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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

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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.*

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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.

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