

The 17th Kilbrandon Lecture (University of Strathclyde, 30 January 2020): The UN Global Study on Children Deprived of Liberty - Deprivation of liberty is deprivation of childhood

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Significance, history and challenges of the Global Study

I am very honoured to deliver the 17th Kilbrandon Lecture in paying tribute to the achievements of Lord Kilbrandon and the Scottish Children's Hearing System today in this beautiful lecture hall. My lecture will deal with one of the most important human rights of children, their right to personal liberty. Since children are in their formative years, they need freedom to develop their talents, skills and their personality. That is the main reason why Article 37(b) of the UN Convention on the Rights of the Child (CRC) established for the right to personal liberty a much higher standard than for adults. While adults may be arrested and detained for various reasons under the sole condition that such deprivation of liberty is in conformity with domestic law and non-arbitrary, the CRC adds that the arrest and detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time. This means that children shall only be detained in truly exceptional circumstances, when non-custodial solutions are definitely not appropriate.

In contrast with these high legal standards, which have been accepted as legally binding by all States of the world with the only exception of the United States, the UN Global Study on Children Deprived of Liberty (Nowak, 2019), hereinafter referred to as the 'Global Study', found that more than seven million children are currently deprived of liberty in various situations. Deprivation of liberty is one of the most severe and most overlooked violations of children's human rights. It exposes children to various forms of physical, mental and sexual violence, seriously hampers their right to develop their personality and their emotional relationship with others, and leaves a deep mark in their lives and in society as a whole. Deprivation of liberty of children is a form of structural violence in violation of Goal 16.2 of the Sustainable Development Goals (SDGs)¹ and in fact deprives children of their childhood.

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

The 17th Kilbrandon Lecture (University of Strathclyde, 30 January 2020): The UN Global Study on Children Deprived of Liberty - Deprivation of liberty is deprivation of childhood

The Global Study on Children Deprived of Liberty has been preceded by two earlier UN global studies related to the rights of children. Graca Machel (1996) published a UN Report on the Impact of Armed Conflict on Children, which led to the appointment of a Special Representative of the Secretary-General on Children in Armed Conflict. This Global Study and its related follow-up mechanism had a profound impact on the global awareness about the fate of child soldiers and prompted the General Assembly, the Security Council and other UN bodies to take a variety of measures aimed at reducing the phenomenon of child soldiers and at strengthening the rights of children recruited into the armed forces. These measures had a considerable impact on the lives of millions of children around the globe.

Paulo Sérgio Pinheiro (2006) published the UN Study on Violence against Children, which led to the appointment of a Special Representative of the Secretary-General on Violence against Children. This Global Study dealt with the suffering of children exposed to physical, mental and sexual violence in the family, in educational settings, in the streets and the wider community, in prisons and similar situations. It concluded that violence is most severe when children are deprived of liberty in prisons, police custody, educational and other closed institutions. The Pinheiro Study and its follow-up mechanism raised the global awareness that violence against children, in whatever setting and for whatever reason, is never in the best interest of the child and can never be justified. As a consequence, many States adopted special laws that abolish corporal punishment of children and prohibit violence against children in every situation, including in the family.

Shortly after the publication of the Global Study on Violence against Children, Non-Governmental Organisation (NGOs) started to campaign for another Global Study on Children Deprived of Liberty, which was also considered as a follow-up to the Pinheiro Study. In May 2014, the Committee on the Rights of the Child (CRC-Committee) sent a formal letter to the UN Secretary-General supporting this initiative, and in December 2014, the UN General Assembly (GA) invited the Secretary-General to commission an in-depth Global Study on Children Deprived

The 17th Kilbrandon Lecture (University of Strathclyde, 30 January 2020): The UN Global Study on Children Deprived of Liberty - Deprivation of liberty is deprivation of childhood

of Liberty.² In 2015, a UN Inter-Agency Task Force, composed of the most relevant UN agencies and offices, was established under the chair of the UN Special Representative on Violence against Children, Marta Santos Pais, which developed the terms of reference and a budget for the Global Study and which selected an Independent Expert to lead this complex process. Since the GA Resolution, unfortunately, had decided that this Global Study needed to be funded entirely through voluntary contributions, the UN Deputy Secretary-General, Jan Eliasson, launched in September 2016 an official funding appeal to all UN member States to raise the roughly 4.7 million USD foreseen in the budget. This amount included the funding of a professional secretariat in the Office of the UN High Commissioner for Human Rights (OHCHR) in Geneva. In October 2016, I was officially selected as Independent Expert leading the Global Study for a period of two years when the Study was expected to be presented to the GA.³

When I was appointed, Switzerland was the only State that had made a financial contribution to the OHCHR for the Global Study. With these funds, one professional officer could be financed in the OHCHR, and I travelled to Geneva, New York and other cities to inform States and civil society about the aims and financial needs of the Global Study. In March, I hosted a first high-level expert meeting at the headquarters of the Global Campus of Human Rights in Venice,⁴ at which we finalised a questionnaire to be sent to all UN member States, UN agencies, National Human Rights Institutions (NHRIs), NGOs and other stakeholders. Shortly thereafter, I was informed by the OHCHR that the funds so far provided were no longer sufficient to translate and distribute the questionnaire to member States. After consultations with civil society and with

² UNGA Res. 69/157 of 18 December 2014, § 52(d), which decided to invite the Secretary-General to commission an in-depth global study on children deprived of liberty, funded through voluntary contributions and conducted in close cooperation with relevant UN agencies and offices, and in consultation with relevant stakeholders, including States, civil society, academia and children.

³ UNGA Res. 71/177 of 19 December 2016, § 88.

⁴ At that time, the Global Campus of Human Rights was still called European Inter-University Centre for Human Rights and Democratisation (EIUC). The name was officially changed in February 2019.

the two academic institutions I had the strongest links with, namely the Ludwig Boltzmann Institute of Human Rights in Vienna and the Global Campus of Human Rights in Venice, I decided to start an emergency fundraising campaign to save the Global Study. Until the end of 2017, we managed to raise a total of one-fifth of the original budget, roughly 1 million USD from a small number of States (Austria, Germany, Liechtenstein, Malta, Qatar) and other donors, such as the European Union, UNICEF and a private foundation. This enabled us to continue the work on the Global Study, albeit with extremely limited financial resources. We had to relocate the secretariat and co-ordination of the Global Study from the OHCHR in Geneva to the Boltzmann Institute in Vienna and had to rely to a considerable extent on *pro bono* contributions from a variety of individuals from civil society and academia. Without the active support and voluntary work of an NGO Panel comprised of 170 NGOs, led by Defence for Children International (DCI) and Human Rights Watch (HRW), an Advisory Board of 22 highly renowned experts under the chair of Ann Skelton from the University of Pretoria, and many other academics and researchers from the Global Campus of Human Rights and other academic institutions, we would not have been able to prepare the Global Study.⁵ Finally, in spring 2019, we signed a partnership agreement between the Global Campus of Human Rights (GC) and the Right Livelihood Foundation (RLF), which greatly facilitated the finalisation of the Global Study (editing, infographics, statistics, lay-out etc.) and its dissemination at various launch events. In fact, the RLF⁶ and another private foundation, which prefers not to be named, jointly provided more funds to the Global Study than all States and inter-governmental organisations together.

I explain the financial aspects of the Global Study in such detail, as it illustrates the difficult situation of the United Nations at a time when many Governments

⁵ I wish to express, once again, my most profound gratitude to my two closest collaborators at the Ludwig Boltzmann Institute of Human Rights in Vienna, Georges Younes and Manu Krishan, for their untiring support throughout the preparation and dissemination of the Global Study. The Acknowledgment Section of the Global Study (pp. X to XXIV) contains the names of all individuals to whom I am indebted for their valuable and usually *pro bono* contributions.

⁶ I also wish to express my sincere gratitude to Ursula Schulz-Dornburg, who provides the funds, and Ole von Uexküll, General Secretary of the RLF, for their invaluable support.

are imposing austerity measures on international organisations, question the advantages of multilateralism in general, and attack human rights! Without the active support of civil society, academia and private foundations, many activities of the United Nations would no longer be feasible!

In view of the funds which I had raised for the continuation of the Study process, the UN General Assembly extended my mandate in December 2017 for another year and requested me to present the Global Study in autumn 2019.⁷ In April 2018, we organised another expert meeting in Vienna, which inaugurated the Advisory Board of experts, established 10 research groups consisting of academia, UN agencies and NGOs, and finally started the substantive work on the Study. With the assistance of a small number of States (the 'Friends' of the Global Study), NGOs, regional organisations, academia and some UN agencies, we organised in 2018 a number of regional, national and thematic consultations in Bangkok, Paris, Addis Ababa, Pretoria, Belgrade, New York, Montevideo, Tunis and Montego Bay. As much as possible, we also included children in our consultations and conducted interviews with 274 children in 22 countries. In October 2018, I provided the UN General Assembly in New York with a progress report, and in March 2019, we organised a final expert meeting in Venice, where we finalised the substantive chapters. In July 2019, we prepared a short summary report (23 pages) to the General Assembly, which I finally presented in October in New York.⁸ The online and printed version of the fairly comprehensive Global Study (756 pages) was then finalized in November 2019 and presented to the United Nations in Geneva in the context of the celebrations on the 30th anniversary of the CRC.

With the generous financial support of the RLF, we also started a process of disseminating the Global Study worldwide and initiating a follow-up process aimed at the implementation of its recommendations by States and UN agencies. For this purpose, we organised bigger launch events in New York (October) and Geneva (November) as well as regional and national launch and dissemination

⁷ UNGA Res. 72/245 of 24 December 2017, § 37.

⁸ UN Doc. A/74/136 of 11 July 2019.

events in Sydney (October), Tokyo (November), Vienna (November) and Pretoria (December). Despite all these efforts by me and my teams in Vienna and Venice, the General Assembly only agreed on a very weak wording in its annual resolution on children's rights, which takes note of the Global Study without, however, providing for any follow-up.⁹ Nevertheless, we continue to plan further launches and dissemination events in 2020 in Brussels (February), Bangkok (February), Bern (March), Strasbourg (March), Rabat (April), Montevideo and Buenos Aires (May), Kathmandu and Nairobi, inspired by the hope that the United Nations and its member States would at a certain time realise the potential of the Global Study and the need for a proper follow-up.

Scope, objectives and contents of the Global Study

The main objectives of the Global Study on Children Deprived of Liberty were to assess the magnitude of this phenomenon, including the total number of children deprived of liberty (disaggregated by age and gender), as well as the reasons, the root causes, the types and length of deprivation of liberty, and the conditions in places of detention. The General Assembly also requested to document good practices of States who managed to reduce the number of children deprived of liberty as well as the views and experiences of children in detention. Like earlier studies, this Global Study also aims at raising awareness and promoting a change in stigmatising attitudes and behaviour towards children at risk of arrest or detention as well as children who are deprived of liberty. Finally, it should provide recommendations for law, policy and practice to safeguard the rights of children concerned, prevent the detention of children and significantly reduce the number of children deprived of liberty through effective non-custodial solutions guided by the best interests of the child. The ultimate aim of the Global Study was not so much to document conditions of detention with the aim of improving such conditions, but to address the root causes with the aim of significantly reducing the number of children deprived of liberty and preventing their arrest and detention.

⁹ UNGA Res. 74/121 of 18 December 2019. See UNDOC A/74/395 of 27 November 2019, pages 9, 14, 19.

From a legal point of view, the terms 'arrest' and 'detention' cover all forms of deprivation of liberty, whether in the context of the administration of justice or in other contexts, such as migration-related detention or deprivation of liberty in institutions.¹⁰ The term 'arrest' refers to the act of depriving personal liberty and generally covers the period up to the point where the person is brought before the competent authority. The term 'detention' refers to the state of deprivation of liberty, regardless of whether this follows from an arrest (police custody, pre-trial detention), a conviction (imprisonment), kidnapping or some other act. The term 'deprivation of liberty' means the forceful confinement of a person to a certain, narrowly bounded location (a room, house or bigger prison complex) which he or she cannot leave at will. It needs to be distinguished from restrictions of freedom of movement by legally requiring or forcing a person not to leave a certain larger area, such as a city, district, island or country. In defining the scope of deprivation of liberty, we applied the legal definition in Article 11(b) of the 1991 Havana Rules¹¹ and in Article 4 of the Optional Protocol to the UN Convention against Torture of 2002. Both provisions require that deprivation of liberty is the result of an order given by a public authority, or at least at its instigation or with its consent or acquiescence. This means that purely private forms of deprivation of liberty, including in the family, by traffickers or similar perpetrators of organised crime, are outside the scope of the Global Study. On the other hand, the placement of children in private prisons or institutions is covered by the Global Study, as this is done at the instigation of a public authority or at least with its consent or acquiescence when licensing such places of detention.

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

- Children deprived of liberty within the administration of justice
- Children living in prisons with their primary caregivers, usually mothers

¹⁰ See Global Study (note 1), 58 ff. and Manfred Nowak (2005, p. 160).

¹¹ UNGA, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, GA Res. 45/113 of 2 April 1991.

The 17th Kilbrandon Lecture (University of Strathclyde, 30 January 2020): The UN Global Study on Children Deprived of Liberty - Deprivation of liberty is deprivation of childhood

- Children deprived of liberty for migration-related reasons
- Children deprived of liberty in institutions
- Children deprived of liberty in the context of armed conflict
- Children deprived of liberty on national security grounds.

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

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

For all these topics, we needed to collect reliable empirical data from a variety of sources.¹² Most importantly, we designed and distributed a detailed questionnaire in all UN languages to all UN member States, National Human Rights Institutions (NHRIs), National Preventive Mechanisms (NPMs), ombudspersons, UN agencies as well as NGOs. There were 118 replies in relation to 92 countries in various languages covering quantitative as well as qualitative areas. With respect to quantitative data, we requested annual data on the number of children deprived of liberty in the six situations, disaggregated by age and gender, for the last 10 years as well as snapshot data on the number of children deprived of liberty at one specific date, namely 26 June 2018. While the responses to our questionnaire constitute the core of data stored in our database, these responses only covered less than half of UN member States and were often incomplete. We, therefore, needed to supplement these original data by a multitude of other reliable data from official government statistics, UN documents and statistics, States' reports to the CRC Committee, regional,

¹² On the study process and research methodology see Global Study (note 1), 14 ff.; on the methods of data collection and analysis see Global Study (note 1), 32 ff.

national and thematic consultations, commissioned studies as well as extraction of relevant data from peer-reviewed literature and other desk research. The collection, storage and analysis of all these data allow scientifically sound statistical estimates for the total number of children deprived of liberty in the different situations covered by the Global Study. On the other hand, I must stress that this data is far from complete, that our findings and conclusions are based on very conservative estimates and extrapolations, and that the figures presented in the Global Study shall, therefore, be treated as minimum estimates. Much more needs to be done by the United Nations and its member States as a follow-up to the Global Study to compile relevant data on an annual basis (ideally: snapshot data) in order to allow for a scientific analysis in measuring progress in the reduction of the number of children deprived of liberty.

Findings and conclusions of the Global Study

Magnitude of the phenomenon of children deprived of liberty

Our hope to compile reliable snapshot data on the total number of children deprived of liberty at a certain date only materialised with respect to a global (and highly conservative) estimate of the total number of children deprived of liberty in prisons and pre-trial detention centres, namely between 160,000 and 250,000. We, therefore, had to rely on annual statistics. In addition, we had to distinguish between *de jure* and *de facto* deprivation of liberty. According to the legal definition of deprivation of liberty outlined above, only children detained by virtue of a court order or a decision by an administrative authority are covered by our data analysis. For the administration of justice, the annual (highly conservative) figure of children deprived of liberty in prisons and pre-trial detention facilities has been estimated at 410,000. However, this figure does not include an estimated number of one million children who are annually arrested by the police and kept in police custody, usually only for a short period of time until the competent authority (prosecutors, judges) decides to place these children in pre-trial detention or to release them. Nevertheless, these children

are deprived of liberty at least *de facto* and are at risk of all forms of violence, ill treatment and traumatising experiences.

Even more difficult is to estimate the total number of children deprived of liberty in a broad range of institutions. When we distributed the questionnaire to member States, we explained that the term 'institutions' refers to: 'all public or private settings outside the justice system or the penitentiary administration, where children can be deprived of liberty for their own protection, for reasons of their education, health or disability, drug or alcohol abuse, poverty, for being separated from their parents, for being orphans, for living in street situations, for having been trafficked or abused, or for similar reasons – by action of the state (either directly or through licensing or contracting of non-state actors) – where the state has assumed or accepted responsibility for the care of the child.'¹³ If children are separated from their parents by a court order and placed in a closed institution for their protection, care and education, these children are *de jure* deprived of liberty. The same holds true if governmental authorities place children with disabilities or children with drug or alcohol problems in closed institutions for children with disabilities or in closed drug and alcohol rehabilitation centres. This is, however, not the case if parents of children with disabilities, learning difficulties or behavioural problems voluntarily place their children in public or private 'children homes'. These children are not legally deprived of liberty, but they also cannot simply leave these institutions of their own free will. They are thus *de facto* deprived of liberty. According to the Human Rights Committee: 'the placement of a child in institutional care amounts to deprivation of liberty within the meaning of Article 9' of the International Covenant on Civil and Political Rights.'¹⁴ Applying this strict standard means in fact that 5.4 million children are deprived of liberty per year in various types of institutions worldwide,¹⁵ whereas the total number of children *de jure* deprived of liberty in institutions was estimated to only amount to roughly 670,000

¹³ See Global Study (note 1), 504, note 8, with further references.

¹⁴ UN Human Rights Committee, General Comment No. 35 of 16 December 2014, UN Doc. CCPR/C/GC/35, § 62.

¹⁵ See Global Study (note 1), 502.

children. There is thus a significant gap between *de jure* and *de facto* deprivation of liberty of children in institutions! However, for the children concerned, it does not make a big difference whether they are deprived of liberty *de jure* or *de facto*, as they suffer conditions that are often characterised by strict discipline, lack of love, violence, sexual abuse and neglect. Of course, there are significant differences between large closed institutions and more open facilities, but our research clearly shows that placing children in facilities that fulfil the characteristics of institutions as defined in the Global Study, is inherently harmful to them. Although not every deprivation of liberty of children in institutions must necessarily amount to a violation of their right to personal liberty under Article 37(b) of the CRC, the Global Study in this respect fully endorses the global call for de-institutionalisation and advocates non-custodial solutions, such as keeping children as far as possible within their own families, or placing them in foster families, small group homes or similar family type settings.¹⁶

By also including children *de facto* deprived of liberty in our statistical estimates, the Global Study arrived at the conclusion that more than seven million children are currently deprived of liberty worldwide per year. According to the different situations of deprivation of liberty, the total number of children is as follows:

- 5.4 million children are deprived of liberty in institutions
- 1,410,000 children are deprived of liberty in the administration of justice
- 330,000 children are deprived of liberty for migration-related reasons
- 35,000 children are deprived of liberty in the context of armed conflict
- 19,000 children are living with their primary caregivers, usually mothers, in prison
- 1,500 children are deprived of liberty on national security grounds.

¹⁶ See also the UN Guidelines for the Alternative Care of Children, UNGA Res. 64/142 of 18 December 2009.

Institutions

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

Administration of justice

The second largest number of children deprived of liberty can be found in the administration of criminal justice, i.e. in police custody, pre-trial detention facilities and prisons. Detaining children in conflict with the law is not *per se* a violation of the CRC. However, the principle of a 'measure of last resort' in Article 37(b) CRC requires all law enforcement agencies, including the police, prosecutors, judges and prison administrators, to examine in each individual case whether proper non-custodial solutions are available and should in fact be applied. Article 40(4) of the CRC provides in this respect: 'A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are

dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.’ This means that diversion measures shall be applied at every stage of the criminal procedure: as alternatives to the arrest by the police; to a court decision leading to pre-trial detention; to a decision of a prosecutor to charge a child for a criminal offence; to a court judgment finding a child guilty of a criminal offence and a judgment sentencing a child to imprisonment; and finally to a decision of the prison administration when enforcing such judgments. At each of these stages, the competent authorities shall consider transfer of children from the criminal justice system to the child welfare system. This requires sophisticated instruments for structured inter-agency co-operation between the child welfare system, social protection, education and health systems on the one hand and law enforcement and justice systems on the other hand, to build comprehensive child protection systems and implement prevention and early intervention policies. Above all, there is a strong need to support families, communities, schools and child welfare systems to deal with children in conflict with the law.

There are a number of root causes and pathways leading to such a large number of children deprived of liberty in the context of the administration of justice.¹⁷ First of all, many States retain an excessively low age of minimum criminal responsibility. While the CRC Committee advocates that this age shall be raised to at least 14 years of age,¹⁸ more than 120 States maintain the minimum age at below 14.¹⁹ At 10 years, England, Wales, Northern Ireland and Ireland maintain the lowest minimum age of criminal responsibility in Europe. In Scotland, the recent increase to 12 years is still far below the European average of 13.6 years. Secondly, instead of prevention, States often rely on repressive and punitive policies that lead to excessive criminalisation of children. Behaviours that are typical for children are criminalised as so-called ‘status offences’: children are charged and detained for truancy, running away from home, disobedience, underage drinking, consensual sexual activity between

¹⁷ See Global Study (note 1), 274 ff.

¹⁸ See CRC-Committee, General Comment No. 24 of 18 September 2019, § 33.

¹⁹ See Global Study (note 1), 280.

teenagers, 'disruptive' behaviours and practices against tradition and morality. Despite the fact that Article 37(b) of the CRC allows deprivation of liberty of children only for the 'shortest appropriate period of time', life sentences for children remain legal in 67 States, specifically in Africa, Asia, Oceania, the Caribbean and North America.²⁰ The United Kingdom and Ireland are the only two countries in Europe that still permit life imprisonment for children. Even capital punishment still persists in 12 countries, and four Islamic countries (Iran, Pakistan, Saudi Arabia and Yemen) are known for having carried out executions of child offenders during the last 10 years. Thirdly, many States still lack a functional child justice system with special child courts and specially trained police officers, prosecutors and judges, as required by Article 40(3) of the CRC.

Discrimination is another important reason for the large number of children deprived of liberty in the administration of justice. Children from poor and socio-economically disadvantaged backgrounds, migrant and indigenous communities, ethnic and religious minorities, the LGBTI community and children with disabilities are largely overrepresented in detention and throughout the judicial proceedings. While boys are committing roughly two thirds of all criminal offenses of children, they account for 94% of all children detained in prisons and pre-trial detention centres.²¹ This significant gender gap can be explained in part by the fact that girls often receive more lenient and non-custodial sentences and benefit much more than boys from diversion and non-custodial solutions during the different phases of the criminal justice system. If boys would equally benefit from diversion measures, the number of children in detention could be significantly reduced. On the other hand, girls are also often discriminated against, for instance, in the application of 'status offences' and due to harsh abortion laws.

The Global Study also revealed significant regional disparities in the detention rate of children in prisons and pre-trial detention centres. While Sub-Saharan Africa has the lowest detention rate (less than four children detained out of

²⁰ See Global Study (note 1), 291.

²¹ See Global Study (note 1), 225 ff.

100,000 children), the American hemisphere scores highest. With a detention rate of 60, the United States is the country with the largest number of children behind bars, followed by South America (19), Central America and Caribbean (16) and Oceania (eight). Western Europe (five) shows a comparably low detention rate.²²

Children living with their primary caregivers in prison

Research for the Global Study shows that approximately 19,000 infants and young children live with their primary caregivers, usually their mothers, in prison.²³ Although they are not legally deprived of liberty, they are so *de facto*. The possibility for children to live in prison with an imprisoned caregiver, which is allowed in most jurisdictions until a certain age, is fraught with difficult considerations, beginning with the question of whether to permit the practice at all. This question can only be decided on a case-by-case basis by adopting a child-rights based approach and taking the best interest of the child into account, as both the exposure of the child to detention and the separation of the child from a primary caregiver/mother have adverse consequences for the child. On the basis of responses by States to the questionnaire and other data collected and analysed, the Global Study presents the most comprehensive overview of this important issue, which has so far not received sufficient attention at policy level, in judicial practice and in the relevant academic literature. The only provision in international law which explicitly addresses this question, is Article 30 of the African Charter on the Rights and Welfare of the Child of 1990. It deals only with 'Children of imprisoned mothers', but the Committee of Experts on the Rights and Welfare of the Child has interpreted it widely and applied it also to other primary caregivers. However, only eight, mostly European States allow children to co-reside with their fathers, and only Finland has provided information about a total of three imprisoned fathers having co-resided with their children in male Finnish prisons during recent years.

²² See Global Study (note 1), 262.

²³ Global Study (note 1), 340 ff.

In the other seven countries, proper 'Father-Child Units' seem to be missing in male prisons.²⁴

Article 30 of the African Charter applies primarily a preventive approach by requiring States to: 'ensure that a non-custodial sentence will always first considered when sentencing such mothers; establish and promote measures alternative to institutional confinement for the treatment of such mothers; establish special alternative institutions for holding such mothers' etc. This preventive approach was applied and further developed by a landmark decision and further judgments of the South African Constitutional Court.²⁵

The Global Study follows the approach of the African Charter and the South African Constitutional Court insofar as a situation in which children live with their imprisoned mothers should be avoided as far as possible. This means that every court, when sentencing a mother who is a primary caregiver of dependent children, has the responsibility to assess the possible impact of her imprisonment on child development, taking the best interests of the children as a separate consideration into account. In such cases, alternatives to imprisonment, including house arrest, and non-custodial sentences should always be considered first, when the children cannot stay with the father or another close family member. If neither solution is possible, States have an obligation to establish special alternative institutions for holding such mothers. In the absence of such special institutions, mothers may be allowed to take their children into prison, under the condition that States establish child-friendly 'Mother-Child Units'. Such units shall restrict the personal liberty of mothers and their dependent children as little as possible, provide for prenatal, perinatal and postnatal care and treatment as well as for access to proper health care, education and other facilities essential for the enjoyment of children's rights. If mothers are allowed to co-reside with their children in prison, arrangements should be made from the outset that they also may leave the prison together with their children. If this is not possible because of a long term prison sentence

²⁴ Global Study (note 1), 238 and 389.

²⁵ South African Constitutional Court, *S v M*, Case CCT 53/06 of 26 September 2007. See Global Study (note 1), 372 ff.

or a strict maximum age limit of children living with their imprisoned mothers, then States must ensure that preparations for the separation of an infant or young child from an imprisoned mother shall begin at the outset in order to avoid a traumatic experience for both. In general, States should avoid strict age limits and other general rules in order to allow proper decisions on a case-by-case basis, taking always the best interests of the child as a rights holder into account.

Migration-related detention

Research for the Global Study found that, at a minimum, 330,000 children are currently detained worldwide for migration-related reasons. This is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of data available.²⁶ This figure covers unaccompanied and separated children as well as children migrating with their parents or other family members. Both from a legal and policy oriented point of view, migration-related detention of children raises a number of highly controversial issues and seems to be one of the major reasons for the lack of financial and other support by States for the Global Study.

From a legal point of view, migration-related detention can never meet the high threshold of a 'measure of last resort' in Article 37(b) CRC and is never in the best interests of the child, as required by Article 3 CRC. In other words, the Global Study follows the legal interpretation of the CRC Committee, the Committee on Migrant Workers, the UN Working Group on Arbitrary Detention, the Special Rapporteur on the Human Rights of Migrants, the UN Secretary-General and various other UN and regional bodies, which clearly state that detention of children for purely migration-related reasons always violates the CRC and other human rights standards and should, therefore, never be allowed by States.²⁷ Nevertheless, data collected for the Global Study show that only 24 States, primarily in the Latin American and Southern African regions, adhere to

²⁶ See Global Study (note 1), 465.

²⁷ See Global Study (note 1), 448 ff.

this international standard and refrain from detaining children for migration-related reasons.²⁸ On the other hand, at least 80 States around the world are known to detain children for migration-related reasons in violation of international law. In Europe, Ireland is the only State that prohibited migration-related detention of children. Other countries, including the United Kingdom, have restricted the practice of detaining children and reduced the actual numbers. Similarly, Australia has significantly reduced its use of its offshore detention and increased its use of community-based non-custodial measures on the Australian mainland. In particular, all children had been moved off Nauru by the end of February 2019. By far the highest numbers of children detained for migration related reasons have been reported from the United States and Mexico.²⁹

There is plenty of evidence that immigration detention is particularly harmful to the physical and mental health of children. The most elaborate health impact studies have been carried out in Australia and its offshore detention locations.³⁰ Inquiries by the Australian Human Rights Commission in 2004 and 2014 found that long-term detention of children resulted in anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour, including attempted and actual self-harm. A significant percentage of these children had a stress code that was consistent with a diagnosis of post-traumatic stress disorder (PTSD). Some of the stresses causing these conditions were related to the context of detention, including living behind razor wire, locked gates and being under the constant supervision of detention officers. Other stresses were related to their prior journeys and experiences during flight and migration.

A particularly cruel and inhuman policy with unimaginable consequences for the mental health and development of thousands of migrant children (and their parents), was imposed in 2017 by US President Donald Trump.³¹ These children,

²⁸ See Global Study (note 1), 463.

²⁹ See Global Study (note 1), 460 f.

³⁰ See Global Study (note 1), 146 ff. and 469 ff.

³¹ See Global Study (note 1), 476 f.

including toddlers and new-borns, were forcibly separated from their parents, treated as unaccompanied children and held in immigration detention, while their parents were detained in different places, and many were returned to Mexico and/or their countries of origin. In the face of legal challenges and public outcry, the Trump administration announced an end to this policy in July 2018. Nevertheless, children continued to report instances of separation from parents or adult caregivers in mid-2019, and the fate of thousands of children, who were separated from their parents before, remains unknown!

Armed conflict

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

Research for the Global Study found that, at a minimum, 35,000 children are currently deprived of liberty in the context of armed conflict.³² That figure includes an estimated 29,000 foreign children of alleged ISIS fighters detained in 2019 in camps in Iraq and the North-East of Syria. In Nigeria, roughly 2,000 children have been detained for suspected Boko Haram affiliation. Hundreds of detained children have also been reported from Israel, the Democratic Republic of Congo, Somalia and Afghanistan.

The conditions of detention are particularly poor in the context of armed conflict, and children are often tried in military or adult courts without adequate procedural rights. Several African countries, including Chad, Mali, Niger and Somalia, have adopted handover protocols for the release and transfer of

³² See Global Study (note 1), 593 ff.

children associated with armed groups from government custody to child protection agencies, including UNICEF supported care centres, for rehabilitation and reintegration.

National security

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

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

The combination of increased activity by such non-State armed groups, the extensive exploitation of children by these groups and increasingly expansive counter-terrorism measures in countries around the world has increased the number of children detained in the context of national security grounds. Research conducted for the Global Study identified at least 31 conflict and non-conflict countries where children have been detained in the context of national

security grounds. The vast majority of these children are detained in conflict countries, such as Syria, Iraq and Afghanistan, as was described above. In countries without an armed conflict on their territories, the number of children detained for reasons of national security is difficult to assess, as many States do not provide relevant data. The Global Study only covers a number of countries where relevant data are available and estimates that at least 1,500 children are detained in these countries on national security grounds.³³ This survey includes Western countries, such as Australia, France, Germany, the United Kingdom and the United States, as well as selected other countries in all world regions, including El Salvador, Egypt, Ethiopia, Jordan, Malaysia, Tajikistan, Thailand and Turkey. For example, in Turkey at least 197 children were detained in prison on terrorism-related offenses related to the Kurdistan Workers' Party (PKK). In El Salvador, 206 children were held in security detention for alleged gang activity. In France, 275 children were placed in administrative detention for a range of suspected offenses, including terrorism and 'apology for terrorism'.

Thousands of children from more than 80 countries travelled to Iraq or Syria, either alone or with their families, to join ISIS both before and after the declaration of the 'caliphate' in June 2014. Many of these children originated from either Western or Eastern Europe. Over 1,000 children associated with ISIS are believed to have returned to their home countries, while others were killed in Iraq or Syria or are detained there. A small number of children have been detained and prosecuted after their return home, including in France. A number of European countries have passed legislation to revoke citizenship for individuals who travelled abroad to join non-State armed groups designated as terrorist in order to prevent them from returning. The Global Study recalls, however, that States should treat children associated with armed groups designated as terrorist or violent extremist primarily as victims of grave abuses of human rights and not as perpetrators.³⁴ It follows that States should take responsibility for their child nationals detained abroad by facilitating their return

³³ See Global Study (note 1), 640.

³⁴ See in this sense also UNSC Res. 2427 of 9 July 2018, §§ 20 ff.

to the country of origin and their participation in de-radicalisation programmes aimed at their reintegration into society.

Progress Achieved

There are a considerable number of positive practices, which are documented in detail in the Global Study, and which have led to a certain reduction of the number of children deprived of liberty.

In the administration of justice, many States have introduced child justice legislation and established corresponding specialised procedures, including special courts for children, which have led to the effective diversion from the criminal justice system. These developments seem to have contributed to a certain decrease in the number of children detained in prisons and pre-trial detention centres. While UNICEF (2007) has estimated the total number worldwide as over one million children, research for the Global Study indicate that this number may have dropped to less than half.

Similarly, the UN Guidelines for the Alternative Care of Children of 2009 seem to have had a positive impact on the de-institutionalisation practices of States. While in the Global Study on Violence against Children of 2006, the total number of children living in institutions was estimated as eight million,³⁵ research conducted for the current Global Study indicates that this number may have dropped to 5.4 million. Good practices of de-institutionalisation have, for instance, been documented in the former Communist countries in Central and Eastern Europe and Central Asia.³⁶ In Georgia and Bulgaria, the decrease in the number of children living in institutions even amounts to more than 95%, in Montenegro, North Macedonia and Moldova to between 80% and 90%, in Lithuania, Poland and Serbia to between 70% and 80%, followed by Belarus (67%), Azerbaijan, Armenia, Romania, Croatia and Hungary (all between 50% and 60%). The Russian Federation, which had one of the highest number of children deprived of liberty in institutions, also reports a decrease of 46%.

³⁵ See Pinheiro Study, para 55.

³⁶ See Global Study (note 1), 551.

Thousands of children, including children with disabilities, have now been reunited with their families or placed in family-type settings in the community. Many Western States, such as Australia, Canada, Austria, Ireland, the United Kingdom, including Scotland, or the Netherlands conducted inquiries regarding children abused in institutions, which have led to system wide reforms, including de-institutionalisation policies. Similar achievements have also been reported from other regions and countries, including Argentina, Brazil, El Salvador, Tanzania, South Africa, Mauritius and Kuwait.³⁷

With respect to migration-related detention of children, research for the Global Study and responses to the questionnaire indicate that 24 countries, above all in Latin America and Southern Africa, do no longer detain children. In response to growing internal and external criticism to its mandatory detention practices and its use of offshore detention facilities, above all on Nauru and Christmas Island, the Australian Government has taken effective measures to reduce its use of offshore detention and increasing its use of community-based non-custodial measures on the Australian mainland. This had a considerable effect on the decline of the number of children detained for migration-related reasons. In Europe, Ireland prohibited the immigration detention of children in asylum and return procedures. In Austria, children under the age of 14 cannot be detained for migration-related reasons, in other European countries, including the Czech Republic, Finland, Latvia and Poland, this age limit is 15. In the United Kingdom, the number of children deprived of liberty for migration purposes has also declined considerably over recent years.

With respect to children living in prisons with their primary caregivers, usually mothers, questionnaire responses reveal that many governments accord much more attention to this issue than before. They apply an individualised, informed and qualitative approach, which aims at striking a fair balance between the interests of the mothers to keep their young children with them in prison, and the best interests of the affected children. Research for the Global Study indicates a trend in both State practice and high court jurisprudence, above all in

³⁷ See Global Study (note 1), 553 ff.

South Africa, to ensure, as far as possible, that mothers as primary caregivers with dependent children are not sentenced to prison terms and that non-custodial solutions are prioritised.

In the context of armed conflict, the UN Security Council in 2018 called on all parties to such conflicts to cease unlawful or arbitrary detention of children and encouraged States to establish 'standard operating procedures for the rapid handover of the children concerned to relevant civilian child protection actors'.³⁸ This has already had a positive impact on States' practice, as some African States, including Chad, Mali, Niger and Somalia, have signed such handover protocols with the United Nations, transferring children associated with armed groups to child welfare centres, with the aim of ensuring their rehabilitation and reintegration into society.

With respect to national security, several States have opted for children associated with non-State armed groups designated as terrorist to be tried in special courts for children. While many States have been reluctant to bring home child nationals associated with such groups from conflict-affected areas, some States, including Switzerland and the Netherlands, have adopted return plans with clear responsibilities for State authorities concerning the necessary steps for the safety, reintegration and rehabilitation of such children.

Recommendations

The overall recommendations of the Global Study³⁹ follow directly from its findings and conclusions as well as from the analysis of best practices. They are inspired by the high legal standards of the CRC regarding the rights to personal liberty, personal integrity and dignity of children and aim at reducing the huge implementation gap between these standards and the sober reality of children deprived of liberty worldwide in all six focus areas covered by the Global Study.

³⁸ UNSC Res. 2427 of 9 July 2018, § 19.

³⁹ See Global Study (note 1), 668 ff.

These recommendations are only the beginning of a long process, which ultimately seeks to ensure that no child is left behind bars.

First of all, I strongly recommend that States make all efforts to significantly reduce the number of children held in places of detention and prevent deprivation of liberty before it occurs, including addressing the root causes and pathways leading to deprivation of liberty in a systemic and holistic manner. In order to achieve this goal, States are urged to develop national action plans with clear targets and benchmarks indicating how to reduce progressively and significantly the number of children in the various situations of deprivation of liberty and how to replace detention of children by non-custodial solutions.

To address the root causes of deprivation of liberty of children, States should invest significant resources to reduce inequalities and support families to empower them to foster the physical, mental, spiritual, moral and social development of their children, including children with disabilities. States should also invest significant resources in the child welfare system. They should ensure a close inter-agency cooperation between the child welfare, social protection, education, health and justice systems, the law enforcement as well as the administration of migration and refugee policies.

In all decisions that may lead to the detention of children, I call upon States to most rigorously apply the requirement of Article 37(b) of the CRC that deprivation of liberty shall be applied only as a measure of last resort. This means that children may only be detained in truly exceptional cases and for the shortest appropriate period of time. I further call upon States to repeal all laws and policies that permit the deprivation of liberty on the basis of an actual, or perceived, impairment or on the basis of their sexual orientation and/or gender identity.

For the six situations of deprivation of liberty covered by the Global Study, my recommendations directly follow from the analysis above and shall not be repeated here in detail. Most importantly, I urge States to:

- Stop all forms of migration-related detention of children
- Adopt a comprehensive de-institutionalisation policy

The 17th Kilbrandon Lecture (University of Strathclyde, 30 January 2020): The UN Global Study on Children Deprived of Liberty - Deprivation of liberty is deprivation of childhood

- Establish special child justice systems, apply diversion at all stages of the criminal justice process and transfer children from the justice to the child welfare system
- Avoid the imprisonment of mothers as primary caregivers of young children
- Treat children recruited by armed forces or groups designated as terrorist as victims rather than as perpetrators.

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

The Global Study is only the first step in liberating millions of children from detention. Let us not lose this momentum to give children back their childhood and to contribute to the ultimate goal of the Agenda 2030 to leave no one behind and, in particular, to leave no child behind bars!

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Professor Manfred Nowak is an Austrian human rights lawyer who served as the UN Special Rapporteur on Torture, 2004-2010 and as a judge at the Human Rights Chamber for Bosnia and Herzegovina. In 2016, he was appointed Independent Expert leading the UN Global Study on Children Deprived of Liberty.