiting from the system (Assouad 2019).

This certainly was not the first time that social protests challenged the sectarian political class in the country. Several movements, such as the 'You Stink' movement during the summer of 2015, had already 'helped to negotiate and reshape "political identities" in the context of the political hegemony of sectarianism' (AbiYaghi et al 2017). However, October 2019 was the first time that a popular movement spread outside the capital Beirut to different cities across the country (Yacoubian 2019), where sectarian lines usually are more typically defined.

This is the case of the northern city of Tripoli, which soon became the most dynamic epicentre of the wave of protests. Tripoli is a city that for decades has been one of the poorest and most neglected by the state (Abdo 2019). The city is characterised by high levels of poverty and

inequality, as well as high rates of unemployment (Kukrety & Al-Jamal 2016; UN-Habitat Lebanon 2016). It also has a long history of social and political mobilisation. However, these were mainly focused on pre-existing networks and shaped by Islamist elements (Gade 2018). The situation of instability that Tripoli witnessed from the Civil War in 1975 until the current day allowed Islamic violence to flourish in the city (Mahoudeau 2016).

There are 264 895 registered Lebanese living in Tripoli (AbiYaghi et al 2016). The overwhelming majority of the population are Sunnis living alongside with an Alawite minority (Lefèvre 2014; AbiYaghi et al 2016). The proximity of the city with Syria reflected in political proxy dynamics between its political actors. This led to spill-over effects that concretised in violent rounds of armed clashes around sectarian lines, especially between the Sunni majority *Bab el Tebbaneh* and the Alawite *Jabal Mohsen* adjacent neighbourhoods (Lefèvre 2014; Ismail et al 2017).

In addition, the city hosts around 70 000 UN Refugee Agency (UNHCR) registered Syrian refugees (AbiYaghi et al 2016) who arrived after the beginning of the Syrian civil war in 2011 (Abdo 2019). Their influx has impacted on Tripoli's socio-economic and demographic context, which led to tensions (Thorleifsson 2016). The population of the city has consequently grown by 17 per cent (Ismail et al 2017). According to the United Nations Children's Fund (UNICEF), UNHCR and World Food Programme (WFP) reports, 74 per cent of the Syrian refugees are living below the poverty line (cf Ismail et al 2017). This reality aggravated an already difficult situation due to the presence since 1948 of thousands of Palestinian refugees. The majority of the Palestinian population lives in the Beddawi refugee camp (AbiYaghi et al 2016), which is the second-largest Palestinian refugee camp in the country. Their status as permanently displaced persons 'has relegated them to a secondary status by their Lebanese Sunnis co-religionists' (Haddad et al 2003: 17) that suffer from 'deliberate neglect' (Suleiman 2006).

Both Syrians and Palestinians have directly or indirectly been involved in the various episodes of violence in Lebanon, particularly in the post-civil war era in Tripoli (Lefèvre 2014; Haddad et al 2003). In the 2000s, for instance, the city witnessed the emergence of Jihadi Salafist groups such as *Fatah al-Islam*, which was active in some surrounding Palestinian camps (Lefèvre 2014). In parallel, high unemployment rates led to competition over jobs in the city that has been a key source of socio-economic tensions (Ismail et al 2017). As a result, locals might often have a conflictual relationship with the refugee population, while their integration remains a pending issue.

## 3 Methodology

Against this background, a research project was conducted to establish the perceptions of Lebanese and non-Lebanese Syrian and Palestinian resident populations of Tripoli, in terms of support/non-support, engagement, their feeling of safety, as well as their expectations about the probable outcomes of the protests ongoing at the time in Lebanon. The choice of Tripoli was motivated, on the one hand, by the high level of the city's mobilisation during the wave of protests since October 2019, and by the high concentration of displaced Syrian and Palestinian populations in a relatively small area, on the other.

The research was conducted during the month of January 2020 by a team of 23 international students, with the coordination and supervision of three tutors. It was realised in the framework of the Arab Master's in Democracy and Human Rights (ArMA) programme's activities, based at the Saint Joseph University of Beirut (USJ), and part of the Global Campus regional programmes.

The project was executed in three phases. A first phase was dedicated to the elaboration of the research plan as well as the tasks' repartition. The second phase included the fieldwork through data collection. This was conducted between 19 and 22 January 2020 in the city of Tripoli and its direct surroundings. The third and last phase consisted of data analysis as well as report drafting and editing.

Since nationality is the main variable, the research question focuses on how nationality affects the perceptions towards protests and mobilisation. Several hypotheses were formulated to verify the likelihood of the expected outcomes. The main tested hypothesis was if nationality, as well as the socio-economic conditions, can affect the level of engagement in the protests. In this study, the definition of the level of engagement is understood as the direct physical participation in any protest-related activity during the period October 2019 to January 2020. In addition to this hypothesis, another expected outcome was assuming that both Syrians and Palestinians would feel more afraid to engage in the protests (fear to be arrested or to be forcibly deported). Their motivation to engage would be hindered by some legal, social, political and historical reasons that are linked to the precariousness of their status as residents. This study used both quantitative and qualitative methods of analysis for the testing of the above listed hypotheses.

### 3.1 Quantitative research methodology

The quantitative research was realised by using the KOBO Toolbox application. The team edited an online-based questionnaire on the application's collect tool that the surveyors could access through

their phones. Survey teams were deployed across Tripoli's various neighbourhoods at different times of the day, throughout the days allocated to the fieldwork. This was held between 19 and 23 January 2020. The data collection process consisted of randomly approaching people on the streets and asking them to orally answer the survey's questions. The surveyors were operating in teams of two to three individuals. Each team had at least one Arabic-speaking member to facilitate the communication with locals. All teams received a brief kick-off training about surveying techniques in order to avoid any form of bias while formulating the questions on the field.

The aimed target was to complete around 300 surveys in order to have a minimal academic relevance. The survey was completed by randomly approaching people on the streets and squares of Tripoli, according to the following sampling categorisation:

- 100 Lebanese who are engaged in the protests: In order to reach this target, surveyors approached Tripoli's protest movements' hotspots where engaged Lebanese were most likely to be found and surveyed. This was mainly done at the Abdel Hamid Karameh or Al-Nour square and its direct surroundings, as well as the Palma intersection. These places were hosting the most vibrant gatherings of protestors since October 2019.
- 100 Lebanese who are not engaged in the protests: In order to deliver the best possible representation of the city's socio-economic and religious repartition, the surveys were collected from areas that present different backgrounds. For low-income populations, surveys were filled in the city's old souks (Remmaneh, Zahriyyeh and Nourieh neighbourhoods), Bab El Tebbaneh, and Al Tell square. For middle and higher-income populations, the surveys were collected around Azmi Street and El Mina. The latter would augment the probability of reaching Tripoli's Christian minority. Finally, surveys were also filled in Jabal Mohsen in order to include a representation of the Alawite religious minority.
- 50 Palestinian refugees: For this purpose, the surveying teams visited the Beddawi Palestinian refugee camp and spread across its streets and markets. The chances of approaching Palestinian respondents on a random base were high enough there to comply with the target.
- 50 displaced Syrians: These were encountered randomly all across Tripoli's different districts that were covered by the surveyors, but also in the Beddawi camp where one finds a significant concentration of Syrian refugees.

### 3.2 Qualitative research methodology

The qualitative research was realised through the organisation of four focus groups and one interview. The focus groups were composed of

young people aged between 18 and 35 years, residing in Tripoli or in its vicinity. The chosen criteria of sampling were limited to a total number of six participants for each one of the four focus groups. All four groups were gender-balanced with three to four men and three to four women. Also, the criteria of participants' repartition were defined around two main axes: nationality, and position towards the ongoing protests. The variables were chosen explicitly in order to limit this study around the analysis of simple criteria due to the lack of time and resources while in the field. Accordingly, two groups were allocated to Lebanese, and two others to non-Lebanese. One of the Lebanese groups was composed of supporters of the protests, while the other was dedicated to non-supporters. Of the two groups made up of non-Lebanese, one was made up of Syrians, and the other of Palestinians. The participants of each focus group were pre-selected by various local non-governmental organisations (NGOs): *Madrassat Al-Mouchaghibin* for Lebanese supporters; *Leb Relief* for Lebanese non-supporters and Syrians; and *Nab'a* for Palestinians. All the focus groups have been moderated and noted down by Arabic-speaking students. Non-Arabic-speaking students were appointed as observers of the groups' dynamics and as note takers. The focus groups were recorded with the voluntary consent of the respondents on an anonymous basis,[1] according to the Saint Joseph University's ethical standards.[2]

Below, the results of the quantitative and qualitative research are presented in two separate parts, titled 'results of quantitative research' and 'other observations from qualitative research'.

## 4 Results of quantitative research

### 4.1 General information about the respondents

A total of 322 persons responded to the survey, of whom 236 were Lebanese, 43 Syrians, and 42 Palestinians. The initial sampling target was reached regarding Lebanese nationals, while it was more difficult to achieve in the case of the two other nationalities. Furthermore, 58 per cent

1 All surveyors who participated in the field had to undergo training in the ethics of conducting interviews and focus groups. The training was delivered by the ArMA Master's programme prior to the field. Surveyors recorded focus groups' conversations on their phones. The records were deleted soon after making transcripts of the conversations. Both records and transcripts kept the participants' identities unknown, without any reference to their names or any other critical personal information.

2 Any research or study in social sciences involving data collection from human subjects, or which results have an incidence on research, should be approved by the Saint-Joseph University's ethical committee. The committee's role is to ensure that the research respects human dignity, personal consent, confidentiality and privacy, to measure the risks, benefits and transparency. For more information about the University's ethical standards and procedures, see the website at https://www.usj.edu.lb/universite/ethique-proc.php.

of the surveyed population was composed of men, while 42 per cent were women.

In order to generate representative results, the sample was diversified according to age, education level, employment, level of income, and engagement in the protests. The following paragraphs present and analyse the collected results by first showing the general outcomes, before combining some elements by crossing the data.

Moreover, different districts of Tripoli were covered, according to the earlier detailed methodology. The following map (Figure 1) shows the repartition of respondents according to their location while approached by the surveyors. The highest concentration of answers was collected in and around the old souks, the Al-Nour square, the Beddawi Palestinian camp and the adjacent neighbourhoods of Bab el Tebbaneh and Jabal Mohsen. Other surveys were filled all along Azmi Street and El Mina districts. Regardless of their nationalities, most respondents were residents of Tripoli's various districts or suburbs. Very few were residents of one of the neighbouring *Cazas* of the North Lebanon Governorate.

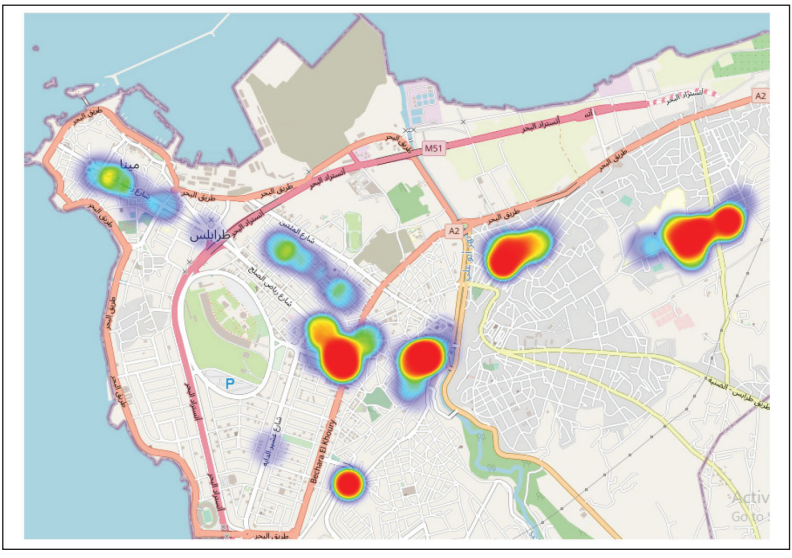


***Figure 1: Map of surveys' repartition and concentration in Tripoli***

Most of the respondents were Lebanese (73,29 per cent), followed by Syrians (13,35 per cent) and Palestinians (13 per cent). These results reflect the demographic reality of Tripoli. More than half of the respondents were between the ages of 18 and 35 years, while almost 40 per cent were middle-aged and almost 10 per cent were 61 years old or older. Fewer

than 1 per cent of the respondents received no kind of formal education, almost 6 per cent were illiterate and nearly 35 per cent attended primary school. More than a third of the participants had a low level of education. Over 27 per cent attended secondary school, while almost 32 per cent declared that they had reached higher education. To assess the respective group affiliation of those surveyed, respondents were asked whether they were active in a religious, political, professional or civil group. The results revealed that such activities were not widespread among the survey respondents. Most respondents (82 per cent) did not have an affiliation with any group. However, most of the people who did engage in a group activity were part of civil society organisations (9 per cent), followed by those affiliated to political parties (5 per cent).

### 4.2 Employment and perceptions

Nearly 35 per cent of respondents declared to be self-employed, around 13 per cent worked in a household, and around 21 per cent were employees. Also, 13 per cent of the respondents declared not currently to be working. Among those, almost 10 per cent were unemployed, while around 3 per cent were retired. However, we suspect that some respondents might have been reticent to confess that they were unemployed, knowing that many surveys were filled during conventional working hours and that the city has high unemployment rates. A small proportion of respondents declared to be students (around 7 per cent), state employees (nearly 5 per cent), or daily labourers (around 7 per cent).

The overwhelming majority of respondents perceived the demands claimed during protests to be very favourable, apart for daily workers: Indeed, only half of these respondents approved. In terms of unfavourable perceptions, state employees turn out to constitute the most sceptical group: 20 per cent were moderately or very unfavourable towards the demands. This may be explained by the fact that the demands target the state, which causes their income to be at stake. The least negative feelings were expressed by those identified as employees and unemployed. Such a result could be explained by the fact that these two groups have less to lose from potential change (see Figure 2).

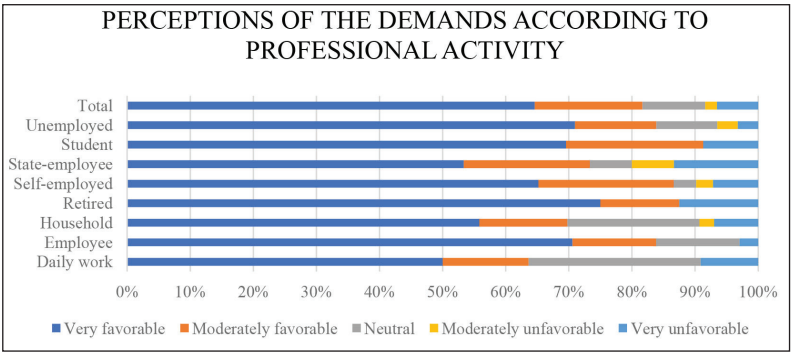


***Figure 2: Perception of the demands according to professional activity***

The feelings towards the actions of protestors were more diverse. When combining the moderately favourable and very favourable answers, the aggregated data showed that a small majority was favourable towards these actions. However, when splitting it up, only the unemployed, students, retired and daily workers were slightly in favour of the protestors' actions. This might be an interesting indicator knowing that these groups are those who are the most marginalised by the Lebanese system. On the other hand, it is important to note that students and retirees were the most divided groups on the issue as no respondent felt neutral towards the modes of action (see Figure 3).

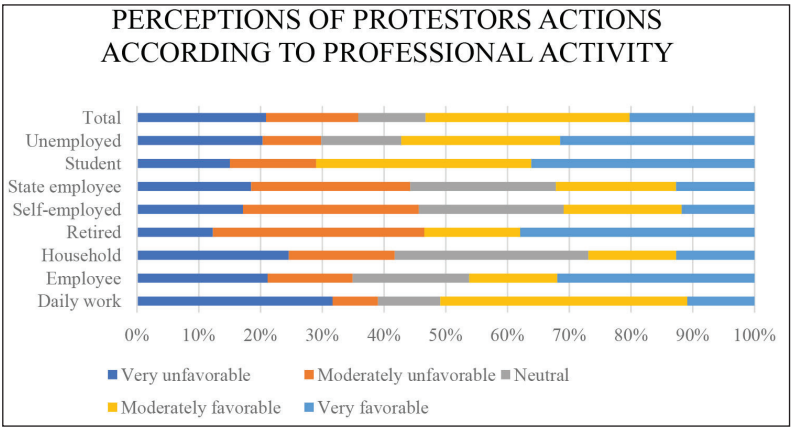


***Figure 3: Perception of protestors' actions according to professional activity***

### 4.3 Declared household income and perceptions

Regarding household income, participants were almost equally split into two categories: low (around 50 per cent) and average (around 45 per cent). Only up to 4 per cent of the interviewed persons declared to have a high income. This result reflects the reality since Tripoli is considered to be the country's poorest city.[3] Concerning the feelings towards the demands according to their income, most of the respondents, regardless of their income levels, were either favourable or moderately favourable towards the protestors' demands. Notably, the only income group where no one perceived the demands as very unfavourable is the high-income group. However, it is important to keep in mind that only 13 out of 322 respondents described their income as high. The difference between the low and average-income groups is inconspicuous (see Figure 4).

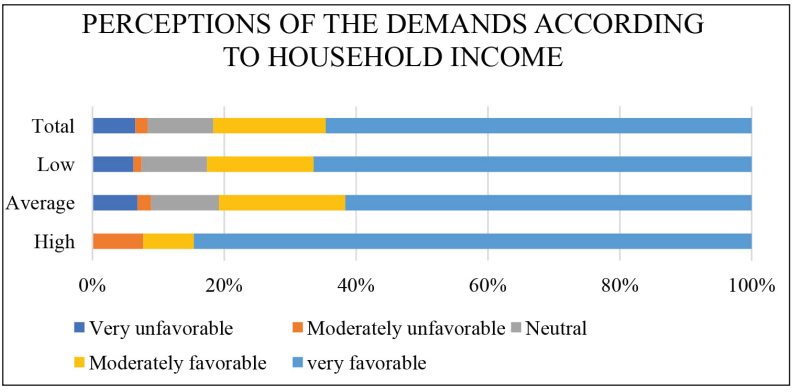


***Figure 4: Perception of the demands according to household income***

Respondents seemed more wary when asked about their perception of the actions undertaken by the protestors in order to achieve their demands. Most of the interviewed persons – mainly participants from the low and average-income groups – were moderately in favour of the protestors' actions (see Figure 5).

3 For more information, see the study conducted by the UN-Habitat Lebanon (2016) *Tripoli City Profile 2016* (updated September 2017) 45, available at the website https://data2.unhcr.org/en/documents/download/60482 (accessed 14 March 2020).

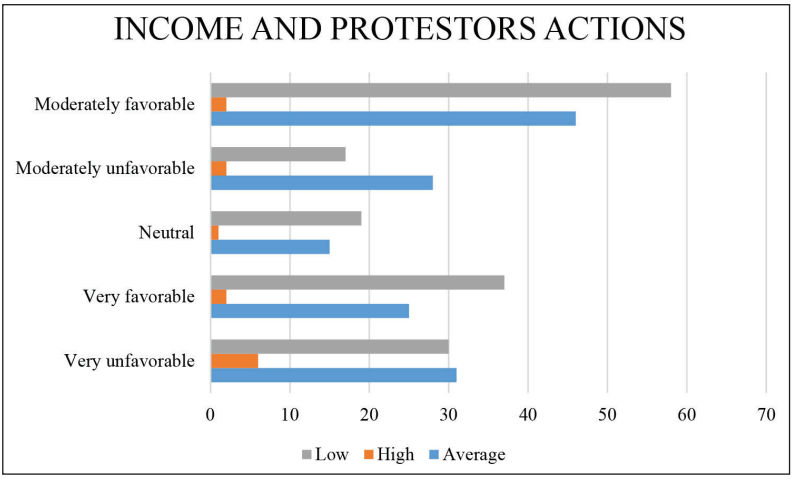


*Figure 5: Income and protestors actions*

In addition, there is a stark contrast in the perceptions about the potential outcomes of the protests between high, average and low-income respondents. An overwhelming majority of 90 per cent of the high-income respondents were pessimistic. This confirms that high-income and low-income groups have different interests at stake. Indeed, one can suppose that the *status quo* characterising the country's configuration allowed citizens from the upper classes to generate high incomes. Therefore, in their opinion, change might be considered a threat and represent a rather risky bet. On a contrary, low-income participants have nothing to lose and everything to win from a potential change (see Figure 6).

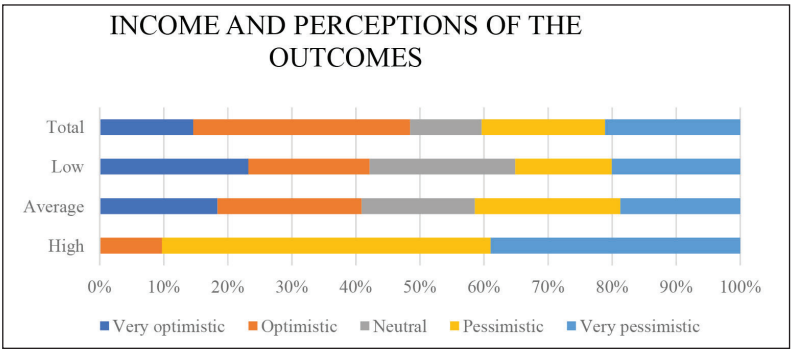


*Figure 6: Income and perceptions towards protests outcomes*

### 4.4 Perceptions towards outcomes according to engagement in the protests

More than half of the respondents (54,3 per cent) did not engage in the protests. The majority of those engaged were not doing it frequently, with up to 30 per cent engaged either 'barely' (8,7 per cent) or 'sometimes' (23,3 per cent), while only close to 5 per cent said that they were 'engaged regularly' and only 9 per cent were 'completely engaged'. Among those people who have been active since the protests have started, approximately half participated in 'sit-ins, marches, roadblocks and demonstrations'. Around one third were active on 'social media' and 19 per cent took part in 'discussions and meetings'. Finally, 2 per cent stated that they were taking part in other activities, which were not further specified. The survey respondents had the option to choose multiple activities, therefore it is not possible to disaggregate the data and to analyse whether people had the tendency to be part of one or multiple activities. Nonetheless, one clear result is that most of the engaged respondents took part in the protests at least once since October 2017. Their engagement was translated into many forms. Some were physical, by attending sit-ins, marches, roadblocks and demonstrations, while others engaged through social media. Although social media plays a major role in the circulation of immediate information and is used by a large number of people during protests, it only came second when it comes to active engagement of the respondents. There is a slight difference between men and women's answers when it comes to levels of engagement. However, more women seem to be 'completely engaged' in protests (close to 11 per cent) compared to the surveyed men (about 8 per cent). For the rest of the answers, we can conclude that the respondents' gender had no significant impact on their level of engagement in the protests.

The relation between the respondents' perceptions towards the projected optimistic or pessimistic outcomes of the protests with their level of engagement produced a very disparate set of results. However, a significant number of those 'completely engaged' in the protests fall under the 'very optimistic' category (about 45 per cent) while it was completely absent for the 'pessimistic'. Yet, the highest levels of participation corresponded to people who are 'optimistic' towards the outcomes and tend mostly to engage either 'regularly', 'barely' (47 per cent) or 'completely' (44 per cent) in the protests. Finally, people who described themselves as 'pessimistic', 'very pessimistic' or 'neutral' do engage although with different frequencies, while people who 'do not engage' in the protests ranged from 27 per cent for the 'optimistic' to 10 per cent for the 'very optimistic' (see Figure 7).

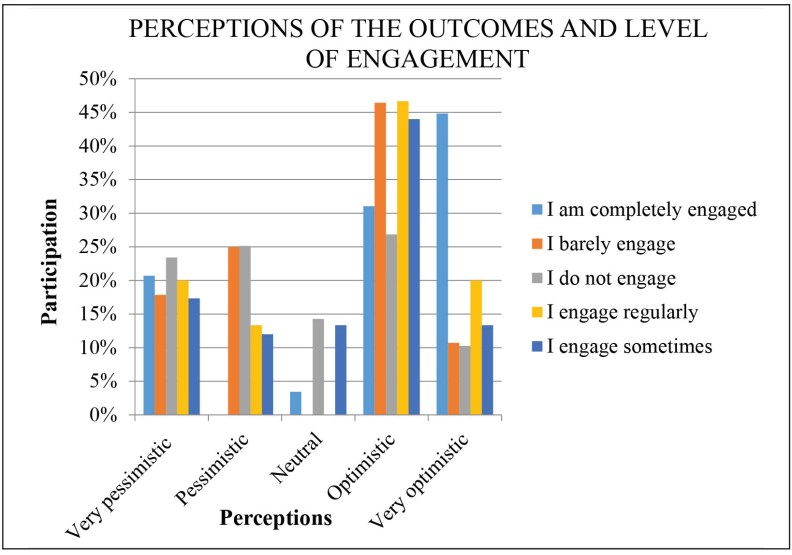


*Figure 7: Perceptions of the outcomes by levels of engagement in the protest*

### 4.5 Perceptions towards the outcomes according to gender

The different perceptions, ranging from 'very pessimistic' to 'very optimistic' towards the outcome of the protests, did not show significant dissimilarities in respect of the respondents' gender. The majority of respondents, both men and women, perceived the outcome of the protests as 'optimistic' respectively at 37 per cent and 29 per cent. The smallest group of respondents were those with a neutral perspective, which accounts for 14 per cent among women and 9 per cent among men (see Figure 8).

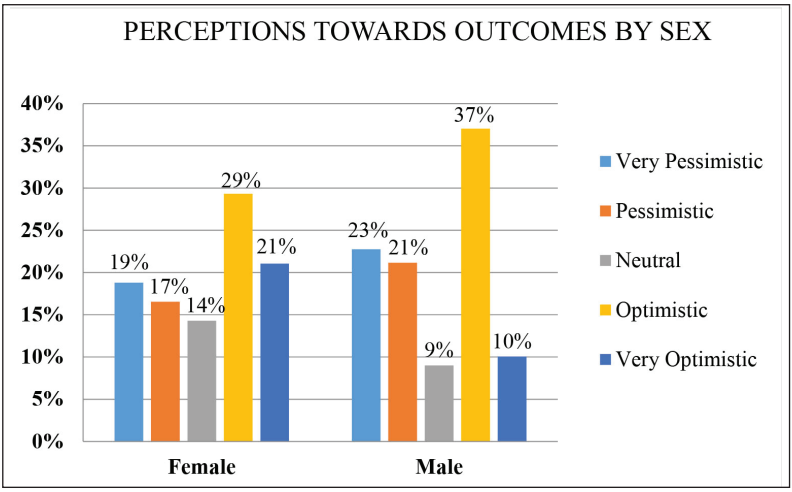


*Figure 8: Perceptions of the outcomes according to sex*

Even though there is a high number of people that have an 'optimistic' or even 'very optimistic' perception, the second largest group of male respondents (23 per cent) assess the outcomes as 'very pessimistic'. In general, the distribution on the scope of perception among men and women is rather similar. However, the women seem to have a slightly more optimistic perception, as the two most selected assessments were 'optimistic' (29 per cent) and 'very optimistic' (21 per cent).

### 4.6 Perceptions towards the outcomes according to age

The largest group of participants (48,45 per cent) had a positive attitude towards the outcomes of the protests. In terms of age, the numbers are relatively equal among the youngest and middle-aged respondents. Of the former, 32 per cent were 'optimistic' and 14 per cent were 'very optimistic'. Of the latter, 35 per cent were 'optimistic' and 15 per cent were 'very optimistic'. In relative terms, respondents aged 61 and above had the most positive attitude towards the outcomes of the protests with 38 per cent of this group being 'optimistic' and 16 per cent 'very optimistic'. However, this category also had some very conflicting results when it comes to pessimism. In this sense, this age category were 9 per cent 'pessimistic' and 28 per cent 'very pessimistic', which are respectively the lowest and the highest rates in the general population of respondents. In contrast, 19 per cent of the interviewees between the ages of 18 and 35 were 'very pessimistic' and 21 per cent were 'pessimistic'. Moreover, 22 per cent of the middle-aged respondents were 'very pessimistic' and 19 per cent were 'pessimistic'. Lastly, about 13 per cent of the youngest group of respondents

and almost 9 per cent of both middle-aged and oldest interviewees had a 'neutral' stance towards the outcomes of the protests (see Figure 9).

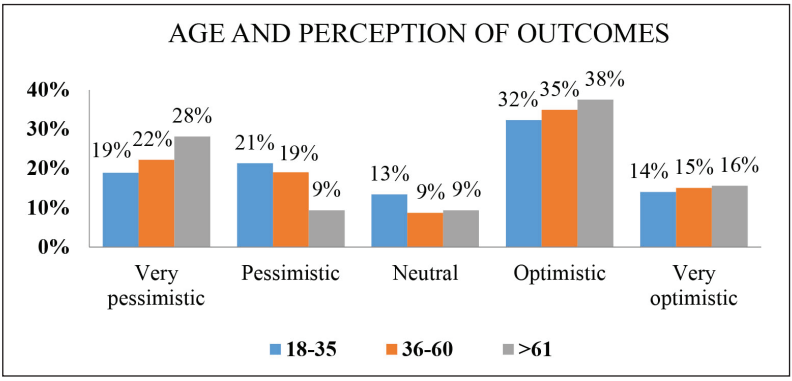


*Figure 9: Perceptions of the outcomes by age categories*

### 4.7 Perceptions towards protestors' actions

Besides the outcome of the protests, the survey participants were also asked to express their feelings towards the actions of the protesters. Again, the figures show a rather similar distribution of opinions among both men and women. Most of both men (38 per cent) and women (27 per cent) indicate a 'moderately favourable' attitude towards the actions of the protestors. Among men, a big gap shows between the most selected response, namely, being 'moderately favourable' (38 per cent) and the second being 'very unfavourable' towards the actions (19 per cent). On the other hand, the women who responded were less divergent. Most of the women (27 per cent) were 'moderately favourable', followed by 23 per cent of them being 'very unfavourable' (see Figure 10).

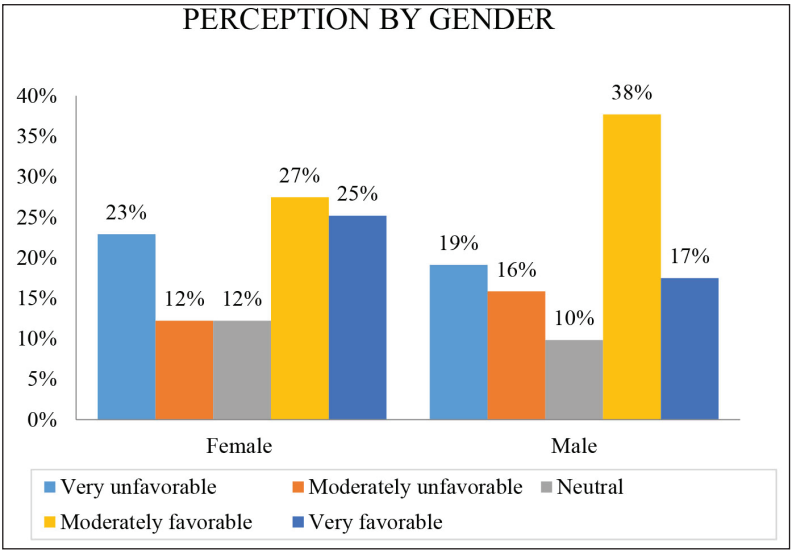


*Figure 10: Perceptions of protestors' actions by gender*

All in all, it can be stated that there is a slight tendency towards more positive perceptions of the respondents concerning the actions of the protesters.

### 4.8 Expected scenarios for the country

To gather information regarding the implications of the protests, those surveyed were asked to select one or multiple scenarios that they thought are most likely to happen. These scenarios referred to either a positive or a negative development or consequence on the economic, social, or political situation in the country. As this is a multiple-choice question, the survey participants did not have to choose either positive or negative scenarios. Therefore, it cannot be stated whether the respondents were generally optimistic or pessimistic towards the future because they expressed different tendencies based on the different social levels, which might be contradictory or additive at times (see Figure 11).

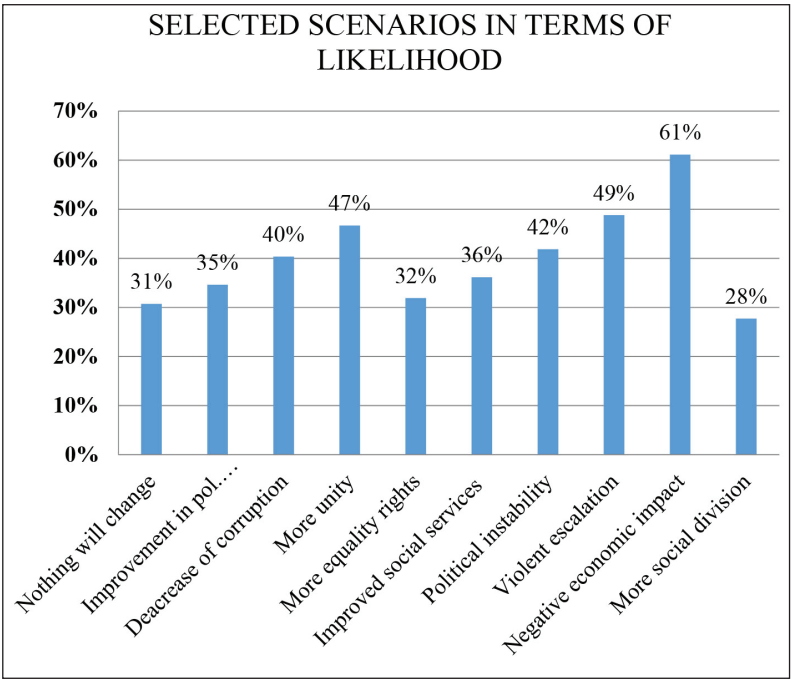


***Figure 11: Perceptions of the protests' outcomes***

It can be summarised that the most selected scenario is the one referring to possible 'negative economic impact' with a total of 61 per cent of the respondents assessing that it is most likely to happen. Almost 50 per cent predicted 'violent escalation', but a similar number of people (47 per cent) also predicted 'more unity' and social cohesion. Regarding the other possible scenarios, 42 per cent of the respondents predicted 'political instability', while 28 per cent predicted 'more social division'. Finally, around one-third of respondents equally assessed that 'nothing will change', that political representation will rise, that there will be more equality in rights, and that social services will improve.

The interpretation of the results concerning the expected outcomes of the protests shows unequivocally that there are both optimistic and pessimistic thoughts, with mixed feelings of fear and hope regarding the impact of the protests on the country and its population. However, there are also other important factors that need to be considered here. This is the case of the deteriorating political and economic situations that can also have reciprocal impacts on the protests. The economic crisis and the political deadlock of Lebanon thus are important intervening variables that cannot be occulted in this analysis and need at least to be mentioned.

### 4.9 Perceptions about safety during the protests

Another question raised in the survey was whether the respondents ever felt unsafe during the protests. If yes, they were asked to identify one or more actors that made them feel unsafe, as this was also a multiple-choice question (see Figure 12).

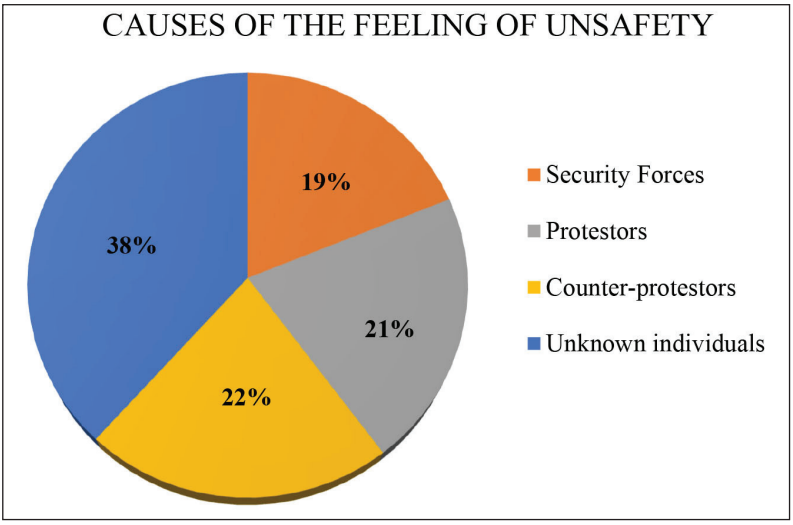


*Figure 12: Causes of the feeling of being unsafe during protests*

Interestingly, less than half of those surveyed (about 44 per cent) stated that they felt unsafe during the protests, whereas most of those who did feel unsafe (38 per cent) declared 'unknown individuals' to be the main cause of their fear in this respect. Also, in a tight range varying from 19 to 22 per cent, respondents expressed that 'security forces', 'protestors' or 'counter-protestors' are the causes of them feeling unsafe. People seemed to be less afraid of security forces during protests than of 'protestors' or 'counter-protestors'. This may be explained by the relative popularity of the Lebanese army in Lebanese society. Also, security forces are well-known and identified, even if they might be a potential threat mainly when protesting in the streets. In opposition, unknown individuals are psychologically the most frightening, especially that beliefs related to the infiltration of the protests by a 'fifth column' is very popular in the country.

### 4.10 Perceptions about safety and nationality

Palestinians had the highest rate of feeling 'unsafe' during protests with 52 per cent compared to 43 per cent and 42 per cent respectively for Lebanese and Syrians. This could be related to their fragile situation in the country and to their long-lasting struggle to stay away from trouble and

keep a low profile in their host country. It is also very interesting to see that the majority of Syrian respondents did not feel unsafe during the protests, even though a few years before they had faced violent repression in their own country (see Figure 13).

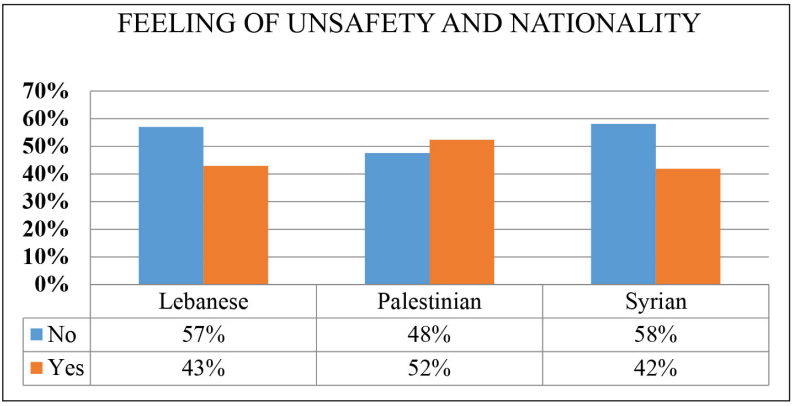


*Figure 13: Feeling of unsafety during protests by nationality*

### 4.11 Nationality and participation in protests

Most of the respondents (about 55 per cent) shared the opinion that people with nationalities other than Lebanese should not participate in the protests. Interestingly, this was not a very predominant view among Lebanese (53 per cent), but rather among Palestinians (62 per cent) and Syrians (57 per cent). Thus, in relative terms, it is mostly the Palestinians who rejected the view that other nationalities should be part of the protests. This might be linked to their previous experiences such as their participation in the Lebanese civil war. It is also interesting to note how even in a Sunni majority city, most of the Lebanese citizens are reluctant to integrate other nationalities in the protests.

In contrast, 129 respondents (40 per cent) shared the opinion that non-Lebanese should participate in the protests. This view was predominantly shared by Lebanese (42 per cent), followed by Syrians (40 per cent) and Palestinians (33 per cent). A few of the respondents (around 5 per cent) had no opinion on this issue (see Figure 14).

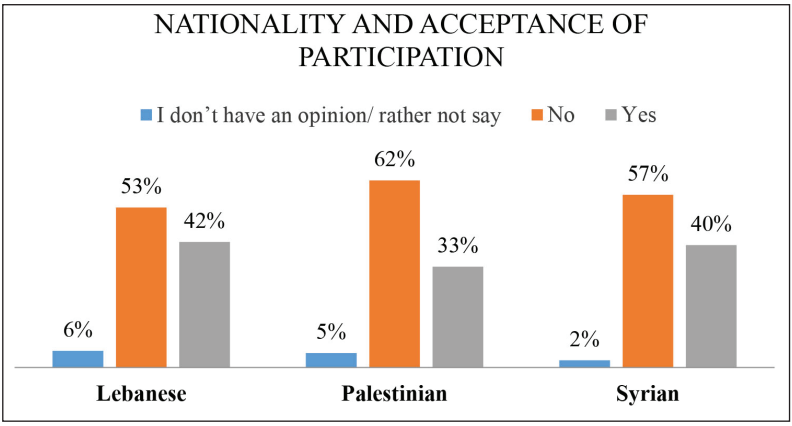


*Figure 14: Acceptance of participation by nationality*

### 4.12 Nationality and engagement in protests

The statistics on the extent of engagement in the protests may be seen in connection with the aforementioned numbers shown in Figure 14. In this respect, the number of engaged Palestinians and Syrians nationals in the protests seems to be very low (see Figure 15). Almost 93 per cent of the Palestinians and 79 per cent of the Syrians did not engage at all. For those who did, Syrians either engaged 'sometimes' (16 per cent), 'regularly' (2 per cent) or 'barely' (2 per cent), while none of them was 'completely engaged' in the protests. In contrast, around 2 per cent of Palestinian respondents said that they were completely engaged, while about 5 per cent declared to engage sometimes.

Even though Tripoli is considered to be the 'Bride of the Revolution' (Anderson, 2019) with the highest mobilisation rates across the country, the number of non-engaged Lebanese in the protests was surprisingly high (43 per cent). For those Lebanese who said that they were engaged, most of these were 'sometimes engaged' (28 per cent), while only 12 per cent were 'completely engaged' and merely 6 per cent were 'regularly engaged' (see Figure 15).

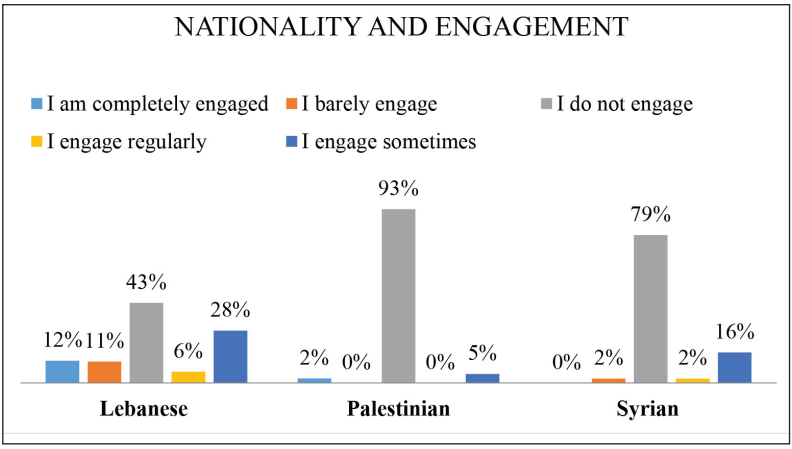


***Figure 15: Engagement in protests by nationality***

These results based on the survey and the quantitative interpretations were coupled with the organisation of focus groups. The qualitative results are the subject of the next part of this study.

## 5 Other observations from qualitative research

As previously mentioned in the methodology, four focus groups were also organised during the team's field work in Tripoli. These four focus groups were divided as follows: Lebanese supporters; Lebanese non-supporters; Syrian refugees; and Palestinian refugees. Each focus group consisted of six to eight people, both men and women, aged between 18 and 35 years. The meeting with the first three groups occurred around the El Nour square, while the Palestinian group was interviewed in the office of the Palestinian *Nab'a* NGO in the vicinity of the Beddawi camp. The moderators asked twelve questions in Arabic, in order to meet the following five main objectives:

(1) to capture how Lebanese, Syrian and Palestinian youths comprehend and define the concepts of revolution and different forms of mobilisation, and the role of women;

(2) to understand the perceptions of Lebanese, Syrian and Palestinian youths regarding the expected outcomes of the protests;

(3) to apprehend the feelings generated by the protests and how it influenced the way youngsters perceive them in terms of identity and belonging;

(4) to understand how participants from various nationalities feel about the participation of non-Lebanese in the protests; and

(5) to filter out the motivations behind people's support of or opposition to the revolution.

### 5.1 Different understandings for the concept of 'revolution'

Regarding the first key objective, almost all participants referred to the same concepts: For instance, they all agreed that the revolution is related to social justice and aimed at reforming the current political system. If non-supporters agreed as well, they, however, added that the Lebanese protests were 'first about revolution, but are not anymore'; it soon turned into an unwelcome *intifada* or 'uprising' in Arabic, which constitutes a 'conspiracy against Lebanon'. Also, some of the Syrian and Palestinian participants described the revolution as a positive event, whereas actions held by protestors in Lebanon were seen by some as negative because they changed from being peaceful to violent aiming for 'sabotage'.

Lebanese supporters' described the mobilisation as somehow being a peaceful protest to drive the country in the right direction, create a platform in which people can connect to each other (through discussions, debates, volunteering, social media, writing, art), but also to try to orient the protests towards continuous pressure, coordination, inter-regional dialogues, as well as encouragement regarding some innovative initiatives. Non-supporters expressed their understanding of a mobilisation as follows: 'A revolution has to be bloody, with destruction of property where roads closures have to target the houses of politicians as well as the parliament'. For Palestinian participants, the revolution should remain peaceful and not resort to violence. Participants expressed their relief when they realised that the events remained peaceful. Some participants supported the idea of 'a civilised form of protests' and reproached protestors to be 'violent'. All participants agreed on corruption being the main trigger of the mobilisation, along with the injustice that affected Lebanese people in past years. The economic situation was also mentioned as an important factor.

### 5.2 The role of women in the protests

According to all focus groups, women played a significant role in the revolution. Lebanese supporters expressed their surprise regarding the active and leading role played by women over the past few weeks, describing it as both positive and effective. However, non-supporters adopted two different approaches: For some participants, women should adopt 'appropriate behaviour' and avoid breaking or vandalising any kind of urban property. Indeed, if women should be part of the protests as their opinion is essential to a successful movement, violent behaviour is not feminine. As explained by a participant, 'breaking furniture doesn't turn a woman into a revolutionary'. For others, on the contrary, the stereotype stating that they represent the 'inferior sex' and that 'they only go to the

square to take "selfies"' should be opposed. Syrian participants agreed on the great role played by women, which they explained by the different Lebanese traditions and customs. One of the Syrian participants, a 15 year-old girl, expressed the impossibility for her to participate in any kind of protests by the fact that Syrian traditions would not allow her to become involved, although the girl did not completely exclude the idea of one day participating. Palestinians explained that 'the participation of women is not something new since Lebanese treat women equally: 'Lebanese women's rights are guaranteed according to the social context.'

Both groups of Lebanese agreed that women are breaking the barrier of fear and changing perceptions about themselves among Lebanese society. According to Syrian participants, 'the Lebanese street respects and give women the space to express herself'; 'women's voices are more powerful'. Two Palestinian women concluded that 'women's participation in the revolution did not change Palestinians' perception since Palestinian women are already revolutionary and inspiring many Lebanese women'.

### 5.3 Optimistic and pessimistic prospects on the outcomes

Supporters were optimistic about potential outcomes, explaining that positive changes take time. Non-supporters had different views mostly about negative outcomes.

Syrian participants constantly referred to their experience in Syria. Therefore, they mostly shared pessimistic thoughts regarding the potential consequences for people's lives. However, they highlighted quite a few positive aspects, such as the army's support towards the people and the positive role of the media. Some of them expressed that 'they hope for the best' for their 'Lebanese brothers'. In general, they showed much fear and scepticism about the outcomes due to their own experience in Syria.

Palestinian participants opened up about the damages that the revolution caused after switching to episodes of violence: If the revolution was something beautiful to witness in the first days, it now harms the citizens of Lebanon. Some participants illustrated their reasoning by highlighting the dangers linked to road blockages. They stressed how the aftermath would impact their economic living standards, since rentals are charged in US dollars. Palestinians raised their concerns regarding the well-being of their families who can barely cope with the current rising cost of living in the country. The protests generated fear and uncertainty: 'We became like prisoners in the camp' said some Palestinians. Some expressed happiness only at the beginning of the events, when the protests were peaceful. They all agreed that they no longer were comfortable with the ongoing events, due to the violent behaviour of some protesters. Some others noted that they were proud to see Lebanese people referring to

Palestinian songs and signs as inspiring symbols. However, they feared being negatively associated with some of the ongoing events.

### 5.4 The refugees and their concerns

Regarding the effects of the protests on the refugees' situation, supporters and non-supporters spoke of the economic impact that will affect both Palestinian and Syrian refugees. They also underlined that there now is a stronger tendency to accept refugees' integration. Non-supporters pointed out that the mobilisation increased the awareness among Lebanese citizens that the presence of Syrian refugees is not 'the reason' behind the current crisis as stated by some politicians. They revealed an existing 'racism' against the presence of Syrian refugees in Lebanon.

Most Syrians did not see potential improvement in their conditions, as the demands were mainly targeting the basic living rights of the Lebanese people. They also considered that tackling the refugee crisis was not one of the demands' priorities. However, for some of them, if the revolution were to succeed, a time might come where the focus would finally be on refugees' demands and needs.

From a slightly different perspective, Palestinians mainly spoke of themselves as being accused of participating in the protests for the sake of sabotage. They were also predominantly pessimistic regarding their future situation and believed that no rights would be granted to refugees. Some participants denounced that 'Palestinians have always been accused to be terrorists. No matter what the revolution will lead to, their situation will remain the same.'

### 5.5 Hope, anxiety and mixed feelings

When moderators asked about the feelings generated by the protests, supporters described instability, stress, anxiety, positive energy, optimism and pride. People who underwent the Lebanese civil war, however, were more pessimistic. The non-supporters expressed feelings of discomfort, fears of degradation, and rising tensions. However, they mentioned that they also felt pride in the beginning of the protests, noticed some harmony between different social classes, and to some extent felt enthusiastic.

Changes in self-perception were not noticeable in most of the supporters' answers, but one Lebanese supporter pointed out that her presence in the revolution was motivated by the fact that she originally was from Tripoli. She now felt a stronger attachment to her hometown and identity and therefore saw her presence there as essential. Others agreed that the protests reaffirmed, now more than ever, the power of the youth to induce change. Most of the non-supporters explained that they identified as Lebanese nationals first and foremost, no matter what their

religious or political affiliation was. Many of them also agreed that fighting sectarianism was a positive outcome. Palestinian participants linked the revolution to their revolutionary identity referring to their continuous fight against the occupation.

### 5.6 Ambiguous opinions about non-Lebanese participation's rights in the protests

As far as the participation of non-Lebanese in the protests was concerned, diverse and conflictual remarks were given as some supporters considered that Palestinian refugees should be allowed to participate according to their residency status. On the contrary, some participants refused to differentiate, stating that everyone can participate in the name of equality, while others strictly refused the potential participation of any non-Lebanese person. Non-supporters agreed that non-Lebanese (Syrians and Palestinians) have the right to take part in the protests and that they are welcomed.

Some Syrians stated that non-Lebanese do not have to participate whatsoever since the security forces in Lebanon use the same oppressive methods as in Syria. If safety and security measures were guaranteed, Syrians and Palestinians would be hugely present in the protests. For most Palestinian participants, the fact that some Lebanese do not accept the participation of non-Lebanese is understandable since 'it is their country'.

### 5.7 Multiple motivations

When the moderators asked about the perceptions motivating the participants to become involved in the protests, supporters insisted on the importance of these events as a means to acquire democracy, to get rid of sectarianism, as well as to bring back human rights and dignity. For non-supporters, one of the objectives was to fight against sectarianism through the unity that people have shown in the streets. For the inhabitants of Tripoli, the goal also was to break some of the city's long-lasting stereotypes, which often depicted it as a bastion for Islamists and extremists. Syrians believed that the need for social justice and the sense of shared responsibility towards the situation were both important triggers.

However, the reasons for the non-participation of some were the fear of the state or the dependency on the clientelist political parties. Non-supporters gave the example of road blockades that are unpleasant and harmful. Syrians also denounced the recourse to certain forms of mobilisation, such as road blocks, disturbing security, and vandalism. Palestinians again referred to their own precarious situation. Some of them referred to the civil war by linking it to the danger of the current situation, especially that the protesters 'lack clarity regarding their exact needs and demands'.

## 6 Limitations

This study reflects only on the perceptions gathered in Tripoli and its direct surroundings at the given time of the field work in January 2020. Therefore, any generalisation on the entire process of the wave of protests, as well as on the entire country is highly improbable because of the socio-economic, political and religious diversity of Lebanon, as well as on the rapid evolution of the dramatic events there. The quantitative results are based on the respondents' declarations and own views. This reality reflects on the limits of the analysis. Therefore, highlighting this point is more than essential. One also has to be aware of the fact that the gathered answers to the questionnaire were those of 322 persons, which is a relatively small sample, despite being slightly above the minimal number for a valid scientific data set. The probability of sampling bias or margin of error has to be taken into consideration during the interpretation of the results. Finally, the perceptions about the protests, collected through both quantitative and qualitative methods, must be relativised by the effects of other independent, causal and intervening variables such as the collapsing financial and economic situations of Lebanon.

## 7 Conclusion

Our research shows that Tripoli's inhabitants have nuanced perceptions about the ongoing wave of protests occurring in Lebanon since October 2019. The divergence in some of these perceptions relates to many variables or conditions such as employment, sex, age or nationality of the respondents.

Most of the interviewed persons were in favour of the protestors' demands. However, when asked about the protestors' actions, even the poorer were only moderately in favour of the protestors' actions. This was the case for both men and women, who were both only moderately supporting these actions. Surprisingly for the city, more than half of the respondents indicated that they never engaged in the protests. Most who were engaged were not frequently participating in the protests. In other words, the active and regular form of mobilisation concerned only a low proportion among the respondents. It can also be deduced that gender had no significant impact on the level of engagement.

Regarding the expected outcomes, there are both optimistic and pessimistic thoughts, with mixed feelings of fear and hope for the future. The most selected scenario was related to the negative economic impact, followed by violence, and then by unity and cohesion. Also, this study gave a good picture about the protestors' perceptions of fear. People declared being less afraid of security forces during protests than of other protestors, counter-protestors or unknown individuals.

In addition, one of the most interesting aspects of this research was to reveal the relationship between nationality and the dynamics if the protests. More than half of the respondents shared the view that non-Lebanese citizens should not participate in the protests. Interestingly, this view was more often defended by Palestinians (62 per cent) and Syrians (57 per cent) than the Lebanese themselves (53 per cent). Thus, the very low levels of participation by Palestinians and Syrians in the protests may be related to these declarations.

Finally, it is worth noting that the interviewed Lebanese supporters were all aware of the sacrifices and the possible outcomes in the long run. If all groups identified the same demands, they clearly had different positions towards the ongoing events: Some participants fully embraced the movement while others seemed to have remained sceptical about the methods or the potential negative scenarios. All agreed in the end that this is still an uprising *intifada* and not yet a revolution, while expressing the fear that an escalation might lead to another civil war.

# References

Abdo N 'Informality and gender dynamics in Tripoli's labour market' (2019), available at https://data2.unhcr.org/en/documents/details/69575 (last visited 20 March 2020)

AbiYaghi M-N, Catusse M & Younes M 'From *isqat-an-nizam at ta'ifi* to the garbage crisis movement: Political identities and sectarian movements' in G Dipieri & D Meier (eds) *Lebanon facing the Arab uprisings: Constraint and adaptation* (2017) Grenoble 75

AbiYaghi MN, Younes M, Yammine L, Hammoud M, Saleh R, Sebas M & Hands T (2016) *The conflict context in Tripoli: Chronic neglect, increased poverty, and leadership crisis* Lebanon Support

Anderson F 'In pictures: Inside Lebanon's Tripoli – The "bride of the revolution"' *Middle East Eye* 16 November 2019

Assouad L 'The Lebanese are united in revolt, but their political system is not made to calm their rage' Diwan, Middle East Insights from Carnegie, 18 November 2019

Barakat H 'Social and political integration in Lebanon: A case of social mosaic' (1973) 25 *Middle East Journal* 301

Baumann H 'The causes, nature, and effect of the current crisis of Lebanese capitalism' (2019) 25 *Nationalism and Ethnic Politics* 61

Cammett M 'Sectarianism and the ambiguities of welfare in Lebanon' (2015) 56 *Current Anthropology* 76

Fakhoury T 'The EU and Lebanon in the wake of the Arab uprisings' (2014) 21 *Middle East Policy* 133

Faour MA 'Religion, demography, and politics in Lebanon' (2007) 43 *Middle Eastern Studies* 909

Gade T 'Together all the way? Abeyance and co-optation of Sunni networks in Lebanon' (2018) 18 *Social Movement Studies* 56

Haddad S & Jamali D 'The politics of refugees' non-integration: The dilemma of Palestinians in Lebanon' Prairie Centre of Excellence for Research on Immigration and Integration (PCERII) (2003) 4 *Journal of International Migration and Integration* 1

Haddad S 'Lebanon: From con-sociationalism to conciliation' (2009) 15 *Nationalism and Ethnic Politics* 398

Ismail K, Wilson C & Cohen-Fournier N (2017) 'Syrian refugees in Tripoli, Lebanon. Refugees in Towns Case Study Series, Feinstein International Centre, Tufts University, Tripoli, Lebanon

Kukrety N & Al-Jamal S (2016) *Poverty, inequality, and social protection in Lebanon* Beirut: AUB ScholarWorks

Lefèvre R (2014) *The roots of crisis in Northern Lebanon* Beirut: Carnegie Endowment for International Peace, Washington DC

Mahoudeau A 'Tripoli (Lebanon), a historic field of dissidence' *The Cobble and the Frame* 7 June 2016

Suleiman J (2006) 'Marginalised community: The case of Palestinian refugees in Lebanon' Development Research Centre on Migration, Globalisation and Poverty, University of Sussex, Brighton, UK

Thorleifssion C 'The limits of hospitality: Coping strategies among displaced Syrians in Lebanon' (2016) 37 *Third World Quarterly* 1071

Traboulsi F (2007) *A history of modern Lebanon* London: Pluto Press

UN-Habitat Lebanon (2016) *Tripoli city profile* UN-Habitat

World Bank 2019 Worldbank.org, available at http://pubdocs.worldbank.org/en/757651553672394797/Lebanon-MEU-April-2019-Eng.pdf (last visited 16 March 2020)

Yacoubian M (2019) *What's next for Lebanon? Examining the implications of current protests* Washington DC: United States Institute of Peace

M Ivanović, M Mušanović, M Ceku, Aida Salihović-Gušić & M Icoski 'Recent regional developments in human rights and democratisation in South-East Europe during 2019' (2020) 4 *Global Campus Human Rights Journal* 517-538
http://doi.org/20.500.11825/2034

# Recent regional developments in human rights and democratisation in South-East Europe during 2019

***Marija Ivanović,* Meris Mušanović,** Mariola Ceku,*** Aida Salihović-Gušić**** and Marjan Icoski********

**Abstract:** *The region of South-East Europe (SEE) continues to be marked by competitive authoritarian regimes. This article employs a dynamic understanding of competitive authoritarianism that places the emphasis on a movement of a regime towards or away from either ends of the imagined consolidated democracy-authoritarian regime spectrum. More precisely, the article highlights strategies used by the parties in power to increase the control in society and thus consolidate political power, while also paying attention to contestations that arise against these negative trends in four countries of the region: Serbia, Albania, Bosnia and Herzegovina and North Macedonia. The general findings reveal that the region is experiencing a continued trend of democratic backsliding in 2019. Two main structural reasons behind this seem to be (i) weak democratic institutions; and (ii) autocratic-minded political leaders, who tend to increase their power. As the contributions demonstrated, in 2019 ruling parties (or coalitions) in the region tended to increase control over media, continued to show disregard for the human rights of minorities and vulnerable groups, while also taking advantage of the ill-functioning judiciary unable to prosecute high-level cases of corruption. These negative trends resulted in a rather bleak democratisation impulse in the region, despite the larger scale citizen mobilisations against increased authoritarianism present in several countries.*

**Key words:** *competitive authoritarianism; political control; protests; democracy; human rights*

* Academic Tutor, Global Campus South East Europe/ERMA Programme.
** Legal Analyst, Humanitarian Law Center (Belgrade).
*** Specialist, Ministry for Europe and Foreign Affairs.
**** Academic Tutor, Global Campus South East Europe/ERMA Programme.
*****Program Manager, Mladiinfo International.

## 1 Introduction

The region of South-East Europe (SEE) continues to be marked by competitive authoritarian (CA) regimes that combine 'democratic formal procedures' while 'conserving an "un-democratic" regime core' (Kmezic & Bieber 2017: 5). In this sense, these regimes can be observed as existing on a spectrum between consolidated democracies and authoritarian regimes (Bieber 2019; see also Levitsky & Way 2010). Interestingly, they are not necessarily moving in a democratic direction, as was expected by those ascribing to the democratic transition paradigm, but rather are following diverse trajectories (Levitsky & Way, 2010; Bieber 2019). Along these lines, Bieber (2019) proposes a dynamic understanding of the concept, such that in a given time frame, the regime in question can move towards or away from either end of the imagined consolidated democracy-authoritarian regime spectrum. This understanding is followed here as it allows one to account for both positive and negative developments – while keeping in mind the overall positioning – with regard to human rights and democracy in the region. Furthermore, it allows, at least to an extent, to disentangle the specificities of each government, rather than subduing them all in a grey zone of hybrid regimes.

This article examines the dynamic processes taking place in four competitive authoritarian regimes in the SEE region: Albania, Bosnia and Herzegovina, North Macedonia and Serbia. It highlights the strategies used to increase the control in these societies, thus consolidating the power of the ruling parties, while also paying attention to contestations that arise against these negative trends. In this regard, it may be argued that in 2019 the overall trend in the SEE was pointing more towards democratic backsliding than towards democratisation. According to the Freedom House reports, three countries of the region – Albania, Montenegro and Serbia – had their democratic scores downgraded; Bosnia and Herzegovina maintained its rather low (lowest in the region) ranking. North Macedonia and Kosovo advanced slightly in comparison to 2018, while both remained in the category of transitional or hybrid regime (Freedom House Report 2020). The reasons behind this general trend in SEE are multiple, but the common conditions include '(1) institutional weakness that provides insufficient democratic safeguards; and (2) authoritarian political actors who utilise these weaknesses to attain and retain power' (Bieber 2018: 338). Thus, even though 'tools and instruments [of control might] differ' from country to country (Bieber 2019), a common repertoire of strategies used by the SEE strongmen in 2019 included increased control over media, often resulting in 'polarisation between the government and the opposition' (Bieber 2019) due to playing field being 'heavily skewed in favour of incumbents' (Lucas & Wey 2010: 5); ill-functioning judiciary, marked by the inability to process (high-level) cases of corruption and

similar malversations; and the neglect of the human rights of vulnerable groups such as migrants, minorities and the youth.

Therefore, the current situation in SEE can best summed up by the term 'autocrat[s] in a democratic system' (Bieber 2019: 5). However, these increased authoritarian tendencies in the region did not go by without contestations by citizens and the opposition which aimed to push out the autocrats from, at least partially, the democratic system. In several countries of SEE, the citizens took to the streets to manifest their dissatisfaction with corrupt elites, unfair election practices, controlled media, and the overall move towards authoritarianism (Kadovic 2019). Even though in many instances these protests were against authoritarian tendencies, due to the multiplicity of actors participating in them and their diverse demands, it cannot simply be concluded that their overall aim was greater democratisation. Nevertheless, protests remain an important strategy for demonstrating dissatisfaction with the current state of affairs. The fact that not all actors are on the same page as to what the alternative should look like is a different story. In line with this, the selected four country cases that follow illustrate these dynamics as well as the overall regional trends, highlighting major developments with regard to human rights and democracy in SEE during 2019.

## 2 Serbia: Consolidating the power of one party and one man

In 2019 the political and social life in Serbia was marked by populist rhetoric, a lack of democratic dialogue and political interference in all spheres of political life. This came to represent the *modus operandi* of the ruling Serbian Progressive Party (SNS) (in its seventh year in power) and its leader, current President and former Prime Minister, Aleksandar Vucic. President Vucic is a good example of an 'autocrat in a democratic system' due to the tendency to concentrate power in the positions he is holding. Therefore, it comes as no surprise that democracy and human rights continued to erode under the SNS-led coalition in 2019. The persistent hold on the social and political sphere was best evidenced in the increasing attacks on journalists, thus restricting media freedom. Judges and prosecutors were also attacked, thus weakening the institutions in charge of the rule of law and justice. This, together with attacks on civil society activists and human rights defenders, points to clear authoritarian tendencies in the country. On a positive note, this trend was met with resistance, as 2019 was also a year of large civic mobilisations that were the expression of many grievances produced by the ruling coalition. Week after week, thousands of protestors across the country were demanding the creation of a more democratic political environment. On the other hand, the international community chose not to become seriously involved in these events that were seen as a domestic political problem. Moreover, a lengthy EU accession process and uncertainty of its outcome affected

the public support to Serbia's European Union (EU) integration. Finally, the events of 2019 raised serious concerns over the country's increasing move towards authoritarianism that can be tracked through the events and tendencies presented below.

### 2.1 Consolidating power through increased political control

One of the biggest issues arising in 2019 was the stifling of media freedom in Serbia. This was noticeable through the intimidation and attacks on journalists, primarily by the government and the ruling SNS party, the lack of transparency of media ownership and the oversized role of the state in the country's media sector. In the period between January and late July, the Independent Journalists' Association of Serbia (NUNS) registered 27 incidents of violence, threats or intimidation against journalists, including eight physical attacks and 19 threats (The Human Rights Watch, Serbia/Kosovo 2020). An especially frequent target of harassment was the N1 television and its staff even reported having received death threats (Zivanovic 2019). At the same time, unbalanced media coverage and a large volume of fake, misleading or unverified news represented another concern. Accordingly, Freedom House downgraded its assessment of Serbia's media environment, from 'free' to only 'partially free' (Freedom House, Serbia 2020). These developments seriously undermined the ability of citizens to meaningfully participate in the democratic processes (US Department of State 2019).

Besides exerting control over the media, the SNS-run coalition has done little to act on its promise of eliminating corruption. In the course of the year, national and international experts and monitors assessed that the Anti-Corruption Agency did not thoroughly investigate dubious political campaign contributions. This was confirmed in the 2019 European Commission report stating that the country has made limited progress in its fight against corruption (EC Report 2019). Subsequently, Freedom House downgraded the country's political pluralism and participation score (Freedom House 2020). Furthermore, between March 2018 and May 2019 the Republic Public Prosecutor's Office reported 255 corruption-related convictions through trial and 530 convictions based on plea agreements (US Department of State Serbia 2019). Hence, corruption remains a pervasive practice in the system and the government has not been keen on the necessary reforms.

Over the years the EU has been the main driving force for a variety of reforms and positive democratic changes in Serbia. Although its citizens had great expectations that the EU integration process would facilitate the fast establishment of the rule of law and consolidation of democracy, in the course of 2019 only limited progress was made in this area. Political interferences and a lack of judicial autonomy continued to be one of

the main obstacles to good governance in Serbia. Especially dangerous were the attacks and criticisms of judicial professionals, which gained in intensity in 2019 and gravely undermined the principles of the rule of law and the independence of the judiciary. Even though Serbia's officials have been describing the EU accession as the state's strategic goal, this process slowed down noticeably, with the country opening only two additional negotiating chapters in 2019, raising the question of Serbia's pro-European course (Belgrade Centre for Human Rights 2019).

While Serbia has established the legal and institutional framework for human rights and the protection of minorities, nationalism, xenophobia and intolerance still dominate its value system (Kmezic 2019). In the context of the EU-Serbia relations an important segment is the signing of an agreement on border management in order to help tackle illegal immigration and further enhance security at the EU's external borders (EU Press Release 2019). Consequently, various press and humanitarian reports have indicated that Serbian authorities have pushed back irregular migrants without screening them to establish whether they were seeking asylum. According to reports provided by the UN Refugee Agency (UNHCR) field staff and partners, in the first half of 2019 there was a 350 per cent increase in apprehensions, compared to the previous year (US Department of State, Serbia 2019). In addition, according to information attributed to the Ministry of Interior, 1 186 denials occurred at the Belgrade Nikola Tesla Airport alone, representing a significant increase, compared to 771 denials in 2018 (US Department of State, Serbia 2019).

Contrary to the adopted anti-discrimination legislation, inter-ethnic tensions continued during 2019. Ethnic Albanians were subjected to discrimination that was strongly correlated with developments in the country's dialogue with Kosovo. They were exposed to hate speech that was used publicly by state officials such as Defence Minister Aleksandar Vulin and the director of the Office for Kosovo and Metohija, Marko Djuric (US Department of State, Serbia 2019). In April, rightists gathered in front of an Albanian-owned bakery in Borča, after photographs of the owner's cousin making a hand gesture associated with Albania were spotted on Facebook, demanding that the authorities shut it down (US Department of State 2019). Moreover, a group of 50 rightists named Zavetnici was stopped by police in their attempt to disrupt the Mirëdita/Good Day Festival – promoting Kosovo culture (Zoric 2019). Besides Albanians, another group that experienced attacks were members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community. Additional concern was articulated in 2019 regarding inadequate protection against discrimination based on sexual orientation and gender identity in all realms of public life. According to the non-governmental organisation (NGO) Let It Be Known, the number of attacks against the LGBTI population in 2019 was 30 per cent higher than in the previous year. Of 42 cases that were reported, 33

were qualified as criminal offences, five were instances of discrimination, three were a combination of a criminal offence and discrimination, and one was a case of hate speech (US Department of State, Serbia 2019). In many cases, these incidents have not been properly investigated and the perpetrators have not been brought to justice.

### 2.2 Resistance of '1 in 5 million'

Even if the climate of fear among citizens was produced by the regime through its populist rhetoric and persistent warnings that the security of the state was jeopardised, it also led to a large-scale civic resistance. The most energetic expression of civic activism during 2019 was the '1 of 5 million' movement that demanded a more even political playing field, in line with basic democratic norms, as a necessity for genuinely free and fair elections. Since December 2018 and throughout 2019, tens of thousands of people, in around 50 Serbian cities and towns, have taken part in Saturday marches under the slogan 'No More Bloodied Shirts', following a violent attack on an opposition leader, Borko Stefanović. Afterwards, President Vucic infamously declared he would not give in to protesters' demands even if five million were to gather, after the first organised rally in December, the protesters named their mobilisations '1 of 5 million' (Srebotnjak 2019). In these protests, the citizens of Serbia were raising their voice against 'violence, injustice, the throttling of freedoms, and destruction of institutions, demeaning of democratic practices and media persecution' (Pescanik 2019). At the beginning, with a few exceptions, the protests were generally peaceful and incident free; however, they escalated in March 2019 when protesters in Belgrade stormed the headquarters of the Serbian public broadcaster (RTS) to draw attention to its biased coverage. The protestors were forcibly ejected from the RTS premises by the police that used disproportionate force (Freedom House 2020). Afterwards, on 13 April, the most immense protest was organised in which tens of thousands of citizens gathered in Belgrade from across Serbia. Yet, weak and divided, Serbia's opposition has failed to benefit from this. Subsequently, the protestors began to lose interest and motivation, although a small group kept going in Belgrade until the end of the year (Belgrade Centre for Human Rights 2019). Finally, this ray of hope for change was dimmed due to the COVID-19 outbreak.

In terms of the overall quality of democracy, with the EU accession process at a standstill, it is indisputable that Serbia has experienced democratic backsliding in 2019. Social and political circumstances were not conducive to progress in the realisation of human rights. The institutions and mechanisms established to protect citizens and public interest represented just a façade serving to advance ruling elite interests. This was the result of the increased centralisation of power in the hands of one branch of government – the executive. Therefore, long-lasting concerns

over political control, media freedom, the fight against corruption, the lack of advancement in the rule of law and EU integration remained and led to a loss of public trust in democratic processes and those leading them. For these reasons, and in view of the events of 2019, Serbia has moved in the direction of authoritarianism. Similar issues were also present in Albania, although some specificities will emerge, as the following part demonstrates.

## 3 Albania: Political turmoil and a questionable democratic legitimacy

Albania, much like Serbia, experienced a number of democracy and human rights setbacks in 2019. The publication of the wiretaps scandal in February related to the implication of high officials of the ruling Socialist Party (SP) in criminal activities, and vote-buying set in motion what was to become a serious political crisis. The culmination of the scandal was marked by the decision of the opposition parties to relinquish their mandates in Parliament (Erebra 2019a). This slowed down many EU reforms and consequentially many Albanians felt unrepresented by the remaining members of Parliament. More importantly, the absence of the opposition from the democratic processes continued in June, when the municipal elections took place. This has put Albania's democracy to a serious test. Despite all this, 2019 also entailed some positive progress with regard to judicial reform, as 2019 was hailed the year of 'new justice'.

### 3.1 To vote or not to vote, now is the question

On 30 June municipal elections were held in Albania. Prior to the elections, a series of wiretaps published by the German newspaper *Bild* demonstrated the 'extent of the vote buying activity by the Socialist Party' in the 2017 elections (Erebra 2019b). The leaked taped conversations implicated not only state officials – members of Parliament, ministers, and Prime Minister Edi Rama himself – but also some criminal groups. One part of the opposition, led by the Democratic Party, called the citizens to the streets and thousands joined in protests against the ruling party and its criminal associates (RFERL 2019).

The numerous opposition-led mobilisations, which took place throughout the year, resulted in the refusal of the opposition parties to participate in the municipal elections and an increased polarisation between the SP-led coalition and those in the opposition. According to the ODIHR report (2019b: 1), the decision of opposition parties to boycott elections implied that 'voters did not have a meaningful choice between political options'. Consequently, 'in 31 of the 61 municipalities mayoral candidates ran unopposed' (ODIHR Report 2019b: 1), while in 60 municipalities out of 61 that exist in the country, the Socialist Party

majority established its rule (US State Department, Albania 2019). When this is coupled with a very low participation in elections, with only 21 per cent of citizens voting, the questions about regimes legitimacy begin to emerge. Although the elections were disputed, they were recognised, and the Socialist Party took control over both the central and local government. The lack of a meaningful choice in the local elections has put democracy in Albania into question.

### 3.2 The year of justice?

Judicial reform, a process that started in 2014, was adopted in 2016 by the Albanian Parliament. That moment was considered historical for further democratisation and strengthening of the rule of law. It consisted of further separation of the judiciary from the executive, a more citizen-oriented legal aid system and ensuring that the young generation of judges and prosecutors is ready to take over in a few years' time. Also, a five-year vetting process which started to effectively operate since 2017 was continued. The judicial reform was considered successful (on paper) and was widely appraised by the international partners, while in practice the goals have hardly been achieved. The vetting process of judges and prosecutors has resumed even when it was followed by contestations by persons dismissed on account of subjective evaluations. Citizens have played an important role in the progress of this process, through the filing of complaints with the vetting bodies and the International Monitoring Operation (IMO). Their cooperation in the vetting process was assessed as pro-active, an indicator of their confidence in its results (Helsinki Committee in Albania Report 2019). The planning of filling the positions of the dismissed judges after the vetting was clearly not thought through. Consequently, at the end of 2019 only three vacancies were filled in the Constitutional Court, even though the process run parallel with political debates between the President and the Parliament for the second vacancy, thus allowing this institution to function.

On 19 December the long-awaited Special Anti-Corruption Structure (SPAK), mandated to investigate corruption and organised crime at the highest levels of government and society in Albania, became operational. The independent judicial body raised hopes that the judicial system would begin to operate more efficiently. Nevertheless, the acquitting judgment in the case of the former Minister of Interior accused of drug trafficking was a disappointment for many (France 24 2019). Overall, Albania continued to face setbacks in the area of the rule of law. Justice and independent judiciary remain 'wanted' in the country, while the political leadership continued to represent a constant risk to undermining the results of the reform.

Meanwhile, as part of a judicial reform the Albanian Council of Ministers approved a series of amendments known as the 'anti-defamation package'

(COE, Media Alert 87 2019). On the proposal of the Council of Ministers Parliament adjusted two laws to empower the Albanian Media Authority (AMA) and the Authority of Electronic and Postal Communications to hear complaints about news websites. The newly-formed media bodies have the right to demand retractions, impose fines and suspend the activities of all news websites in the online media (Ombudsman, Report 2019). The law raised many concerns as 'critics say [it] grant[s] the nation's top media regulator too much power' (Kostreci 2019). Reporters without Borders (RwB) agreed with different international and local stakeholders 'that this package would be detrimental to freedom of expression online' (RwB 2019a).

### 3.3 Fight for democracy and human rights

The beginning of 2019 was marked by a series of street protests by Albanian students, opposing the high tuition fees while requesting better living conditions and involvement in the decision-making processes at universities. Thousands of students across Tirana boycotted lessons and marched from their faculties towards the Ministry of Education, Youth and Sports building, demanding the Minister to re-examine the decision. Some of the slogans read 'Be a voice, not an echo', 'Albanian youth like European youth', 'Students are coming'. For the first time in 28 years this protest was not politicised or hijacked by the political parties. The government reorganised the cabinet, replaced the Minister of Education and repealed the law that had increased the tuition fees. Tuition fees were cut in half for all students for the next academic year and the government announced that it would continue to help excellent students through a monthly salary, and employment in the administration (Albanian Newsroom, 2019 in IBNA), which can be seen as a major success of the protests.

Apart from the students, another group that was taking to the streets for their rights were the members of LGBTI community and their supporters, as another Pride Parade took place in the capital city. The members of LGBTI community remain very stigmatised and discriminated against in Albanian society (Taylor 2019). In 2019 legislation against discrimination was drafted, together with public discussion about LGBTI rights, resulting in the establishment of a solid and active community for protecting such rights and ending with the drafting of an action plan with specific tasks for each institution (Ombudsman report 2019). As in most major cities of the world, over 300 people marched in Tirana to celebrate Pride 2019. One of the organisers in her speech said that this was the best Pride ever because there were so many young people from the community showing their pride and need for freedom, as well as raising their voices. 'It is a new era, not only for LGBTI people, but also for Albanian society', she mentioned (Taylor 2019). Notably in the protest, only one person was

seen with a face covered to hide their identity, compared to previous years where the number was much higher (Taylor 2019).

Lastly, the persistent political scandals, implicating high officials of the ruling party in criminal actions, such as electoral fraud, negatively influenced the possible democratisation of the country and likewise slowed down Albania's progress in terms of EU integration. Furthermore, the legitimacy of the democratic processes in Albania was put in serious question bearing in mind that the opposition parties boycotted municipal elections, thus leaving the ruling coalition to run almost unopposed. When these events are coupled with increased control of media freedom, something ushered in with the controversial anti-defamation package, it becomes clear that Albania, just as Serbia, moved in the direction of the authoritarian end of the spectrum. Nevertheless, some progress was made in 2019, especially with regard to judicial reform, where the creation of SPAK represents a positive step towards fostering citizens' trust towards the judiciary. Besides this, the student protests once again that the citizens will not silently give up the rights and democratic standards that they have so far enjoyed, something that will remain missing in the case of Bosnia and Herzegovina, where the prolonged *status quo* seems to have exhausted much of the protest potential in the country.

## 4 Bosnia and Herzegovina: *Status quo* continues

The year 2019 was challenging for Bosnia and Herzegovina (BiH) in terms of human rights and democracy developments. On the one side, the country held its first Pride march losing the status of the only ex-Yugoslav country without one, thus giving space to LGBTI persons to express their dissatisfaction with the treatment and rights they do not have, as they still face discrimination and human rights violations daily. Additionally, another positive development was the case of *Irma Baralija v Bosnia and Herzegovina*, before the European Court of Human Rights (European Court), where the applicant filed a complaint about the inability to vote in the municipal elections for 11 years in Mostar, as the elections had not been held since 2008.

On the other side, some devastating facts still push the country far below the line of respecting human rights and democracy, especially considering that this year will be remembered as the year in which the state government was not formed even a year after the parliamentary elections. Corruption, scandals and irregularities in the judiciary marked 2019, which once again showed how unstable one of the key institutions for the democratic functioning of the state is. Furthermore, the government showed a clear inability and unwillingness to properly respond to and handle the migration while there were thousands of people heading through the country as part of the route to the European Union (EU). Hate

crimes and hate speech against specific groups, especially minorities, were almost daily events, showing how the country has again failed to deal with discrimination on various levels. Journalists faced political pressure as well as harassment, threats and assaults in the course of their work.

### 4.1 Democracy in Bosnia and Herzegovina

The issue of a poor judiciary system seriously affects Bosnia and Herzegovina's path towards the EU and its democratic ranking. One of the most significant portrayals was the scandalous affair *Potkivanje* (literally translated as 'calking') investigated by the ***Žurnal*** magazine, stating that the President of the High Judicial and Prosecutorial Council, Milan Tegeltija, had accepted a bribe to expedite a court case. However, the disciplinary prosecutor decided that he was not responsible as there was no evidence (*Žurnal* 2019). This is only one of the numerous cases of high-level corruption that, for the time being, remain without proper sanctions. In the first half of 2019, 409 investigations were conducted in prosecutor's offices due to corruption crimes, which is less than 4 per cent of the total number of investigations (BHRT 2020). The decades-long absence of judicial reform did not take place during this year, and citizens' trust in the judiciary declined (Freedom House 2020).

Restrictions of the freedom of media and independent journalism continued, somewhat more in the entity of the Republic of Srpska (RS) than in the Federation of BiH, where the entity public broadcaster RTRS serves the interests of the long-ruling nationalistic SNSD party, broadcasting news to support the ideas the official party endorses exclusively. Journalists face political pressure as well as harassment, threats and assaults in the course of their work (Freedom House 2020). In 2019 the Association of 'BH Journalists' recorded 56 cases of violations of journalists' rights, including nine cases of physical attacks, 21 threats, of which eight death threats and ten cases of political pressure (Safe Journalists 2020). Attacks on journalists are attacks on freedom of speech, which is a clear indicator of democratic backsliding towards authoritarianism.

Notwithstanding the issue of the judicial system and media freedom, one of the recurring problems for Bosnia and Herzegovina's democracy – besides basing democracy on the ethno-national principle of rule – is the country's complicated and cumbersome institutional design. In this regard, November 2019 marked a year without the central government formation. It is not at all surprising that the country received 39/100 points on the democratic scale, thus marking it once more as a transitional and hybrid regime (Freedom House 2020). This is particularly devastating when it comes to the EU accession, considering that BiH expected to receive candidate status in 2019.

### 4.2 Human rights in Bosnia and Herzegovina

The very first Pride march was held in Sarajevo on 8 September. It was one of the major steps towards breaking the veil of invisibility and recognition of this traditionally-marginalised group. In terms of human rights and democratic development, the mere Pride march may be regarded as a success story in terms of freedom of assembly and in terms of the rights of minorities and marginalised groups, although it faced certain pressure from various sides during the preparations. The march itself proceeded with no major issues, although there were peaceful counter-protests, which may even be regarded as a positive outcome, showing that diversity of opinions can coexist in the same space without conflicts.

Another crucial event for the advancement of human rights was the European Court ruling in the case of *Baralija v Bosnia and Herzegovina* (Application 30100/18). Irma Baralija, a president of the local branch of the political party *Nasa stranka* in Mostar filed a complaint before the European Court related to her inability to vote and stand in local elections for a prolonged period of time, more precisely from 2008. The verdict was in Ms Baralija's favour as it ordered BiH to amend the legislation, no later than six months after this verdict became final, and to ensure free and undisturbed elections in Mostar (Kresmer & Sandic-Hadzihasanovic 2020). This was the first, but very important step in the long battle ahead, which will be crucial for creating a vision of a better Mostar, a city divided along ethnic lines ever since the 1990s.

On the other hand, the humanitarian situation in Bosnia and Herzegovina in 2019 showed no progress compared to previous years. The number of migrants/refugees arriving to Bosnia and Herzegovina in 2019 significantly increased, going beyond 59 000 (European Civil Protection and Humanitarian Aid Operations). According to the UN Refugee Agency (UNHCR), around 9 000 people were stranded in the country, and in the first of half of 2019, 17 165 people indicated an intention to seek asylum, but only 426 people actually ended up applying (UNHCR). The conditions in the Vučjak migrant camp in North-Western Bosnia was harshly criticised by activists, civil society members and migrants workers, bringing it to the point where hundreds of camp residents were moved to facilities near Sarajevo (Freedom House 2020). Additionally, the officials from the Republic of Srpska entity openly stated that they would not allow migrant reception centres to be set up on RS territory, thereby refusing to act upon the international human rights obligations of BiH.

As for the issues of hate crimes against various vulnerable groups, including religious groups, persons with disabilities, LGBTI persons and Roma, as well as general cases of racism and xenophobia, ODIHR reported that there were 126 incidents reported by civil society and non-state officials, while Bosnia and Herzegovina reported 21 cases of hate crimes to

ODIHR for the first time since 2016 (ODIHR 2020a). This all affects the democratic establishment in Bosnia and Herzegovina and harshly violates human rights of the minorities and marginalised groups, thus sending the message of hate and emphasising that not everyone is the same and not everyone has the same rights.

The presented facts lead to a conclusion that the country experiences difficulties in advancing democratic principles in the political sphere. This is primarily due to the weak institutions, such as the judiciary, which are staffed by people accused of corruption and other criminal deeds, thus making progress hard to achieve. Another contributing factor of stalled democratisation in the country is its cumbersome and complex institutional design, which often results in difficulties of forming governments on different levels, such was the case one year after general elections in 2018. Taking all this into consideration, things such as daily discrimination, hard conditions for migrants and other minorities and vulnerable groups in the country, as well as attacks on journalists and hate crimes against religious groups, persons with disabilities, LGBTI persons and Roma are not surprising, but remain an important issue with which the country has to deal in order to respect human rights. However, there were some small yet very important steps towards a more tolerant society, such as the successfully held Pride march. It remains to be seen how Bosnia and Herzegovina will handle the issue of elections in Mostar. On a note of hope and positive developments, the following part discusses whether governments that promise change and largely refrain from tools in the authoritarian toolbox can really live up to these promises.

## 5 North Macedonia: Can a government turnover bring promised change?

The year 2019 was another turbulent year for North Macedonia, both internationally and domestically. The landmark Prespa Agreement resolved the 30-year name dispute with Greece, and the country changed the official name from Former Yugoslav Republic of Macedonia to North Macedonia, seemingly overcoming the last obstacle towards EU integration. The year 2019 also marked two years of the new government of the Social Democratic Party-led coalition that came into power after the 11-year rule of the conservative VMRO-DPMNE. The overthrow of the VMRO-DPMNE 'regime' was largely ushered in during 2015 and 2016 by the Colourful Revolution, a civic movement requiring justice for their crimes and reforms in the EU spirit. Therefore, and in comparison to other countries presented here, it can be argued that North Macedonia entered into 'calm waters' politically, as the country experienced a certain stabilisation and progress in the key EU reforms. For instance, crucial amendments to the judiciary legislation were made, the new law on anti-discrimination was adopted, the first LGBTQ parade was held, as well

as good progress was noted in crucial areas such as media freedom and freedom of expression, the protection of minority rights, and civil society, among others. Nevertheless, these positive developments were jeopardised by several events that presented serious drawbacks in the democratisation processes of the country. In the first row was the the scandal involving the Chief Special Prosecutor Katica Janeva and head of the Special Prosecution Office (SPO),[1] who had been charged and arrested for extortion and bribery precisely in connection with these cases. This was one of the key triggers for another political turmoil, huge citizens` distrust, and a *déjà vu* state of play in the 30 years of the country's independence.

### 5.1 Chapter 23: Still a 'system error'

Since earning the status of candidate country in 2005, North Macedonia constantly struggles with drawbacks in the crucial EU-related reforms connected to the judiciary, corruption and the protection of fundamental rights. The 'homework' given by the EU in reforming the rigid judiciary and corrupt politicians intensified in recent years, right after the Colourful Revolution and, especially, after the change of government in 2017. In this context, in 2019 the judiciary reforms tackled various important questions such as the amendments to the Criminal Code (the conviction of hate crimes, witness protection, and justice obstructions), the amendments to the Law on Courts and the Law on Judicial Council (elections, dismissal, discipline procedure, and liability of judges), and the Law on Free Legal Aid, among others, strengthening the legal framework and harmonisation with the EU *acquis* (Helsinki Committee 2019). The formal adoption of the new legislation granting more independence, professionalism and objectiveness of the judiciary system was assessed as a positive development for the country, but the effects remain to be seen in the following years.

Furthermore, according to Freedom Barometer, not only the independence but also the efficiency of the judiciary and the discrepancies between reforms adopted in Parliament and those implemented on the ground also remain a problem (Freedom Barometer 2019). In this regard, the Blueprint Group, as the largest representation from the civil society sector, commented on the lack of transparency, the partial exclusion of the civil society sector, and slow and inconsistent implementation of the Strategy for Judiciary Reforms (Institute for Democracy Societas Civilis 2019), as negative traits repeating from the previous years. Hence, the judiciary remains prone to political pressure and control, invoking a very low trust of the citizens, weaker protection, and exercise of their fundamental rights and freedoms, and a serious challenge to the core democratic values in the country (EU Progress Report 2019).

1 The SPO was created in 2015 after political agreement of the biggest parties to deliver justice for the crimes of the VMRO-DPMNE and sentence high-profile corruption in the country.

In relation to this, the more important aspect of chapter 23 is the fight against corruption on the part of high-profile officials and party members from the former ruling party VMRO-DPMNE. Much hope was put into the Special Prosecutor Katica Janeva, to charge all those responsible for a decade of state capture, corruption, embezzlements, or other misuses of power (Freedom Barometar 2019). After years of court proceedings, in 2019 several trials were concluded and convictions of high officials and high echelons of the VRMO-DPMNE party took place, yet with visible obstruction of the justice and impunity of the accused. This was notable to loyal members and closest collaborators of the former Prime Minister, Mr Nikola Gruevski, who was sentenced to imprisonment in 2018 and 2019 but previously managed to flee to Hungary and receive political asylum.

Ironically, by mid-2019 the Special Prosecutor Katica Janeva herself had to resign because a criminal investigation and charges have been launched against her (and party members of the ruling social-democratic party SDSM) for extortion and bribery in connection with these cases. This was an additional momentum to increase the pressure on the political scene to SPO as a political construct to cease existing. As a result, in September 2019 the SPO was terminated and all cases and authorisations transferred to the Public Prosecution Office (PPO) of North Macedonia. Contrary to the requests of the civil society sector and the expert community, the transformation did not grant the same position and a mandate for the prosecution of high-profile corruption as the Prosecution Office for Organised Crime and Corruption, casting serious doubts on all investigations and trials, and in the integrity and importance of the PPO as well (Blueprint Group 2019). Noteworthy, the country also appointed a new State Commission for Prevention of Corruption (SCPC). Even though the SCPC received and initiated hundreds of corruption and corruption-related complaints, it acknowledged that prevalent corruption in many areas remains of concern (State Commission for Prevention of Corruption 2019). This deteriorating trend is also visible from the recent data, according to which North Macedonia dropped from 93rd in 2018 to 106th position on the Transparency International Corruption Perception Index (Transparency International 2019).

These corruption scandals and insufficient implementation of the EU urgent priority reforms sparked the French *non* for the start of the EU accession negotiations, against the EU Commission recommendation. The veto triggered the announcement of the 2020 parliamentary elections, the second one in just three years, and, as a result, a technical government capable of securing free and fair elections. In practical terms, this meant another disappointment for the citizens in the justice system and the EU enlargement as such, as well as lower motivation for the political elites to proceed with the fundamental judiciary and rule of law reforms (Helsinki Committee 2019).

### 5.2 Toughly-won human rights victories

Despite the political scandals and modest implementation of the urgent priority reforms, 2019 was also a year of human rights improvements. The climate for media freedom and freedom of expression improved in comparison to previous years. North Macedonia's ranking progressed from 111th in 2018 to 95th position in 2019, according to Reporters Without Borders (RwB 2019b). The country's ban on government advertising was an important step to avoid control over the media and the abuse of state funds, notably creating a ground that is favourable for expressing pluralistic viewpoints, but the problem of politicised media and political and business influence remained (EU Progress Report 2019). On the other hand, open political debate and criticism of the media, citizens, and the civil society sector continued. In this context, the country encouraged the involvement of civil society organisations, more openly and inclusively leading the policy-making and legislative processes. In May Parliament adopted a preliminary amendment to financial laws that had been deliberately misinterpreted by the previous government of VMRO-DPMNE to penalise NGOs that received external funding (Amnesty International 2019), thus legally cleared with their idea of 'de-sorosoisation' of the state (Kotevska & Kamberi 2019).

Moreover, several of the marginalised and vulnerable groups after years of advocacy, court, and street 'battles' were acknowledged and protected through legal mechanisms and policy actions. After 'shameful prolongation and sabotage from the conservative political forces' (Helsinki Committee 2019), the new Law on Prevention and Protection from Discrimination was adopted in May, after the election of the new President of the country.[2] The Law was in parliamentary procedure for more than a year, under high scrutiny by the EU and the civil society sector that organised several public campaigns and protests in the capital of Skopje for its fast adoption. Importantly, the Law for the first time, explicitly forbids discrimination based on sexual orientation and gender identity in all areas, as well as requires courts to waive fees for plaintiffs in discrimination cases and civil society action lawsuits (US State Department Report 2019).

In this connection, the landmark event of 2019 was the first-ever LGBTI Parade #SkopjePride, as an important victory for civil rights and liberties. Thousands of people marched through the streets of Skopje in support of the LGBTI community. The parade was against societal prejudice, hate speech and crimes, discrimination, and widespread intolerance, and insufficient protection against the hatred and violence against LGBTI perons. According to the organisers, 'the aim of the Parade is not to

2 The Law was previously adopted earlier that year, but the former President, Mr Gjorge Ivanov, refused to sign the proclamation decree, due to the standings of his party VMRO-DPMNE against sexual orientation and gender identity.

celebrate, rather protest and freely open-up the questions of the human rights of the LGBT people in the region' (Kalinski 2019).

Furthermore, 2019 was also a progressive year for women's rights. The controversial Law on Termination of Pregnancy from 2013 adopted under the VMRO-DPMNE was abolished and replaced by liberal regulations removing all restrictions and administrative obstacles. The government also adopted a new action plan for gender equality which proposed to introduce a 50 [per cent quota for ensuring participation of women in electoral processes and decision making by 2020. Moreover, a working group for the preparation of the Law on Equal Opportunities for Men and Women in line with the CEDAW Committee recommendations was formed, and the Law on Prevention and Protection of Family and Violence Against Women is in the process of preparation. The government also continued to work on the National Plan for the implementation of the Istanbul Convention, noting serious progress in terms of conditions and infrastructure (Helsinki Committee 2019).

The pitfalls in the key areas of the judiciary and fundamental rights remain a severe problem for North Macedonia in 2019. The difficulties to deal with the legacy of VMRO-DPMNE crimes demonstrate the considerable weaknesses of the system and the new government, while also representing a source of disappointment for the citizens. Also, the future delivery of justice and judiciary reforms are put into serious question with the arrest of Special Prosecutor Katica Janeva. In other areas of democratisation and human rights, the country has experienced positive and progressive developments that should not be undermined. Even the latter can be seen more in the legal and policy framework in connection with the EU accession, they represent breakthrough events in 2019 and toughly-won victories of the LGBTI community, the human rights defenders, the civil society, and citizens as a whole.

## 6 Concluding remarks

This article explored the concept of competitive authoritarianism in the SEE region, and its specificities both in terms of the repressive mechanism applied by ruling parties and citizens' mobilisations against markedly authoritarian trends during 2019. The perseverance of weak institutions, especially the judiciary, together with increased stifling of media by the ruling parties, remain among the main issues. The cases of North Macedonia, Bosnia and Herzegovina and Albania seem to evidence that the judiciary-related issues remain a severe problem, as high-positioned judicial or political officials were either accused or even arrested on corruption charges. Importantly, even with the political will to fight corruption (as expressed by SDSM in Macedonia) the accused rarely face any repercussions as the systemic pitfalls prove resistant to reformist

attempts. When the structural element of institutional weakness is coupled with authoritarian-minded politicians, the result is the increased concentration of power in one persona and one party, as is the case with President Vucic and SNS in Serbia and Prime Minister Edi Rama and SP in Albania. The outcome of these tactics usually is followed by the polarisation between the opposition and incumbent parties, such that the former even chooses to exit the democratic institutions and seeks regime removal on the streets, as was the case in Albania. In terms of the overall quality of democracy, with the EU accession process at a standstill in the case of all four countries, it is indisputable that the region has experienced democratic backsliding in 2019.

Even though the social and political circumstances were not conducive to the realisation of human rights, the regional trends in this regard seem to be more diverse that those related to democracy. Although it is crucial to bear in mind the daily occurrence of violence against journalists, and discrimination against vulnerable groups such as migrants and other minorities, some small, yet important steps towards more tolerant society, such as the first LGBTI march in BiH and change of restrictive legislation with regards to abortion in North Macedonia. Furthermore, two out of four countries experienced large-scale citizen resistance to the undermining of fundamental rights and freedoms. The anti-government protests were most intense in Albania and Serbia (and in Montenegro), a fact that prompted some observers to talk about the 'Balkan Spring' (Santora 2019; Eror 2019; Stojanovic 2019). However, by the end of the year it became clear that the hopes and demands of the so-called Balkan Spring would not materialise. One of the main reasons behind this was the inability of the opposition, or any other political actor, to offer a viable alternative to the regime in power. Even though 'none of the protests … have managed to unseat Balkan leaders, they have encouraged civic resistance and shaken their firm grip on power and the support they have been receiving from the West' (Stojanovic 2019). The failure of these mobilisations to bring about larger changes can mostly be attributed to strong authoritarian tendencies of the ruling parties and the diversity of actors (for instance, right wing parties and movements took part in mobilisations in Serbia) and demands put forward by the protesters. In cases where this is accompanied by an uneven political playing field, as is the case in much of SEE, the democratisation potential of contentious politics turns into mere episodes, rather than becoming a strong regional trend.

# References

Albania Ombudsman Annual report: The activity of the people's advocate institution (2019) 2-162, available at https://www.avokatipopullit.gov.al/media/manager/website/reports/Annual Report 2019.pdf (last visited 17 November 2020)

Albanian Helsinki Committee *Raport mbi situaten e respektimit te te Drejtave dhe Lirive te Njeriut ne Shqiperi per vitin 2019* (2020) 3-16, available at https://ahc.org.al/wp-content/uploads/2020/03/Raport-i-te-drejtave-te-njeriut-per-vitin-2019-_-KSHH.pdf (last visited 17 November 2020)

Albanian Newsroom 'Students' protests, the government delivers some of the demands' *Independent Balkan News Agency* (26 December 2018), available at https://balkaneu.com/students-protests-the-government-delivers-some-of-the-demands/ (last visited 17 November 2020)

Amnesty International *North Macedonia 2019* (2019), available at https://www.amnesty.org/en/countries/europe-and-central-asia/north-macedonia/report-macedonia/ (last visited 17 November 2020)

Amnesty International *Serbia (including Kosovo)* (2019), available at https://www.amnesty.org/en/countries/europe-and-central-asia/serbia/report-serbia/ (last visited 16 November 2020)

*Baralija v Bosnia and Herzegovina* (App 30100/18) European Court of Human Rights (29 October 2019), available at https://bit.ly/3oELa1P (last visited 20 November 2020)

Belgrade Centre for Human Rights 'Human rights in Serbia 2019: Law, practice and international human rights standards' (2019), available at http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2014/01/Human-Rights-in-Serbia-2019.pdf (last visited 16 November 2020)

Bieber F 'Patterns of competitive authoritarianism in the Western Balkans' (2018) 34 *East European Politics* 337

Bieber F (2020) *The rise of authoritarianism in the Western Balkans* Cham: Palgrave Macmillan

Blazevska K 'Skopje Pride: No one is free until everyone is free' *Deutsche Welle* (29 June 2019), available at https://bit.ly/3mmI7ud (last visited 15 November 2020)

Council of Europe 'New "anti-defamation" legislative package threatens online media freedom' [Alert 87] (29 July 2019) Platform to promote the protection of journalism and safety of journalists, available at https://bit.ly/3grzMU8 (last visited 17 November 2020)

Council of the EU 'Border management: EU signs agreement with Serbia on European Border and Coast Guard cooperation' (Press release) (19 November 2019), available at https://www.consilium.europa.eu/en/press/press-releases/2019/11/19/border-management-eu-signs-agreement-with-serbia-on-european-border-and-coast-guard-cooperation/ (last visited 24 November 2020)

Erebara G (2019a) 'Albania opposition MPs to quit "mafia" parliament' *BalkanInsight* (18 February 2019), available at https://balkaninsight.com/2019/02/18/albania-main-opposition-party-gives-up-its-parliamentary-seats/ (last visited 17 November 2020)

Erebra G (2019b) 'Albanian PM vows to sue over leaked tapes "blackmail"' *BalkanInsight* (18 June 2019), available at https://balkaninsight.com/2019/06/18/albania-heads-for-more-troubles/ (last visited 17 November 2020)

Eror A 'Serbia's protests aren't the beginning of a Balkan Spring' Foreign Policy (9 March 2019), available at https://foreignpolicy.com/2019/03/19/serbias-

protests-arent-the-beginning-of-a-balkan-spring-vucic-stefanovic-protests-belgrade/ (last visited 17 November 2020)

European Western Balkans 'Judiciary under reconstruction. Albania's EU-orientated reforms in progress' (9 March 2020), available at https://europeanwesternbalkans.com/2020/03/03/judiciary-under-reconstruction-albanias-eu-orientated-reforms-in-progress/ (last visited 17 November 2020)

European Civil Protection and Humanitarian Aid Operations *Bosnia and Herzegovina* (Factsheet) (2019), available at https://ec.europa.eu/echo/where/europe/bosnia-and-herzegovina_en (last visited 27 November 2020)

***European Commission** North Macedonia 2019 Report (2019), a*vailable at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf (last visited 26 November 2020)

European Commission *Serbia 2019 Report* (2019), available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf (last visited 16 November 2020)

FoNet 'Saturday protests discontinued because of Coronavirus' *N1 Serbia* (10 March 2020), available at http://rs.n1info.com/English/NEWS/a576776/Saturday-protests-discontinued-because-of-coronavirus.html (last visited 24 November 2020)

*France 24* 'Ex-Albanian Interior Minister acquitted of drug charges' *France 24* (20 September 2019), available at https://www.france24.com/en/20190920-ex-albanian-interior-minister-acquitted-of-drug-charges (last visited 17 November 2020)

***Freedom Barometer** Report for North Macedonia (2019),* available at http://freedombarometer.org/country/north-macedonia/197/2019/ (last visited 28 November 2020)

Freedom House 'Freedom in the world: Bosnia and Herzegovina' (2020), available at https://freedomhouse.org/country/bosnia-and-herzegovina/freedom-world/2020 (last visited 21 November 2020)

Freedom House 'Freedom in the world: Serbia' (2020), available at https://freedomhouse.org/country/serbia/freedom-world/2020 (last visited 16 November 2020)

Freedom House 'Nations in transit: Bosnia and Herzegovina' (2020), available at https://freedomhouse.org/country/bosnia-and-herzegovina/nations-transit/2020 (last visited 21 November 2020)

Helsinki Committee for Human Rights of the Republic of Macedonia *Annual report for human rights in 2019* (2020), available at https://mhc.org.mk/godishni-izveshtai-za-sostojbata-so-chovekovite-prava/ (last visited 17 November 2020)

Human Rights House Belgrade 'Excessive force used against protesters in Serbia' (5 April 2019), available at https://humanrightshouse.org/articles/excessive-force-used-against-protesters-in-serbia/ (last visited 16 November 2020)

*Independent Balkan News Agency* 'Opposition in Albania intensifies its action, boycott of upcoming elections' (19 March 2019), available at https://balkaneu.com/opposition-in-albania-intensifies-its-action-boycott-of-upcoming-elections/ (last visited 17 November 2020)

Institute for Democracy Societas Civilis 'Blueprint: Urgent democratic reforms recommendations' (2019), available at https://idscs.org.mk/mk/bluprint/ (last visited 22 November 2020)

Kadovic M '"Balkan Spring": Anti-government protests arise throughout the Balkans' *ESJnews* (19 April 2019), available at https://www.esjnews.com/balkan-spring-anti-government-protests-arise-throughout-the-balkans (last visited 17 November 2020)

Kalinski V 'Improve LGBT rights, discrimination and hate speech are still present' *Radio Free Europe North Macedonia* (22 June 2019), available at https://www.slobodnaevropa.mk/a/30012192.html (last visited 15 November 2020)

Kapidzic D 'The rise of illiberal politics in Southeast Europe' (2019) 20 *Southeast European and Black Sea Studies* 1, available at https://www.tandfonline.com/doi/full/10.1080/14683857.2020.1709701 (last visited 17 November 2020)

Kmezić M 'Rule of law and democracy in the Western Balkans: Addressing the gap between policies and practice' (2019) 20 *Southeast European and Black Sea Studies* 183, available at https://www.tandfonline.com/doi/full/10.1080/14683857.2019.1706257 (last visited 17 November 2020)

Kmezić M & Bieber F (eds) (2017) *The crisis of democracy in the Western Balkans. An anatomy of stabilitocracy and the limits of EU democracy promotion* Balkans in Europe Policy Advisory Group, available at https://biepag.eu/wp content/uploads/2017/05/final.pdf (last visited 17 November 2020)

Kostreci K 'Albania approves controversial anti-defamation laws' *VoA* (18 December 2019), available at https://www.voanews.com/press-freedom/albania-approves-controversial-anti-defamation-laws (last visited 17 November 2020)

Kotevska B & Kamberi I 'Human rights defenders in the Western Balkans: Intimidation instead of recognition' Civil Rights Defenders (2019), available at https://pure.qub.ac.uk/en/publications/human-rights-defenders-in-the-western-balkans-north-macedonia (last visited 15 November 2020)

Kresmer M & Sandic-Hadzihasanovic G 'Baralija o dobijenoj presudi: Lopta je na Parlamentu BiH' *Radio Slobodna Evropa* (29 October 2019), available at https://www.slobodnaevropa.org/a/mostarka-dobila-spor-u-strazburu-slijedeli-konačno-izbori/30242066.html (last visited 25 November 2020)

Levitsky S & Way LA (2010) *Competitive authoritarianism: Hybrid regimes after the Cold War* Cambridge: Cambridge University Press

ODIHR (2019a) *Hate crime reporting: Bosnia and Herzegovina*, available at https://hatecrime.osce.org/bosnia-and-herzegovina?year=2019 (last visited 22 November 2020)

ODIHR (2019b) Republic of Albania local elections, 30 June 2019 ODIHR Election Observation Mission Final Report (5 September 2019), available at https://www.osce.org/files/f/documents/1/f/429230_0.pdf (last visited 17 November 2020)

Pescanik 'Second Belgrade University School supports protests' *N1 Serbia* (21 January 2019), available at http://rs.n1info.com/English/NEWS/a453685/Second-Belgrade-University-school-supports-protests.html (last visited 24 November 2020)

Popovic D 'Serbia drops 14 places on 2019 World Press Freedom Index' *N1 Serbia* (18 April 2019), available at http://rs.n1info.com/English/NEWS/a477247/Serbia-drops-14-places-on-2019-World-Press-Freedom-Index.html (last visited 16 November 2020)

Reporters Without Borders 'Albania: Government should withdraw "anti-defamation" legislative package introducing state regulation of online media outlets' (26 July 2019), available at https://rsf.org/en/news/albania-government-should-withdraw-anti-defamation-legislative-package-introducing-state-regulation (last visited 17 November 2020)

Reporters Without Borders *North Macedonia* (2019), available at https://rsf.org/en/north-macedonia (last visited 22 November 2020)

Safe Journalists 'Investigations and processing of attacks on journalists and media workers in Bosnia and Herzegovina' (2020), available at https://safejournalists.net/resources1/investigations-and-processing-of-attacks-on-journalists-and-media-workers-in-bosnia-and-herzegovina/ (last visited 25 November 2020)

Santora M 'Balkan Spring' turns to summer, and hopes for change dim' *NYTimes* (1 June 2019), available at https://www.nytimes.com/2019/06/01/world/

europe/balkans-protests-montenegro-serbia-bosnia-albania.html (last visited 17 November 2020)

Srebotnjak H '"All as one – 1 out of 5 million": Serbian protesters mobilise against growing authoritarian rule' *Open Democracy* (7 May 2019), available at https://www.opendemocracy.net/en/democraciaabierta/international-civil-society-week/all-as-one-1-out-of-5-million-serbian-protesters-mobilise-against-growing-authoritarian-rule/ (last visited 16 November 2020)

State Commission for Prevention of Corruption of Republic of North Macedonia, available at https://www.dksk.mk/index.php?id=home (last visited 22 November 2020)

Stojanovic D 'Anti-government protests prompt the talk of "Balkan Spring"' *Associated Press* (6 April 2019), available at https://apnews.com/article/ae6880bd49394933a208ff4090d13050 (last visited 17 November 2020)

Taylor AE 'Tirana Pride attracts over 300 attendees' *Exit – Explaining Albania* (18 May 2019), available at https://exit.al/en/2019/05/18/tirana-pride-attracts-over-300-attendees/ (last visited 17 November 2020)

The Delegation of the European Union to the Republic of Serbia *Rule of Law Fact Sheet: EU and Serbia at work* (2017), available at http://europa.rs/eu-assistance-to-serbia/eu-and-serbia-15-years-of-partnership/rule-of-law/?lang=en (last visited 24 November 2020)

The Human Rights Watch *Serbia/Kosovo Report: Events of 2019* (2020), available at https://www.hrw.org/world-report/2020/country-chapters/serbia/kosovo (last visited 16 November 2020)

Transparency International 'How corruption weakens democracy' (2018), available at https://www.transparency.org/en/news/cpi-2018-global-analysis# (last visited 24 November 2020)

Transparency International *North Macedonia* (2019), available at https://www.transparency.org/en/countries/macedonia-fyr (last visited 18 November 2020)

US Department of State (2019) *Serbia 2019 Human Rights Report*, available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/serbia/ (last visited 16 November 2020)

UNHCR 'Inter-agency operational update: Bosnia and Herzegovina' (2019), available at https://reliefweb.int/sites/reliefweb.int/files/resources/70020.pdf (last visited 20 November 2020)

United for Human Rights 'Voices for human rights' (2019), available at https://www.humanrights.com/voices-for-human-rights/human-rights-organizations/non-governmental.html (last visited 24 November 2020)

OHCHR 'Minorities' (2020), available at https://www.ohchr.org/en/issues/minorities/pages/minoritiesindex.aspx (last visited 24 November 2020)

US Department of State *North Macedonia 2019 Human Rights Report* (2019), available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/north-macedonia/ (last visited 19 November 2020)

Zivanovic M 'N1 TV station targeted by "death threat" in Serbia' *Balkan Insight* (5 February 2019), available at https://balkaninsight.com/2019/02/05/n1-television-warns-on-new-threats-02-05-2019/ (last visited 16 November 2020)

Zoric J 'Desničari i huligani protiv festivala "Mirdita", iz vrha vlasti bez osude napada' *N1 Serbia* (31 May 2019), available at http://rs.n1info.com/Vesti/a488278/Desnicari-i-huligani-protiv-festivala-Mirdita-iz-vrha-vlasti-bez-osude-napada.html (last visited 17 November 2020)

Marina Rakopyan 'Human rights and democratisation during 2019: The case of Armenia, Georgia and Moldova' (2020) 4 *Global Campus Human Rights Journal* 539-556
http://doi.org/20.500.11825/2033

# Human rights and democratisation during 2019: The case of Armenia, Georgia and Moldova

***Marina Rakopyan****

**Abstract:** *The three countries discussed in the article, the Republic of Armenia, the Republic of Georgia and the Republic of Moldova, have all witnessed developments and experienced weaknesses as far as human rights and democracy are concerned, particularly during 2019. From elections to emigration, the three countries have had different obstacles to overcome. All post-Soviet Union countries are making efforts to improve their record in respect of human rights and as they forge closer ties with the European Union (EU). Over the course of 2019, the three countries were moving forward slowly but steadily towards improved protection and promotion of human rights. All three countries had an issue with arbitrary detention, and the independence of the judiciary, while the majority of them had issues with torture and inhuman treatment and unlawful interference with privacy by government. Despite some differences in the areas, women's rights were not fully respected in the three countries. Minorities had fewer opportunities to participate in governmental structures. Protecting the rights of LGBTQ+ persons remained an issue in all three countries, despite the considerable effort that countries made toward greater tolerance. Children's rights were not fully respected in the countries, especially as far as child labour and child trafficking are concerned.*

**Key words:** *Armenia; Georgia; Moldova; human rights; democracy; arbitrary detention; torture and inhuman treatment; women's rights; minorities; rights of LGBTQ+ persons*

* MA (Master's degree in Human Rights and Democratisation at Yerevan State University); LLM (Master of Law in Intercultural Human Rights at St. Thomas University, School of Law); JSD (Doctor of Juridical Science in Intercultural Human Rights) candidate (St Thomas University School of Law); marinarakopyan@yahoo.com

## 1 Introduction

The three countries discussed in the article, namely, the Republic of Armenia, the Republic of Georgia and the Republic of Moldova, have witnessed developments and experienced weaknesses as far as human rights and democracy are concerned, particularly during 2019. From elections to emigration, the three countries have had different obstacles to overcome. The three countries are post-Soviet Union countries that are making efforts towards becoming more respectful of and more democratic countries by forging close ties with the European Union (EU).

The first ever agreement between the countries and the EU was signed in 1996 when the Partnership and Cooperation Agreement was signed between the EU and Armenia, Georgia, Moldova in 1994 (Monitor nd). Armenian signed the Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) in 2018 (Commission, European Neighbourhood Policy And Enlargement Negotiations nd). Georgia signed and enforced the European Union – Georgia Association Agreement including a Deep and Comprehensive Free Trade Area (DCFTA) in 2016 (Commission, European Neighbourhood Policy and Enlargement Negotiations nd). Georgia and Moldova are signatures of the Deep and Comprehensive Free Trade Area (DCFTA) (Commission, European Neighbourhood Policy And Enlargement Negotiations nd). Moldova is closer to the EU and is working cooperatively within the framework of the European Neighbourhood Policy (Commission, European Neighbourhood Policy and Enlargement Negotiations nd).

In its first part, this article takes a thematic focus. It deals with a number of human rights issues, with reference to the situation during 2019 in each of the three countries. The second part of the article is country-directed, and investigates the broader context of human rights and democracy in each of the three countries during 2019, located within the particular country context. As will be noted, in some respects the three countries share challenges and have similar experiences, but in a number of other respects the position in the three countries is quite different and distinct.

## 2 Arbitrary deprivation of life or unlawful killing by government officials

### 2.1 Armenia

In Armenia the number of arbitrary deprivations of life and especially unlawful and politically-motivated killings has diminished by the year 2019. The has been only one reported case of the government having committed an arbitrary of unlawful killing since 2018. The case involved a man who was found hanged in the National Centre for Mental Health

after having been transferred for psychological assessment. His family stated that there definitely were signs of violence on the body (Bureau of Democracy 2019).

### 2.2 Georgia

Throughout the year there were no reports of arbitrary or unlawful killings by the government or its agencies, and no reports of disappearances by government authorities in Georgia (Bureau of Democracy 2019 Country Reports on Human Rights Practices: Georgia 2019).

### 2.3 Moldova

Throughout the year there were no reports of arbitrary or unlawful killings by the government or its agents in Moldova (Bureau of Democracy 2019 Country Reports on Human Rights Practices: Moldova 2019).

## 3 Prisons and detention centers

### 3.1 Armenia

In Armenia, as far as prisons and detention centers are concerned, there has been some progress in the sense that less corruption occurred, and overcrowding of prisons was reduced. The 2019-2023 new strategy and implementation action plan is supposed to improve the conditions in penitentiaries and probation, such as capital renovation, closing the facilities that are in a poor condition, the construction of prisons as well as combating ongoing corruption and improving inmate socialisation (Bureau of Democracy 2019). So far the government has implemented 'a zero-tolerance policy towards organised, hierarchical criminal gangs' (Bureau of Democracy 2019). Human rights organisations, including domestic and international organisations, met no obstacles in on a regular basis monitoring detention centers and prison conditions. They were allowed to speak privately to prisoners (Bureau of Democracy 2019). The water supplies in prisons were also improved. In ten regional police stations and detention centers audio and video recording devices were installed. The government has allocated nearly 446,7 million drams ($926 000) to renovation and improvement of the conditions in prisons as well as the hospital for inmates (Bureau of Democracy 2019).

### 3.2 Georgia

In Georgia the situation in prisons improved significantly, especially as far as overcrowding is concerned. Medical units were also improved, including the quality of medical personnel, medical examinations and documentation. While medical personnel were trained to meet the required

standards, security staff had also been trained (Bureau of Democracy 2019 Country Reports on Human Rights Practices: Georgia 2019).

### 3.3 Moldova

According to reports, the overall situation at detention facilities in Moldova was not good. There were some minor improvements at some of the facilities, and some reconstruction work was done, but other than that the conditions remained poor, including 'poor sanitation, lack of privacy, insufficient or no access to outdoor exercise, and a lack of facilities for persons with disabilities' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Some facilities met neither national nor international standards with extremely poor conditions and pervasive overcrowding. There were some facilities that lacked adequate food, natural light and sewage systems. Generally, some detainees were not fed on the day of their hearing, which causes problems, especially when they have to be transported over long distances for their trials (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Nevertheless, access to the complaint mechanisms by detainees also continues to be restricted despite the fact that they have a right to submit complaints about misconduct by prison personnel or other inmates. The head of the human rights committee of the Moldova Parliament has received multiple complaints throughout the year.

Despite the poor conditions, the government restricted neither local nor international human rights observers from monitoring prison conditions. Inmate interviews were also allowed to be conducted in private. Although conditions were poor, attorneys report that after the change of government they experienced less restricted access to their clients, especially those involved in politically-sensitive cases (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 4 Disappearances

### 4.1 Armenia

There were no reports of disappearances by government authorities in Armenia throughout the year (Bureau of Democracy 2019).

### 4.2 Georgia and Moldova

There were no reports of disappearances by government authorities in Georgia (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019), as well as in Moldova.

## 5 Freedom of peaceful assembly and association

### 5.1 Armenia

The Armenian government has mostly respected the right to freedom of peaceful assembly and association. The Helsinki Committee of Armenia has especially noted that there have been major improvements, especially in the area of freedom of peaceful assembly, which had resulted in holding more assemblies; police interference was more controlled (Bureau of Democracy 2019).

### 5.2 Moldova

The government of Moldova also did not restrict freedom of peaceful assembly during 2019. However, there were several exceptions in Transnistria, where restrictions were imposed by the Transnistrian authorities in the case of unauthorised protests. The Constitution provides for freedom of association and the government generally did not restrict this right, except when the organisations 'engaged in fighting against political pluralism, the principles of the rule of law, or the sovereignty and independence or territorial integrity of the country' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 6 Freedom of movement

### 6.1 Armenia

Freedom of movement has also been respected by the Armenian government, including internal movement, foreign travel, emigration and repatriation. Notable changes have been effected with respect to immigration, in that in the year 2019 the court has considered more cases of asylum than in 2018. The country was also very lenient towards refugees, by offering naturalisation programmes for them to reside in the country. There were designated support programmes for the people who were returning or being deported from Western countries and for the families that had fled from Azerbaijan in the late 1980s to 1990s.

### 6.2 Moldova

The government of Moldova generally respected freedom of movement, including internal movement, foreign travel, emigration and repatriation during 2019. Despite the fact that Transnistrian authorities had earlier restricted travel to the territory of some Moldavian officials, the governments recently agreed that restrictions be lifted and the travel process be simplified on both sides. The government worked closely with

the Office of the UN High Commissioner for Refugees in order to provide and protect the rights of refugees, migrants and stateless persons. With the help of UNHCR, the refugees in the country were being provided essential support such as logistical, housing, medical and financial support. It should also be mentioned that the government provides humanitarian protection whether or not a person qualifies for refugee status (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 7 Freedom of expression

### 7.1 Armenia

As far as the press is concerned, the law provides for freedom of expression and since the change of the government, it is noticeable that the press has become much freer than before. The most notable change has been with regard to the plurality of opinions in the press, which has not been expressed in years. Within the press, individuals were able to more freely criticise the government without fear of detention. The main reason was that after the 2018 revolution in the country, individuals, especially social media users, were free to express their opinions (Armenia HC 2019). Despite the growing number of false social media accounts due to the fact that the right to freedom of expression was no longer a challenge, the government imposed no restrictions on individuals to access online platforms and to express their own opinions, neither has the government monitored any private online communications (Bureau of Democracy 2019). NGOs were also allowed to freely operate without government intervention or restriction, including investigating and publishing their findings about the human rights situation throughout the country (Bureau of Democracy 2019).

### 7.2 Moldova

When it comes to the most basic rights such as freedom of expression, the Moldavian government imposes no restrictions unless it 'poses a threat to national security, territorial integrity, public order or safety' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 8 Academic freedom

### 8.1 Armenia

No restrictions were imposed by the Armenian government on academic freedom, which clearly was supported by the government. The

developments in these spheres were noticeable since the government had made efforts to free the academia from any politicisation, including corruption. New boards of trustees were appointed to public universities, and new rectors replaced those that for years had been in these positions (Bureau of Democracy 2019).

### 8.2 Moldova

There were no cases of restriction of academic freedom and cultural events by the Moldavian government (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 9 Elections

### 9.1 Armenia

There were significant developments in the field of elections and political participation in Armenia. The country held spontaneous parliamentary elections in December 2018, which were considered free and competitive. The Organization for Security and Cooperation in Europe (OSCE) reported that freedom and public trust were upheld during the early elections. There were also no reports of vote-buying or other electoral malfeasance (Rights 2019).

### 9.2 Moldova

Moldova held parliamentary elections on 24 February. As provided in the Constitution, the citizens have the freedom to participate in the political process and to have the ability to choose their government in free and fair elections which, according to the OSCR election observer mission and Council of Europe as well as other international observers, were generally respected and were quite competitive. The elections consisted of two rounds that, despite minor incidents, were held efficiently and in conformity with international standards (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 10 Corruption

### 10.1 Armenia

For the new government the eradication of corruption was one of the targetable priorities. The law provides for criminal penalties for the act of corruption ranging from a few hundred to millions of US dollars. There have been positive developments in this area. After the new government came into power, it started to investigate systemic corruption occurring

in public and private life. Former government officials, their relatives as well as judges and their relatives were involved in investigations of alleged corruption. One of the targets was the former President of Armenia and his family (House 2019). The majority of the cases are ongoing; there were also reports of corruption cases against current government officials (Bureau of Democracy 2019).

### 10.2 Moldova

Moldova was not dealing very well with corruption and the lack of transparency in government despite the fact that corruption is considered a criminal offence. There were some improvements, but corruption remained a problem especially in the judiciary and other governmental structures. The improvements were made with regard to the investigation and particularly the charging process in corruption cases, especially high-profile cases, which include public officials and judiciaries (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Other progress in 2019 in the elimination of corruption in the country included the creation by the Moldavian government of the Coordinating Council and Consultative Bureau for Anticorruption and Justice Reform under the supervision of the Prime Minister of the country (Commission 2019).

## 11 Participation of women in politics

### 11.1 Armenia

The participation of women in political life in Armenia seemed to be improving, albeit slowly. The first-ever female mayor in the country was elected and more women were being seen involved in politics and economic life of the country, even in executive positions (Bureau of Democracy 2019).

### 11.2 Georgia

According to reliable reports, the participation of women in political process is quite developed in Georgia (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

### 11.3 Moldova

The Moldavian government respects the rights of women and minorities to participate in the political process. According to the law each party must have a minimum of 40 per cent of each gender as candidates on their election lists. The government also provides financial support to promote female candidacy. Any type of discrimination by political parties or the

media is sanctioned by law. However, unfortunately there were reports that the parties not always include the valid number of female representatives on their lists. In the last election, women were elected in only 26 out of a total of 101 parliamentary seats (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 12 Domestic violence against women

### 12.1 Armenia

Despite the growing role of women in Armenian political life, the country has not yet ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. More than 378 domestic violence cases were investigated throughout the year. The government was trying to attend to this matter despite the fact that cases remain underreported (International 2019).

### 12.2 Georgia

Domestic violence remains a significant problem in Georgia, but the government is attempting to overcome this. With the help of the new law on Violence Against Women and Domestic Violence the government tried to eliminate the shortcomings of the existing law in an effort to prevent domestic violence from occurring. The government also worked very closely with NGOs to provide appropriate care for victims of domestic violence and human trafficking (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

## 13 Children's rights

### 13.1 Armenia

The violation of children's rights was one of the prioritized fields of the new government of Armenia. The problem with addressing this, however, is that there was insufficient official data on this matter and there were loopholes in legislation in so far as violence against children is concerned. The Council of Justice for Children created a platform for coordinating a national plan. The extent of the problem was extensive, and extended to domestic violence and child trafficking. When new laws were implemented, however, the services were not fully available to the victims which caused more problems for the government. Furthermore, the scope of the violence against children includes cyber violence against minors and labour exploitation (Bureau of Democracy 2019).

An amendment to the Family Code, which entered into force in 2018, provides for more foster care homes and improvements in respect of adoption. The number of foster families in Armenia was 45, which represents an increase compared to previous years. Despite all these efforts to improve the adoption system, illegal adoptions continued. On 14 November 2019 the National Security Service of Armenia reported that approximately 30 children had been illegally adopted. The majority of children had been adopted in Italy (Armenia NS 2019).

### 13.2 Georgia

Children's rights were not respected very well in Georgia in 2019. With the help of Europol, Georgian authorities had arrested 11 people who were involved in child-trafficking rings. The girls who were trafficked were aged 8 to 14 years. Among the arrested individuals were one American and one Australian citizen who were charged with child trafficking and producing or selling child pornography (Bacchi 2019). The government did progressive work by replacing orphanages with foster care arrangements (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

### 13.3 Moldova

Compared to previous years, there was a decreasing number of reported cases of violence against children in Moldova during 2019. Reported cases include neglect, labour exploitation and sexual abuse. Unfortunately, not all cases were monitored due to a lack of experts in the field. However, the Prosecutor-General's office was ensuring particular attention to child abuse victims (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Child prostitution and commercial sex is punishable by law. The government was generally responsible for implementing these laws, despite the fact that the country is a child sex tourism destination. According to UNICEF around 10 per cent of children were exposed to this. Only during 2019 there were seven victims of child pornography identified whose ages vary from three to 14 years. Overall there were more than 79 registered cases of sexual exploitation and sexual abuse of children (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 14 Rights of lesbian, gay, bisexual, transgender, queer or questioning persons

### 14.1 Armenia

There were fewer instances of harassment and discrimination of LGBTQ+ persons. Still, there were at least 24 cases of homophobia and violence

documented by local non-governmental groups. Nevertheless, probably the only progress was that for the first time ever an openly transgender activist 'addressed the parliament during a hearing on human rights' (International 2019).

### 14.2 Moldova

Despite the fact that the law prohibits any type of discrimination based on sexual orientation, social discrimination continued. There were reports by the LGBTQ+ community of verbal and physical abuse, who were regarded as having 'the lowest societal acceptance rate of any minority group'. In May the NGO Genderdoc-M organised the annual Solidarity Pride March. It should be noted that the march was held for the second time in a row with up to 300 participants (International 2019) who were marching through the central parts of the capital city of Moldova (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). This was the first time in the history of the country that a current member of Parliament also participated in the march, together with his family (House, Freedom in the World: Moldova, 2019).

This article now turns to the broader context of human rights and democracy in each of the three countries during 2019, located within the particular country context.

## 15 Human rights and democratisation in the context of Armenia

Throughout 2019 the human rights situation in Armenia improved, even if some specific areas require more attention. Since the change of the old regime the government has taken solid steps to investigate and punish the abuses perpetrated by the former government and law enforcement agencies.

Throughout the year the Armenian officials continued the investigation of high-ranking government officials. These high-ranking officials were accused of having been involved in the deaths of eight civilians and two police officials during the protest in 2008. The investigation continues. In 2008 mass protests were held in Armenia, particularly in Yerevan, after the presidential elections. People gathered in Yerevan's Freedom Square and remained there for almost 10 days. On 1 March the police forcibly tried to disperse the protest which led to clashes between civilians and the police, resulting in the death of 10 people including police and civilians (Bureau of Democracy 2019). After the investigation on 12 September, the hearings began. The charges that were filed included 'allegations of overthrowing the constitutional order, abuse and exceeding official authority, torture, complicity in bribery, official fraud, and falsification

of evidence connected with the investigation of the 2008 post-election events' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Armenia, 2019). It should also be noted that it was only in 2019, after the government had started the investigation, that Parliament adopted a law that will provide assistance to victims and their families (Bureau of Democracy 2019). The former President of Armenia, who was ruling President at the time of the clashes, was among the people who were being investigated. He was arrested and charged with 'overthrowing the constitutional order and bribe-taking'. He allegedly was one of the persons responsible for the violence that had resulted in the deaths of 10 people (Interrnational 2019).

Another field to be looked at is the military situation in Armenia, which has also improved, albeit only to some extent. The death in the army of non-combatants was and continues to be qualified as suicide, rather than deaths, since suicides are less likely to be investigated for violence or abuse. In 2018, the government established a working group of NGOs and individuals who are experts in the field to investigate the cases that had led to the deaths in the army under non-combat conditions. The group has been working with the past five cases and one of the tasks of the group was to identify the systemic problems occurring in the army. On 2019 the government also approved the Judicial and Legal Reform Strategy for 2019-2023 for implementation of the fact-finding group 'to examine noncombat deaths, among other human rights violations' (Bureau of Democracy 2019). This was the first time that the Ministry of Defence had considered as a priority the protection of soldiers' human rights. The Ministry has launched a 'trust line' where the soldiers would be able to call and submit their own complains or suggestions (Bureau of Democracy 2019).

It should be noted that throughout 2019 there were no political prisoners or detainees in Armenia (Bureau of Democracy 2019).

When it comes to the political participation of citizens, as well as joining or creating new political parties, no significant hurdles were identified. There also were no restrictions noted in the registration or any activities of political parties or political participation in 2019 (Bureau of Democracy 2019).

Improvements had been also noticed in areas such as arbitrary arrest or detention. Despite the fact that the law completely prohibits it and guarantees individuals a right to challenge the lawfulness of their arrest or detention in court, such cases still occur. However, it should be noted that the reports were few, especially compared to the previous years. Generally speaking, authorities do comply with court orders and the new Judicial and Legal Reform Strategy for 2019-2023 is supposed to improve

the judicial independence and public trust in the judiciary (Bureau of Democracy 2019).

The development of respect for human rights was promising in Armenia in 2019, especially compared to neighbouring countries. However, there certainly are areas that still require improvement. According to human rights reports, Armenia continues to face human rights violations in the following forms: 'torture; arbitrary detention, although with fewer reports; harsh and life-threatening prison conditions; arbitrary interference with privacy; significant problems with the independence of the judiciary; crimes involving violence or threats of violence targeting lesbian, gay, bisexual, transgender, or intersex (LGBTI) persons; and use of forced or compulsory child labour' (Bureau of Democracy 2019).

## 16 Human rights and democratisation in the context of Georgia

The year 2019 for Georgia was also a year of modest developments. In spite of this the Georgian government tried to do its best to protect and promote human rights in Georgia.

One of the disturbing problems was torture and other cruel, inhuman or degrading treatment. In 2018 the Georgian Parliament voted to create a separate institution to investigate all accusations, particularly those perpetrated by law enforcements and government officials. This in fact would help to reduce the cruelty that citizens are facing when encountering law enforcement agents (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019). Three police officers were charged throughout the year with exceeding their powers, and 11 law enforcement officers were charged with misconduct (Watch 2019).

The entire judicial system has since the judicial reform passed in Parliament on 13 December experienced improvements in respect of transparency, accountability, judicial appointment and caseload management (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019). It should be noted that last year there were comparably fewer cases filed against Georgia at the European Court of Human Rights than before (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

The government also took initiatives to provide more people with internally-displaced person status and giving them monthly allowances, improving their social and economic integration and attempting to create conditions for their safe return. Nevertheless, the Georgian government was also attempting to improve the situation of people from Turkey and Azerbaijan by providing for asylum or refugee status in the country and

offering them a way to naturalisation (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019). As was mentioned above, the participation of both women and minority groups in the political processes of the country has improved (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

However, despite the freedom of political participation in the country there were other issues that women in Georgia were facing, such as sexual harassment. It should be noted that all forms of harassment have been criminalised in Georgia. Women especially experienced harassment in the workplace. The Georgian government was trying to eliminate harassment and Parliament in May passed a law that strengthens protection against sexual harassment (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

Despite the fact that Georgia was trying to promote human rights in the country, the annual human rights report found that there were 'significant problems with the independence of the judiciary and investigations and prosecutions widely considered to be politically motivated; unlawful interference with privacy; inappropriate police force against journalists; substantial interference with the right of peaceful assembly, including inappropriate police force against protesters; and crimes involving violence or threats targeting lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Georgia, 2019).

## 17 Human rights and democratisation in the context of Moldova

In 2019 Moldova was trying its best to fulfil its human rights obligations to respect and protect basic human rights in the country. Like any other country discussed, aspects of Moldova's democratic credentials need attention. One of these is the situation of torture, and inhuman and degrading treatment. The law forbids any type of torture or any cruel, inhuman and degrading treatment including medical abuse. However, the human rights ombudsman presented official reports of inhuman treatment, particularly in pre-trial detention centres in police stations and in regional police inspectorates. The Prosecutor-General's office has received more than 456 allegations of torture and mistreatment and this was only for half of the year. This number shown was higher than the previous year's report. It should be noted that the incidents of torture were mainly reported as occurring in public spaces, with less than half occurring at government facilities (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Nevertheless, it should be noted that Moldovan courts had convicted police officers on torture charges. There were cases where inmates of the convicted person who had been found dead were

charged with torture. As of the end of 2019, there were 13 cases against police officers accused of inhuman treatment and torture, and 'two doctors were accused of workplace negligence' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

Citizens of Moldova are allowed to seek damages in civil courts. However, despite the fact that government was trying to protect and promote human rights in the country, the entire system still lacks implementation mechanisms. The lack of access to effective judicial remedies remained an area that the Moldavian government should work to improve (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

The Moldavian government was cooperative and responsive towards human rights organisations and placed no restrictions on their operations. Parliament itself has a committee or human rights and inter-ethnic relations (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). The support of the government continued throughout the year, with around 30 NGOs participating in different trainings for promoting human rights in Moldova. One of these training events, conducted by the OHCHR on state reporting to CEDAW, played a part in the subsequent review of Moldova's report to CEDAW. The government of Moldova supports the implementation of international human rights mechanisms and helped four UN Special Rapporteurs to conduct human right visits to and reports on the country situation (Commissioner 2019).

Another issue that Moldova was facing was interference with the privacy of the country's people. The arbitrary or unlawful interference with privacy, family, home or correspondence is prohibited by the Constitution, unless it is 'necessary to ensure state security, economic welfare or public order or to prevent crimes' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). This provision was not enforced fully by the government agencies, as evidenced by reports of illegal wiretaps, surveillance, even threats against family members. It should be noted that the most instances of unlawful interference with privacy were committed against the opposition party. The Moldavian Parliament has a national security, defence and public order committee which organised hearings on illegal wiretappings. The committee reported that the number of wiretapping requests had doubled in the last five years as well, with 98 per cent of these requests being judicially approved. The most wiretap requests were done by the Ministry of Interior and the highest number occurred during the elections. After the report, the Prosecutor-General laid a criminal charge against Interior Ministry employees, prosecutors and judges for wiretapping politicians, activists and journalists (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

Generally, women did not face discrimination and received equal pay for equal work. The law requires that there should be at least 40 per cent of female representatives in decision-making positions, and requires employers to be responsible to ensure a workplace free of discrimination and sexual harassment (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019). Not only women but also minority groups such as Gagauzians, Bulgarians and Romany people gained seats in the Parliament after the elections (House, Freedom in the World: Moldova, 2019).

In Moldova all types of discrimination with respect to employment and occupation is prohibited by law, including on the basis of 'sex, age, race, color, nationality, religion, political opinion, social origin, residence, disability, HIV-positive status, and membership or activity in trade unions, as well as other criteria'. However, throughout 2019 the Council for Preventing and Eliminating Discrimination and Ensuring Equality received more than 43 per cent more complaints and made decisions on them. The reports outnumbered the reports received the year before (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

According to the annual human rights report the overall significant human rights issues in the country were 'torture; arbitrary detention; harsh and life-threatening prison conditions; political prisoners; arbitrary or unlawful interference with privacy; problems with judicial independence; acts of corruption; violence against and medical abuse of children and adults in psychiatric hospitals and residential institutions for persons with mental disabilities; and the use of forced or compulsory child labour' (Bureau of Democracy, 2019 Country Reports on Human Rights Practices: Moldova, 2019).

## 18 Conclusion

Overall, the three republics discussed above were moving forward slowly but steadily towards improved protection and promotion of human rights. All three countries had an issue with arbitrary detention, and a majority of them had issues with torture and inhuman treatment. The independence of the judiciary remained a problem in all three republics. The majority of them also had an issue with unlawful interference with privacy by government as well as in some countries, harsh and even life-threatening conditions in prisons. Despite some differences in the areas, women's rights were not fully respected in the three countries. Minorities had fewer opportunities to participate in governmental structures. Protecting the rights of LGBTQ+ persons remained an issue in all three countries, despite the considerable effort that countries made toward greater tolerance. Children's rights were not fully respected in the countries, especially as

far as child labour and child trafficking are concerned. Institutionalisation still exists and children were still kept in orphanages in all three countries, despite the fact that there were legislative and practical changes towards moving from orphanages to foster care.

# References


Armenia HC (2019) *Human Rights in Armenia 2019 report*

Armenia NS (Director) (2019). *Cases of illegal child adoption by foreigners are revealed* (motion picture)

Bacchi U 'Georgian police arrest 11 in child-trafficking crackdown' (2019) *Reuters*, available at https://www.reuters.com/article/us-georgia-trafficking-sexcrimes/georgian-police-arrest-11-in-child-trafficking-crackdown-idUSKBN1W42JU

Bureau of Democracy HR (2019) *2019 Country Reports on Human Rights Practices: Armenia* US Department of State

Bureau of Democracy HR (2019) *2019 Country Reports on Human Rights Practices: Georgia* US Department of State

Bureau of Democracy HR (2019) *2019 Country Reports on Human Rights Practices: Moldova* US Department of State

Commission E (2019) *Joint Staff Working Document Association Implementation Report on Moldova.* High Representative Of The Union For Foreign Affairs And Security Policy, available at https://www.ecoi.net/en/file/local/2016433/swd_2019_325_f1_joint_staff_working_paper_en_v10_p1_1045191.pdf

Commission E (nd) *European Neighbourhood Policy And Enlargement Negotiations*. Retrieved from EU – Armenia Relations, available at https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/armenia_en

Commission E (nd) *European Neighbourhood Policy And Enlargement Negotiations*. Retrieved from EU – Georgia Relations, available at: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/georgia_en

Commission E (nd) *European Neighbourhood Policy And Enlargement Negotiations*, available at Moldova: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/moldova_en

Commissioner UN (2019) *UN Human Rights in the Republic of Moldova*, available at Profile: https://www.ohchr.org/EN/Countries/ENACARegion/Pages/UN-Human-Rights-in-Moldova.aspx

House F (2019) *Armenia*, available at https://freedomhouse.org/country/armenia

House F (2019) *Freedom in the World: Moldova*, available at https://freedomhouse.org/country/moldova/freedom-world/2020

International A (2019) *Armenia 2019*, available at https://www.amnesty.org/en/countries/europe-and-central-asia/armenia/report-armenia/

International A (2019) *Moldova 2019*, available at https://www.amnesty.org/en/countries/europe-and-central-asia/moldova/report-moldova/

Monitor E (nd) *Partnership and cooperation agreement (PCA)*, available at https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7gkuhng0wh

Rights (2019) *Early parliamentary elections of Armenia* ODIHR Election Observation Mission

Watch HR (2019) *Georgia Events of 2019*, available at https://www.hrw.org/world-report/2020/country-chapters/georgia#

2020

# Global Campus Human Rights Journal, Volume 4 No 2

Global Campus of Human Rights

http://doi.org/20.500.11825/2045