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## **Child-Friendly Justice in Europe - Participation and Restorative Justice: Online event – 12 May 2020**

### **Statement by Mr Manfred NOWAK, Independent Expert for the United Nations Global Study on Children Deprived of Their Liberty**

#### **Are we there yet? Addressing the rights of children deprived of liberty in Europe**

Children deprived of liberty remain an invisible and forgotten group in society notwithstanding the increasing evidence of these children being in fact victims of further human rights violations. Childhood is when children develop their personality, their emotional relationships with others, their social and educational skills and their talents. For children, deprivation of liberty means depriving them of their childhood. The personal cost to these children is immeasurable in terms of the destructive impact on their physical and mental development, and on their ability to lead healthy and constructive lives in society.

More than seven million children worldwide are in fact deprived of liberty per year.<sup>1</sup> They are detained in settings such as prisons, pre-trial detention centres, police custody, migration detention centres and institutions of all kinds, including institutions for children with disabilities. Still a conservative estimate, this figure stands in direct contrast and is difficult to reconcile with the Convention on the Rights of the Child (CRC), which celebrated its 30th anniversary in 2019. Article 37(b) of the Convention clearly states that deprivation of liberty

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<sup>1</sup> Manfred Nowak (Independent Expert leading the UN Global Study), The United Nations Global Study on Children Deprived of Liberty, Geneva, November 2019 (hereinafter referred to as the "Global Study"), available at <http://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562>.

of children shall be used only as a measure of last resort and for the shortest appropriate period of time. Although there has been progress, it is evident that much more needs to be done in terms of deinstitutionalisation, diversion, ending migration-related detention and other measures in order to comply with the Convention. Deprivation of liberty of children is a form of structural violence in violation of Goal 16.2 of the Sustainable Development Goals (SDGs).<sup>2</sup>

The Global Study on Children Deprived of Liberty has been preceded by two earlier UN global studies related to the rights of children. In 1996, Graca Machel published a UN Report on the Impact of Armed Conflict on Children,<sup>3</sup> which led to the appointment of a Special Representative of the Secretary-General on Children in Armed Conflict. In 2006, Paulo Sérgio Pinheiro published the UN Study on Violence against Children,<sup>4</sup> which led to the appointment of a Special Representative of the Secretary-General on Violence against Children. Both these studies had a considerable impact on the lives of millions of children around the globe.

Shortly after the publication of the Global Study on Violence against Children, NGOs started to campaign for another Global Study on Children Deprived of Liberty, which was also considered as a follow-up to the Pinheiro Study. In May 2014, the Committee on the Rights of the Child (CRC-Committee) sent a formal letter to the UN Secretary-General supporting this initiative, and in December 2014, the UN General Assembly invited the Secretary-General to commission an in-depth Global Study on Children Deprived of Liberty. In 2015, a UN Inter-Agency Task Force, composed of the most relevant UN agencies and offices, was established under the chair of the UN Special Representative on Violence against Children, Marta Santos Pais, which selected an Independent Expert to lead this complex process.

From the outset, it was decided that the Global Study covers the following six situations:

- Children deprived of liberty within the administration of justice
- Children living in prisons with their primary caregivers, usually mothers
- Children deprived of liberty for migration-related reasons
- Children deprived of liberty in institutions
- Children deprived of liberty in the context of armed conflict
- Children deprived of liberty on national security grounds.

For each of these situations research groups were established. During the process of preparing the Global Study, further research groups were set up for the following four cross-cutting themes with the aim of contextualizing children's deprivation of liberty:

- Views and perspectives of children deprived of liberty
- Impacts on health of children deprived of liberty
- Children with disabilities deprived of liberty
- Gender dimension.

The main objectives of the Global Study on Children Deprived of Liberty were to assess the magnitude of this phenomenon, including the total number of children deprived of liberty (disaggregated by age and gender), as well as the reasons, the root causes, the types and length of deprivation of liberty, and the conditions in places of detention. The General Assembly also requested to document good practices of States who managed to reduce the number of children deprived of liberty as well as the views and experiences of children in detention. Like earlier studies, this Global Study also aims at raising awareness and promoting

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<sup>2</sup> UNGA Resolution 70/1 "Transforming our world: the 2030 Agenda for Sustainable Development", UN Doc A/RES/70/1 of 21 October 2015.

<sup>3</sup> Graca Machel, "Impact of armed conflict on children", UN Doc A/51/306 of 26 August 1996.

<sup>4</sup> Paulo Sérgio Pinheiro, "Report of the independent expert for the United Nations study on violence against children" UN Doc A/61/299 of 29 August 2006.

a change in stigmatizing attitudes and behaviour towards children at risk of arrest or detention as well as children who are deprived of liberty. Finally, it should provide recommendations for law, policy and practice to safeguard the rights of children concerned, prevent the detention of children through effective non-custodial solutions guided by the best interests of the child. The ultimate aim of the Global Study was not so much to document conditions of detention with the aim of improving such conditions, but to address the root causes with the aim of significantly reducing the number of children deprived of liberty and preventing their arrest and detention.

## Key findings of the United Nations Global Study on Children Deprived of Liberty:

### *Children Deprived of Liberty in Institutions:*

The vast majority of children deprived of liberty live in institutions of all kinds which are characterized by a common “institutional culture”: Children are isolated from the broader community, are compelled to live together, and do not have sufficient control over their lives and decisions which affect them. The requirements of institutions tend to take precedence over the children’s individual needs, lead to fixed routines and are enforced by strict discipline, often amounting to solitary confinement, physical restraints and corporal punishment. In general, institutions can be characterized by de-personalization, lack of individual care and love, instability of caregiver relationships and lack of caregiver responsiveness. As many recent inquiries into abuse of children show, institutions are often characterized by a high level of violence, sexual abuse and neglect, which amounts to inhuman or degrading treatment in violation of international law. Although much has been achieved in recent years by means of de-institutionalization, much more remains to be done to ensure that all children, including children with physical and mental disabilities, can enjoy their right to grow up in a family environment and in community based non-custodial settings.

The UN Guidelines for the Alternative Care of Children of 2009 seem to have had a positive impact on the de-institutionalization practices of States. While in the Global Study on Violence against Children of 2006, the total number of children living in institutions was estimated as 8 million, research conducted for the current Global Study indicates that this number may have dropped to 5,4 million. Good practices of de-institutionalization have, for instance, been documented in the former Communist countries in Central and Eastern Europe and Central Asia during the last 15 years, where major deinstitutionalisation programmes developed and implemented with the assistance of UNICEF, have led to a significant decrease of children in (large) institutions. In Georgia and Bulgaria, the decrease in the number of children living in institutions even amounts to more than 95%, in Montenegro, North Macedonia and Moldova to between 80 and 90%, in Lithuania, Poland and Serbia to between 70 and 80%, followed by Belarus (67%), Azerbaijan, Armenia, Romania, Croatia and Hungary (all between 50 and 60%). The Russian Federation, which had one of the highest number of children deprived of liberty in institutions, also reports a decrease of 46%. Thousands of children, including children with disabilities, have now been reunited with their families or placed in family-type settings in the community. Many Western European States including Austria, Ireland, the United Kingdom, including Scotland, or the Netherlands conducted inquiries regarding children abused in institutions, which have led to system wide reforms, including de-institutionalization policies.<sup>5</sup>

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<sup>5</sup> UNICEF, 15 years of De-Institutionalization Reforms in Europe and Central Asia. Key results achieved for children and remaining challenges, available at <https://www.unicef.org/eca/sites/unicef.org/eca/files/2018->

### *Children Deprived of Liberty in the Administration of Justice:*

In the administration of justice, many States have introduced child justice legislation and established corresponding specialized procedures, including special courts for children, which have led to the effective diversion from the criminal justice system. These developments seem to have contributed to a certain decrease in the number of children detained in prisons and pre-trial detention centres. While UNICEF in 2007 has estimated the total number worldwide as over 1 million children, research for the Global Study indicate that this number may have dropped to less than half. In the 110 countries/territories for which data could be obtained and that do not have life imprisonment for children, the maximum sentence for children ranges from 3 to 50 years. The average maximum sentence is 13.3 years. The median average maximum in turn lies at 12 years.<sup>6</sup>

If one counts an estimated number of 1 million children in police custody, more than 1,4 million children are currently detained per year in the context of the administration of criminal justice, i.e. in police custody, pre-trial detention facilities and prisons. Detaining children in conflict with the law is not per se a violation of the CRC. However, the principle of a "measure of last resort" in Article 37(b) CRC requires all law enforcement agencies, including the police, prosecutors, judges and prison administrators, to examine in each individual case whether proper non-custodial solutions are available and should in fact be applied. Article 40(4) CRC provides in this respect: "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." This means that diversion measures shall be applied at every stage of the criminal procedure: as alternatives to the arrest by the police; to a court decision leading to pre-trial detention; to a decision of a prosecutor to charge a child for a criminal offence; to a court judgment finding a child guilty of a criminal offence and a judgment sentencing a child to imprisonment; and finally to a decision of the prison administration when enforcing such judgments. At each of these stages, the competent authorities shall consider to transfer children from the criminal justice system to the child welfare system. This requires sophisticated instruments for structured inter-agency cooperation between the child welfare system, social protection, education and health systems on the one hand and law enforcement and justice systems on the other hand, to build comprehensive child protection systems and implement prevention and early intervention policies. Above all, there is a strong need to support families, communities, schools and child welfare systems to deal with children in conflict with the law.

There are a number of root causes and pathways leading to such a large number of children deprived of liberty in the context of the administration of justice.<sup>7</sup> First of all, many States retain an excessively low age of minimum criminal responsibility. While the CRC-Committee advocates that this age shall be raised to at least 14 years of age,<sup>8</sup> more than 120 States maintain the minimum age at below 14.<sup>9</sup> With 10 years, England, Wales, Northern Ireland and Ireland maintain the lowest minimum age of criminal responsibility in Europe. Secondly, instead of prevention, States often rely on repressive and punitive policies that lead to excessive criminalisation of children. Behaviours that are typical for children are criminalized

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[11/Key%20Results%20in%20Deinstitutionalization%20in%20Europe%20and%20Central%20Asia\\_0.pdf](#),  
(accessed 1 May 2020)

<sup>6</sup> See Global Study (note 1), 290.

<sup>7</sup> See Global Study (note 1), 274 ff.

<sup>8</sup> See CRC-Committee, General Comment No. 24 of 18 September 2019, § 33.

<sup>9</sup> See Global Study (note 1), 280.

as so-called “status offences”: children are charged and detained for truancy, running away from home, disobedience, underage drinking, consensual sexual activity between teenagers, “disruptive” behaviours and practices against tradition and morality. Despite the fact that Article 37(b) CRC allows deprivation of liberty of children only for the “shortest appropriate period of time”, life sentences for children remain legal in 67 States, specifically in Africa, Asia, Oceania, the Caribbean and North America.<sup>10</sup> The United Kingdom and Ireland are the only two countries in Europe that still permit life imprisonment for children. Even capital punishment still persists in 12 countries, and four Islamic countries (Iran, Pakistan, Saudi Arabia and Yemen) are known for having carried out executions of child offenders during the last 10 years. Thirdly, many States still lack a functional child justice system with special child courts and specially trained police officers, prosecutors and judges, as required by Article 40(3) CRC.

Discrimination is another important reason for the large number of children deprived of liberty in the administration of justice. Children from poor and socio-economically disadvantaged backgrounds, migrant and indigenous communities, ethnic and religious minorities, the LGBTI community and children with disabilities are largely overrepresented in detention and throughout the judicial proceedings. While boys are committing roughly two thirds of all criminal offences of children, they account for 94% of all children detained in prisons and pre-trial detention centres.<sup>11</sup> This significant gender gap can be explained in part by the fact that girls often receive more lenient and non-custodial sentences and benefit much more than boys from diversion and non-custodial solutions during the different phases of the criminal justice system.

The Global Study also revealed significant regional disparities in the detention rate of children in prisons and pre-trial detention centres. While Sub-Saharan Africa has the lowest detention rate (less than 4 children detained out of 100,000 children), the American hemisphere scores highest. With a detention rate of 60, the United States is the country with the largest number of children behind bars, followed by South America (19), Central America and Caribbean (16) and Oceania (8). Western Europe (5) and Central and Eastern Europe (5.8) shows a comparably low detention rate.

Research suggests that trends might relate to legal tradition and culture. A large majority of countries that have life imprisonment for children (around two-thirds) are within the Commonwealth and come from the English legal tradition, while countries with a Spanish or Portuguese legal history commonly tend to set explicit limits on maximum sentences and prohibit any kind of ‘perpetual imprisonment’. Most post-Soviet States, in Eastern Europe and Central Asia, on the other hand, have coalesced around a 10-15 year maximum fixed term sentence for children. Beyond these trends, the length of sentences largely varies between countries and sometimes within the same country - mainly depending on the child’s age and the seriousness of the crime. In its recently adopted General Comment No. 24 relating to the administration of child justice, the CRC-Committee has specified certain time limits.<sup>12</sup> For instance, it recommends to States Parties that no child in conflict with the law below the age of 16 years should be deprived of liberty, police custody should never be longer than 24 hours and pre-trial detention should not last longer than 30 days.<sup>13</sup> However, the Committee has

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<sup>10</sup> See Global Study (note 1), 291.

<sup>11</sup> See Global Study (note 1), 225 ff.

<sup>12</sup> CRC-Committee, General Comment No. 24 (2019), replacing General Comment No. 10 (2007): Children’s rights in juvenile justice, CRC/C/ GC/24, 2019.

<sup>13</sup> Cf. ‘Beijing Rules’, *op. cit.*, Rule 13: providing that detention pending trial shall be used only for the ‘shortest possible period of time’ and that, whenever possible, ‘detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home’. Cf. ‘Havana Rules’, *op. cit.*, Rule 17: ‘Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.’

not yet specified a maximum duration of imprisonment of children after conviction by a criminal court.

*Children Deprived of Liberty in Migration related Detention:*

Research for the Global Study found that, at a minimum, 330,000 children are currently detained worldwide for migration-related reasons. This is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of data available.<sup>14</sup> This figure covers unaccompanied and separated children as well as children migrating with their parents or other family members. Both from a legal and policy oriented point of view, migration-related detention of children raises a number of highly controversial issues.

From a legal point of view, migration-related detention can never meet the high threshold of a "measure of last resort" in Article 37(b) CRC and is never in the best interests of the child, as required by Article 3 CRC. In other words, the Global Study follows the legal interpretation of the CRC-Committee, the UN Working Group on Arbitrary Detention, the Special Rapporteur on the Human Rights of Migrants, the UN Secretary-General and various other UN such as the International Organization for Migration (IOM), the United Nations Childrens Fund (UNICEF) and the United Nations High Commissioner for Refugees (UNHCR) as well as regional bodies such as the Council of Europe and its Parliamentary Assembly (PACE) and the European Parliament, which clearly state that detention of children for purely migration-related reasons always violates the CRC and other human rights standards and should, therefore, never abolished by states.

With respect to migration-related detention of children, research for the Global Study and responses to the questionnaire indicate that 24 countries, above all in Latin America and Southern Africa, do no longer detain children.<sup>15</sup> On the other hand, at least 80 States are around the world are known to detain children for migration related reasons in violation of international law. In Europe, Ireland prohibited the immigration detention of children in asylum and return procedures. In Austria, children under the age of 14 cannot be detained for migration-related reasons, in other European countries, including the Czech Republic, Finland, Latvia and Poland, this age limit is 15. In the United Kingdom, the number of children deprived of liberty for migration purposes has also declined considerably over recent years and the UK has publicly committed to ending detention of children for immigration purposes.<sup>16</sup>

Nevertheless, immigration detention of children is still employed extensively in many European countries. Evidence has been collated for the Global Study of immigration detention of children being allowed in 40 European countries.<sup>17</sup> There is no single consistent trend in immigration

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<sup>14</sup> See Global Study (note 1), 465.

<sup>15</sup> See Global Study (note 1), 463.

<sup>16</sup> See Global Study (note 1), 445 and 459.

<sup>17</sup> Albania, Austria, Belgium, Bosnia Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom. See Council of Europe, A study of immigration detention practices and the use of alternatives to immigration detention of children, Strasbourg, 2017; European Migration Network, The use of detention and alternatives to detention in the context of immigration policies, Country case studies, 2014; the European Union Agency for Fundamental Rights, European legal and policy framework on immigration detention of children, 2017. UN Global Study Questionnaire, Albania (State Reply), Austria (State Reply), Belgium (State Reply), Bosnia Herzegovina (State Reply), Croatia (State Reply), Denmark (State Reply), Estonia (State Reply), Italy (State Reply), Liechtenstein (State Reply), Lithuania (State Reply), Portugal (State Reply), Romania (State Reply), Russia (State Reply), Slovenia (State Reply), Spain (State Reply), Sweden (State Reply), Switzerland (State Reply), Ukraine (State Reply), United Kingdom (State Reply).

detention of children across European countries. In some, there has been a decline in the number of children deprived of liberty for migration purposes over recent years whilst in others there has been a significant increase.

### *Children Living with their Primary Caregivers in Prison:*

Research for the Global Study shows that approximately 19,000 infants and young children live with their primary caregivers, usually their mothers, in prison. Although they are not legally deprived of liberty, they are so de facto. The possibility for children to live in prison with an imprisoned caregiver, which is allowed in most jurisdictions until a certain age, is fraught with difficult considerations, beginning with the question of whether to permit the practice at all. This question can only be decided on a case-by-case basis by adopting a child-rights based approach and taking the best interest of the child into account, as both the exposure of the child to detention and the separation of the child from a primary caregiver/mother have adverse consequences for the child.

The Global Study follows the approach of the African Charter and the South African Constitutional Court insofar as a situation in which children live with their imprisoned mothers should be avoided as far as possible. This means that every court, when sentencing a mother who is a primary caregiver of dependent children, has the responsibility to assess the possible impact of her imprisonment on child development, taking the best interests of the children as a separate consideration into account. In such cases, alternatives to imprisonment, including house arrest, and non-custodial sentences should always be considered first, when the children cannot stay with the father or another close family member. If neither solution is possible, States have an obligation to establish special alternative institutions for holding such mothers. In the absence of such special institutions, mothers may be allowed to take their children into prison, under the condition that States establish child-friendly "Mother-Child Units".<sup>18</sup>

Research conducted and data collected for the global study show that primary caregivers, who are detained in the context of administration of justice and who are allowed to keep their infants and small children with them in prison, are almost exclusively mothers. Only eight, mostly European States (Belgium, Bolivia, Denmark, Finland, Germany, Italy Spain and Sweden) allow children to co-reside with their fathers, and only Finland has provided information about a total of three imprisoned fathers having co-resided with their children in male Finnish prisons during recent years. In the other seven countries, proper "Father-Child Units" seem to be missing in male prisons.<sup>19</sup>

When choosing the sentence, non-custodial punitive options for a parent of a dependent child are provided in several national jurisdictions (in Austria, Czech Republic, Denmark, Georgia, France, Lithuania, Portugal, Ukraine). For instance, in France, the judge can pronounce a suspended sentence on probation, community service order, social and judicial supervision, or even a sentence of imprisonment accompanied ab initio by measures alleviating the penalty (e.g. outside placement, semi-liberty, conditional release, or release under electronic surveillance).<sup>20</sup>

Likewise, adjustments of the execution of a prison sentence for a parent can be decided, including the application of a non-custodial measure under certain conditions, especially depending on the length of the sentence, the situation of the prisoner, and the age of the child (in France, Italy, Greece, Ukraine, Denmark). In addition, the enforcement of a custodial

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<sup>18</sup> See Global Study (Note 1), 427.

<sup>19</sup> See Global Study (Note 1), 238 and 389.

<sup>20</sup> See Global Study (Note), 384.

sentence can be regulated in a way to prevent the case where a parent would live in prison with a dependent child, by allowing deferment/ suspension or postponement until a certain period of time, or implementation in an open environment, in various jurisdictions (in Croatia, Czech Republic, Denmark, Finland, Italy, France, Georgia, Russian Federation, Ukraine).<sup>21</sup>

### *Children Deprived of Liberty in Armed Conflict:*

Children detained in the context of armed conflict often find themselves in a cycle of violence. First, armed groups illegally recruit them, usually through force, coercion or deception. Second, government authorities then detain them for suspected association with those very groups, often subjecting them to torture and other forms of ill-treatment, most often for intelligence gathering purposes or confessions of involvement with armed groups. Many children are detained simply because they appear to be of fighting age or come from communities perceived to be sympathetic to opposition forces, or because their family members are suspected of involvement with such forces.

Research for the Global Study found that, at a minimum, 35,000 children are currently deprived of liberty in the context of armed conflict. That figure includes an estimated 29,000 foreign children of alleged ISIS fighters and children who joined ISIS and became fighters who were detained in 2019 in camps in Iraq and the North-East of Syria. In Nigeria, roughly 2,000 children have been detained on suspected Boko Haram affiliation. Hundreds of detained children have also been reported from Israel, the Democratic Republic of Congo, Somalia and Afghanistan.

The conditions of detention are particularly poor in the context of armed conflict, and children are often tried in military or adult courts without adequate procedural rights. The UN Security Council in 2018 called on all parties to such conflicts to cease unlawful or arbitrary detention of children and encouraged States to establish “standard operating procedures for the rapid handover of the children concerned to relevant civilian child protection actors”. This has already had a positive impact on State practice, as some African States, including Chad, Mali, Niger and Somalia, have signed such handover protocols with the United Nations, transferring children associated with armed groups to child welfare centres, with the aim of ensuring their rehabilitation and reintegration into society.<sup>22</sup>

Of countries with data, those with the largest number of children who left to join ISIS are France (460-700), Morocco (391), Kazakhstan (390), Tajikistan (293) and Germany (290).<sup>23</sup> In addition, thousands of children were likely born inside the Caliphate. An unknown number of children were killed in the conflict, while more than 1,000 children associated with ISIS are believed to have returned to their home countries.

### *Children Deprived of Liberty due to National Security:*

In recent years, armed groups designated as terrorist or armed groups termed violent extremist have recruited thousands of children, in some cases across borders, to carry out suicide and other attacks, and for various support roles. Some are recruited through force, coercion or deception, while others are influenced by family members and peer networks, poverty, physical insecurity, social exclusion, financial incentives, or a search for identity and status. The Internet has also provided such groups with new avenues to recruit children, who

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<sup>21</sup> See Global Study (Note), 385.

<sup>22</sup> See Global Study (Note), p.607.

<sup>23</sup> Joana Cook & Gina Vale, *From Daesh to Diaspora: Tracing the Women and Minors of Islamic State*, International Centre for the Study of Radicalisation, 2018, p 3.



are often particularly susceptible to propaganda and online exploitation due to their age and relative immaturity.

In response to heightened concerns about threats to their national security and counter-terrorism resolutions adopted by the UN Security Council, the vast majority of States have adopted new counter-terrorism legislation or amended existing national laws since 2001. These laws often fail to distinguish between adults and children, include overly broad definitions of terrorism, provide fewer procedural guarantees, and impose harsher penalties. Some States criminalize mere association with non-State armed groups designated as terrorist, thereby increasing the number of children detained and prosecuted for association with such groups. Such laws are also used to detain children for a broad range of activities outside of national security concerns, such as posting political opinions online, participating in peaceful protests, involvement in banned political groups or alleged gang activity.

Research conducted for the Global Study identified at least 31 conflict and non-conflict countries where children have been detained in the context of national security grounds. The vast majority of these children are detained in conflict countries, such as Syria, Iraq and Afghanistan, as was described above. In countries without an armed conflict on their territories, the number of children detained for reasons of national security is difficult to assess, as many States do not provide relevant data. The Global Study only covers a number of countries where relevant data are available and estimates that at least 1,500 children are detained in these countries on national security grounds.

Thousands of children from more than 80 countries travelled to Iraq or Syria, either alone or with their families, to join ISIS both before and after the declaration of the “caliphate” in June 2014.<sup>24</sup> Many of these children originated from either Western or Eastern Europe. Over 1,000 children associated with ISIS are believed to have returned to their home countries, while others were killed in Iraq or Syria or are detained there. A small number of children have been detained and prosecuted after their return home. A number of European countries have passed legislation to revoke citizenship for individuals who travelled abroad to join non-State armed groups designated as terrorist in order to prevent them from returning.

### *Key Recommendations:*

For every situation of children deprivation of liberty and the respective cross-cutting issues such as the views of children, the impact on health, children with disabilities and the gender dimension there are multiple findings and recommendations which are conveyed in the comprehensive Global Study on Children Deprived of Liberty. Nevertheless, the overall recommendations of the Global Study follow directly from its findings and conclusions as well as from the analysis of best practices. They are inspired by the high legal standards of the CRC regarding the rights to personal liberty, personal integrity and dignity of children and aim at reducing the huge implementation gap between these standards and the reality of children deprived of liberty worldwide in all six focus areas covered by the Global Study. The compact overarching recommendations to States are to:

- Significantly **reduce the number** of children held in places of detention and apply non-custodial solutions
- Address **root causes** and invest resources to reduce inequalities and **support families**
- Rigorously **apply the requirement of detention as a measure of last resort of Article 37 (b)** of the CRC

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<sup>24</sup> See Global Study (Note), p.591.

- If absolutely unavoidable detention only for **shortest appropriate period** of time in **child friendly conditions** with essential services
- **Listen to the children**, they are experts in their own rights: ratify the third optional protocol to the CRC (Communications procedure)
- **Ratify OPCAT**: creation of **National Preventive Mechanisms** (NPMs) carrying out preventive visits
- Invest in awareness-raising, **education and training of all professionals** who work with and for children in decisions leading to their deprivation of liberty, and those who are responsible for their well-being while in detention.
- Establish an appropriate system of **data collection** at the national level, involving all relevant ministries and other State agencies, coordinated by a focal point. Ensure the development and maintenance of an **international database** containing all relevant data on children's deprivation of liberty. In developing such a database, a common methodology, based on the Global Study, needs to be applied in order to enhance comparative research.

For the six situations of deprivation of liberty covered by the Global Study, the most key recommendations are to:

- **Stop all forms of immigration detention of children**, whether unaccompanied or migrating with their families, and replace it by appropriate non-custodial solutions.
- **Adopt a comprehensive deinstitutionalisation policy** by developing appropriate family-type settings, since children should not grow up in institutions, which are characterised by strict discipline, neglect, abuse and lack of love.
- Establish **special child justice systems**, apply diversion at all stages of the criminal justice process and transfer children from the justice to the child welfare system. **Diversion measures** should equally be applied to boys and girls and be appropriate to the child's age, level of maturity, as well as the situation in the community. Increase the **minimum age of criminal responsibility** to at least 14 years, **shorten the length of detention** and decriminalise perceived "immoral" or "disruptive" behaviour of children, consensual sexual activities between teenagers as well as behaviour typical of children (status offences).
- Avoid the imprisonment of mothers as primary caregivers of young children
- Treat children recruited by armed forces or groups designated as terrorist as victims rather than as perpetrators.

Furthermore:

- **Repeal all laws and policies** that permit the deprivation of liberty of children on the basis of an actual, or perceived, impairment or on the basis of their sexual orientation and/or gender identity.
- If detention is unavoidable under the particular circumstances of a case, it shall be applied only for the shortest appropriate period of time. States have an obligation to apply **child-friendly and gender-sensitive conditions, without any discrimination**. Children shall not be exposed to neglect, violence, sexual abuse or exploitation, ill-treatment, torture and inhuman conditions of detention. States should ensure that children have **access to essential services** aimed at their rehabilitation and reintegration into society, including education, vocational training, family contacts, sports and recreation, adequate nutrition, housing and health care. **Health services** in detention shall be of a standard equivalent to that available in the community at large.

*Follow-up initiation and dissemination of the Global Study:*

With respect to the follow-up of the United Nations Global Study on Children Deprived of Liberty, the Independent Expert strongly recommended that deprivation of liberty, as one of the most neglected violations of the CRC, remains on the agenda of the General Assembly, the Security Council and the Human Rights Council. While all UN agencies and mechanisms should play an active role in the monitoring of the implementation of these recommendations, the Independent Expert calls upon the General Assembly to consider, as soon as possible, a specific and effective follow-up mechanism and process aimed at disseminating the Study findings, at promoting its recommendations, monitoring progress and ensuring the development and maintenance of an international database, containing all relevant data on children's deprivation of liberty in all UN member States. As children have a right to be heard and actively participate in all matters directly affecting their lives, they should also be directly involved in follow-up activities.

Following the presentation of the report on the Global Study on Children Deprived of Liberty to the UN General Assembly Third Committee in New York on 8 October 2019, and the presentation of the comprehensive version of the Global Study to the UN in Geneva on 19 November 2019, it was evident there was a strong desire by the international community and diverse key stakeholders to implement its recommendations. This has been conveyed by the number of international, regional and national requests and invitations to present the study findings and recommendations as well as a number of requests by key stakeholders for guidance in implementing the Study recommendations. However, the UNGA Resolution of December 2019 only took note of the Global Study on Children Deprived of Liberty, without however deciding on any Follow-up. Unfortunately, the United Nations has not taken initiatives to disseminate this Global Study despite a strong pressure from civil society (NGO Panel of 170 NGOs), the Committee on the Rights of the Child and the academic community.

With respect to the previous Global Studies it took at least a year for the UN member States to absorb the information and decide on the new international mechanism(s) and processes. For this Global Study and its interim decision making phase, the Global Campus of Human Rights consisting of 100 universities worldwide has taken the initiative to keep the Global Study on the international agenda and support its dissemination activities. The cooperation between the Global Campus of Human Rights (GC) and the Right Livelihood Foundation (RLF) has taken a pivotal role in supporting the process of the Study to be presented in the different regions of the world. We hope that the UN General Assembly will adopt a more positive and pro-active resolution on the Global Study in December 2020 and that the United Nations will then gradually take over the Follow-up activities from the Global Campus. However, for the time being the further involvement of the Global Campus is essential for the overall success of the Global Study. In the long run, a closer cooperation on the Follow-up between the United Nations, the NGO panel, the Global Campus of Human Rights and regional bodies such as the Council of Europe would be welcomed and would create a positive synergy by bringing international organizations, civil society and academia together in stimulating and facilitating the domestic implementation of the Global Study recommendations.

*The objectives and activities of the follow-up initiation and dissemination are to:*

- Firstly, to present the Global Study findings, recommendations and to develop the most effective short, mid and long-term follow-up strategies with international, regional and national key-stakeholders by means of trainings, workshops and consultations. In this regard, a number of regional and national launches have taken place throughout the world to raise awareness and create actions plans to implement the recommendations

as well as use this momentum to support the initiation of a follow-up process to the Study.

- Secondly, to coordinate and support the development and facilitation of further Global Study related research and advocacy activities and outputs such as the creation of Thematic toolkits, creating an executive summary and its translations in all UN languages, an animated child friendly version, multiple e-learning massive open online courses (MOOCs) and further projects related to the implementation of the recommendations through the Global Campus network and its universities.
- Thirdly, to maintain and strengthen the Global Study network consisting of research institutes and universities, Advisory Board members and other experts, the NGO Panel of 170 NGOs, UN agencies and other international as well as regional organizations, National Human Rights Institutions, National Preventive Mechanisms and Children's ombudspersons. This is to be done by a variety of communication channels, by creating a website and a database as well as by a regular newsletter and other advocacy and communication tools.

## Concluding thoughts:

The European region provided the most comprehensive set of replies to the Global Study questionnaire. However, the data collection efforts revealed many disparities between States. The largest disparities in the replies to the questionnaire were observed in the area of migration related detention of children. On average, European countries replied to 50% of the questions which indicates that more needs to be done in improving the data collection efforts, at the very least in regard to migration related detention.

Many countries in the region mentioned specialised children's courts<sup>25</sup> as well as family courts,<sup>26</sup> minor sections within national courts<sup>27</sup> or specialised children's judges.<sup>28</sup> At the European regional level, progressive guidelines on child-friendly justice have been adopted by the Council of Europe's Committee of Ministers in 2010, based also on direct consultation also with children, and which have become an influential tool for further standard-setting and implementation.<sup>29</sup> The Guidelines reconfirm fundamental child rights principles and provide standards for child-friendly justice before, during and after any type of judicial proceedings, including in relation to detention; here, specific attention is paid inter alia to the child's right to regular contacts to the outside world and to pre-release preparation programmes. The Guidelines have been widely disseminated and taken into account in judgments by the European Court of Human Rights,<sup>30</sup> as well as in European Union legislation. In this regard, reference should be made to the EU directive 2016/800/EU on special safeguards for children

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<sup>25</sup> *UN Global Study Questionnaires*: Croatia (UNICEF), Czech Republic (State Reply), France (State Reply & NGO Reply: Grandir Dignement), Germany (State Reply), Greece (State Reply), Ireland (State Reply), Italy (State Reply), Portugal (State Reply).

<sup>26</sup> UN Global Study Questionnaire, Austria (State Reply).

<sup>27</sup> UN Global Study Questionnaire, Spain (State Reply).

<sup>28</sup> *UN Global Study Questionnaire*, Belgium (State Reply), Croatia (State Reply), France (State Reply & NHRI Reply), Russia (State Reply).

<sup>29</sup> CoE, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, 17 November 2010, Available at <https://www.coe.int/en/web/children/child-friendly-justice> (accessed 10 June 2019); see also the extensive documentation on relevant CoE action in CoE, *Report to the UN Global Study on Children Deprived of Liberty*, 2018.

<sup>30</sup> Cf. for relevant case law, CoE (2018), *op. cit.*, and the HUDOC database of case-law of the European Court of Human Rights, Available at <https://hudoc.echr.coe.int/> (accessed 7 August 2019).

suspected or accused in criminal proceedings,<sup>31</sup> which requires the child's access to legal assistance from the earliest point of investigations and proceedings and which contains limitations concerning deprivation of liberty, the provision of 'alternative measures' and safeguards for children while in detention. There is a comparatively low number of children in detention in the context of the administration of justice compared to other regions due to the introduction and strengthening of special child justice mechanisms, diversion as well as strict jurisprudence of European Court of Human Rights and regular monitoring by Committee for the Prevention of Torture.

Within the Council of Europe (CoE) framework, significant instruments, principles, standards, guidelines, and actions have been adopted to support member States in upholding the rights and needs of children with detained or imprisoned parents. It is generally recognised that while it is not desirable to have children living in adult places of detention, it is nevertheless essential to consider the possible negative impact on children of separating them from an imprisoned parent. This is highlighted already in paragraph 5 of the Parliamentary Assembly (PACE) Recommendation 1469 (2000) on Mothers and Babies in Prison,<sup>32</sup> inviting States to take a range of basic actions. In setting out minimum requirements for the treatment and detention conditions of inmates, the European Prison Rules (EPR), as revised in 2006, broadly address the situation of infants staying with their imprisoned parents.<sup>33</sup> consensus on taking the special needs of women with babies in prison into consideration is expressed in the PACE Resolution 1663 (2009) on Women in Prison, which puts emphasis on human rights considerations particularly in paragraph 9. A new tool to raise awareness and promote action by member States and fostering shifts in how children of prisoners are seen and treated (directly or indirectly) is the CoE Committee of Ministers' Recommendation CM/Rec(2018)5 concerning children with imprisoned parents. It aims to ensure that children can maintain meaningful contact with their parents, also addressing the situation of 'infants in prison' with a parent and making explicit the relevance of children's rights to guidance on how to provide for and treat prisoners.

Over the last decade, hundreds of large scale institutions for children have been closed and replaced with family-based alternatives in Europe and Central Asia. There has been positive progress in de-institutionalization and noticeable decline in the rate of children in institutional care. Some of the positive examples include the reform of child care systems in Bulgaria, Croatia and Romania which show significant progress in creating a comprehensive legal framework aimed to improve the quality of care. In Montenegro, Serbia and Turkey there has been notable progress in transforming, closing down or downscaling residential institutions. In the Eastern Neighborhood countries such as Azerbaijan, Georgia, Moldova, Ukraine and Belarus), child care reforms are taking place in a less decentralized context, as funds for child care are still to a large extent concentrated at central levels of government. Although much has been done in the deinstitutionalisation efforts, children with disabilities are still overrepresented in institutional care across Europe and Central Asia. Children from marginalized groups, such as the Roma, are also vulnerable to being placed in institutional care. There is still a need to incorporate a multi-sectoral systems approach whilst

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<sup>31</sup> For further information, cf. European Commission, *Children in judicial proceedings*, Available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en) (accessed 10 June 2019).

<sup>32</sup> See Social, Health and Family Affairs Committee of the PACE, *Report 'Mothers and Babies in Prison'*, Doc. 8762, 9 June 2000: Summary, arguing the need of a new approach for those few mothers of young children who commit serious offences and represent a danger to the community, but also that the overwhelming majority of female offenders with young children should be managed in the community.

<sup>33</sup> Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, Rec(2006)2, 11 January 2006.

systematically closing large scale institutions housing children with disabilities and other marginalised groups. Last but not least, child care reforms should take place in a more decentralised context. In this context it would be advisable if the European Court of Human Rights, in its jurisprudence regarding the detention of children for the purpose of educational supervision as authorized by Article 5(1)(d) ECHR, would take the stricter standards of Article 37(b) of the CRC into account, which is binding on all member States of the Council of Europe.

As numerous European initiatives portray, the issue of migrant children in detention is of particular concern to the Council of Europe. Since April 2015, the Parliamentary Assembly has been campaigning to end the immigration detention of children, and the Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019) has prioritised measures to avoid resorting to the deprivation of liberty of children on the sole ground of their migration status. The European Court of Human Rights has repeatedly found that immigration detention of children constitutes inhuman and degrading treatment.<sup>34</sup> Similarly, the Committee for the Prevention of Torture (CPT) has stated that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a child.<sup>35</sup> The Commissioner for Human Rights has called for the abolition of child detention in the migration context,<sup>36</sup> and the Special Representative of the Secretary General on Migration and Refugees has stated that immigration detention of children is never in the best interests of the child and that the lack of alternatives to detention is one of the most damaging structural problems.<sup>37</sup> It is commendable on the achievement of recommendation on Effective guardianship for unaccompanied and separated children<sup>38</sup> in the context of migration which sets clear guiding principles for putting at the forefront the protection, assistance and safety of children in migration through guardianship. The prompt appointment and the role of guardians is paramount for acting in the best interest of the child and in line with the Global Study recommendations. Nevertheless, it is important to note there still seems to have been limited progress in abolishing migration related detention of children in Europe. The only state that prohibited the immigration detention of children in asylum and return procedures is Ireland. Much more efforts are needed to abolish this type of detention in line with the recommendations of the Global Study. As was suggested in the previous section, the Council of Europe could take a pioneering role worldwide in this respect, together with the European Union.

In regard to national security related detention many laws that criminalize children under very strict national security and ant-terrorism legislation. The Global Study recommends that children associated with armed and terrorist groups should be treated primarily as victims and not as perpetrators. Under international law, the recruitment of children by non-State armed groups is always illegal. Yet some countries have criminalised mere association or membership with organisations designated as terrorist, including in cases involving children, even if no other crime has been committed.<sup>39</sup>

European States should also be more pro-active to get children, who are their own citizens, back from Syria and Iraq for the purpose of rehabilitation and resocialization, rather than

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<sup>34</sup> See, for example, ECtHR, *A.B and Others v. France*, No. 11593/12, 12 July 2016

<sup>35</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 19th General Report of the CPT's activities, October 2009, para. 97.

<sup>36</sup> Council of Europe, Commissioner for Human Rights, *High time for states to invest in alternatives to detention*, January 2017.

<sup>37</sup> Council of Europe, Special Representative of the Secretary General on Migration and Refugees, *Thematic Report on migrant and refugee children*, SG/Inf(2017)3, March 2017.

<sup>38</sup> Recommendation CM/Rec(2019)11 of the Committee of Ministers (2019)

<sup>39</sup> United Kingdom, *Terrorism Act 2000*, 2000, Section 11.

prosecution. A positive example is in the Netherlands, where child protection boards create a return plan for children returning from conflict-affected areas. The plan covers who will take care of the child, what kind of professional care the child should receive, which school is best positioned to take the child, and what safety measures, if necessary, should be taken to ensure both the safety of the child and his or her environment. An individual officer maintains regular contact with family members of the child, and the local municipality is responsible for ensuring that the conditions of the return plan are met.<sup>40</sup> Furthermore, in Switzerland children returning from Syria or another conflict area who may have been associated with a non-State armed group designated as terrorist are handled by the prosecutor's office of the Swiss canton in which the young person resides. Whether a child requires special educational care or therapeutic treatment is determined on a case-by-case basis. Irrespective of whether the child is responsible for the commission of a crime, various protective measures can be selected according to the child's needs, such as supervision, personal care, outpatient care or accommodation. If the culpability of the child is ascertained, penalties can take the form of an admonition, a personal work order, a fine, or deprivation of liberty.<sup>41</sup>

Despite the improvements that have occurred, States and the international community still have to do a great deal more in order to ensure the full protection of children deprived of liberty. As I have stated in my introduction, **depriving a child of liberty, is to deprive that child of his/her childhood.** The Council of Europe has played a significant role in supporting the global study from the onset and is positively positioned to play a strong role in the dissemination and implementation of the study recommendations within its member's states as well as supporting the follow-up initiation. Most importantly the Council of Europe and its members can play a significant role in advocating for a strong process and mechanism internationally as well as support the implementation of the recommendations nationally within its member States on the regional and local levels.

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<sup>40</sup> Information from the United Nations Office of Counter-Terrorism, April 2019.

<sup>41</sup> UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, 2017, p. 80.