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**Article:**

Barbulescu, R [orcid.org/0000-0003-3362-4840](http://orcid.org/0000-0003-3362-4840) and Grugel, J (2016) Unaccompanied minors, migration control and human rights at the EU's southern border: The role and limits of civil society activism. *Migration Studies*, 4 (2). pp. 253-272. ISSN 2049-5838

<https://doi.org/10.1093/migration/mnw001>

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**Unaccompanied minors, migration control and human rights at the EU's Southern border: The role and limits of civil society activism**

Roxana Barbulescu and Jean Grugel

**Abstract**

Civil society movements can play an important political role in advocating for human rights, including the rights of migrants and migrant children. But successfully asserting their rights is difficult in the domain of migration, even in democracies, and any victories that are achieved can be short-lived. This article examines an initially successful episode of civil society advocacy on behalf of unaccompanied child migrants, drawing on evidence from Spain. We argue that pro-rights civil society organizations were initially able to force the Spanish state to act in accordance with its international human rights obligations in relation to repatriation. But states can learn and adapt. States might seek new venues for migration control and enlist new allies, thereby multiplying the numbers of gate-keepers, for example. In this case, the Spanish state reacted energetically to regain control by working closely with countries of origin, regional governments within Spain, private actors and service delivery NGOs to reassert its authority with regard to repatriation. We use the case to reflect on the difficulties of civil society activism in this issue-area and the obstacles to claiming the legal rights of this community of highly vulnerable children, even in advanced democracies.

**Keywords:**

Child migrants, unaccompanied minors, human rights, civil society, immigration control, repatriation, Spain

Global conflict, unequal development, austerity and labour opportunities beyond the nation state of birth or residence mean that child migrants, including unaccompanied children, have become “participants in a polarized global migration regime” (Bhabha 2002, 160). For states in the developed world, sovereignty means that they seek to exercise tight control over this regime. Although the numbers of unaccompanied children arriving in Europe and the US are relatively small, they can expand suddenly in response to local conflicts, as the influx of child migrants escaping violence in Central America and fleeing to the US in 2014 indicates. State responses to the migration of unaccompanied children, and indeed all children (that is, people under the age of 18 according to international law), should be shaped by international legislation that is expressly designed to ensure that children’s rights are protected. International human rights treaties provide children and young people who are outside their country of origin and separated from their parents or carers (often referred to as ‘unaccompanied minors’ or ‘unaccompanied children’) with specific rights and entrust states with their protection. Yet European states, and indeed the US, seem reluctant to treat child migrants in ways that respect their legal entitlements and their rights are, in fact, frequently and systematically violated (Bhabha 2009, 2011; Kasnics, Senovilla Hernandez and Touzenis 2010). There is, in other words, a massive gap between the rights unaccompanied children formally enjoy and the abuse they experience once they arrive at their destination. An area of particular concern relates to state practices in repatriation<sup>1</sup>, which we focus on here.

It is generally accepted that international human rights treaties, including those that are aimed at protecting migrants and children, depend on civil society activism for enforcement (Hafner-Burton and Tsutsui 2005, Goodman and Jinks 2003; Simmons 2009). Pro-human rights civil society organizations have been influential advocates for vulnerable children for many years (Grugel and Piper 2007). But there are relatively few studies of how civil society organizations try and defend the rights of unaccompanied child migrants, the difficulties they face when they mobilize, which civil society organizations take action or, indeed, how far their activism could be said to be successful. Our paper seeks to unpick some of these issues, and makes a conceptual contribution in the area of migrants’ rights and the relationship between the state and civil society in relation to migration. In so doing, we make a distinction between different groups within civil society and in particular between pro-rights social organizations, on the one hand, and service delivery organizations on the other, in relation to child migration. In addition,

this article makes an empirical contribution to studies of European migration by documenting both migrant rights activism and state resistance in the case of Spain, which remains somewhat neglected still in studies of migration in Europe.

Specifically, we zoom in on an initially successful episode of civil society advocacy, identifying how some civil society groups were able to challenge state practices of repatriation of unaccompanied children using a range of tactics from documenting cases of abuse to mounting legal challenges in the courts. Mobilization peaked in the period 2006-2008, when a landmark victory in the courts slowed down and in some cases even prevented repatriation. But we also show how the Spanish state was able to regain the initiative by enlisting new allies in the countries of origin and transit and within Spain. By delivering policy through these new relationships, Spain was able to outsource some of its responsibilities, direct public attention away from the issue and insulate migration policy from the overview and reach of pro-rights movements.

The Spanish case is an important one. Positioned at the South West of the EU, Spain has the largest frontier with Africa of any EU member state and is, as a result, one of the main destinations for migrants from Africa seeking to enter the EU. But Spain is only one of several Southern European countries with rising numbers of migrants arriving from North Africa and the treatment of unaccompanied minors by the Spanish state is similar to the approach in Southern Europe generally (*Wall St Journal* 12/09/2014; Human Rights Watch 2010, 2014). The US, like Southern Europe, also shares a border with the global South and faces similar challenges around how to “manage” the migration of rising numbers of unaccompanied children in ways that are respectful of human rights, as the crisis of 2014 indicates (*New York Times*, 19 July 2014). The findings from this study, namely that even an advanced European democracy with generally good rates of human rights compliance is able to successfully find ways to successfully find ways to avoid its rights obligations, even in the teeth of energetic, organized pro-rights civil society activism, are therefore salient for all scholars of migration and human rights.

### **Unaccompanied children in Spain: case and method**

The impact of human rights principles on policy making can best be ascertained in cases where rights are ratified and the norms are salient, while research into the role of civil society in promoting rights-based policy on behalf of unaccompanied minors in practices of repatriation

requires the presence of relevant, active and engaged civil society organizations, as well as a significant number of child migrants. Spain satisfies these criteria for case selection. Immigration is rising up the national political agenda. With a quarter of all unaccompanied children in the EU (at least until the recent Syrian crisis), around 5,000 in number, most of whom come from African countries (European Migration Network 2010, 124), the treatment of migrant children is an important national issue. Spain, like all EU member states, has ratified the UN Convention on the Rights of the Child (UNCRC), the Hague Convention on the Protection of Children (1993), the EU Charter of Fundamental Rights (2007) and the agreement on the Status of Refugees (1951). These agreements establish a normative and statutory obligation on signatory states to provide unaccompanied child migrants with legal protection and basic human rights at all times, including during repatriation to their country of origin. Additionally, the EU Directive on Return 2008/115/EC and the EU Action Plan (2010-2014) on unaccompanied minors emphasize commitment to international norms, the pursuit of the “best interests” of the child and the importance of 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 legal obligations create an opportunity for pro-human rights civil society to frame the issue of unaccompanied child migrants in humanitarian and even emotional terms precisely because of their status as ‘children’, and to challenge the focus on control and security that frequently prevails in other areas of migration.

The first wave of unaccompanied children began to arrive into Spain in the 1990s, in the context of a massive expansion of migration generally. The number of migrants jumped from under 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 (Eurostat 2013). It is difficult to establish firmly how many of these migrants were children who had travelled independently or found themselves separated from parents and carers. It is clear, however, that whilst Latin Americans make up the largest group of migrants in general, most unaccompanied children come from Africa. UNICEF (2010, 40) found that between 1993 and 2007, 49,485 unaccompanied children entered the Spanish care system, which implies an annual average of 3,299 children. These children are predominantly male, aged between 14-18, and Morocco is the main country of origin (Quiroga, Segura and Soria 2011). By 2008, Moroccan children accounted for 67 per cent of the total population of unaccompanied children (Spanish Ministry of Employment and Immigration quoted in UNICEF 2010, 45).

The research draw on a combination of qualitative interviews with NGOs concerned with migration and children's rights in Madrid, and document analysis of reports press releases and open letters by international NGOs, national and local/regional NGOs, official reports from the national regional Ombudsperson'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. These documents were not selected randomly. To our knowledge, they represent all publicly available materials on unaccompanied minors in Spain and cover the period from the 1990s to the present day. Documents are rich data sources and document analysis is a qualitative method that examines and interprets complex data in order to elicit meaning, gain understanding and develop empirical knowledge (Bowen 2009: 27). Concretely, we scrutinised the documents to identify the main actors involved, the chain of events in which the civil society organizations participated, and the impact of the activism on state practices. Interviews with representatives of key pro-rights associations helped to triangulate and strengthen the data collected through the documentary analysis (Quinn Patton 2015), as well as offering an insight into civil society strategies and actions. The interviews were carried out during the period November-December 2012.

### **Civil society activism, human rights and migration control**

Research on migration has been dominated by studies of migration management by states. Yet migrant workers, and migrant children specifically, have accrued an important range of rights under international conventions (Soysal 1994, Piper 2013); at the same time, there is a growing recognition in international organizations that the effective governance of migration requires the monitoring and implementation of those rights (Newland 2010). Civil society organizations play a vital role in the global governance of 'soft' issues area such as human rights (Simmons 2009) and they are also recognised as having an important 'social accountability' role over states, especially in areas where human rights are potentially at risk (Peruzzotti and Smulovitz 2006). The success of their activism, or the range of resources they mobilize – which, in this case are discussed below - can be measured by changes in government policy or, more indirectly, by greater public awareness of, or insider support for, issues of concern. In short, civil society actors are potentially influential actors in migration and the struggles that take place around migrants' rights, yet their full significance is not always fully appreciated (see Castles 2004, Freeman 1995, Guiraudon and Lahav 2000, Grugel and Piper 2011).

Civil society is of course a highly diverse space (Cohen and Arato 1992). Often conceptualized as a “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” Walzer 1992 quoted in Foley and Edwards 1996: 38), it is, in fact, far from harmonious, or ideationally and ethically coherent. Civil society organizations include charities, NGOs, humanitarian organizations, professional associations, lobby groups, unions, churches and other associations. Some have global reach and funding that enables a critical independence from states whilst others survive principally through providing services for states, which can compromise how far they can distance themselves from state policies. The distinction between service-delivery civil society and independent organizations is a crucial one where human rights are concerned, as Grugel and Peruzotti (2010, 2012) found in relation to children’s rights. But even here the distinction can sometimes be more a matter of nuance than an absolute division since many apparently independent NGOs find reasons to provide services for governments, sometimes with a view that they will do so in a more rights-respecting way. Barnardo’s for example, a major UK children’s charity, claims to do this in relation to child migrants in the process of repatriation in the UK (see <https://www.opendemocracy.net/ourkingdom/frances-webber/barnardos-and-g4s-partners-in-child-detention-business>). One reason this ambiguity is possible is because the European left, which has traditionally been vocal in support of human rights, is generally less engaged with ‘migrant politics’ (Pero 2005).

Hafner-Burton and Tsutsui (2005, 1385) refer to human rights movements and rights-based civil society organizations as “the enforcement mechanism that international human rights lack”. It is true of course that it is the job of legislation and the courts to formalize rights standards or take a judgement on government policies when asked to do so. But courts can only establish minimum standards of compliance in a piecemeal fashion by building jurisprudence. In contrast, pro-rights civil society actors are able to develop rich narratives around human rights standards, mobilize and respond quickly to rights abuses and interpret them in ways that fit local political agendas. For this reason, Castles (2004,849), regards civil society as an “additional factor” that can limit the capacity of the state to manage migration. But he leaves the important questions of the long-term value of civil society action or which civil society groups mobilize on behalf of migrants unanswered. And he does not link civil society activism to international human rights agreements, even though so much civil society activism in this area is rooted in demands that states respect international law (Grugel and Piper 2007). Guiraudon and Lahav (2000), meanwhile,

identify restrictions on state agency that derive from international law, but fail to link these constraints to civil society activism. Soyal (1994), Jacobson (1996) and Guiraudon and Lahav (2000) also note the constraints imposed by international human rights law on state capacity to control migration and identify the courts as important actors in the migration process, but they too do not take the role of civil society movements sufficiently seriously. Joppke (1997) notes the significance of judicial activism by civil society organizations, but only in relation to asylum claimants. Morris (2010) has taken the discussion in migration studies furthest – although again only in relation to mobilization for asylum rights - by identifying the impact of judicial activism as civil society organizations increasingly seek to push the courts to intervene.

Tillie and Fennema (1999) make the important point that actors from within civil society operate differently in relation to migration. Like Tillie and Fennema (1999), Eggert and Pilati (2014) regard the social capital of civil society groups, that is their networks, contacts and resources, as key to whether they can act effectively. Certainly resources matter for successful activism; but as Caponio (2005) points out, effecting some degree of policy change also depends on whether and when opportunity structures open for activism, the degree of resistance within state institutions and whether states devote resources to closing down windows of opportunities quickly and effectively. In that sense, McMahon's (2015) argument about the importance of the political context for understanding the mobilization of pro-rights groups and their impact is important.

How pro-rights activists respond to the context they find themselves in shapes the tactics they adopt. In general, the purpose of pro-rights activism is to persuade, pressurize and socialize states to “walk the walk” as well as “talk the talk” of human rights (Finnmore 1996; Risse and Sikkink 1999). Activism can take a number of different forms, from dissemination of information to confrontation and mobilization against government policy to legal activism and even alliances with sympathetic parts of the state. The most straightforward tactic is to document abuses by submitting evidence of abuse to international and national bodies such as UN bodies, national Ombudsperson offices, concerned politicians or parliamentary committees or the media via independent reports. Such reports can serve to name and shame states by exposing double standards (Risse and Sikkink 1999). Specific state practices can also be challenged, through public mobilization – if there is enough support for it - or via judicial activism, which generally requires less public support. The point is to shift policies in the direction of a better implementation of agreed human rights standards; the fact that states have signed up to international human rights agreements, in other words, becomes a resource that can be deployed against signatory states.



But, as we show here, achieving a reversal of rights-violating behaviour using the template of international law may not always lead to a permanent victory. Rights for unaccompanied children are particularly vulnerable to reversal because the interests of citizens are not at stake (Bhabha 2011). This is true of all migrants (Bastamante 2002); but children, additionally, can only rarely mobilize for themselves. Signatory states can also argue that they did not sign the UNCRC with the purpose of offering protection to migrant children and policies to restrict immigration can be electorally attractive (see Messina 2007).

Furthermore, as migration increases, states re-invent the toolbox of policies to deny entry and repatriate those migrants they regard as unwanted and their resources to do so are growing. One such tactic is what Zolberg (2003) refers to as the introduction of “remote control” of migration, or the growing practice of shifting border control to outside national territory. Guiraudon and Lahav (2000) and Lavenex (2006) identify new mechanisms for migration control through “transfers of sovereignty” to other actors. Such “transfers” can go “upward, downward and outward” (Guiraudon and Lahav 2000, 164): states push responsibilities upward to international organizations or regional bodies like the European Union, downward by engaging local and regional elected representatives to enforce controls, and outward by involving a variety of non-state actors, such as airline and maritime carriers, employers or landlords. In so doing, they involve and implicate more actors in the regulatory process itself, including some actors from within the civil society space, who can find themselves cooperating with the state for a range of reasons that might even include a desire to offer some degree of protection to children who would otherwise be dealt with by the security forces. At the same time, when NGOs cooperate with states in this way they may make it more difficult for pro-rights groups to scrutinize and sanction state actions.

### **One step forward: civil society activism and positive change in state practices of repatriation**

Spain was not a major destination country for migration until the 1990s. For this reason, when the state was forced to consider how to deal with the issue of unaccompanied children at that time, there were few legal guidelines in place. The Ministries of Foreign Affairs and the Interior issued a joint resolution in 1998, which was later incorporated into the 2000 Immigration Law and reproduced in the Protocol on Unaccompanied Minors in 2005. Whatever its intentions, the 1998 guidelines led to unaccompanied children being repatriated, en masse and collectively, with little consideration as to their individual circumstances, by the security

services. Few if any attempts were made to trace the children's families. In the case of Moroccan children, the children would be handed over directly into the custody of the Moroccan frontier police, a practice that was condemned in an international report in 2002 (Human Rights Watch 2002).

Following the Human Rights Watch Report, a range of local and international civil society, organizations began to mobilize. They included rights-inspired international actors such as UNICEF, Save the Children, Spain and Human Rights Watch, along with national-level NGOs, such as SOS Racism and local and regional organizations. The tactics they developed included information dissemination and shaming. 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) set out in detail cases of rights violations against unaccompanied children. The National Network of Associations for Unaccompanied Minors (Red estatal de Entidades de Apoyo a los Menores Migrantes No Acompañados), a coalition formed in 2002 that included rights-based organizations and NGOs that provided care services for young people, also reported a series of serious irregularities on the part of the state. Made up of around 30 groups, it included the Tomillo Foundation (Madrid), La Merced (Madrid), Paideia (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, as well as international organizations such as Caritas, Doctors without Borders, Red Cross, SOS Racism, Human Rights Watch and Save the Children. In addition some state actors, especially the Ombudsperson (Annual Reports 2003-2011) and Basque Regional Ombudsperson (2005), also began to criticize government policy over repatriation. The UN Committee on the Rights of the Child (1994, 2002 and 2010) took note of information provided by local and international NGOs and drew attention to abuses committed against children during repatriation. So, by the early 2000s, the issue had successfully been placed on the political agenda and was increasingly visible in the national and international media.

The government decided, nonetheless, to try and resist the gathering pressure. In October 2003, the state prosecutor (Fiscal General del Estado), Jesus Cardenal, introduced new, and tougher, guidelines governing unaccompanied children. The children were now referred to as "illegal

migrants” and it was decided that unaccompanied minors aged 16 years of age or older should be treated as if they were adults. The new guidelines also called for the children to be returned to the country of origin within 48 hours of arrival. Since most unaccompanied children are adolescents and there is often no clarity as their precise age, in practice this applied to almost all the unaccompanied children in the care of the Spanish state. Not surprisingly, immediate and highly vocal protest from civil society quickly followed.

In the first place, the new Instruction (No. 3/2003) directly contradicted Article 1 of the UNCRC, which established 18 as the legal age of adulthood. This was the basis for vocal opposition by the pro rights NGO community. One of Spain’s largest trades union federations, the Union General de Trabajadores (UGT), then condemned the Instruction just days after it was issued. The support of UGT was important because it ensured much more widespread publicity than the NGOs alone would have been able to achieve. It signified that the issue had now moved into wider political society and moreover, that elements of the left were engaging with the issue; as we discussed above, the European left has often been lukewarm at best in supporting migrants’ rights (Pero 2005). Such was the public criticism of the Instruction that it was replaced a year later (Instruction 6/2004) and Cardenal also stepped down. This was the first concrete victory for civil society. The new state Prosecutor, Candido Conde-Pumpido, accepted that Instruction 3/2003 was a violation of Spain’s core human rights responsibilities. Pressure did not go away, however, since at the same time, the Ombudsperson’s Office, whose support was vital for civil society activities, began to work with pro-rights groups to demand changes to how repatriation was being carried out.

In effect, repatriation had become the glue binding a range of disparate actors together. Information dissemination by rights-based groups had successfully led to vocal protest by trades unions, garnered publicity in the press and extended the network of groups and actors opposed to government policy. So, whilst it could not be said that repatriation was deliberately chosen as the key issue for campaigning – it emerged on the back of the furore following Cardenal’s Instruction 3/2003 and was only one of several issues where the state could be said to be evading its rights responsibilities – the issue was able to unite domestic and international, moderate and radical groups and, crucially, brought some government agencies groups into a network demanding compliance with international law in ways that more radical claims for rights would almost certainly not have succeeded in doing. After 2004, therefore, repatriation became the theme around which rights groups mobilized.

The visit of the Special Rapporteur of the UN Commission for Human Rights, Gabriela Rodriguez Pizarro, in 2004 added more pressure. She used the occasion to draw attention directly to rights abuses of children that occurred during the act of repatriation. In remarks that were a conscious act of “shaming”, she noted the Spanish security forces seemed not to understand “the difference between return and expulsion” (Rodriguez Pizarro 2004, 11). She went on to identify abuses, including physical abuse by the Moroccan border police, in detail (Rodriguez Pizarro 2004,15). Violence during repatriation, she went on, was an institutionalized and “tacitly understood practice” (2004, 11). As a result of the visit, the Ombudsperson Enrique Mugica Herzog increased his vigilance of state practices. He had already begun to itemize the treatment of unaccompanied minors in annual reports from 2001. Because of his position, Mugica Herzog had privileged access to files detailing individual repatriation decisions and, using evidence from them, he stated publicly and authoritatively that the Spanish authorities were making no effort to identify the families of children they were repatriating or to contact child services in the country of origin (Ombudsperson’s Annual Reports 2002, 228; 2011, 253). He concluded that the Spanish state could not possibly be using the best interest principle set out in the UNCRC since they took no steps to acquire the information needed to make informed judgements. The irregularities that he set out in detail, along with the clear moral judgement he was prepared to make, helped civil society actors pinpoint with certainty the extent to which the state was in breach of its obligations.

This new domestic climate encouraged the Spanish Refugee Council (Comision Espanola Ayuda al Refugiado) to contest the repatriations in the courts, supported by local NGOs in the Community of Madrid. The importance of doing so in Madrid lay in the fact that the regional government of Madrid was responsible for more 50 per cent of all child repatriations (Senovilla Hernandez 2009, 147). The legal challenge worked and over the course of that year the court ordered seven repatriations to be cancelled, five of them in Madrid. As NGOs elsewhere in the country also began to challenge repatriation orders, state authorities finally introduced some minimal safeguards in order to avoid long-drawn out battles in the courts that were increasingly culminating in defeat. By now, however, this was not enough for the rights groups to call off their campaign. Buoyed up by their successes, the NGO networks sought to challenge the fact that unaccompanied children were represented in court by a lawyer appointed by the regional government, meaning that, in effect, the children were being represented legally by the state that was seeking to repatriate them. They were successful here as well 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).

Legal advocacy was accompanied by campaigns in the press. This campaign, once again, was supported by all relevant civil society actors, from rights-based organizations to the NGOs that cared for detained children and it now went beyond simply the act of repatriation itself. In 2006, 60 NGOs jointly produced a report 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 central government via the Delegación de Gobierno in Madrid, which shared legal responsibility for unaccompanied minors, were guilty of comprehensive failure to protect the rights of unaccompanied children. The children's right to be heard was consistently violated, they argued, and the government failed to notify children in advance about the decision to repatriate them, 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. The report claimed that children were being repatriated at night to avoid publicity, often abandoned at great distances from their home and sometimes simply deposited in police stations, leaving them vulnerable to abuse and putting their lives at risk. UNICEF, meanwhile, teamed up with the Spanish Bar Association (Consejo General de la Abogacía Española) to issue a joint statement in 2009, calling on the Spanish authorities to prioritize the status of child over that of migrant and to stop "automatic repatriations" (UNICEF 2009).

To sum up, then, and somewhat against the odds, the campaign of documentation of abuses, and the practices of shaming and challenging state decisions seemed to have worked, at least in relation to repatriation. A coalition of international rights organizations, local NGOs and concerned actors from within the state brought to an end the rapid, forced repatriations of unaccompanied children that the Spanish state had adopted as its primary response to the rising numbers of children reaching Spain from North Africa. It was not that there was a change of policy as such, but the numbers of repatriations began to fall very significantly. The publicity of the repatriations, the fact that they now had to go through the courts and that children had to be represented by an independent lawyer made forced returns expensive and time-consuming, and sometimes prevented it altogether. Each individual decision now had to be justified and

the state had to demonstrate that guarantees to protect the children had been put in place, in case of appeal. 87 children were repatriated in 2006. This fell to 23 in 2007 and 6 in 2008 (European Migration Network 2010, 135). It seemed at that point that the days of repatriation as a “tacitly understood” and automatic practice were coming to an end.

### **One step back: The state adapts**

Any success achieved by human rights civil society groups should always be assessed alongside state responses to those victories, for, just as civil society groups learn how to challenge state practices, states too learn to adapt. Moreover, we must be wary of assuming that simply because European civil society movements are relatively well-resourced that they are always able to “win” rights fights or score permanent victories. As Scholte (1999) points out, there can be an excessive liberal optimism about what can be achieved through civil society pressure in the advanced liberal democracies. Especially in areas where states perceive sovereignty to be at stake, they are likely to seek ways to resist or to comply in the most minimal fashion, whilst actively defending in practice their right to control the borders that are integral to their very existence.

The pro-rights coalition in Spain succeeded in halting the repatriation of unaccompanied minors precisely because it had been able to separate repatriation from debates about migration in general. It was not just that the clearest, most documented rights violations took place during the repatriation of children; this was also where it had been possible to win the backing of the courts and public support. The Spanish state suffered a major defeat since having to go through the courts to repatriate unaccompanied children delayed the process significantly. As such, it threatened the viability of repatriation itself because the longer children remain on Spanish territory, the greater the likelihood that they would be allowed to remain indefinitely, since children become eligible for Spanish nationality once they have been in the custody of the Spanish authorities for two years or more (Article 22c, Civil Code). Additionally, the campaign against repatriations had broken with the public apathy and even hostility that is often felt towards migrants in Europe and successfully recast unaccompanied minors as vulnerable children in need of protection.

States are more likely to be able to regain control over rights agendas and to limit the influence of pro-rights groups when they have partnerships and resources to support the creation of new allies. The Spanish state has used its financial and diplomatic resources to re-assign the

treatment of unaccompanied children to the arena of ‘migration’ rather than ‘childhood’ and in so doing the issue has dropped from the public gaze. The state enlisted new actors, created new gate-keepers and transferred the responsibility of managing migration “upward, downward and outward” (Guiraidon and Lahav 2000: 164). At the same time, migration itself has been discursively embedded migration in a wider, and apparently more progressive agenda, around human development. These policies have disrupted the unity of the pro-rights coalition, especially since some service provider NGOs were co-opted to take on migration control responsibilities.

The enlistment of new partners began with the regional governments. In Spain, the central state retains competence over immigration but the regional governments have responsibilities for ensuring migrants’ access to rights, welfare and integration (Barbulescu 2013). Regional governments take day-to-day responsibility for unaccompanied children, bear the costs of accommodation, welfare and education and have legal guardianship over the children. They had to assume, therefore, the financial burden of the decisions by the courts to delay and suspend repatriation and they consequently have had an additional incentive to cooperate with the central state in reinstating repatriation. Indeed, the regional governments had already begun to respond to the slow-down in repatriation by “losing” the children or passing them between the different regions, meaning no region would have to take responsibility for long. In 2009, UNICEF identified this as a “frequent practice” (UNICEF 2009, 145). Children were effectively brought under pressure to abandon the residences where they are being housed and to drop out of the system in advance of the decision about their right to remain (UNICEF 2009,125). UNICEF (2010,125) also found that children were actively being encouraged to move from one region to another and to re-enter the care system on arrival. The children were being released from care and allowed to travel long distances across the country, unsupervised and without emotional or financial support. Some ended up crossing the country in this way on multiple occasions (UNICEF 2006, 2009; Save the Children 2008). There can be no doubt that such practices were a dereliction of the (regional) state’s duty of care to children, deprived the children of any possibility of education, exposed them to the risk of harm, and caused disruption and psychological distress. From the state’s perspective, however, passing them about in this way relieved regional governments of financial responsibility for the children, prevented them from accruing the right to remain and kept them from civil society organizations that might take up their case.

Nevertheless, such tactics could only be short term responses. For the longer term, Spain signed bilateral agreements with countries of origin that merged restrictive migration control policies, and action on unaccompanied children in particular, with a broader and apparently more progressive agenda on overseas development. These agreements have been crucial in allowing Spain to circumvent rights claims on behalf of unaccompanied children.

Closer collaboration with countries of origin was initially the result of the decision by the courts to insist on safeguarding measures during repatriation. This meant that Spain had to verify the identity of the child, contact the family or ensure that returned children would not be repatriated to areas of conflict areas or situations of risk. But Spain had also been keen to deepen cooperation with countries of origin before the court judgements on repatriation and these efforts intensified after 2006. As a result, a so-called series of “second generation” (Cassarino 2010) agreements were signed with Senegal (2008) and Morocco (2007 and again in 2013), countries of origin for 80 per cent of unaccompanied minors in Spain (UNICEF 2010, 45). Crucially, the agreement with Morocco created the possibilities of building residential centres there, funded by Spain, with the purpose of holding the children before formal repatriation actually takes place. Five residences and two apartments have been built in Tangier, Nador, Beni Mellal, Taghram and Ben Gurir, with a total capacity of 210 places (Human Rights Watch 2008, 5). Spain can claim to be safeguarding the children in some way whilst they are in the centres because of they have oversight of the running of the centres. Nevertheless, the role of these centres, and how they are run is certainly controversial (Human Rights Watch 2008). Nevertheless, the policy is backed by the regional governments, which have in fact shared the costs of building and maintaining the residences. In fact, the regional government of Catalonia has taken something of a lead here. The Programme Catalonia-Maghreb (2006-2009) was an early example of the policy and, introduced in 2006, promoted the “voluntary” return of unaccompanied children from Catalonia to a centre in Tangier, funded by the regional government. Children who are taken to Catalan detention centres are given a leaflet that directly encourages them to move to Tangier. It reads:

While you are here [in Catalonia], without a clear future, without residence documents, without a job, we are working as your partners every day in Morocco to make it a better country ... You have found out now that Europe is not the paradise everybody told you and that you had dreamed of; now you 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 Government] have created the Catalonia-Maghreb Programme.

This controversial strategy has only been legally possible because bilateral agreements have a different status from international agreements and do not receive the same scrutiny (Asin 2012, 311). Relatively low-key profile, there is little public awareness of their purpose or content. Yet they are being used to legalize the fast-track return of unaccompanied children to their country of origin in ways that are almost certainly inconsistent with international rights agreements. They leave Spain in breach of its obligations under the UNCRC in a number of ways, including the obligation to involve children in good faith in decisions that affect them. Self-evidently, they prioritize the interests of the state over the best interest of the child. Moreover, the agreements lead to differential treatment of unaccompanied minors in that Spain can only return children in this way, that is in advance of legal repatriation, if there is an agreement with the country of origin. In other words, they can only do this with children from Morocco and Senegal. Spain could therefore be said also to be violation of the non-discriminatory principle of Article 2 of the UNCRC.

Cooperation with a variety of non-state and private actors has also proved vital to the success of new approach and, starting in 2006, the Spanish state has built a web of public-private partnerships to support repatriation and police migration more closely. Airline carriers, for example, have been encouraged to act as gate-keepers to prevent the arrival of unaccompanied minors and are now encouraged to be extra vigilant that minors do not board planes unless they are clearly accompanied by their legal guardians. The most important actors cooperating with the state, however, come from within civil society. In particular, the state has been able to co-opt some service providers, undermining the civil society unity that was central to mobilization in the run up to 2006. Some are now even providing services for the unaccompanied minors in the new centres in Morocco. Their decision to do so reflects, at least in part, the financial dependence on the state of many children's services NGOs that makes it difficult for them to actively criticize the government; furthermore, such dependence means regular, close contact with state actors that can also socialise them into supporting the state's views (see Grugel and Peruzzotti 2010, 2012). Paideia, for example, has traditionally provided services for children in care. Although it has been part of the National Network of Associations for Unaccompanied Minors, it acquired contracts to provide care for

unaccompanied minors in the centres in Tangier and Ben Querir as part of its wider portfolio of care services for regional governments.

As well as seeking to reduce the numbers of unaccompanied children on Spanish soil, the state has worked discursively to embed migration control issues into development policy. For instance, the agreement between Spain and Morocco links funding from Spain for the economic development of Morocco directly with the repatriation of children in Article 2.1 of the Agreement (published in BOE no70/2013 22 March). And there is a similar clause in the 2008 agreement with Senegal (Article 2.1 published in BOE no 173/2008, July 18, 2008). Furthermore, Spain has focused development aid specifically on those geographical areas where most unaccompanied children come from. Spain has promised to invest 150 million euros in Morocco between 2013-2016, of which 50 million is a donation and 100 million a development loan (AECID Morocco 2014). The funds will predominantly be spent in the Northern region of Tánger-Tetuán, in the Eastern region of Taza-Alhucemas-Taounate and in Greater Casablanca and the coastline of Sous-Massa-Draa (AECID Morocco 2014). These are not the poorest parts of Morocco – but they are the main exit point to Europe. Similarly, Spain is spending 50 million euros in development aid in the principal exist points from Senegal over the same period (AECID Senegal 2014).

And Spain – and the EU – is linking development to the fight against human trafficking. Of course, this merging of agendas is not necessarily entirely a marriage of convenience: the Spanish state is undoubtedly correct in arguing that migrants are open to exploitation from trafficking gangs. But there is no doubt that there are also benefits in preventing human trafficking is crucial for more effective migration control. It is not surprising that Spain has called for more pro-active policing to put an end to migrants crossing into Europe. Doing so satisfies, to some extent, pressures to act on human rights violations in the Mediterranean whilst allowing in practice for the introduction of tighter border controls. Spain has been working with Senegal and the European border control agency, FRONTEX since 2006 to patrol the Senegalese West Coast in order to intercept would-be migrants before they arrive in Spain. FRONTEX can only do so thanks to bilateral agreements between Spain and Senegal and it now patrols the area the Canary Islands and the Spanish waters to the coast of West Africa including the Senegalese coast (FRONTEX 2007). These controls do not target children in particular; but children will often figure in press reports because of their hugely emotive worth. Indeed, on a visit to emphasize the importance of Spain-Senegal cooperation in controlling the

outflow of migrants to Spain in 2009, the then Spanish Prime Minister Alfredo Rubalcaba drew attention specifically to the agreements as instruments to control the flow of unaccompanied children, saying that the children “should not be deceived” and that “they need to know that it is not worth risking their lives on a boat because if they arrive illegally [in Spain], they will be repatriated” (*El Pais* 21 July 2009). The EU Action Plan on Unaccompanied Minors (2010-2014) is another outcome of increased pressure from Spain and other countries for more concerted EU action.

In summary, the Spanish state responded energetically and has once again been able to seize the initiative. And, despite state protestations to the contrary, the current policies are very grey, both ethically and legally. It is not at all clear that states are legally entitled to delegate their rights responsibilities in the ways that Spain is doing. State responsibilities to uphold rights cannot be contracted out (see Lavenex 2006 who makes a similar point with respect to asylum seekers). Non state actors do not have the same responsibilities as states for human rights in international law; additionally Spain is delegating some of its responsibilities to other states that have a poor human rights record and higher levels of violence. But equally, there is no denying that its multi-pronged strategy has been effective.

### **Conclusion**

What are we to make of the story of civil society-state struggles around the repatriation of unaccompanied children in Spain? Certainly, there are lessons here for scholars of migration and human rights more broadly. First, it is clear that civil society can sometimes achieve positive changes, especially when it offers a coherent and unified rights-based critique, builds a cross-sectorial alliance and is supported by international rights actors. In this case, organized civil society actors, led by human rights organizations, were able to push for greater compliance by working with actors in the state sympathetic to children’s rights. Their activism embraced tactics that ranged from shaming to legal appeals. While the courts were essential, it was the rights-based civil society organizations that provided the leadership, support and legal aid that successfully challenged automatic repatriation.

Yet the rights “victories” activists achieved on behalf of migrant children were not permanent. Gains engineered from civil society, it seems, can be reversed, at least so far as migration is concerned. In this case, despite the time, energy, commitment of human rights groups and the support of the courts, the Spanish state was able to reassert its authority to repatriate North

African unaccompanied children, undeterred by the dubious legality of its actions. It did so by enlisting state and non-state partners, including service delivery NGOs, in the process. Most effective were the bilateral agreements with the countries of origin of children, especially as these also implicated some civil society actors. As Tarrow (1996: 199) reminds us, states “do not sit idly by while challengers contest their rule”. The Spanish state has fought back, using weapons that are unique to states – making agreements with other state to divide, or ignore, responsibilities, enlisting new partners in governance, selective use of state contracts to separate service NGOs from rights groups and framing migration as an issue of sovereignty, not rights. It is not that the rights organizations have given up – they are in fact trying to mobilize age assessment practices that Spain uses to treat children as undocumented adults (Diario Juridico, 2 May 2014) – but they have, at least for now, lost the initiative.

The Spanish case thus raises important questions about rights-based advocacy movements and migration governance. If states are able to physically relocate people for whom they have legal responsibility outside their borders, they reduce the effectiveness of the traditional tools of rights advocacy. In this case, once the children were no longer visible inside Spain, putting information into the public domain or “shaming” the state in the eyes of the electorate was of more limited value. At the same time, the children were placed beyond the reach of the national courts. It is crucial for our understanding of human rights, civil society and international migration that we do not miss these state push-back strategies and the ways in which states challenge the human rights victories that civil society organizations work so hard to achieve.



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## NOTES

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<sup>1</sup>Repatriation is the procedure of returning migrants to their country of origin or to a country of transit. Other widely used terms are "return" or, more frequent in the American context, "deportation". In an attempt to whitewash the procedure, some state authorities have relabelled the procedure "assisted return".