

EUROPEAN YEARBOOK ON HUMAN RIGHTS 2020

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EUROPEAN YEARBOOK
ON HUMAN RIGHTS 2020

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EDITORS' PREFACE

Dear readers,

This edition of the European Yearbook on Human Rights has been produced during an unprecedented global health crisis which has had economic, social and humanitarian dimensions, resulting in a severe impact on human rights. COVID-19 exposed the weaknesses of public healthcare systems and access thereto, prevailing structural inequalities and the fragility of the rule of law in times of emergency. Hate speech, fake news, the targeting of vulnerable groups, nationalism and populism have spread alongside the virus and pave the way for the adoption of repressive measures for purposes unrelated to the pandemic. Human rights appear as afterthoughts in the global pandemic rather than as the guiding principles for response and recovery measures. The crisis, however, did not disclose anything new. Instead, it revealed existing human rights protection gaps and exacerbated persistent shortcomings. The European Yearbook on Human Rights has always provided a platform to address contemporary human rights issues and identify weaknesses in the human rights protection system. Even though the topics had been selected well before the pandemic, they remain of great importance for the wider debate on the future of human rights protection in Europe both during and after the crisis.

The European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) have ensured stability, security and peace in Europe over the last 70 years in a unique way. Therefore, this year's edition opens with a contribution from the former President of the ECtHR, Linos-Alexander Sicilianos, on 'The European Convention on Human Rights at 70: The Dynamic of a Unique International Instrument'. In his contribution, he reflects on the dynamic the ECHR has developed over the years, creating its 'extraordinary impetus for a protection of human rights'. However, the protection of human rights requires not only strong instruments but also effectively working institutions, and not just in times of crisis. In light of the pandemic, Katarzyna Gardapkhadze, First Deputy Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), in her opinion piece, 'On International Organisations and Responsible Leadership: A Snake Eating its Own Tail', strikes a blow for the need for a new responsible leadership framework for international organisations rooted in strong moral values and being inclusive and people-centred in order to make international organisations become truly relevant and able to bring about the change they were founded for.

The subsequent structure of the Yearbook deviates from previous editions. In light of the 30th anniversary of the UN Convention on the Rights of the Child (CRC) in 2019, and its undisputed continuing importance, we have decided to dedicate a whole Part of the Yearbook to the rights of the child. The thematic Part is introduced by Manfred Nowak, the Independent Expert leading the UN Global Study on Children Deprived of Liberty which was presented in late 2019. Despite the achievements of the CRC regarding the protection of children and the recognition of children as rights-holders, data regarding the violations of their rights is still more than disturbing. The Global Study on Children Deprived of Liberty has been a joint effort of various actors, including UN agencies, governments and civil society organisations to capture the magnitude of the respective situations of children worldwide. Manfred Nowak, in this opening contribution, presents the key findings of the study.

By ratifying the CRC, states commit themselves to respect and ensure the rights of all children under their jurisdiction. The effective protection of human rights, however, depends, *inter alia*, on the access to justice when they have been violated. Lorenzo Acconciamezza raises the question whether the legal framework governing the proceedings before the ECtHR guarantees children's access to justice and child sensitive procedures in his contribution 'Bringing the Child's Procedural Rights before the ECtHR through Interpretative Tools: Access to Justice, Participation, Representation'.

One of the major achievements of the CRC was the recognition that children are, as legal subjects, independent rights-holders and not merely legal objects. The right to family life in all its facets has nevertheless traditionally been assessed from the perspective of parents. In their contribution on 'The Child's Right to Family Life: Shifting Sands and Social Science', Lydia Bracken and Conor O'Mahony explore the evolution of the child's right to family life and the role that social science research and the better understanding of family life can play in delineating the parameters of the right to family life and its interplay with the principle of the best interests of the child. The need to interpret the right to family life from a child-centred perspective and to adapt procedural rules accordingly becomes further obvious in parental separation cases. While decisions in such cases often impact the life of children in the most dramatic way, only parents are party to the respective proceedings. In her contribution, 'The ECtHR on Parental Authority and Contact after Separation: Towards a More Child-Centred Perspective?', Evelyn Merckx elaborates on the ECtHR's efforts to acknowledge children's rights in cases of parental separation and on the limits the Court faces due to the subsidiarity and margin of appreciation principles. Conflicting views of parents' and children's rights and the difficulty in balancing these rights have, furthermore, shaped adoption cases and, in particular, cases of compulsory adoption. Anette Faye Jacobsen's contribution, 'Principles and Politics in Compulsory Adoption Cases in the European Court of Human Rights: The Right Balancing of Rights', analyses the relevant case law of the ECtHR in this

regard, which has been affected and shaped by wider trans-European controversies concerning the understanding of family ties and the family as a (biological) entity. While compulsory adoption is, in all likelihood, the most intrusive of interventions in the right to family life in the name of the best interests of the child, intercountry adoptions also give rise to important questions in this regard. Wouter Vandenhoele thus asks in his contribution on 'Triangulating Children's Rights Law: Which Future for Intercountry Adoptions in Europe?' whether the current trend of declining numbers in intercountry adoptions is a positive or negative trend from a child rights perspective.

Manfred Nowak elaborates on a specific type of child deprived of his or her liberty, namely children who are detained for the purpose of educational supervision ('Detention of Children for the Purpose of Educational Supervision'). While it is beyond doubt that the detention of children gives rise to various human rights concerns, the imprisonment of parents can have detrimental effects on children's rights too. Peggy ter Vrugt dedicates her contribution, 'Rights of Children of Prisoners: Innocent, Forgotten and Punished', to the right to family life and the right to maintain contact with the imprisoned parent of these 'invisible victims', and uses the Dutch practice on this matter as a case study.

The confinement or detention of minors for the duration of their asylum determination procedures, as well as the rights of unaccompanied minors in general, has been heatedly discussed over the last few years. The complex concept of 'migrant children', the protection of their rights and the application of the concept of vulnerability in such cases before the ECtHR and the CRC are discussed by Rebecca Thorburn Stern in her contribution on 'The Image of the Vulnerable Migrant Child in Recent ECtHR and CRC Committee Case Law'.

Of course, the protection of the rights of the child covers the whole range of economic, social and cultural rights. In her contribution on 'Social Rights are also Children's Rights!? An Analysis of the ECSR's Case Law on Children', Katharina Häusler explores the reception of the CRC in Europe by analysing the 'case law' of the European Committee of Social Rights (ECSR) on the social rights of children. One of the most important social rights of children is the right to education. The CRC recognises this legal right of every child on the basis of equal opportunities. Even though, overall, more children than ever are in schools and have access to education, progress has been uneven and unfair. Barriers to the right to education can be associated, *inter alia*, with gender, poverty, displacement or, most recently, with the COVID-19 pandemic. The contribution 'Inclusive Education in Strasbourg: Still Learning?', by Marie Spinoy and Kurt Willems, is dedicated to the right to inclusive education and analyses how the ECtHR has dealt with the right to education of children with disabilities in its case law. Aida Kisunaite and Simone Delicati subsequently turn to the protection of the rights of the child at the EU level in their contribution 'Children's Rights and the EU: Analysis of Social, Health and Education Laws and Policies'. While the mainstreaming of children's rights and the respective

intersectoral policy coordination have been progressively endorsed at EU level, there are still considerable challenges, as revealed by the authors who use social, health and education laws and policies as examples.

The effective protection of the rights of the child requires their effective implementation at the national level. While the CRC does not require state parties to elevate children's rights to the constitutional level, many states have done so by including, at the very least, specific child rights in their constitutions. Domenico Rosani, in his contribution 'The Increasing Recognition of Child Rights by European Constitutions and its Relevance for the Criminal Regulation of Sexting', uses the example of 'sexting' to compare constitutional perspectives and approaches on children's rights in three European states and to analyse how the constitutional acknowledgement of children's rights can influence criminal law.

The next contribution concerns the right of the child to participate in public affairs. While the CRC foresees that children shall have the right to freely express their views in all matters affecting them, and that due weight shall be given to these views, the concept of participation in the context of children's rights remains unclear. Kata Dozsa, in her contribution 'The Inconvenient Truths of the Eco-Generation: Mapping the Role of Children (and Youth) in the Global Climate Change Governance', reflects on the normative background of the right of the child to participate in decisions regarding measures in the field of climate change, and the tools children have at hand to actively participate in policy-making processes.

The vulnerability of children becomes particularly obvious when they are subjected to armed conflicts and often become direct victims of war and violence. Recruited by state and non-state actors, they participate actively in hostilities as child soldiers. Saeed Bagheri, in his contribution 'Theoretical and Empirical Reflections about the Use of Children in Armed Conflicts: A Case Study of the Afghan Refugee Children Recruited by the IRGC in the Syrian Civil War', analyses the practice of the Iranian Revolutionary Guard Corps to recruit Afghan children as soldiers in the Syrian war from a humanitarian, human rights and refugee law perspective. Child soldiers often suffer severe long-term physical and psychological impacts of armed conflicts and experience extreme difficulties when they are reintegrated into civilian life. Children of 'foreign fighters' or children associated with the so-called Islamic State (IS) experience similar difficulties. In Syria and Iraq, thousands of children in the IS sphere of influence remain in displacement and detention camps and suffer from inhuman conditions and the constant risk of abuse, many of whom have ties to European or other Western states. Still, these states are hesitant to assume responsibility for these children due to short-sighted security considerations. The contribution by Mona Koehler-Schindler and Johannes Heiler on 'Protecting the Rights of the Child while Countering Terrorism: State Policies on Repatriation of Children Associated with "Foreign Fighters" in Syria and Iraq' – which also closes the

thematic section on the rights of the child – addresses the main human rights implications of different (non-)repatriation policies and promotes a human rights-based approach to the treatment of children allegedly associated with IS.

The third Part of the Yearbook deals with human rights in Europe and beyond. It opens with a contribution by Alessandro Mantelero on 'Regulating AI within the Human Rights Framework: A Roadmapping Methodology'. Rapid developments in the field of Artificial Intelligence (AI) pose a constant challenge to the development of a regulatory framework based on human rights. Regulations need to go beyond legal standards and have to include ethical standards as well as moral and social values.

The need to transcend established legal categories in order to provide effective human rights protection for all is also addressed by Ino Kehler in her contribution on 'Bodies and Identities beyond the Binary Sex and Gender System: From Question of Order to Question of Rights'. The contribution examines recent rulings passed by the German and Austrian Constitutional Courts which recognise the right to personal identity and the right to personal life of persons who do not identify with the categories provided by the predominant binary sex and gender classification system. Despite the progress made, however, Ino Kehler calls for a need to ensure the protection of the right to self-determination regardless of any sex or gender attributions.

Courts play a crucial role in the protection of human rights. Over the last decade, the roles of the ECHR and the ECtHR have regularly been challenged by states in the name of state sovereignty. Mikhail Antonov, in his contribution 'Sovereignty and Russian Resistance to Human Rights', analyses the features of Russian legal culture that prioritise state sovereignty, thus preventing the acceptance of human rights. The Part on human rights in Europe and beyond is concluded by reviews of the relevant judgments issued by the European courts in 2019. While Christian Breitler and Martin Traussnigg analyse the jurisprudence of the Court of Justice of the European Union, Stefan Kieber focuses on the judgments of the ECtHR.

Academia, as all other parts of professional life, had to adjust to the novel situation caused by COVID-19. Throughout the whole publication process of this edition, a great amount of flexibility and commitment was required from all partners involved. The editorial team – composed of representatives from the European Training and Research Centre for Human Rights and Democracy of the University of Graz (UNI-ETC), the Ludwig Boltzmann Institute of Human Rights Vienna (BIM), the Austrian Human Rights Institute of the University of Salzburg and the Global Campus of Human Rights Venice – would like to express their sincere gratitude to all our authors who, despite having to juggle new, online teaching formats, home schooling and the general circumstances of quarantine, managed to submit all contributions on time, allowing for a punctual publication of the Yearbook. We would also like to thank all reviewers whose comments allow us to ensure the high academic standard of our publication and

to improve the Yearbook with every edition. We would furthermore like to thank the Global Campus of Human Rights for the financial support which makes this publication possible. Many thanks go further to Alma Stankovic, who was in charge of the book review process, and to Johanna Tesar and Johanna Binder for their pre-editorial work. And lastly, particular thanks go to Tom Scheirs and Rebecca Moffat from Intersentia for their constant support, their availability and their flexibility during the whole publication process.

Graz, Salzburg, Venice, Vienna – August 2020
Philip Czech, Lisa Heschl, Karin Lukas,
Manfred Nowak and Gerd Oberleitner

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AG	Advocate General
AI	Artificial Intelligence
AP ECHR	First Additional Protocol to the European Convention on Human Rights
APPROACH	Association for the Protection of All Children
B-VG	Bundes-Verfassungsgesetz, Austrian federal constitution
c.p.	codice penale, Italian criminal code
CAT	United Nations Convention against Torture
CDPC	European Committee on Crime Problems
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMW	Committee on Migrant Workers
CNDH	French National Consultative Commission on Human Rights
CoE	Council of Europe
COP	Conference of Parties
COPE	Children of Prisoners Europe
COs	Concurring Opinions
CPSE	Communist Party of the Soviet Union
CRC	Convention on the Rights of the Child
CRIN	Child Rights International Network
CRPD	United Nations Convention on the Rights of People with Disabilities
CSOs	Civil society organisations
CSRs	Country Specific Recommendations
DOs	Dissenting Opinions
DRC	Democratic Republic of the Congo
dStGB	Deutsches Strafgesetzbuch, German criminal code

EaSI	European Union Programme for Employment and Social Innovation
ECEC	Early childhood education and care
ECHR	European Convention on Human Rights
ECPT	European Convention for the Prevention of Torture
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EP	European Parliament
ERDF	European Regional Development Funds
ESC	European Social Charter
ESF	European Social Fund
ESIF	European Structural and Investment Funds
ETA	Euskadi Ta Askatasuna (Basque Homeland and Liberty)
EU	European Union
EWHC	High Court of Justice of England and Wales
FEAD	Fund for European Aid to the Most Deprived
FFF	Fridays For Future
GA	United Nations General Assembly
GAI	Guidelines on Artificial Intelligence and Data Protection
GBD	Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data
GC	General Comment, Grand Chamber
GDPR	General Data Protection Regulation
GG	Grundgesetz, Basic Law, German constitution
HCHR	Helsinki Committee for Human Rights
HUDOC	Human Rights Documentation of the European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICDPPC	International Conference of Data Protection and Privacy Commissioners, Declaration on Ethics and Data Protection in Artificial Intelligence
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTs	Information and communication technologies

IO(s)	International organisation(s)
IoT	The Internet of Things
IRGC	Iranian Revolutionary Guard Corps
ISIL	Islamic State in Iraq and the Levant
LEA	Local educational authority
LGBT+/I	Lesbian, Gay, Bisexual, Transgender/Transsexual plus/ Intersexual
MDAC	Mental Disability Advocacy Centre
MEP	Member(s) of the European Parliament
MGCY	Major Group of Children and Youth
ML	Machine learning
NCJ	National Council of the Judiciary
NGO(s)	Non-governmental organisation(s)
OCT	Our Children's Trust
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OKB	Ouder en Kind Bezoek, Parent and Child visits
OMCT	World Organisation Against Torture
OP	Optional Protocol(s)
OPCAT	Optional Protocol to the United Nations Convention against Torture
OPIC	Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure
OSCE	Organization for Security and Co-operation in Europe
öStGB	Österreichisches Strafgesetzbuch, Austrian criminal code
PACE	Parliamentary Assembly of the Council of Europe
PC-CP	Council for Penological Co-operation
PPA	Penitentiary Principles Act
PStG	Personenstandsgesetz, German civil status act
RESC	Revised European Social Charter of 1996
RF	Russian Federation
RF CC	Russian Constitutional Court
SC	Supreme Court
SDF	Syrian Democratic Forces

SDGs	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNMA	Turkish National Music Academy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCSD	United Nations Conference on Sustainable Development
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
US(A)	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	1969 Vienna Convention on the Law of Treaties
VSC	Variation of sex characteristic
WEF	World Economic Forum
WZB	Berlin Social Science Center
YEI	Youth Employment Initiative
YOUNGO	Youth Non-Governmental Organisation

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