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# **Unaccompanied minors, repatriation practices and human rights at the EU's**

## **Southern border: The limits of civil society activism**

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### **Abstract**

The rights of unaccompanied minors are protected in international law yet states, including EU states, continue to view child migrants through the lens of security and to promote policies of 'assisted return' or repatriation. This article examines how, and how far, civil society activism on behalf of unaccompanied minors has been able to promote positive change in state practices with regard to repatriation in the case of Spain. Although a rights coalition between NGOs and some state actors led to some changes after 2006, the Spanish state has responded chiefly by funding and building residential centres in the children's country of origin (mainly Morocco), thereby allowing it to circumvent pro-rights pressures. We reflect on the difficulties of rights activism in Europe – which is, in theory committed to international human rights - for this community of highly vulnerable children.

### **Keywords:**

Unaccompanied minors, human rights, civil society, assisted return, Spain

## **Unaccompanied minors, repatriation practices and human rights at the EU's**

### **Southern border: The limits of civil society activism**

International and European human rights treaties provide children and young people who are outside their country of origin and separated from their parents or carers (usually called unaccompanied minors or unaccompanied children) with specific rights and entrust signatory states with their protection. States sometimes see this obligation to protect child migrants as limiting their sovereignty and negatively affecting their capacity to police borders or control migration (Joppke 1998, 1999; Hollifield 1992; Guiraudon and Lahav 2000, Messina 2007). Nevertheless, any decision to repatriate unaccompanied children (or 'assisted return' as states call it), especially without accompanying safeguards, is highly problematic in international law because of the special protection these children enjoy.

European Union (EU) member states have ratified the UN Conventions on the Rights of the Child (1989) and on the Status of Refugees (1951), the Hague Convention on the Protection of Children (1993) and the EU Charter of Fundamental Rights (2007). These agreements establish the normative and statutory obligation of signatory states to provide unaccompanied child migrants with legal protection and basic human rights at all times, including during repatriation/'assisted return' to their country of origin. The EU Directive on Return 2008/115/EC and the EU Action Plan (2010-2014) on unaccompanied minors both emphasized the EU's commitment to international norms,

the “best interests” of the child and to putting the status of child over that of migrant in all decisions affecting unaccompanied minors (Article 5(a) of Directive; EU Action Plan 2010, 3). These principles aim to safeguard and promote the welfare of the unaccompanied children, including when states take the decision to return the child to her country or origin as well as during the procedure of return.

Respect for international human rights law is generally regarded as a badge of European identity. Yet there is clear and growing evidence that the rights of unaccompanied children inside the EU as well as the conditions under which repatriations are conducted are being systematically violated (Bhabha 2009, 2011; Kasnics, Senovilla Hernandez and Touzenis 2010; Ressler, Boothby and Steinbock, 1988). In this article, we examine civil society struggles to challenge those rights abuses and state responses in the case of Spain. We show how civil society movements, combined with pressure from some actors from within the Spanish state itself, were able to bring about some elements of change, at least in how repatriation was being handled. But the state was able to re-gain control of the agenda by entering into direct bilateral agreements on the repatriation of unaccompanied children with the main countries of origin of the children and by funding and building residential centres in those countries, rather than on Spanish territory. Pro-rights campaigns can, it seems, sometimes trigger ‘push-back’ from the state, suggesting that rights ‘victories’, at least in the area of migration, are not necessarily stable. As such, we depart somewhat from Simmons’ (2009) cautiously optimistic argument about the impact of rights treaties in that we argue that initial civil society success can be reversed if states learn and adapt to the first wave of rights demands.

This paper, then, seeks to make a contribution to the important debate on the implementation of human rights treaties and the role of the civil society in reducing the

gap between the ratification and the adoption of rights-based policies (Hafner-Burton and Tsutsui 2005, 2007). The dichotomy between the formal rights of unaccompanied children on the one hand and their systematic violation on the other certainly raises questions as to the worth of international and regional human rights agreements. Ratification of international human rights agreements can be seen as a ‘costless’ signal, with little or no impact on state behaviour (Hathaway 2002); but there is also a view that the impact of these treaties varies and may be contingent on the extent to which relevant civil society groups are able to mobilize to leverage compliance (Goodman and Jinks 2003; Simmons 2009; Grugel and Peruzzotti 2011). Hafner-Burton and Tsutsui call the intervention of pro-rights civil society groups “the enforcement mechanism that international human rights lack” (2005: 1385). Whilst we do not question this view completely, we show that there are limitations to how far civil society actors can act as enforcement mechanisms in areas the state defines as vital to its security or sovereignty, such as migration.

The research for this paper draws on a combination of qualitative interviews with NGOs concerned with migration and children’s rights in Madrid and document analysis of 61 reports, press releases and open letters by INGOs, national and local/regional NGOs, official reports from the national regional Ombudsman’s offices, the expert EU network on migration, the European Migration Network, the UN Committee on the Rights of Child and the UN Rapporteur for Human Rights. Interviews were carried out during the period November-December 2012 in Madrid.

### **A note on the case study**

Academic understanding of the extent to which international human rights agreements work derives mainly from non-Western or developing countries, where state

violations are greatest in number (Hafner-Burton and Tsutsui 2007). The spread of democratization and the introduction of the rule of law are thought to play a positive role in leveraging change (see Simmons 2009). Neumayer (2005) links compliance with strong democracies and organised civil society. But there are few qualitative accounts of the struggles for compliance with human rights in advanced liberal democracies, even where there is documented abuse – as there is with regard to the treatment by states of children who migrate into Europe. These children are undoubtedly amongst the most disenfranchised and deprived in Europe (Bhabha 2011) often lacking even formal documentation (UNICEF 2007). Within the EU, the plight of unaccompanied minors has risen up the agenda of the European Commission since 2010, as part of children’s rights agenda (Grugel and Iusmen 2013). A recent study of the European Migration Network (2010: 78, 85) concluded that there were 20.238 unaccompanied minors in care in Europe, of whom 11.292 have lodged an application for asylum. Most of these children can be found on the EU external Southern-border, in Italy, Spain and Greece.

Despite their age, states see unaccompanied children through the lens of security. They are frequently denied education, medical treatment, emotional support and the right to be heard; and they may find themselves held in detention centres and forcibly deported. Unlike adults, unaccompanied children have no or little means to contest or appeal decisions in court because they are routinely denied independent legal representation since, in theory, their interests are supposed to be protected by the very state authorities that are responsible for violating their rights. These children undoubtedly constitute something of a test case of how seriously European states take their human rights responsibilities and their commitments to defend children’s rights.

We explore in this paper the rights/abuse of unaccompanied minors in Spain, a case we have chosen for two reasons. To begin with, there are approximately five

thousand unaccompanied children in Spain, making it second most significant destinations for child migrants in the EU (European Migration Network 2010: 78). This is chiefly a result of geography: Spain is positioned on the EU's Southern external border, and is the European country with the largest frontier with Africa. As a result, Spain is one of the main destination country for the EU's poorest migrants. Secondly, Spain went through a successful transition to democracy in the 1980s and has made significant progress in implementing international human rights treaties (Gunther, Montero, Bottella 2004), although there are still important lacunae in the country's rights record (see, for instance Davies [2005] on an analysis of the impunity of the crimes committed during Franco's regime) which led to the establishment of an impressive range of pro-rights NGOs and civil society organizations (Perez Diaz 1993). Since the 1990s especially, a sub-set of rights organizations specifically concerned with advancing the rights of migrants and young people, many of which are linked into transnational rights networks, has emerged. These include large and experienced pro-rights INGOs active in Spain such as Human Rights Watch, Unicef, or local NGOs the *Comision espanola ayuda al refugiado* (CEAR), *Movimiento por la Paz* and social NGOs *Paideia* and *La Merced*, which form the basis of our research. In short, Spain should follow the pattern set out by Neumayer (2005) and Simmons (2009) of positive change and the growth of civil society after a transition to democracy. It would, in other words, not be unreasonable to expect to find effective rights advocacy and a responsive state.

### **Human rights and civil society**

Traditionally, civil society has been seen as a vital ingredient for a liberal society, a driver and promoter of positive social change and an advocate of human

rights. Civil society can be understood as “dense network of civil associations [that] promote the stability and effectiveness of the democratic polity through (...) the ability to mobilize citizens on behalf of public causes” such as human rights (Walzer 1992 quoted in Foley and Edwards 1996: 38). Often described as homogenous, civil society is, in fact, heterogeneous, and brings together charities, humanitarian organisations, professional associations, lobby groups, unions, churches and other associations. Associations and NGOs represent different interest groups and have different motivations and preferences. Civil society is thus intrinsically a space of difference, conflict and negotiation. It is also essentially political (Cohen and Arato 1992) in that preferences, networks and resources can shape state practices. When it comes to upholding the rights of child migrants, for example, it is likely that pro-rights groups will clash with anti-migration groups that may also be able to access channels within the state and/or shape popular opinion. Additionally, the leverage of civil society organizations is not fixed; it varies over time, depending on the political agenda, resources, state openness and economic opportunities/constraints (Cohen and Arato 1992; Gellner 1994; Pérez-Díaz 1993).

It is increasingly accepted, meanwhile, that human rights treaties do not implement themselves. There is, in other words, a gap between human rights in-law and the human rights in-practice created by the low cost of the ratification alongside weak international enforcement mechanisms; as Hafner-Burton and Tsutsi (2005: 1384) point out ‘treaties offer no material, legal or political rewards in exchange for better practices and they cannot directly punish violations by withholding valuable goods’. Pro-rights civil society organizations play a role in reducing this gap. They have been the engine behind the human rights ‘turn’ in international politics (Keck and Sikkink 1998). But they can also shape national and local level practices. Engle Merry (2006) shows how

adaptation is the key to the success of local human rights groups, arguing that global norms resonate in local settings only when they are ‘translated’ by local activists to fit local abuse and injustice.

High levels of concern with human rights issues within civil society are not generally found in countries with the most pressing rights needs. Participation in human rights movements reflects the extent to which rights norms are taken-for-granted principles, rather than levels of rights abuse (Tsutui and Wotipka 2004, Hafner-Burton and Tsutsui 2007). As a result, European and North American countries tend to have more citizen engagement with human rights organizations than elsewhere in the world. Spain, which was an outlier in this regard until the 1990s, entered the top ten countries in terms of density of civil society activism for the first time in 1998 (Tsutsui and Wotipka 2004), reflecting its increased integration into European and international society.

There is a risk in assuming that simply because Europe and North America are the home of relatively well-resourced pro-rights movements that they are able to effectively protect the rights of the vulnerable. As Scholte (1999) points out, in these societies there can be an excessive liberal optimism about what can be achieved through civil society pressure; in the end, rights must be upheld, as well as violated, by states. Democratic states can still be reluctant to implement rights, even following pressure from rights organizations because of electoral, financial or institutional costs or what Chayes and Chayes (1995) call ‘organisational inertia’. There are, in short, sometimes strong incentives within all states not to adhere to international norms and there may be little to be gained instrumentally from so doing and particularly so when implementation interferes with their traditional powers or spheres of authority (Risse, Ropp and Sikknik 1999; Moravcsik 2000; Krachowil 1989).

In order to push states to ‘walk the walk’ as well as ‘talk the talk’ of human rights, pro-rights movements seek to persuade, pressurize and socialise states into implementing international treaties (Finnmore 1996; Risse and Sikkink 1999). How do they do this? Essentially, they have three options or instruments available to them. They can document risk and abuse, shame states or challenge specific state practices.

The first and most straightforward instrument is *to research and document* rights abuses, nationally and internationally. Pro-rights groups can submit evidence of abuse or state failure to respect rights to international and national bodies (such as UN bodies, national Ombudsmen offices, concerned politicians or parliamentary committees) or the media and they can release their own reports to the public. Documentation of rights abuse can be effective if it provides sufficiently rich empirical data that can garner public sympathy and support. Human rights organizations can also opt to try and *name and shame* states. This second instrument requires more than putting information in the public domain. To shame states, NGOs must select the information they use very carefully in order to directly expose double standards or rights violation; and they will target state representatives, relevant public bodies and international organizations in order to persuade others to bring pressure to bear as well. Shaming can be particularly effective internationally when directed against states that belong to a regional community that espouses high standards or when a state is in violation of a norm that is generally applied internationally. Norm-violating states can then find themselves ‘denounced as pariah states which do not belong to the community of civilised nations. Shaming (...) constructs categories of “us” and “them” that is, in-groups and out-groups, thus re-affirming particular state identities” which [may] ultimately persuade states that their behaviour is inconsistent with an identity which they claim or aspire to” (Risse and Sikkink 1999:15). Finally, pro-rights groups can opt to try and challenge

specific state practices through mobilisation. To do so requires either support from networks that can access the policy making arena or mass mobilization from society and sufficient numbers of people who are willing to protest in order to demand change.

Some of all these strategies can be combined with making discreet use of insider access and influence. If rights activists are well connected and networked and have built up channels of influence over time, they may be able to bring quiet pressure to bear, especially in combination with a public campaign of shaming. In so doing, they sometimes find allies from within states. For this reason, Grugel and Peruzzotti (2010, 2012) speak of rights ‘coalitions’ that can cross from groups within civil society into the state.

One caveat to the comments above is in order: as we alluded to above, most of the research that underpins scholarly understanding of rights activism and state compliance comes – unusually for social science – from countries outside than Europe and North America. Rights violations are assumed implicitly to take place elsewhere. But in fact, whilst advanced liberal democracies have discursively strong commitments to human rights norms and are generally rights-respecting, compliance is much weaker with regard to the rights of communities who are not citizens or who are unable, for whatever reason, to actively claim those rights. This is particularly the case when rights seem to conflict with matters of sovereignty, national security and border control. On the face of it, then, vulnerable children, and migrants are amongst the groups for whom rights can be very hard to claim. Governments that take their rights obligations towards migrants seriously could risk losing electoral support, and implementing rights-respecting policies might consume scarce resources and require costly organizational reform. But being seen publicly to be ignoring the human rights of very vulnerable groups potentially puts European states in the awkward position of advocating rights

practices abroad whilst disregarding them domestically. As we will see, this is precisely the contradiction that pro-rights groups used to leverage the first set of reforms in Spain.

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### **Unaccompanied children in Spain: the context**

The family of international human rights treaties is a vital tool for protecting the rights of people living outside their country of citizenship or for those to whom citizenship is denied. For children, the Convention on the Rights of the Child (CRC, 1989) is an important codification of their age-distinctive entitlements and, therefore, the

responsibilities of duty-bearers (states). But whilst the CRC is widely ratified at least (even if implementation is often problematic), this is not the case for the Convention on the Rights of Migrant Workers (CRM 1990), which also seeks to extend protection of non-citizens. The CRM has been ratified only by 46 countries, none of which are within the EU. Unaccompanied child migrants, meanwhile, face even greater levels of disenfranchisement to the extent that Jacqueline Bhabha (2009) argues they should be regarded as *de facto* stateless persons. For Bhabha, stateless people and unaccompanied children are prevented from accessing the universal rights that are in theory available to them. Rather than protecting the most vulnerable, their 'precarious [legal] status - allied to the rejection in Europe of migrants, especially those from poor frontier countries, states are able simply to "hijack" their rights' (Bhabha 2011:10).

This was certainly the case in Spain in the early 1990s when the first unaccompanied children began to arrive, in the context of a massive expansion of migration generally into the country. The number of migrants jumped in Spain from 500,000 in 1991 to 5.6 million in 2012, 52.3 per cent of whom came from Central and South America, 24.4 per cent from Africa and 24.3 per cent from EU countries (de la Rica 2008). It is difficult to establish firm figures as to how many migrants are children under the age of 18 and even more difficult to do so with regard to children who have travelled independently or found themselves separated from parents and carers. Figures vary greatly as different regions collect data differently. UNICEF (2010: 40) found that between 1993 and 2007, 49485 unaccompanied children were in care in Spain which means an annual average of 3299 children.

Unaccompanied children in Spain are predominantly male, aged between 14-18 years old. They come from a variety of countries but predominately North African and Sub-Saharan countries (Quiroga, Segura and Soria 2011). By the 1990s Morocco had

become the main country of origin (Quiroga, Segura and Soria 2011, Senovilla Hernandez 2011), as with migrant workers generally (Arango 2005). By 2008, children from Morocco accounted for 67 per cent of the total population of unaccompanied children (Spanish Ministry of Employment and Immigration quoted in UNICEF 2010: 45). Others came from Mali, Senegal, Mauritania and Algeria. Particular concentrations of unaccompanied migrant children can be found in the South of Spain and the Canary Islands, which are also their main entry points, and in Madrid, Valencia, Catalonia and Basque Country, the areas where they are most likely

Unaccompanied minors, as is the case for all children, are protected by the CRC, which was formally incorporated into Spanish law in 1996. The situation of unaccompanied foreign children remained unclear, despite the protection that the CRC legally provided to them, until 1998 when the Ministries of Foreign Affairs and the Interior issues a joint resolution, which was later reproduced in the Protocol on Unaccompanied Minors from 14 of November 2005 by the Minister of Work and Social Affairs and finalised in the 2000 Immigration Law no 4/2000 (Article 35). No attempt was made either in the Law itself or in the Ministerial Note to set out a best-interests solution or to promote rights-respecting practices with regard to repatriation. Most unaccompanied children continued to be sent back to their country of origin almost automatically, despite the state's legal obligation to safeguard vulnerable children. Children would be repatriated en masse and collectively, without any consideration as to their individual circumstances, accompanied only by representatives of the security services. In the case of Moroccan children, this meant effectively they would be handed over directly into the custody of the Moroccan frontier police (Human Rights Watch 2002) rather than to child's family or to specialised child services. This was the

situation in the early 2000s, when pro-rights movements began to actively to seek to socialise the state into adopting a rights-abiding code for unaccompanied children.

### **One Step Forward: achieving some positive change in state practices of return**

By the mid 2000s, it seemed that pro-rights groups were making headway through a combination of information dissemination, shaming and policy-specific pressure. First, serious irregularities with regard to the treatment of unaccompanied children were raised. Most of the reports reviewed, denounced violations of the rights of the child including reports by UNICEF (2009, 2010), Human Rights Watch (2002, 2007, 2008), Save the Children Spain (2003), SOS Racism (2004), Pro Human Rights Association Andalusia (2006). Irregularities were reported also by local NGOs that formed the National Network of Associations for Unaccompanied Minors (*Red estatal de Entidades de Apoyo a los Menores Migrantes No acompañados*) which was formed in 2002 in Barcelona. The network comprised approximately thirty local NGOs including the Tomillo Foundation (Madrid), La Merced, Paideia (Madrid) (Madrid), *Plataforma Ciudadana en defensa dels menors immigrants desemparats* (Barcelona), Pere Tarres Foundation - Ramon Lull University (Barcelona), *Colectivo Intercultural Al-Jaima* (Morocco-Sevilla), *Comision Espanola de Ayuda al Refugiado* (CEAR), the *Asociacion Valenciana de Ayuda al Refugiado*, *Movimiento por la Paz*, and the *Plataforma de organizaciones de infancia* (state-wide organisation), as well as international organisations such as Caritas, Doctors without Borders, Red Cross, SOS Racism, Human Rights Watch and Save the Children. In addition some state actors, especially the Ombudsman (Annual Reports 2003-2011) and Basque Regional Ombudsman (2005), were critical of how repatriation was being conducted. And there was some international pressure, especially from the Committee on the Rights of the Child (1994,

2002 and 2010), which also drew attention to the failures of Spain to respect the rights of unaccompanied minors.

For all these actors, the *process* of repatriation of unaccompanied children by the Spanish state was deeply concerning. A particular critical moment was reached in 2003. On 27<sup>th</sup> of October of that year, the General Prosecutor (*fiscal general del estado*), Jesus Cardenal, issued a 12-page instruction No. 3/2003 insisting that all state institutions to treat unaccompanied minors of 16 years of age or older as adults. The instruction referred to the child as ‘illegal migrants’ and urged the authorities to ensure return within 48 hours of their arrival in Spain. By treating minors as adults, the Instruction No. 3/2003 from 27 October entered in direct contradiction with the Article 1 of the Convention which defined as children and thus subjects entitled to child protection and bearer of the rights of the child all children with ages lower than 18. The Instruction was strongly criticised by the NGOs and by one of the largest trades union federations in Spain, the *Union General de Trabajadores* (UGT), which issued a statement just days after it was issued and leaked the details of the Instruction it on its website.

Publicising the Instruction in this way contributed to its eventual replacement a year later, in November 2004, with Instruction no 6/2004. This was issued by a newly appointed General Prosecutor, Candido Conde-Pumpido, who recognised the earlier policy as a serious rights violation and that it contradicted previous instructions. The fact that this recognition came from the General Prosecutor himself and the gravity of the rights’ violation that had been committed under the earlier Instruction helped to gain wide support from the public for the mobilisation that followed. Had the Prosecutor not issued the instruction, arguably, the mobilisation of the civil society for rights for these children - such a small group of people who had little connection with the day to day life of most Spaniards - would have attracted less public attention.

Instead, the way was opened for the formation of a rights coalition composed of actors from within rights groups and the state – the Ombudsman Office especially – which set out to draw sustained attention to the failures of the repatriation policy to respect children’s rights. The network of NGOs seized the window of opportunity that opened with the General Prosecutor’s own acknowledgement of the state’s failure. Already organised into an effective network, the NGOs were able to mobilise quickly and share detailed information about the situation of particular immigrant children across the country, whilst support from the Ombudsmen Office was critical in legitimizing the criticisms of the NGOs.

The visit of the Special Rapporteur of the UN Commission for Human Rights, Gabriela Rodriguez Pizarro, in the same year (2004) added more pressure. She used the occasion to draw attention directly to the issue of repatriation. The Spanish security forces, she noted, seemed not to be aware of “the difference between return and expulsion” (Rodriguez Pizarro 2004: 11). Her remarks “shamed” the Spanish state as she not only identified irregularities but also highlighted the physical abuse the children were exposed by the Moroccan border police that as a consequence of repatriation (Rodriguez Pizarro 2004:15). The Special Rapporteur also pointed out to the fact that repatriation of Moroccan children was a “tacitly understood practice” (2004: 11), and a cheap solution to controlling migration flows by preventing the rising number of young Moroccan migrants entering Europe via Spain. Other children, from Latin American countries or Eastern Europe for example, were more difficult to repatriate due to their distance from their countries of origin. Repatriation would be more costly due to larger distances and a higher number of transit countries and it would be diplomatically more complex to carry out. Nevertheless, treating Moroccan children differently from unaccompanied child migrants from other countries was yet another rights abuse, since

the Spanish state was clearly being discriminatory to children on the basis of their nationality, something that is expressly prohibited under Article 2 of the CRC.

The Spanish Ombudsman, Enrique Mugica Herzog, meanwhile, began to note the treatment of unaccompanied minors as a separate item in his annual reports from 2001. Given its strategic position within the state, the Office of the Ombudsman was able to obtain state files detailing individual repatriation decisions. Mugica Herzog concluded that there was no evidence of efforts by the Spanish authorities to identify family members of children that were being repatriated or to contact the responsible child services in the country of origin (Ombudsman's Annual Reports 2002: 228; 2011: 253). Consequently, Mugica Herzog concluded, the Spanish state could not have used the best interests principle when deciding to repatriate because they had simply not acquired the information needed to do so. These irregularities were unveiled in the Ombudsman's reports helped civil society actors pinpoint with certainty the extent to which the state was in breach of its obligations to respect children's rights and, was furthermore, seeking to keep the issue out of public oversight.

The new Instruction of 2004 and the interventions of the Special Rapporteur and the Ombudsman certainly helped to keep the issue of unaccompanied children on the political agenda. This was followed by a timely and highly effective intervention by the Spanish Refugee Council (*Comision Espanola Ayuda al Refugiado*) and other local NGOs, which decided in 2006 to legally contest repatriation in the MCommunity of Madrid which was responsible for more than fifty per cent of all repatriations in 2006 (Senovilla Hernandez 2009a: 147). The legal challenge worked. Over the course of that year, no less than seven court decisions ordered cancelations of repatriation, five of them in Madrid. As a result, NGOs elsewhere in the country also began to challenge repatriation orders. And state authorities slowly and reluctantly began to implement

some safeguards in repatriation of in order to avoid legal challenges and defeat in the courts.

Repatriation had not been contested before 2006 chiefly because, as minors, the children had no right to independent legal representation. Instead, they were represented by a lawyer appointed by the regional government, which stood *in loco parentis* as the legal guardian of the child. This meant, in effect, that up until 2006 the children were represented legally by the very state that was violating their rights. Buoyed up by their successes in 2006, the NGOs also sought to challenge this practice and, in 2008, a decision of the Spanish Constitutional Court (sentence 183/2008 from 22 December 2008) confirmed the children's right to independent representation. This was eventually incorporated in the 2009 revision of the immigration law (Article 35). As a result some regional governments decided to sign cooperation agreements with independent lawyers' associations in order to prevent further and costly legal challenges, which was, in itself, something of a step forward.

Legal advocacy was accompanied by campaigns in the press. In 2006, 60 NGOs issued a joint statement denouncing the conditions in which unaccompanied children were being in the Community of Madrid (*El Mundo* 15 May 2006). They argued that the Madrid Institute for the Child and the Family (*Instituto madrileño para el menor y la familia*) and the office of the central government (*Delegación de Gobierno*) in Madrid, which were legally responsible for unaccompanied minors, were guilty of comprehensive failure to protect the rights of unaccompanied children. They violated the children's right of the child to be heard and, additionally, failed to notify children in advance about the decision to repatriate, thereby violating their right to appeal; the individual circumstances of children were ignored, violating the principle of best interest of child; the right to independent representation was not recognised in process

of repatriation; and the authorities did not guarantee repatriation either to children's families or to social services in the country of origin. In fact, the report highlighted that children were repatriated at night, often left great distances from their home and sometimes deposited in police stations putting in Morocco, leaving them vulnerable to abuse and even putting their lives at risk.

UNICEF, meanwhile, teamed up with the Bar Association (*Consejo General de la Abogacía Española*) to issue a joint statement in 2009, calling the Spanish authorities to prioritise the status of child over that of migrant and to stop the “automatic repatriations” (UNICEF 2009). The report entitled ‘Neither illegal nor invisible’ (2009) identified legal violations in nearly all areas including age assessments, identity documents and residence permits, guardianship, repatriation, legal representation, integration in the host society and family reunification.

NGO documentation of abuse, practices of shaming and challenging state decisions succeeded in persuading the authorities to reconsider aspects of repatriation practices. As a result, the number of repatriations began to fall because the state now had to take on the possibility of having to justify each individual decision in case of appeal and show that guarantees to protect the child had been put in place before initiating the procedure. As a result, the number of effective return dropped drastically. According to the Minister of Labour and Immigration, 87 children were repatriated in 2006. This fell to 23 in 2007 and 6 in 2008 (EMN 2010: 135). It seemed that the days of repatriation as a ‘tacitly understood’ and automatic practice were gradually coming to an end.

### **Limiting positive change: the Spanish state adapts**

We started this article claiming that the rights-based successes can sometimes be short-lived. Just as civil society groups learn, so do states. Civil society claims on behalf of unaccompanied children certainly led to some changes in state practices around repatriation. For the Spanish state, the prospect of legal challenge in relation to repatriations meant uncertainty as to outcomes and additional costs. Spanish authorities were now forced to ensure some level of safeguarding and, in order to do so, they would need to cooperate with the children's countries of origin. Without doing that, it would be impossible to verify the identity of the child, contact the family or ensure that returned children were not going back to conflict areas or to situations of risk. Furthermore, in cases where reunification with the family was not possible, the countries of origin would need to agree to provide care.

Additionally, after the courts' decisions, there was a recognition that the state would now have to expand its residential capacity for children in Spain in order to deal with more thorough checks and procedures. This in particular was a significant defeat for the state since the longer children remained, the greater the likelihood that they would be allowed to remain indefinitely. For instance, once children are in custody of the Spanish authorities for more than two years, they become eligible for Spanish nationality (Article 22c, Civil Code). In these circumstances, the Spanish state looked for ways to comply formally, whilst continuing effectively to return children as quickly as possible.

One way this is achieved is through pressure on children to abandon the residences in Spain where they are being housed and to drop out of the system before a final decision is reached (UNICEF 2009: 125). UNICEF (2009: 145) also identifies passing children around Spain's decentralised regions as a "frequent practice". Both these strategies mean that children stay in Spain, but for those who leave the residences

altogether the state fails education and care; and for those who are passed around the system, there is a continuous deferral of decisions and dislocation of the children's lives. Regional governments appear to collaborate or even to instigate these practices. A report by UNICEF (2010, 125) found that children were also encouraged to move to another Spanish region and to enter the care system. It appears that any children are changing regions several times, sometimes travelling long distances unsupervised long distance and without support (UNICEF 2006, 2009; Save the Children 2008).

The most systematic and effective state response, however, has been to make use of bilateral agreements to change the terms on which migrants – and children in particular – are returned to their country of origin. Spain began signing bilateral agreements with countries of origin for the repatriation of minors in 2003. As the bilateral agreements are only *agreements*, they are subject to less rigorous interpretation of international laws (Asin Cabrera 2012: 311). Thus far, Spain has agreements of this sort with Romania (2003) Senegal (2006) and Morocco (2007); 80 per cent of unaccompanied minors in Spain come from these three partner countries (UNICEF 2010: 45). These so-called 'second generation' agreements seek to prevent migration as well as offering more extensive support for return and reintegration. In particular they offer development aid and measures to combat human trafficking. But in parallel to the agreements, Spain has started to build residential centres in countries of origin to house the repatriated children. Although the government claims that only two of these centres are used for housing returned children, this is disputed by NGOs (Human Rights Watch 2008). Five residences and two apartments have been built in recent years, in the North of Morocco (Tangier, Nador, Beni Mellal, Taghram and Ben Gurir) with a total capacity of 210 places (Human Rights Watch 2008: 5). Interestingly, although formally the responsibility for the welfare of unaccompanied children rests with the regional

governments, the central state has shared the costs of funding for the centres, suggesting an agreed preference for continuing to repatriate migrant children and to keeping the transport of children back to Morocco as far below the legal radar as they can. Catalunya, as a major destination for Moroccan immigrants, has, in fact, taken something of a lead here. The Programme Catalonia-Maghreb (2006-2009) was introduced as early as 2006 to promote voluntary return via a centre in Tangier, which apparently offers training to minors and seeks to prevent further departures. The children in Catalan detention centres are given a leaflet that says:

“During the time you are spending here [in Catalunya], without a clear future, without residence documents, without a job, your partners are working every day in Morocco to make it a better country ... Now you realize that Europe is not the paradise everybody had described and you had dreamed of; you now know what happens on the other side of Gibraltar, and you don't like it. You should not be ashamed of returning ... Because we know you are lonely, because of all the moments you miss your own people, out of respect for your dream of a better life for you and your family, we [Catalan Regional Government] have created the Catalonia-Maghreb Programme”.

On the face of it, this is quite a subtle response by Spain since voluntary repatriation may well be in the children's long-term best interests. But in fact, the children are being returned to centres the main purpose of which is to 'solve' the problem of the children being in Spain. It is not a child-centred policy at all. Externalising rights responsibilities in this way represents a major challenge to human rights advocacy movements. Once the children are physically out of Spain, it is very

difficult for the network of Spanish NGOs to support them. They have no access and little information about what happens. The most effective strategy employed by the NGOs – legal challenge through the courts – becomes impossible once the children are outside the jurisdiction of Spain.

Externalising rights responsibilities in this way represents a major challenge to human rights advocacy movements. Once the children are physically out of Spain, it is very difficult for the network of Spanish NGOs to support them. They have no access and little information of their situation which means they cannot report it or shame these states for not fulfilling their human rights commitments. The most effective strategy employed by the civil society – legal challenge through the courts – becomes impossible once the children are outside the jurisdiction of Spain.

### **Conclusion**

Compliance with international human rights norms is, always and everywhere, a local affair: the norm may be internationally agreed but states must implement. Spain, an advanced liberal democracy with a strong civil society, has been able to avoid implementation in the case of the relatively small number of unaccompanied minors who enter the country generally in search of work. Furthermore, it is doing so despite an initially successful campaign by an engaged and active community of NGOs, many of which enjoy international legitimacy and support, and who were able to work with some sympathetic state actors in building a state-society pro-rights coalition. Why is this? First of all, no pressure could be exerted effectively from the regional level since there clearly is no enforced regional norm inside the EU relating to unaccompanied children – meaning that shaming has a distinct limit in this case. Despite children's rights moving up the EU agenda, there still little in the way of regional best practices to

add pressure on states to follow norm-abiding practices. The EU Action Plan for Unaccompanied Minors (2010-2014) is very limited in scope and focuses on prevention measures. Secondly, although there is evidence of successful rights advocacy by civil society actors, especially if they have allies inside the state, there are enormous difficulties with regard to advocacy for migrant workers; and these are exacerbated in relation to migrant children. As Bhabha (2009) argues, children are severely disenfranchised by their very condition as children. And finally, states have agency in areas that touch directly on sovereignty and security – if they choose to actively resist, as Spain has done, they undoubtedly have the resources to defy civil society pressure.

What does all this mean for human rights compliance? We already know that vulnerable groups such as unaccompanied minors face considerable hurdles even to have their rights recognised, let alone respected (Grugel and Piper 2007, 2009). But this case also shows that compliance is not unlinear; gains made can be reversed or at least minimised. Compliance is a dynamic and incremental process. In this case, there are two distinct stages in the narrative of Spain's resistance to civil society pressure. Initially, pressure from civil society led to some positive change and a recognition by the state that it would have to tread more carefully. Mobilisation, insider networking, shaming and legal advocacy reduced the scale of abuses. But (partial) civil society success increased the costs of non-compliance for Spain and provided the incentive to explore new ways to return to the status quo where state authorities could view unaccompanied children through the lens of migration and security, not human rights. In order to do so, the Spanish state has created and funds residential centres in countries of origin – mainly in North Africa – to hold the children. This raises important questions about the reach and strategies of local rights-based advocacy movements. If states are able to physically relocate people for whom it has legal responsibility outside

its borders, they reduce the effectiveness of the traditional tools of advocacy itself. Once the children are no longer visible inside Spain, putting information into the Spanish public domain about how they are being treated or “shaming” the state in the eyes of the electorate or even the regional community, the EU, is of limited value. At the same time, the children are beyond the reach of the national courts. As Tarrow (1996: 199) reminds us soberly, states “do not sit idly by while challengers contest their rule”.

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