



Migrant children in detention Law Vs. Member States' practice

Intensive Training Course “International protection and rights of minors in the European Union”

Jean Monnet Module MARS – “Migration, Asylum and Rights of Minors”



International human rights, European legal framework and standards between hard and soft law

Alfonsina Ciccarelli

International Level

On detention, **International human rights law** is clear :

- It should have a **clear legal basis** in national law,
- It should only be used as **last resort measure**, for the **shortest possible period of time** and can only be justified where it is necessary, reasonable, and proportionate to the legitimate purposes to be achieved, and;
- It is only permissible after less coercive alternatives have been found not to be suitable in each individual case.

This will require an **individual assessment** in each situation:

- If decided by an administrative body or enforcement agency, it must be reviewed as soon as practicable by a judicial authority
- It must be periodically reviewed by a judicial authority and discontinued if it appears
- there is not anymore any reasonable perspective of enforcement of the removal.

United Nations Convention on the Rights of the Child (CRC)

In the case of children, CRC prescribed in its **Article 37** that “no child should be deprived of his or her liberty unlawfully and arbitrarily”. Article 3 further states that “in all actions concerning children ... the best interests of the child shall be taken into consideration.” While these legal requirements do not prohibit child immigration detention, over the years, **the CRC has further clarified the standards that should be applied and have come to the following conclusions:**

- **Children should never be detained for migration-related purposes**
- **Alternatives to detention need to be found for them and their families**
- **The right to family life must be respected**

The Inter-American Court of Human Rights in the Advisory opinion OC-21/14 Par.154 and 158

Rights and guarantees of children in the context of migration and/or in need of international protection (adopted on 19 August 2014), **the Court reminds states the CRC 3 Key conclusion and underlines that the “*deprivation of liberty of a child in this context (migration) can never be understood as a measure that responds to the child’s best interest*”**

Conclusion

There seems to be a **clear consensus**, especially among various UN Bodies and agencies, that **children should not be detained**, whether they are unaccompanied or with their families and regardless of their or their parents’ migration status. Therefore, states need to ensure that non-custodial, community based alternatives are found. Through the December 2016 **New York Declaration for Refugees and Migrants**, UN member states have committed themselves to working towards ending this practice. This commitment has been further reaffirmed in the inter-governmentally negotiated and agreed **United Nations Global Compact on Migration** on 13 July 2018.

In conclusion, despite such consensus, among these bodies, agencies, and soft law international instruments two different approaches on the issue are emerging:

- a most severe and **unconditional condemnation of the detention for migrant children**, on the one hand (the **Inter-American Court of Human Rights, Special Rapporteur on the human rights of migrants, Committee on the rights of the child+Committee on the right of migrant workers**);
- on the other hand those **who condemn** as well children detention, **but do not exclude *per se*** the possibility to employ it , but it **should be seen as a last resort instrument (Human Rights Committee, Global Compact on Migration)**.

EUROPEAN LAWS, POLICIES AND STANDARDS

EUROPEAN UNION LEVEL

Under EU asylum and migration law, individuals can be detained for immigration-related reasons, either as asylum applicants in order to ensure transfer under the Dublin Regulation procedure, or as irregular immigrant or stayer in order to enforce their actual return.

The Reception Conditions Directive (2013/33/EU Art. 8) and the Return Directive (2008/115/EC Art. 15) include specific provisions for member states to follow in their treatment of children and both underline **the need for the children's best interests to be a primary consideration**. Both emphasise that children are to be detained **only as a last resort and only if less coercive measures cannot be applied effectively**. Such detention must be for the **shortest period of time possible and**, in the asylum context, all efforts must be made to release those detained and to place them in **accommodation suitable for minors**.

Currently, the implementation of EU migration management strategies is standardising the use of detention at borders. Rather than a measure of last resort, detention is increasingly used as a first response in border procedures and the “hotspot approach”, during accelerated procedures for persons with “unfounded asylum claims”, and as a sanction for secondary movements contrary to the Dublin system.

Detention of migrant children in the New Pact on Migration and Asylum

[Human rights organisations](#) raise several serious concerns regarding the new measures proposed. They are particularly concerned with the proposed **procedures at borders**. **Both pre-entry screening and border procedures may lead to the prolonged detention of children.** Whilst some children are excluded from the border procedure, none are excluded from the pre-entry process. This means that **all children arriving to the EU irregularly could end up being detained for up to ten days, and in the worst-case scenario, which concerns children aged 12-18 travelling with families, children would be detained also within the border procedures, which could last up to ten months in situations of so-called “crisis”.** **This is the first time under EU law that immigration detention of children could become the rule rather than a measure of last resort.**

EUROPEAN LAWS, POLICIES AND STANDARDS

EUROPE LEVEL

The European Convention on Human Rights (ECHR) does not contain specific provisions regarding the detention of children. However, on many occasions, the European Court of Human Rights, through **its case law** has recalled that the extreme vulnerability of a child was a paramount consideration and takes precedence over their immigration status. **States have an obligation to give primary consideration to the best interests of the child and provide appropriate care for their specific needs, including alternatives to detention, so as to not create a situation which would cause stress and anxiety, with particularly traumatic consequences.**

The Committee of Minister has emphasised that **the detention of asylum seekers should be the exception**. In May 2017, the Committee adopted an Action Plan on protecting refugee and migrant children. One of the Action Plan's pillars focuses on providing effective protection to children with one of the objectives being to avoid resorting to the deprivation of their liberty on the sole ground of their immigration status. One of the proposed measures includes guidance and training on alternatives to detention

The Parliamentary Assembly (PACE) In its [Resolution 2020](#) recalls its position: “**unaccompanied children should never be detained** and that the detention of children on the basis of their or their parents' immigration status is **contrary to the best interests of the child and constitutes a child rights violation**. PACE has called on the member States to: introduce legislation prohibiting the detention of children for immigration reasons and ensure its full implementation in practice. Governments should adopt alternatives that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved”.

Conclusion

In conclusion, when comparing International and European laws and policies, one can make the following observations:

- **At international level**, there seems to be a growing consensus that children, whether they are unaccompanied or with their families, should not be detained. **UN Child rights experts have explicitly called for a ban of the practice and, at UN level, States have committed to working towards ending it.**
- **At European level, the Council of Europe** has also been pushing towards **ending detention and focusing on alternatives.**
- **At European Union level**, there an emerging gap between EU law on the one hand, and international human rights standards and the Council of Europe's position on the other. **While EU law puts limitations** on the detention of children in the context of migration, **it does not prohibit it.** Despite this, over the past year, the **EU has put a stronger emphasis on the need to implement alternatives.** However, it stopped short of prohibiting it at a time where EU laws are being reformed.



The Situation in Europe

Giulia Pelizzo

- **Immigration detention:** any setting in which children are deprived of their liberty for reasons related to their migration status or that of their parents, both unaccompanied children and children detained together with their parents
- **Precise data are missing:** major differences in how child migration and the detention of children are defined and measured from State to State. Data sources are often not comparable across countries (i.e: they use different age ranges, methods of counting or definitions and many states do not have disaggregated data or data on the irregular migrant population)
- **No precise overview of trends over time:** it is also difficult to monitor whether changes occur over time as there is not a consistent trend across European countries.(i.e: significant reduction in the Uk from 1.119 children detained in 2009 to 63 in 2007 v. Hungary which recorded an increase from 255 in 2015 to 1254 in 2017).

The global scale of child immigration detention

According to the UN Global Study on Children Deprived of Liberty (2019) 80 countries around the world detain children for migration purposes while 24 do not - or claim not to.

- The UN Global Study developed statistical models to estimate missing values and calculated that at least **330.000 children** may be deprived of liberty for migration-related purposes around the world per year.
- It may be an **under-estimation** of the true figure due to the lack of consistent information.
- Moreover, children detained with parents but not subject to detention order themselves, children held in *ad hoc* temporary arrangements, at border posts or police stations or children deprived of liberty pending the age assessment/during age assessment review are **not always counted** in statistics.

Europe

- In Europe, immigration detention of children is **employed extensively**
- It is allowed in 40 European countries
- One EU Member State (Ireland) prohibited the immigration detention of any children in asylum or in return procedures
- In several States there are **limitations** on who can be detained (ie: in Austria children above 14 years old can be detained for up to three months but children under the age of 14 cannot be detained, in Czech Republic, Finland, Latvia and Poland children under the age of 15 cannot be detained)
- Certain States prohibit the immigration detention of **unaccompanied or separated children** but allow children to be detained with their parents



Gaps between laws, policy and practice

Giulia Pelizzo

Duration of Deprivation of Liberty

- Detention should be allowed only for the **shortest period of time**
- In practice, detention can last **from few hours to several months**, in most cases detention does not go beyond 15 days.
- The length of detention depends on **several factors**: the EU Member State, whether the child is travelling alone or with parents, the child's age, the type of procedures the child is involved in and considerations of public order or national security.
- In certain States (i.e: Switzerland) a distinction is made between temporary detention for identification reasons and detention in preparation for departure that can last several months. In others (i.e: UK) there is a difference between unaccompanied children (max 24h) and the detention of families with children.

Places of Detention

*police stations,
airports, border posts or
ports of entry, ordinary
prisons,
hotspots, reception and
identification centres,
retention centres,
detention centres,
immigration centres...*

In **Finland** detention of children in police stations or border guard facilities is forbidden.

- According to the recommendations of the Human Rights Committee, the Committee on Migrant Workers, The Committee against Torture (among others) facilities should be **specifically adapted** for the accommodation and care of children
- In practice, immigration detention take place in a range of different facilities, at borders or inside a State's territory.
- Abusive conditions are common, especially in **facilities not specifically organised for children.**
- Sometimes children are detained with **unrelated adults** in violation of the international prohibition of this practice.

Justifications for detention of migrant children

- **Identification:** temporary detention for identification purposes or in order to clarify which action should be taken (usually not more than maximum 72 hours by law)
- **Error:** a failure in the identification/age assessment can lead to detention as the child may be treated as an adult (i.e: erroneous recording of a child's age during Frontex-supported screening or by other State's authorities when a child is unable to prove his/her age)
- **Age-assessment:** deprivation of liberty **pending age determination** (i.e. Belgium) or when during age-assessment procedures adulthood is presumed (i.e: Hungary and Slovakia)
- **Asylum purposes** (i.e: accelerated procedures)
- **Return or removal** procedures: detention of children allowed in 19 EU States, while is prohibited in 9
- **Lack of alternatives:** children may be housed in closed facility
- **Family Unity:** children may not always be subject of a detention order but may be deprived of liberty to keep them with their parents
- **Protection:** inappropriate use of detention as a mean to protect children from exploitation/trafficking or from them going missing
- **Criminal Procedure:** immigration detention may also involve a **criminal procedure**, where irregular entry or stay is considered a criminal offence (ie: Russia, Hungary)



The alternatives to detention

Margherita Gambi

Refugee, asylum seeking and irregular migrant children are, first and foremost, children. The **UN Committee on the Rights of the Child** (CRC Committee) has stated that: *The detention of a child because of their or their parents migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status. Further, the detention of a migrant child to maintain family unity may violate the principle of the best interests of the child, the child's right to be detained only as a measure of last resort, and the right to not be punished for the acts of his or her parents. Alternatives should be applied to the whole family, with detention only in very exceptional circumstances, and forced separation from their parents should also be spared.*

The **Convention on the Rights of the Child** lists several human rights standards that must be observed for reception or alternatives to detention for children:

- *The right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27);*
- *Access to alternative care arrangements, including foster care (Article 20);*
- *Appropriate protection and humanitarian assistance (Article 22);*
- *The right to education (Articles 28, 29, 30 and 32);*
- *The right to the highest attainable standard of health (Article 24);*
- *Protection or treatment of mental and physical health (Article 25) and social reintegration and recovery (Article 39);*
- *Special assistance for mentally and physically disabled children (Article 23);*
- *The right to an adequate standard of living (Article 27);*
- *The right to benefit from social security (Article 26);*
- *The right to rest and leisure (Article 31), and enjoyment of the child's own culture, practices and religion (Article 30).*

Important guidelines about alternatives to detention for minor children:

- *UNHCR, Refugee Children Guidelines on Protection and Care*
- *UNICEF, Alternatives to Immigration Detention of Children First” - 2019*
- *INTERNATIONAL DETENTION COALITION, There are alternatives: a handbook for preventing unnecessary immigration detention*

UNICEF working paper “Alternatives to Immigration Detention of Children First – 2019”

Highlights:

In many cases, when making decisions about possible migration, children and families do not have adequate information or access to in-country processes and systems for asylum claim or regular migration planning, and resort to irregular migration, which can place them at risk of detention. The greater the number of safe, regular means of migration that are available to individuals, the less likely children are to make unsafe journeys and resort to irregular and/or unsafe migration.

The Responsibility to Protect Migrant and Refugee Children is upon authorities (border guards/migration officers, refugee authorities, police and security forces). As has been stated by the CRC Committee and the Migrant Worker Committee, once a migrant child (accompanied or unaccompanied) has been detected, child protection or welfare officials should immediately be informed, and take responsibility for screening the child for protection, shelter and other needs.

Special Measures for Unaccompanied and Separated Children: the key mechanisms that states can put in place to prevent detention are referral to national child protection authorities, and provision of a guardian. An unaccompanied and separated child should be accorded the same protection, support and care that any national child deprived of parental care would be offered.

Care arrangements for **unaccompanied or separated children** can be grouped into three broad categories: *family-based care*, *community-based placement* and *residential care*.

For **children traveling with family members**, organizations such as UNHCR, the International Detention Coalition and others have implemented a range of setting solutions that include:

- 1) *Supported community placement*;
 - 2) *Bail schemes*: where the migrant family pays a financial bond which will be forfeited if they do not comply with agreed-upon-requirements such as court appearances, participation in immigration proceedings hearings;
 - 3) *Guarantors and sponsors*: individuals or community organizations agree to be responsible for the care and supervision of the migrant family in the community, sometimes including help for housing, clothing and food, as well as social and emotional support. The guarantor also agrees to guarantee that the migrant will attend immigration proceedings hearings as required.
 - 4) *Placement with host families*;
 - 5) *Foster care placements*, in those strict cases where the child cannot be cared for by his/her parents.
- Many states choose to implement a mixture of such measures. The key in the success of these schemes is case management, support and information for families.

UNICEF final recommendations:

1. Develop National Action Plans to end immigration detention of children and their families
2. Invest in inclusive child protection systems
3. Invest Overseas Development Assistance into building and strengthening alternatives to detention
4. Provide clear information
5. Ensure host community support
6. Strengthen referral networks to avoid any referral into detention

INTERNATIONAL DETENTION COALITION (IDC) “There are alternatives: a handbook for preventing unnecessary immigration detention”

IDC is a global network of over 300 civil society organisations and individuals in more than 70 countries that advocate for, research and provide direct services to refugees, asylum-seekers and migrants affected by immigration detention.

The IDC’s approach to alternatives:

- Do not apply only to vulnerable individuals such as children or refugees
- Do not refer only to accommodation models
- Do not necessarily require the application of conditions such as bail/reporting
- Do not refer to alternative forms of detention

The Handbook works to instrumentalise protections enshrined in international law and to strengthen systems so that:

- Detention is shown to be legal, necessary and proportionate in the individual case;
- Detention is only used as a last resort in exceptional cases;
- Community options are as effective as possible.

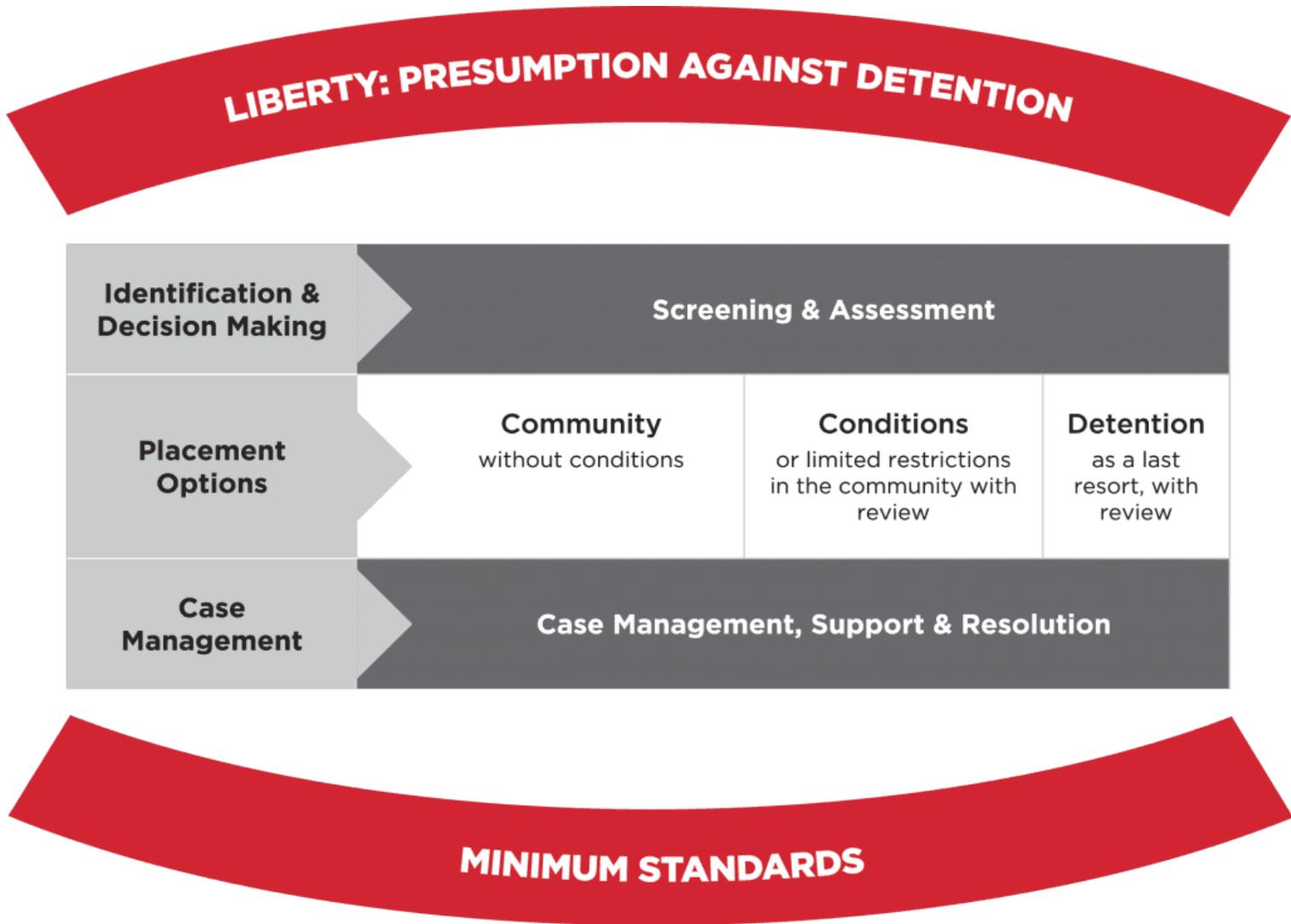
Benefits of alternatives:

- Alternatives are more affordable than detention: Alternatives have been shown to be up to 80% cheaper than detention
- Alternatives are more humane
- Alternatives are highly effective: Alternatives can achieve high compliance rates, achieving up to 95% appearance rates and up to 69% independent departure rates for refused cases.

The IDC's five-step Child-Sensitive Community Assessment and Placement model is designed to be applicable from the time that a child (or a person who is potentially a child) is discovered by authorities until the full case resolution. It articulates into:

- 1) ***Prevention***: this systemic aspect protects children from detention by establishing in law or policy that children should not be detained.
Screening,
- 2) ***Assessment and Referral***: within hours of coming into contact with a child, authorities must undertake a best interest assessment and place them in an appropriate community setting that takes into account age, gender and cultural background. This component includes screening the individual to determine their age (with a full age determination only when there are serious doubts), assigning a guardian to unaccompanied or separated children, allocating a caseworker to children who are travelling with their families, undertaking an intake assessment and placing the child and their family into a community setting.
- 3) ***Placement and Case Management***: it involves an exploration of the migration options available to the child and their family, a full best interest determination, and an assessment of the protection needs of the child and/or their family.
- 4) ***Reviewing and Safeguarding***: this step ensures that the rights of children and their best interests are safeguarded through regular independent review of any decisions taken including placement, conditions applied and legal status.
- 5) ***Case Resolution***: the realisation of a sustainable migration solution for the child and their family.

The Community Assessment & Placement (CAP) Model:





The case of France

Margherita Tommasini

Immigration detention of children

French legal framework

- The detention of minors, whether they are isolated or accompanied, is in **violation of domestic law** (article 28, Law of 10 September 2018)
- French law **prohibits** the removal of unaccompanied minors
- France has the **obligation to protect** minors until they reach adulthood

In practice...

- France has been repeatedly sanctioned for **detaining children and deporting unaccompanied foreign minors** after contesting their minority, most often by means of a bone age examination only.
- Law of 10 september 2018:
 - - extension of the maximum detention period from 45 days to 90 days (administrative detention centers)
 - - more explicitly provided for the **possibility of detaining children with their father and/or their mother**
 - ❖ between less than 2 years up
→ to 17 years old
 - ❖ from 2-20 days

Detention

| 2018 | | 2019 | |
|----------------------------|-----------------|----------------------------|-----------------|
| 1429 children detained | | 3380 children detained | |
| 208 in metropolitan France | 1221 in Mayotte | 279 in metropolitan France | 3101 in Mayotte |

In metropolitan France, family retention is mainly used “to facilitate” the logistical organization of the execution of Dublin transfers to European countries.

The situation in Mayotte is alarming: the mass confinement of children is aggravated by the virtual impossibility of recourse and by the illegal practice of the administration of entrusting children to child welfare while their parents were locked up or even deported.

Age assessment

Individuals claiming to be minors were often arbitrarily considered adults by the administration

- the date of birth giving them the age of majority had been **arbitrarily** assigned to them by the police or by the interpreter required during their hearing.

In **2018**,

339 minors between 12 and 17 years old were detained because the administration considered them to be adults.

Pas-de-Calais Prefecture alone is responsible for **42%** of these imprisonments of minors, most of whom were arrested as they tried to cross the Franco-British border

In **2019**,

264 minors have declared they were minor but were considered by the administration to be major and therefore detained.

Pas-de-Calais Prefecture alone is responsible for **25%** of these imprisonments of minors, most of whom were arrested as they tried to cross the Franco-British border.

- These practices have led to several convictions of France by the ECtHR.
- In five judgments issued on July 12, 2016, the European Court of Human Rights condemned France for **inhuman and degrading treatment** (art. 3), **violation of the right to liberty and security** (art.5) and **violation of the right to normal family life** (art.8) in its **treatment of foreign minors accompanying their parents in detention centers**. Sadly, the Court refuses to declare a general prohibition of detention of migrant children.

R.M. v. France, app. N°33201/11 R.C & V.C. v. France, app. N° 76491/14

A.B. v. France, app. N° 11593/12 R.K. v. France, app. N° 68264/14

A.M. v. France, app. N° 56324/13

- Recently, on 25 june 2020, the ECtHR found France accountable for eight violations of the European Convention on Human Rights and for inflicting **inhuman and degrading treatment on two children expelled from Mayotte without their parents**.

Moustahi v. France, app. n° 9347/14



The case of Spain

Ester Zangrandi

Detention of migrant children in Spain

Looking back at 2020

The Spanish legal framework

- According to Spanish law, children **shall not** be detained as a rule.
- Detention of asylum seekers and vulnerable categories, including unaccompanied children, is **not explicitly allowed** by law.

The reception system in practice

Difficulties in identification and age assessment:

- Children placed in *de facto* detention centres waiting for age assessment.
- Children declaring themselves as **adults** in Ceuta and Melilla.

Maximum detention period for adults

| | |
|------------------------------------|----------|
| Police facilities | 72 hours |
| Foreigners Detention Centres (CIE) | 60 days |
| Border detention facilities | 8 days |

In 2020, Spain **emptied** its Foreigners Detention Centres (CIE) in response to the Covid crisis.

In the meantime, arrivals were mounting in the **Canary Islands** and lockdown was imposed on the detention centres of the **Spanish enclaves**.

Ceuta and Melilla

April 2020:

- Temporary Stay Centres (CETI) placed under **lockdown**.
- Spain's Ombudsman deplores the **plight of children** hosted in the CETIs.
- The CETI in Melilla running at more than **200%** of its capacity.



Migrants walking towards a bus to cross the Strait of Gibraltar, Melilla | Photo: EPA/F.G.Guerrero

August 2020:

- New **lockdown** imposed on the CETI in Melilla.
- The centre hosted more than 1,400 people, including **143 children**.
- Lockdown measures lifted following **court ruling**.



Migrants and Spanish police forces at the Ceuta-Melilla border, 2018 / Photo: EPA

The Canary Islands

- Eight fold increase in arrivals: **23,023** in 2020, up to 2,687 in 2019.
- COVID-19 emergency: deportation flights and transfers to the mainland **suspended**.
- Overwhelmed reception facilities: people **stranded** at docks and ports.

In October 2020, a two-year old child was **separated** from its mother at their arrival in a registration point in Gran Canaria. The toddler was transferred to a centre for unaccompanied minors in order to wait for **DNA testing results**. The separation was carried out following an order by Las Palmas Prosecutor's Office on **verifying parenthood** and preventing potential child trafficking

The same procedure was reportedly used in **five other cases within the same week** in Gran Canaria. Even more worryingly, the collective Caminando Fronteras reported cases of **separation that lasted up to six months** and included very young children.

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