

WHEN THE STATE DOESN'T CARE

A GUIDE TO ACCESSING JUSTICE FOR VIOLATIONS OF
CHILDREN'S RIGHTS IN CARE INSTITUTIONS IN EASTERN
AND SOUTHEASTERN EUROPE AND THE CAUCASUS



Acknowledgements

—

CRIN would like to thank the following individuals who generously shared information and advice for the report (in alphabetical order):

Andreea Hotopan, ACTEDO (Romania); Andrey Makhanko, INGO “Understanding” (Belarus); Andriy Nazarenko, Foundation “Future for Orphans” (Ukraine); Andy Guth, World Vision (Romania); Anna Arganashvili, Partnership for Human Rights (Georgia); Arina Turcan, attorney (Moldova); Dani Koleva, National Network for Children (Bulgaria); Diana Negut, legal consultant (Romania); Dilyana Slavkova, National Network for Children (Bulgaria); Erjon Muharremaj, University of Tirana (Albania); Georgiana Pascu, Center for Legal Resources (Romania); Ivana Stankovic, Praxis (Serbia); Iulia Pascu, ACTEDO (Romania); Mirela Oprea, ChildPact (Romania); Pavel Denisov, Charitable Fund “Hope for Tomorrow” (Russia); Sergiu Rusanovschi, Soros Foundation Moldova (Moldova); Tatevik Gharibyan, Armenian Child Protection Network (Armenia); Vasile Coroi, legal consultant (Moldova); Velina Todorova, UN Committee on the Rights of the Child, Plovdiv University (Bulgaria); Veronica Goinic, National Centre for Prevention of Child Abuse (Moldova); Visinel Balan, NGO “Drawing Your Future” (Romania).

In particular, CRIN would like to thank Agnes Von Maravic (Council of Europe), Aneta Genova (Bulgarian Helsinki Committee), Jane Buchanan (Human Rights Watch) and Munir Mammadzade (UNICEF) for reviewing the guide and providing invaluable insight and advice.

CRIN was also very lucky to benefit from the work of our interns - Tatiana Bogacheva and Anastasia Koroleva - and would like to thank them for their substantial input into the research of the guide.

—

ABOUT CRIN (www.crin.org)

Our goal: A world where children’s rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children’s rights, not ourselves.

The Child Rights International Network (CRIN) is registered in the United Kingdom and regulated by Companies House and the Charity Commission (Company Limited by Guarantee No 6653398 and Charity No 1125925).

Illustrations by Miriam Sugranyes Coca
Designed by Remember Creative

Contents

Foreword	4
Introduction	5
Methodology	6
Chapter I: Global overview of redress for children's rights violations in care institutions	7 - 10
Chapter II: How to bring a case domestically	11 - 26
Chapter III: How to get justice at the regional and international level	27 - 31
Resources	32



Foreword

Over the years there have been many stories in the media revealing the staggering levels of institutional abuse and neglect in children's orphanages across Eastern Europe. Many of us working in this field have repeatedly called for a shift from institutional care to family-type alternative care — in order to give these forgotten children a chance to live in dignity.

The process of deinstitutionalisation is now on the EU political agenda, thanks to relentless advocacy from passionate children's rights defenders over many years.

But a lot of work still remains. First, we need to ensure that deinstitutionalisation reform does not stall. It is outrageous that my native Bulgaria, for example, still doesn't recognise the placement of children in institutions as a discriminatory measure equal to torture and inhuman and degrading treatment. To this day, no government in Eastern and Southeastern Europe has ever issued an official apology, conducted a public inquiry into rights abuses of children in institutional care or implemented redress schemes for survivors. The only way to seek accountability and redress today is to go to the European Court of Human Rights.

The right to access justice for children in general has long been neglected and ignored. It is much more challenging for children to access justice when their rights are violated as a result of their placement in an institution because their guardian - the State - is the perpetrator of the crime. Children's voices are unheard, they do not know who to trust, have no means of accessing help from the outside world and many have disabilities, making communication even more challenging.

Access to justice should be at the core of guaranteeing these children their rights. We must focus on securing justice for historical abuse and neglect that children experienced while in institutions, but it is equally important to ensure that those children who remain in care today have accessible legal and quasi-legal complaints mechanisms to provide remedy for the violations they have suffered.

This research offers a new approach for campaigners seeking to secure justice for children who are in care and for those who have left, but never got justice for violations they suffered. This guide sheds light on what has been done in other parts of the world to achieve redress for institutional abuse and looks into different avenues to challenge violations and secure lasting improvements for children in care. This material will be useful not only to children's rights advocates, but also to national human rights institutions, pro bono lawyers, journalists, donors and others. It provides ideas for action and seeks to give hope to survivors of institutional abuse and to children who are still in care today.

I hope this is the beginning of a very much needed change to make access to justice for all children, including vulnerable ones, a matter of priority.

Ms. Velina Todorova

Member of the UN Committee on the Rights of the Child



Introduction

The problem of neglect and abuse of children in care institutions in Eastern and Southeastern Europe and the Caucasus has been known to governments for decades, yet few victims have secured redress for the harm suffered. While a deluge of information has been published about the scale of the violations, access to justice and redress for these children has largely been neglected. But when a child's guardian - the State - is the very perpetrator of violations committed against them, they face even greater barriers to accessing justice.

The aim of this guide is to enable advocates to access the legal and practical tools needed to secure an end to, and compensation for, violations of rights suffered while in institutional care. It draws on successes from outside the region and demonstrates the growing movement among civil society organisations within the region to take legal action to defend the rights of children in state care.

Examples documented here include domestic and supra-national strategic litigation, the use of national human rights institutions and large-scale investigations, all of which are important tools for securing lasting improvements and justice for children in care. While this guide should be used in a practical way, it should not be construed as a source of legal advice, and we encourage cooperation between lawyers, NGOs and activists with complementary expertise wherever possible. The guide should be used alongside other CRIN resources, including country-specific access to justice reports, our guide to strategic litigation and legal assistance toolkit.

CRIN hopes that this guide will help advocates secure justice for children who are still in care, when they have left care, prevent further abuses and set a precedent for other interventions.

CRIN welcomes:

- Comments on the guide
- Additional information on the situation of children in state care
- Enquiries about starting a new campaign
- Ideas for further regional and international advocacy

Please contact info@crin.org or, for communications in Russian, russian@crin.org.

Background

Today, hundreds of thousands of children in Eastern Europe and the Caucasus live without parental care. These children are victims of an ideology which continues to dominate many former Soviet and communist countries and is rooted in the idea that the State is capable of taking better care of children than their parents. In addition, particularly during and immediately after the Second World War, institutionalising children was considered important because it allowed mothers to return to work and provided care for unwanted children.

Institutional abuse has been documented by many researchers and is still regarded as an endemic problem in Eastern Europe. Children are often placed in large communal facilities, far from other communities, cutting them off from oversight and making access to justice for violations of their rights virtually impossible. These abuses take many forms, with a pervasive culture of depersonalisation, poor one-to-one care, inactivity, lack of stimulation and inadequate food and heating among the most commonly reported complaints. Abject living conditions are compounded by unsatisfactory training and supervision of staff, and the huge numbers of children that institutions are expected to house in order to save government funds. Some children grow up and are moved to facilities for adults, becoming institutionalised and never experiencing the outside world, while others have frozen or starved to death. Studies have demonstrated that homelessness, criminalisation and suicide are often the ultimate fate of many young adults raised in state care institutions.

Deinstitutionalisation has been taking place to varying degrees in countries in the region with the aim of closing old-fashioned care institutions. Despite much progress, state-run orphanages and boarding schools remain the norm. Today, institutional abuse of children takes various forms, including sexual abuse of children by adults in a range of residential care and community-based settings; physical, sexual, or emotional abuse of children by adults (or their peers) in residential and out-of-home care; and, most broadly, the living conditions in the 'dehumanising institutional environment' of residential care.¹

In all of these situations it is crucial that children, and those acting on their behalf, have access to legal and practical resources to end, prohibit, or compensate for, the violations of rights suffered whilst in institutional care. It is also vital that the institutionalisation of children is ended, that children's right to grow up in a family environment is respected, and that all of the rights enshrined in the Convention on the Rights of the Child are enforced.

¹ Penglase J., *Orphans of the Living*, Fremantle Press, 2005, p. 48

Methodology

This practical guide is based on a combination of qualitative and quantitative research. The scope of the publication is limited to 11 countries: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia and Ukraine. The guide uses analysis of national, regional and international law and compiles the redress mechanisms available for the victims of rights violations during and after leaving state care institutions. By providing relevant precedents of success in countries with similar problems, it serves as a tool for those attempting to lobby for structural change in legal systems, helping to tackle the issue of neglect and abuse of children in care institutions.

CRIN is grateful for input from NGOs and lawyers in ten of the countries represented² who were contacted by email or telephone. All interviewees were asked to outline legal options, typical procedural and practical obstacles and sources of support, to provide examples of case law, ongoing legal reform initiatives, quasi-judicial mechanisms and to share their personal experiences of pursuing justice for the victims of rights violations in state care institutions. No government officials were interviewed.

Key concepts

For the purpose of this guide we use the term “institutional care” to describe alternative care settings which are characterised by several recurring elements, including depersonalisation, rigidity of routine, block treatment, social distance, dependence, lack of accountability and social, emotional and geographical isolation.³ These types of settings include, but are not limited to: infant homes, children’s homes, orphanages, boarding homes, specialised boarding schools, and others.

The same approach is used towards all the groups of children in care without distinguishing any particular groups on grounds of disability, gender, race, etc. The issue of access to justice for children with physical and mental disabilities is being undertaken by other NGOs.⁴

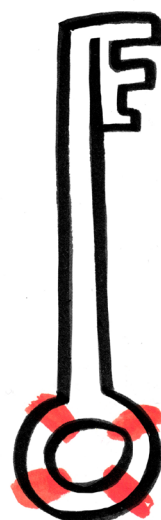
International standards on the rights of children in alternative care

There are various international legal instruments, both binding and nonbinding, that impose important obligations on States for the care and protection of children without parental care. These standards can also be used to support advocacy efforts and in legal proceedings in States where these standards are not fully observed.

The Convention on the Rights of the Child makes clear the State’s responsibility to ensure alternative care for children deprived of their family environment (art. 20) which is recognised as the most desirable form of raising a child.

Further responsibilities of the State relating to alternative care have been outlined in the Guidelines for the Alternative Care of Children adopted by the UN General Assembly in 2009⁵ and the Council of Europe’s Recommendation on the rights of children living in residential institutions.⁶

The Convention on the Rights of Persons with Disabilities⁷ additionally requires that where the immediate family is unable to care for a child with disabilities, States should provide alternative care within the wider family, and failing that, within the community in a family setting (art. 23). It also recognises the right of persons with disabilities to education (art. 24) in support of which the State should ensure appropriate training of qualified staff.



² Albania, Armenia, Belarus, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia and Ukraine. It was not possible to get feedback from Azerbaijan.

³ Eurochild, Deinstitutionalisation and quality alternative care for children in Europe: Lessons learned and the way forward, September 2014, p. 8. Available at: http://www.openingdoors.eu/wp-content/uploads/2014/11/DI_Lessons_Learned_web_use.pdf

⁴ See Mental Disability Advocacy Centre resources. Available at: <http://mdac.info/en/resources>.

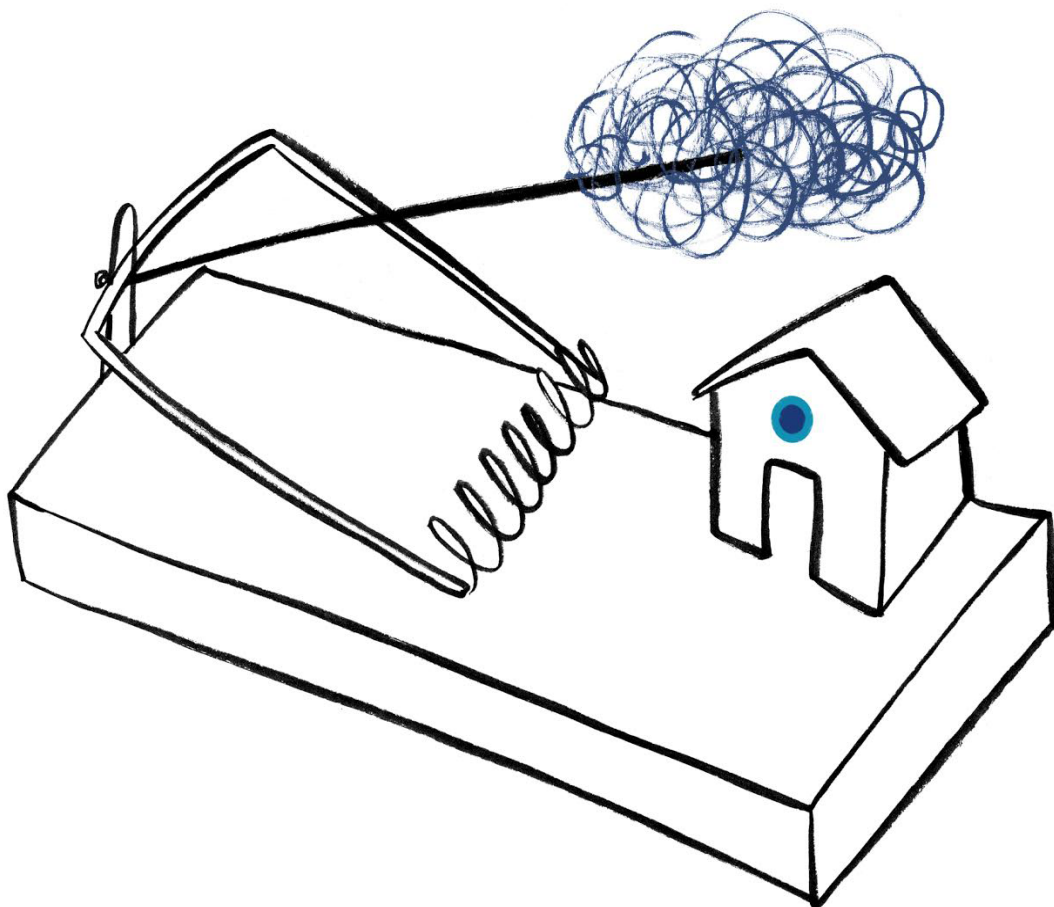
⁵ Available at: http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf.

⁶ Available at: <https://www.coe.int/en/web/children/alternative-care>.

⁷ Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>. Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia and Ukraine have ratified the Convention on the Rights of Persons with Disabilities; Belarus has signed the Convention.

Chapter I:

Global overview of redress for children's rights violations in care institutions



The extent of children's rights violations in state care institutions in Eastern and Southeastern Europe and the Caucasus has been known to governments for decades, yet the many victims have not secured access to justice for the harm suffered. Only a few cases concerning abuse and neglect of children in orphanages have reached the European Court of Human Rights, and no large-scale investigations or redress schemes⁸ have been enacted. Examples of access to justice for such violations from elsewhere, however, highlight the possibilities.

The need for access to justice for violations suffered in care institutions has pierced public consciousness as a result of inquiry commissions set up in Australia, Austria, Belgium, Canada, Denmark, England, Finland, Germany, Ireland, Iceland, Netherlands, New Zealand, Northern Ireland, Norway, Scotland, Sweden, Switzerland, the United States and Wales.

The emergence of redress processes in some countries and regions has provided a basis for care leaver advocates, researchers, inquiry commissions and others to argue for such reparations elsewhere. The inquiry commissions are now linked to a global movement. The International Network on Studies of Inquiries into Child Abuse, Politics of Apology and Historical Representations of Children in Out-of-Home Care was established in 2012 and aims to facilitate this exchange between activists, lawyers, state agencies, and scholars involved in the process of exposing state crimes against children in care.⁹ In 2016, members of the network represented 15 countries, but the Network still lacks geographical diversity and is dominated by Western countries.¹⁰

Factors that facilitate large-scale investigations

The triggers for a public inquiry or a large-scale investigation vary, but include those set out below. Often several of these actions may be necessary to create the political will needed to secure justice.

Advocacy campaigns initiated by survivors' networks have been instrumental in establishing large-scale investigations and systemic reforms of varying degrees. The Care Leavers Australia Network, founded in 2000 by two former orphanage residents, played a significant role in

the establishment of three public inquiries and the issue of national and state level apologies.¹¹

The failure of the State to investigate criminal cases in a timely fashion and as a result a larger **campaign against corruption and cover-ups** can be a trigger for an investigation. In this way, responses to institutional abuse may be only partly about the abuse of children; they are also about the failure of authorities to investigate the matter properly and their efforts to hide the truth from the public.

Example: Wales, United Kingdom

The North Wales Tribunal of Inquiry (1996) was established 'to satisfy a public need to know the truth'¹² after it had been revealed that for over ten years police and local authorities failed to probe cases of paedophilia and abuse in care institutions,¹³ ultimately creating the conditions for widespread public demand for investigating the crimes and cover-ups.

Adult **survivors' firsthand personal accounts of abuse brought to public attention** as opposed to 'anonymous abstract crimes' are an essential factor in public visibility of the problems of institutional abuse. In Ireland, firsthand statements of the victims were recorded in the documentary 'States of Fear'. With pressure from advocacy groups, the broadcast of this documentary was followed by a public apology by the Prime Minister of Ireland.¹⁴

While physical abuse in care institutions do not appear to resonate as much as cases of sexual abuse with the general public, it is worth noting that **cases of sexual abuse** have been important for the launch of large-scale investigations into other forms of violence.

Example: Sweden

In Sweden, the stories of men who suffered sexual abuse in care institutions in the 1950s-1960s were recounted on a television programme. It was only then that the Inquiry on Child Abuse and Neglect in Institutions and Foster Homes (2006) was initiated. The evidence of endemic abuse was overwhelming: 866 people interviewed claimed that they had been subjected to neglect and abuse during their time in municipal or state care in Sweden.

8 For the purpose of this report, the term 'redress' is used to describe 'schemes or processes established by governments or institutions to offer compensation, reparation and/or services'. Murray S., *Supporting Adult Care-Leavers: International Good Practice*, Bristol Policy Press, 2015, p. 87.

9 Information provided to CRIN by Johanna Sköld, Associate Professor of Child Studies at University of Linköping, Sweden.

10 Ibid.

11 Murray S., *Supporting Adult Care-Leavers: International Good Practice*, Bristol Policy Press, 2015, p. 175.

12 Corby, Doig and Roberts 2001:120 quoted in Daly, K.; "Conceptualising Responses to Institutional Abuse of Children", *Current Issues in Criminal Justice*, Vol 10, 2014: 5-31.

13 Ibid.

14 Thomas L., Simpson L. and O'Callaghan E., *Models of Compensation: Ireland – the Compensatory Advisory Committee, the Commission To Inquire Into Child Abuse and the Residential Institutions Redress Board*, p. 1. Presented at the New South Wales Community Legal Centres State Conference, Sydney, 7-9 April, 2008.

Alongside media campaigns, **victims' hotlines** have helped to establish the prevalence of institutional abuse. When, for example, in 1996 a special Child Abuse Hotline was established by the Queensland Department of Families, Youth and Community Care (Australia), nearly 70 percent of the callers were adults reporting abuse experienced during their childhood when they were residents at one specific orphanage.¹⁵

Bringing a court case against the government (civil litigation) is a catalyst for the State to compensate victims for the damage, harm and neglect experienced while in care.

Example: Ireland

In Ireland, the maltreatment of children in out-of-home care institutions was first revealed by the investigative committee headed by the judge of a Children's Court in the 'Kennedy Report' (1970). The conditions reported were so awful that two institutions were closed immediately.¹⁶ But it took another 20 years for adult care leavers to initiate court proceedings against the Department of Education and Science and the religious orders - proceedings which played a crucial role in establishing the redress scheme.¹⁷

Purpose and nature of large-scale investigations

The triggers set out above can pressure the State to provide resources for an independent large-scale investigation. Public inquiry commissions¹⁸ into the abuse of children in care first occurred in Australia and Canada and the UK during the 1990s and were later launched in Ireland, Sweden, Denmark, Norway and Iceland in the 2000s.

Investigations usually look into the details of the crime reported as well as the general conditions in care institutions during the period under examination. To build a complete picture, the investigating authority draws on testimonies by the victims, suspects and witnesses, documents at the care institutions (or their absence), and revisits state policy. While this section focuses on public inquiries, it is important to note that other fora to investigate institutional abuse and neglect, for example criminal justice prosecutions, civil law actions, criminal injuries compensation programmes, inquiries by ombudspersons are also possible.¹⁹

Example: Ireland

The Commission to Inquire into Child Abuse in Ireland was created to listen to people who have been abused during childhood in care institutions since the 1940s, find out why the abuse occurred and determine who was responsible.²⁰ Four areas of abuse were examined – neglect, physical, sexual and emotional abuse. At the end of the process, the Commission had to report the results of the inquiry directly to the public. It also issued recommendations to prevent abuse in care institutions in the future and halt the continuing effects of the abuse.

A public inquiry should encourage and support survivors' participation. In Ireland care leavers were guaranteed an opportunity to testify either before the Confidential Committee and stay anonymous or the Investigative Committee and provide fuller accounts of the violations. The Royal Commission into Institutional Responses to Child Sexual Abuse in Australia provides for both private sessions and public hearings, telephone or written submissions, and links survivors to counselling services.²¹

Investigative commissions typically issue non-binding recommendations upon completion of the inquiry. Usually these include initiatives such as apologies, memorials, redress schemes and specialist support services.

Example: Queensland, Australia

The Commission of Inquiry into Abuse of Children in Queensland Institutions (Australia) covered 159 institutions from 1911 to 1999 and found extensive evidence of abuse.²² It made 42 recommendations relating to contemporary child protection practices, youth justice and redress of past abuse. It also brought reconciliation initiatives including apologies, memorials and events, the establishment and delivery of the Queensland Government Redress Scheme, the Forde Foundation Trust Fund, and community-based support services.²³ Furthermore, following the Inquiry and a number of other regional investigations, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2013) was established to examine the response to practices of individuals using their work in an institution (orphanages, juvenile system centres, sport clubs, etc.) to sexually abused children.²⁴

¹⁵ Daly, p. 14.

¹⁶ Thomas, Simpson and O'Callaghan, p. 1.

¹⁷ Ibid.

¹⁸ Public inquiry commissions discussed in this report are differentiated from those inquiries conducted by government officers; their independent nature is ensured through the appointment of judges as commissioners.

¹⁹ Murray, p. 37.

²⁰ Thomas, Simpson and O'Callaghan, p. 2.

²¹ Murray, p. 48.

²² Daly, p. 24.

²³ See the report of the Commission of Inquiry into Abuse of Children in Queensland Institutions, Australia, 1999. Available at: <http://fordefoundation.org.au/u/lib/cms/forde-inquiry-report.pdf>.

²⁴ Middleton W., "Institutional abuse and societal silence: an emerging global problem". *Australia and New Zealand Journal of Psychiatry* Vol. 48, 2014: 22-25.

Creation of redress schemes

Findings of large-scale investigations and public inquiries look at a variety of violations that children may have suffered while in state care. These range from ill-treatment and its negative long-term consequences to discriminatory state policies. The State must also assess the extent of the damage and establish fair compensation for the care leavers. Redress schemes are typically implemented when a public inquiry has concluded.

Features of redress schemes:

- Redress schemes normally include, but are not limited to financial compensation.
- They also involve practical measures such as psychiatric and therapeutic support, access to adult education, assistance in accessing information about biological parents and support with family reunification.²⁵ Ireland and Canada reportedly have the most comprehensive redress schemes for survivors who experienced abuse and neglect while in care.²⁶
- The particular form of compensation and the mechanism of distribution is determined by an independent body.
- Redress schemes must be well organised to be effective (see example below).

Example: Ireland

In Ireland, the Compensatory Advisory Committee was established to create a predictable, sensitive and flexible scheme to establish an award in each case.²⁷ These awards are comparable with those ordered - or likely to be ordered - by court decisions for similar violations. Then, the Residential Institutions Redress Act 2002 set up the Residential Institutions Redress Board²⁸ - an independent body chaired by a judge - to distribute the allocated money.

In Ireland, the victims were given three years to submit an application and a total of 13,692 cases were considered by the Irish Redress Board.²⁹ To facilitate the procedure for the applicants, legal and other reasonable expenses were covered by the State. Advertisements communicating the Board's activities were placed in the global press and Irish media and Redress Board officers travelled to the US and UK to hear evidence and accept applications. Moreover, children, spouses and partners of deceased survivors were able to apply for compensation or continue to pursue the claim.

There are various types of redress scheme:

- Universal or targeted (everyone in care or only some groups can claim redress);
- Not assessed or validated (either having been in care is sufficient to gain redress or assessment of the claim is required);
- Financial compensation (flat sum for each year spent in care or amount based on the degree of the harm) and/or particular service (adult education or counselling).³⁰

One of the reasons redress schemes are implemented is a fear of litigation against the government and major payouts to victims. In Canada, a 'recent flood' of civil litigation suits filed by care leavers threatened to 'overwhelm the court system and drive several church organisations to bankruptcy'.³¹ Typically, applying to a redress scheme means that a claimant will not be allowed to bring a court case against the government later.

In some countries in Eastern and Southeastern Europe and the Caucasus examined in this report, discussions about litigation against the government for these kinds of violations and opportunities to seek redress are only just emerging. Despite the fact that public inquiries in different countries arise in the context of different welfare policies it is important to note that they have also inspired each other. International experiences examined in this chapter could therefore serve as examples for establishing inquiry commissions and redress schemes in the region.



²⁵ Murray, p. 190.

²⁶ In Canada, there has been a national redress scheme for Indigenous people and schemes in several provinces on institutional abuse, while Ireland has implemented a universal scheme available to any person who grew up in care. Ibid, p. 97, 102, 194.

²⁷ Daly, p. 24.

²⁸ Official website available at: www.rirb.ie.

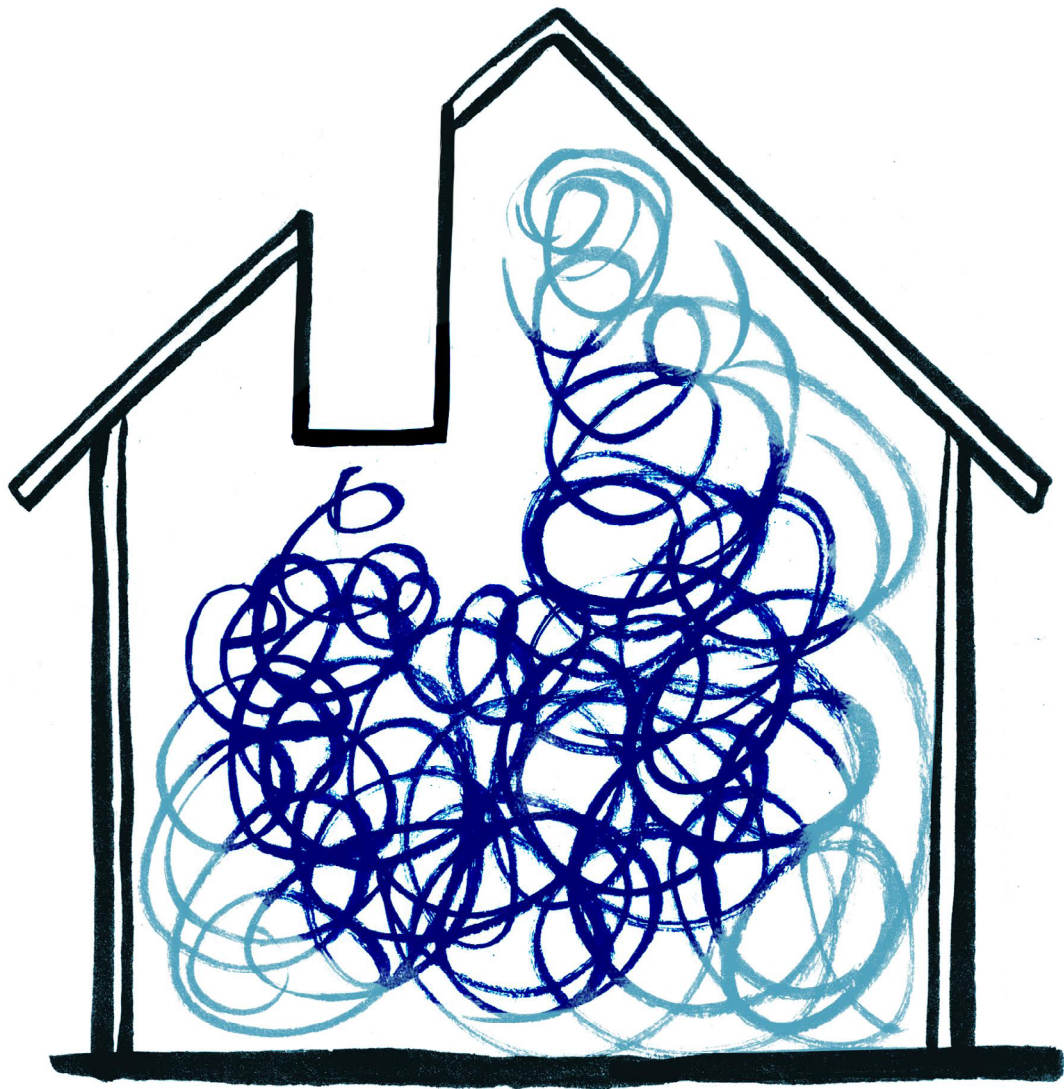
²⁹ *Annual Report of the Residential Institutions Redress Board, Ireland*, 2008. Available at: www.rirb.ie/annualReport.asp.

³⁰ Ibid, p. 95-96.

³¹ Winter S., *Transitional Justice in Established Democracies: A Political Theory*, Palgrave Macmillan, Basingstoke, 2014, p. 185.

Chapter II:

How to bring a case domestically



This chapter examines possible challenges within domestic legal systems and quasi-judicial mechanisms in Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia and Ukraine. It analyses how each mechanism would be best used for challenging violations of children's rights in institutional care. Conditions for opening public inquiries into abuse and redress schemes are also explored.

Judicial proceedings and strategic litigation

Used alone, traditional advocacy methods such as protests, media campaigns, petitions and reports have not done enough to make authorities accountable for abject living conditions and extensive violations of children's rights in state care. The aim of bringing a 'strategic' case to court is to create a broader change in addition to resolving the matter at hand. Strategic litigation remains an underused tool for defending children's rights, particularly in relation to institutional abuse and in the countries examined in this report. However, it is a powerful means to establish and enforce children's rights where other methods of advocacy have proven ineffective. Although a demanding endeavour, the advantage of bringing a court case against the State is that the government is obliged to implement the court's decision.

Read more about strategic litigation in CRIN's guide.³² For definitions of legal terms used in this report, see CRIN's glossary of legal terms.³³

1. What type of proceedings should you choose?

Choosing what type of case to file is the first step to challenging a violation. Sometimes the same violation will give rise to more than one type of claim, in which case you can consider what powers the different courts will have in relation to your case and which would be in the position to best remedy the violation.

- **Criminal prosecutions.** Many violations that children in institutions suffer constitute crimes. This includes violence, sexual abuse, corporal punishment and others. State authorities may launch an investigation and a criminal prosecution on the basis of a complaint by the victim or another person who knows about the occurrence of the crime, such as a social worker or an NGO worker. The alleged perpetrator of the crime will be the defendant in such cases, but a charge may also be possible against their supervisor

(for example, the director of the home) if they knew about or facilitated the crime. If convicted, the defendant will be punished by a fine and/or imprisonment. Where the state authorities fail to launch a criminal investigation, prosecutions can be launched by victims in Albania,³⁴ Armenia,³⁵ Azerbaijan,³⁶ Belarus,³⁷ Bulgaria,³⁸ Russia³⁹ and Serbia.⁴⁰ It may also be possible to lodge an application with a regional or international human rights mechanism over the State's failure to investigate and punish those responsible for the crime (see next chapter).

Example: A member of staff at the institution sexually assaulted a young child repeatedly. The home's director caught the abuse in progress on one occasion and reprimanded the perpetrator, but did not report the crime or take any disciplinary measures. The abuse continued. The victim can report the abuse to the police so that criminal charges are brought against the perpetrator for the abuse and possibly the director for the 'cover-up'.

- **Civil cases.** These are typically claims for compensation against those responsible for the violation, but the courts also have the power to order that the violation is stopped and prevent it from recurring. Civil cases may be easier to win, as evidentiary requirements are more relaxed than in criminal cases, though they tend to be lengthier and more expensive.

Example: Malnourishment seriously impacted the physical development of a group of children in home 'X' and left them with lifelong disabilities, requiring continuous medical care. The shortage of food was the result of a failure of the authorities to allocate a sufficient budget for the children and was exacerbated by the fact that the home's director embezzled the scarce funds available. The embezzlement was not discovered for a long time due to a failure to conduct a periodic audit of the home's finances. The children affected can bring a civil claim for compensation against the State for failing to protect their right to development and health and ask the court to grant them compensation that would cover the cost of the medical assistance they require.

- **Administrative.** This type of case can be used to challenge something that a public body does. The court evaluates the decision-making process of the state body and,

34 In cases of temporary incapacity caused by beating or a serious injury due to negligence. Criminal Procedure Code, Article 59.

35 Criminal Procedure Code, Articles 33, 183.

36 Victim may exercise such a right through a legal representative. Criminal Procedure Code, Article 87(8).

37 Criminal Procedure Code, Article 28.

38 In Bulgaria individuals can bring private complaints as well as prosecutions to similar effect. Criminal Procedure Code, Articles 76, 80.

39 Criminal Procedure Code, Article 20.

40 Criminal Procedure Code, Article 65.

32 CRIN, Guide to Strategic Litigation. Available at: www.crin.org/en/node/38840/.

33 Available at: www.crin.org/en/node/29308.

if necessary, can order it to reconsider the matter in line with guidance laid out by the court, though the court will not substitute the substance of the decision.

Example: In a home for children without parental care, access to a computer room, where the children are taught computer and programming skills, is through a staircase of several steps. Four children out of 70 require a wheelchair to get around. The director of the home refused to authorise the construction of a wheelchair ramp that would make the computer room accessible on the grounds that it only benefits four children. An administrative challenge to this refusal can be launched against the institution for failing to consider the children's right to equality and to reasonable accommodation.

• **Constitutional challenges.** When a law or policy infringes rights granted by the country's constitution, a constitutional challenge may be filed. In such a case, the court will have the power to strike down the offending provisions of the legislation. In some countries, it is possible to bring a case to the constitutional court directly, whereas in others the case needs to first be brought to an ordinary civil court that will refer the constitutional aspect of the complaint to the constitutional court.

Example: A law allows staff in institutions to administer 'light' corporal punishment to children aged five and over for disciplinary purposes. The Constitution states that children must be protected from violence and the CRC takes direct effect in national law. A constitutional challenge can ask the court to strike down the offending law on the grounds of unconstitutionality.

A lawyer will be able to advise you on the advantages and disadvantages of each type of action and help you decide how to proceed in order to meet your strategic goals. CRIN's legal assistance toolkit outlines how children and NGOs can obtain advice and assistance from a legal professional to challenge rights violations.⁴¹

2. What do I need to know about launching a case?

• **Standing.** Standing refers to the right or capacity of a party to bring suit in court. One of the most important things to determine is who has legal standing to bring the case and whether it is necessary to identify a victim for the violation to be challenged. Sometimes cases can be brought only in the name of the victim of the violation, but in some situations the case can be in the name of a non-governmental organisation

Children. In all countries surveyed, children acquire full legal capacity when they reach the age of majority - 18 years. Care leavers can therefore independently launch a case about violations suffered while in care, provided that legal requirements relating to statutes of limitations are met (see below).

The right of children to access justice requires that children are able to address the court independently without age restrictions. However, in nearly every jurisdiction in the world, children's legal capacity to file a case is limited on the basis of their age, which means that children cannot file a case independently, but may only do so through a parent, legal guardian or other representative, as determined by national law.⁴²

Children between the ages of 14 and 18 have only limited legal capacity allowing them to address the court in certain types of cases in Armenia,⁴³ Azerbaijan,⁴⁴ Ukraine,⁴⁵ Belarus,⁴⁶ Romania (only with their guardian's approval),⁴⁷ Russia,⁴⁸ Bulgaria⁴⁹, Albania⁵⁰ and Georgia (only civil claims).⁵¹ Limits on children's 'legal capacity' hinder all children's ability to access justice, but children without parental care are placed in a particularly difficult situation. National law generally assumes that a parent or guardian will step in to bring legal action in response to a rights violation on the child's behalf when necessary. However, in the case of a child in state care, where the institution is also the child's legal guardian, there is an inherent conflict of interest. A further difficulty is that children are often unaware of their rights or the possibility of filing a legal challenge. As a result, cases initiated by children are extremely rare.

Non-governmental organisations. Few countries in the region allow non-governmental organisations to bring cases in their own name regarding children's rights violations, and even then this is possible only in limited circumstances.

42 CRIN, Rights, Remedies and Representation: A global report on access to justice for children, p. 17. Available at: www.crin.org/en/node/42383.

43 Civil Procedure Code, Articles 24, 29, 30.

44 Law on the Rights of the Child, Article 12; Civil Procedure Code, Article 49. See also CRIN, Access to justice for children: Azerbaijan, October 2014, part II. Available at: www.crin.org/en/node/40631.

45 Civil Procedure Code of Ukraine, Article 29(2).

46 Code of Civil Procedure, Article 81.

47 See more about parental responsibility in Romania: http://ec.europa.eu/civiljustice/parental_resp/parental_resp_rom_en.htm.

48 Civil Code of Russian Federation, Article 26.

49 Civil Procedure Code, Article 28(2).

50 Code of Civil Procedure, Articles 90-92. See CRIN Access to justice for children: Albania report, part II B. Available at: www.crin.org/en/node/39227.

51 CRIN, Access to justice for children: Georgia, January 2015, p. 3. Available at: www.crin.org/en/node/39226.

41 CRIN, Legal assistance toolkit. Available at: www.crin.org/en/node/38869.

In civil cases, NGOs have legal standing when the rights of a child in care are violated only in Russia⁵² and Belarus.⁵³ Russia's Law on the Rights of the Child explicitly empowers NGOs to file a case challenging actions of state officials, organisations, or citizens, including parents (or legal guardians), educators, medical or social workers, if such actions violate the rights of children in "difficult life circumstances".⁵⁴ Under the law, "children in difficult circumstances" includes anyone under 18 deprived of parental care.⁵⁵

In Bulgaria, organisations working in the area of protection against violence may submit claims on behalf of a group of persons to ask the court for a number of remedies: to declare that the rights of the group have been violated, to order that the violation stops and/or to order that the victims receive compensation.⁵⁶ In Romania, NGOs which have legitimate interests⁵⁷ in combating discrimination may bring cases alleging discrimination on behalf of a group or on behalf of an individual with their consent (the law does not stipulate whether children are able to consent in such cases).⁵⁸ In Moldova⁵⁹ and Serbia⁶⁰ human rights NGOs are explicitly empowered to initiate lawsuits concerning discrimination matters in the local courts.

Georgian NGOs report that they are in practice prevented from representing any child because the law requires the consent of a legal guardian, which in the case of children in institutional care is the same party that is responsible for preventing violations and for protecting the child.⁶¹ In Albania, organisations may be able to bring a constitutional case if they can demonstrate a direct link between its mission and the case.⁶²

Furthermore, children of any age, as well as NGOs, can notify the authorities that a crime has taken place. Although the decision about whether a criminal case will be brought rests with the prosecutor, it is possible for NGOs to support child victims and ensure that investigations are carried out effectively and in good faith. For example, the National Council for Institutionalised Children in Romania⁶³ is a platform run by volunteers which encourages institutionalised children who are victims of abuse or neglect to take action against authorities and guide them through the process of documenting cases for the court.⁶⁴

NGOs ensuring effective criminal investigation

Following a television report in which children from a home in Oradea described suffering violence at the hands of their carers, the Romanian NGO Centre for Legal Resources (CLR) filed a complaint with the prosecutor's office. In March 2014, the prosecutor closed the investigation and declined to bring any criminal charges, citing lack of evidence, despite statements made by five children, and stating that violence against children can be justified in some situations.

The CLR referred the matter to the local court as reluctance to investigate such violence against children in institutional care is common. In January 2015, the court ruled in their favour, confirming that the prosecutor is obliged to conduct an effective investigation and order the prosecutor to reopen the investigation.⁶⁵

Group or individual actions. In all countries in the region, it is possible to join several cases which concern the same subject matter, however collective action in the name of a group or class of persons is possible only in two. In Bulgaria, according to the Code of Civil Procedure, collective claims "may be submitted on behalf of persons, damaged by the same infringement of a right, where according to the nature of that infringement their number cannot be determined exactly, but is determinable."⁶⁶ In Moldova, cases can be brought in defence of the rights, freedoms and legitimate interests of others, including an indeterminate group of persons.⁶⁷

NGOs seeking to bring legal action must consider that children could be at risk of being victimised for participating in a challenge against the institution. This means that children will

52 Federal Law on Basic Guarantees of the Rights of the Child in the Russian Federation, Article 15.

53 All NGOs must register and obtain the status of a legal entity in order to operate in Belarus. Legal entities are entitled to file a claim for protection of child's rights on their own initiative. Code of Civil Procedure of the Republic of Belarus, Article 85.4.

54 Federal Law on Basic Guarantees of the Rights of the Child in the Russian Federation, Article 15.

55 Ibid., Article 1.

56 Code of Civil Procedure, Article 379. See also CRIN, Access to justice for children: Bulgaria, September 2014, part III.E. Available at: www.crin.org/en/node/40376.

57 For definition, see Supreme Court of Romania, decision No. 3838/2006. It is a landmark decision where protecting and promoting human rights and ensuring access to justice were recognised as legitimate interests for the purpose of providing an NGO with legal standing to contest the decisions of a public prosecutor.

58 Emergency Ordinance on preventing and sanctioning all forms of discrimination, No. 137/2000 (31 August 2000), Article 28.

59 NGOs can also bring cases to defend the rights of people who lack capacity, including children, without their request or regardless of the consent of their legal representative. Law on Equality, Article 18(2); Civil Procedure Code, Article 73(1).

60 Law on the Prohibition of Discrimination, Article 46.

61 Information provided to CRIN by Anna Arganashvili, Partnership for Human Rights, Georgia.

62 CRIN, Access to justice for children: Albania, February 2014, part III.E. Available at: www.crin.org/en/node/39227/.

63 Official website available at: www.consiliulinerilor.ro.

64 Information provided by Visinel Balan, Consiliul Tinerilor Instituționalizați, Romania.

65 Read more about the case on the website of the Centre for Legal Resources: <http://www.crj.ro/cazul-centrului-de-plasament-pentru-copii-cu-probleme-psiho-sociale-oradea/>.

66 Civil Procedure Code, Article 379. See also CRIN, Access to justice for children: Bulgaria, September 2014, part III.D. Available at: www.crin.org/en/node/40376.

67 Civil Procedure Code, Article 73. See also CRIN, Access to justice for children: Moldova, April 2014, part III.D. Available at: www.crin.org/en/node/40140.

often be reluctant to come forward, especially if they are the victim of a violation to which society attaches a stigma, such as sexual violence. This might not be an issue in some types of cases, such as constitutional complaints challenging the validity of a law, where a direct victim does not necessarily need to be identified; but in all cases involving children, their rights must be fully respected. See CRIN's strategic litigation guide section 'How do you choose plaintiffs?'.⁶⁸

However, it is not generally possible to protect the identity of the child in whose name a civil case is filed.⁶⁹ In Moldova, a specific victim must be identified in order to bring court proceedings, however, hearings may be held in private where necessary to protect the interests of any child.⁷⁰

• ***Child plaintiffs and evidence-gathering.*** Gathering evidence of abuse taking place in institutions poses immense challenges. Children are typically not allowed to leave institutions freely and are often not able to complain to anyone. Often, basic means of communication with the outside world such as writing materials are not available, or even if they are, children's right to privacy can be breached by institution staff checking their correspondence.

Stereotypes that children in care are 'problematic' mean that their accounts may be considered unreliable. While children can report abuse to a sympathetic member of staff, evidence provided by children is too often disregarded by law enforcement bodies. Furthermore, a child can be punished for complaining by orphanage medical staff labelling him/her with a false diagnosis (usually, "oligophrenia") which is not an uncommon measure of keeping children in care more submissive.⁷¹ These factors highlight the importance of ensuring the access of independent organisations to care institutions.

In some countries, NGOs are allowed to monitor care institutions and collect evidence. For example, the Bulgarian Helsinki Committee has had access to all child care institutions in Bulgaria since 2000 and performs regular monitoring visits and publishes reports about violations.⁷² In Belarus the directors of six non-governmental organisations and many public bodies have unrestricted access to care

institutions.⁷³ A campaign for reform that will ensure unrestricted access to closed institutions is also ongoing in Russia.⁷⁴

As a rule, ombudspersons can access care institutions and investigate violations. However, such investigations do not often lead to court cases (see section on National Human Rights Institutions below). When NGO access to institutions is not guaranteed, it is possible to gain access with consent of the administration of the institution or the local administration (see example below on how to challenge restrictions) or cooperate with the ombudsperson to facilitate such opportunities (see example below on how to establish an agreement with an ombudsperson).

Gaining access to institutions through a legal challenge

In October 2012, the Romanian NGO Centre for Legal Resources (CLR) suspected maltreatment was taking place at the Gheorghe Serban centre in Bucharest, so they requested access to the institution from the General Directorate of Social Assistance and Child Protection.

Their request was denied by the authorities, who said that only state bodies, and not NGOs, can be allowed access to survey the conditions in the institutions and that complaining to international bodies about this situation would only 'make a fool of Romania'.

The CLR successfully challenged this refusal through the courts using the obligations assumed by the Romanian State under the UN Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights. They won a case compelling the authorities to grant them access to the institution.⁷⁵

Establishing an agreement between NGOs and ombudspersons to conduct visits in institutions

In March 2015, after long consultations between the representatives of the Romanian Ombudsman's office and national human rights NGOs, a protocol to allow NGOs to conduct announced and unannounced visits to care

68 Available at: www.crin.org/en/node/38843.

69 See CRIN access to justice for children reports for each country, part III.C. Available at: www.crin.org/en/node/42362.

70 Civil Procedure Code, Article 218(2); Criminal Procedure Code, Articles 18(2) and 1101.

71 Oligophrenia is a severe learning disability or mental retardation with three severity levels and further classification into different types. Because the term is very vague, it can be easily manipulated. Information provided by Ternopil Regional Foundation "Orphan's future" (Ukraine). For more information on the issue read an article by Radio Liberty, "Our country has chosen a horrible path", 10 May 2016. Available at: <http://www.svoboda.org/a/27734513.html>.

72 Reports by Bulgarian Helsinki Committee are available at: <http://www.bghelsinki.org/bg/publikacii/dokladi-na-bhk/dokladi-specialni-dokladi-na-bhk/>.

73 Information provided to CRIN by INGO "Understanding", Belarus.

74 Kommersant, "Volunteers require transparency from care institutions", 7 May 2016. Available at: <http://www.kommersant.ru/doc/2982030>.

75 Read more about the case on the website of the Centre for Legal Resources: <http://www.crl.ro/cazul-centrului-gheorghe-serban-din-bucuresti/>.

institutions and detention facilities was signed.⁷⁶ The document was the result of lobbying by the Association “Drawing Your Future”, founded by a former care leaver. According to the protocol, representatives of NGOs will be part of the team’s visiting care institutions alongside representatives of the ombudsman’s office and medical personnel to monitor and prevent torture.

Journalists can play an important role in helping to expose violations and attract public attention. Numerous cases have shown that children in institutions try to reach out to journalists to report abuse.⁷⁷ For example, complaints by children and activists about the maltreatment of boys in an orphanage in Orhei in Moldova had been ignored by the authorities for several years until a journalist published a video interview with a child.⁷⁸ In Russia, the broadcast of a documentary about an institution for children with mental disabilities allowed thousands of children to have their diagnosis reconsidered.⁷⁹ However, children in institutions are vulnerable to reprisals from staff and other potential abusers, therefore journalists must always protect and respect the privacy of children and refrain from publishing their identifying details.

It is not uncommon for investigating authorities to declare evidence of violations insufficient, therefore when access to the institution is granted, documenting violations is crucial to create strong evidence for litigation. The kinds of evidence that could be presented at trial include: reports by doctors who have examined the victim(s), photographs and videos of injuries, interviews with the victim(s) and/or witnesses. Children can be asked to keep a journal with details of violations. It is also possible to provide children with a mobile phone to record abuse which will make staff aware that they are being monitored. However, if children are intimidated or harassed by staff for providing evidence and complaining to outsiders, the first priority is to make sure they are safe.

For more information about working with child plaintiffs and collecting evidence for strategic litigation, see CRIN’s guide.⁸⁰

• **Time limits.** NGOs bringing cases in their own name concerning rights violations of children in care, or care leavers who have acquired full legal capacity and are independently launching a court challenge, have to check that their claim is not barred by a ‘statute of limitations’. A statute of limitations is a law that sets out how long you have to file your lawsuit after the violation takes place. Different types of claims or lawsuits usually have different time requirements.

Countries examined in this report have quite different statutes of limitations, ranging from 3-10 years in civil proceedings⁸¹ and 2-15 years in criminal proceedings depending on the severity of the violation.⁸² Full details of each country’s laws regarding limitation periods can be found in CRIN’s reports on access to justice for children.⁸³ Notably, the law in Armenia⁸⁴ provides that no time limitations for civil cases relating to violations that have caused damage to life or health. In Serbia no statutes of limitations are applicable to offences of sexual acts against children.⁸⁵

Some countries in the region have tailored the application of limitation periods to children. In Bulgaria, where a child’s rights are violated by their parent or guardian, the limitation period is suspended until parental rights are terminated (typically at the age of 18) and in relation to violations of the rights of children who do not have legitimate representatives, until six months after a representative is appointed.⁸⁶ In Moldova, too, limitation periods for children do not start to run until they reach the age of 18.⁸⁷ This gives children extra time to initiate a court case when they reach the age of majority.

Despite limits on when children and NGOs can bring cases, there are a number of exceptions that would allow a legal challenge to be brought. Even where the system isn’t set up to facilitate children’s easy access to justice, creative solutions can be found to bring the case before a judge.

76 NGO “Drawing Your Future” (DESENĂM VIITORUL TĂU), “A historical moment: Stop torture in detention places and the child protection system”, 13 March 2015. Available at: <http://en.desenamviitorul.ro/a-historical-moment-stop-the-torture-in-detention-places-and-in-the-child-protection-system/>.

77 See, for example, Radio Liberty, “Our country has chosen a horrible path”, 10 May 2016. Available at: <http://www.svoboda.org/a/27734513.html>.

78 Mir 24, “Moldovan Prosecutor General’s Office will check teaching methods in orphanages”, 20 September 2015. Available at: <http://mir24.tv/news/society/13272343>.

79 Takie Dela, “Lenfilm”, 28 January 2016. Available at: <http://takiedela.ru/2016/01/pogrebizhskaya/>.

80 CRIN, Guide to Strategic Litigation: How would you bring strategic litigation? Available at: www.crin.org/en/node/38860.

81 In Albania, Azerbaijan, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia, Ukraine. For details, see CRIN access to justice for children reports for each country. Available at: www.crin.org/en/node/42362.

82 In Azerbaijan, Belarus, Romania, Russia and Ukraine. For details, see CRIN access to justice for children reports for each country. Available at: www.crin.org/en/node/42362.

83 See CRIN access to justice for children reports for each country. Available at: www.crin.org/en/node/42362.

84 Although the reimbursement would be limited to the three years preceding the date of legal action. Civil Code, Article 344.

85 Law on Special Measures for the Prevention of Crime against Sexual Freedom Involving Minors No. 32/2013, Article 15; Criminal Code, Article 108. Information provided to CRIN by the Office of the Protector of Citizens.

86 Obligations and Contracts Act 1950, Article 115.

87 Civil Code, Article 275(b).

The preparation stage of the case is of great importance to preclude any possibility of your case being postponed or dismissed because of insufficient evidence or because the statute of limitations has lapsed.

A decision in cases brought by or on behalf of individual children are limited to that situation, however, broader change may be achieved by bringing multiple cases, a collective case in relation to a group of children or by seeking a change in the law.

The aims of strategic litigation should never compromise the legal rights of the child in whose name the case is launched. The best interests of the child must come first, even if this undermines the strategic value of the case, and children should be protected from any negative repercussions. Some types of action, such as constitutional challenges or administrative cases in the name of an NGO, could avoid the requirement of naming a child victim.

3. What are the options for covering the costs of a case?

There are many costs associated with litigation, however some of these can be avoided through legal aid, free legal resources and other methods. In many countries, an exemption from court fees may be available for cases related to children's rights violations. Children filing cases for the protection of their human rights are explicitly exempted from court fees in Azerbaijan,⁸⁸ Georgia,⁸⁹ Moldova⁹⁰, Romania⁹¹ and Russia.⁹² In Belarus,⁹³ Bulgaria⁹⁴ and Serbia⁹⁵ the court has a discretionary power to waive court fees.

In most countries, free legal aid is provided by the State to cover the costs of legal representation for some types of case.⁹⁶ In Russia, children residing in state institutions are guaranteed free legal aid in cases relating to the protection of the rights and legal interests of such children.⁹⁷ Likewise, Armenia's Law on Advocacy explicitly guarantees legal aid for children without parental care⁹⁸ which can also be provided by

the Public Defender's Office.⁹⁹ In Ukraine, certain categories of children, including orphaned children and children deprived of parental care, are entitled to free secondary legal aid, which includes the drafting of procedural documents and representation in court or before other persons.¹⁰⁰ In Bulgaria, children in care are explicitly granted the right to free legal aid in relation to all types of proceedings which affect their rights or interests.¹⁰¹ In Moldova, the court can order to cover the costs of legal representation if it finds that there is a conflict of interest between the child and his or her legal representative.¹⁰²

If a case is not covered by legal aid, NGOs could seek legal assistance on a *pro bono* basis¹⁰³ from law firms, legal clinics, legal charities and others. Pro bono practice is a relatively new phenomenon in the region, though it is gaining traction in some countries. There are useful online resources that outline best practice when it comes to 'pitching' a pro bono case to a law firm.¹⁰⁴ CRIN might also be able to support you in establishing pro bono partnerships. It may also be possible to strike a so-called 'contingency agreement' with your lawyer. This means that they agree to take payment only if the case is successful. For details about providers of pro bono services in your country, see part IV. C of CRIN's access to justice for children country reports.¹⁰⁵

Pro bono services in the region

Albania: Tirana Legal Aid Society¹⁰⁶ and Albanian Helsinki Committee¹⁰⁷ provide legal aid services for specified target groups of people in need, including children from poor families and children without parents.

Armenia: Legal Clinic of Yerevan State University Law Faculty provides free legal aid to vulnerable members of society, including children.¹⁰⁸ The Pro-Bono Legal Clinic, operating on the premises of School of Advocates in Yerevan also offers pro-bono legal aid services in the capital and remote towns and villages.¹⁰⁹ Furthermore, Helsinki Citizens' Assembly-Vanadzor provides free legal advice to all persons

88 Civil Procedure Code, Article 110.1.12.

89 Code of Civil Procedure, Article 46(e).

90 Civil Procedure Code, Article 85(1)(c).

91 Emergency Ordinance on Judicial Stamp Duties, Article 29(e).

92 Tax Code of the Russian Federation, Article 333.36 and 333.37.

93 Civil Procedure Code, Article 130.

94 Only if certain conditions are met, see Bulgarian Civil Procedure Code, Article 83. Also, victims of domestic violence, including children, are exempted from court fees, see S.11 of the Protection Against Domestic Violence Act.

95 Civil Procedure Law, Article 168.

96 See CRIN country reports on access to justice for children: www.crin.org/en/node/42362.

97 Law on Free Legal Assistance, Article 20.

98 The Law on Advocacy, Article 6. Available at: www.legislationline.org/documents/id/6626. Information provided by the Civil Society Institute, Armenia in September 2014.

99 Ibid, Articles 41-42.

100 Law on Free Legal Aid, Articles 13(2) and 14(2).

101 Legal Aid Act, Article 22.

102 Law on State Guaranteed Legal Aid, Article 19; Civil Procedure Code, Article 77(b).

103 Pro bono professional work is undertaken voluntarily and without payment as a public service.

104 Lash, Karen A., "Pitching Pro Bono: Getting to First Base with the 'Big Firm'", 2008 (Vol. 2) DePaul Journal for Social Justice, p. 141. Available at: <http://ssrn.com/abstract=1417526>. See also: Australian Pro Bono Centre, "Tips for making an attractive and effective pitch to a law firm or in-house legal team to start a new pro bono project", March 2006. Available at: <http://probonocentre.org.au/wp-content/uploads/2015/09/TipsfromEstherLardent.pdf>.

105 Available at: www.crin.org/en/node/42362.

106 Official website available at: www.tlas.org.al/en.

107 Official website available at: <http://ahc.org.al/>.

108 Official website available at: www.legalaid.am/english/members/clinic/clinic.htm.

109 Official website available at: www.advschool.am.

and undertakes further protection of their interests, including through strategic litigation.¹¹⁰

Azerbaijan: Children's Rights Legal Clinic was established in 2007 and provides free legal assistance to all children on a range of different issues.¹¹¹ Legal Education Society also provides free legal assistance to low-income populations, including children.¹¹²

Bulgaria: Bulgarian Helsinki Committee (BHC) provides free legal counselling and/or procedural representation before the domestic courts and the European Court of Human Rights for anyone whose basic human rights and fundamental freedoms have been violated. BHC accepts cases following its monitoring activities on behalf of residents in orphanages and care homes, particularly for children with disabilities, and has submitted several cases to the European Court of Human Rights.¹¹³

Georgia: Georgian Young Lawyers (GYLA), Partnership for Human Rights (PHR) and other NGOs provide legal aid and advice on a wide range of issues to vulnerable members of society, including children, who have restricted access to information or are not aware of their rights. GYLA has a free telephone hotline, headquarters in Tbilisi and nine regional offices in other cities. It also has a mobile office to reach remote areas.¹¹⁴

Moldova: Promo-LEX provides free legal aid including strategic litigation before domestic and international courts for all citizens specifically in the areas of torture and inhuman or degrading treatment, gender-based violence and discrimination.¹¹⁵

Romania: The Pro Bono Network for Human Rights run by ACTEDO is designed to facilitate access to justice for vulnerable groups. They provide free legal advice and assistance in the area of discrimination and human rights, through a network of lawyers who work pro bono, mainly in three counties in Romania (Cluj, Mureş, Bistriţa-Năşăud) and the city of Bucharest.¹¹⁶ The Centre for Legal Resources is another NGO based in Bucharest that monitors orphanages, investigates violations and represents children with disabilities in courts.¹¹⁷ They are famous for bringing the case on behalf of Valentin Campeanu to the European Court of Human rights.¹¹⁸

Serbia: NGO Praxis,¹¹⁹ Child Rights Centre¹²⁰ and Lawyers Committee for Human Rights (YUCOM)¹²¹ provide free legal aid to the most marginalised and socially excluded communities and their children in the country.

Ukraine: Ukrainian Legal Aid Foundation (ULAF) runs centres that provide legal information and consultations, as well as a network of professional lawyers who provide free legal assistance to vulnerable groups, including children. ULAF also maintains a website that provides links to online free legal help and consultations, which is actively used by citizens.¹²²

Another way to gather financial resources to support your case is through crowdfunding, which involves advertising your case online and inviting individuals to donate funds online.¹²³ The idea is to gather donations from a large number of people who all contribute small funds. However, it is important to consider whether your case would be suitable to be advertised online as it is likely to involve vulnerable victims.

The financing of your case should be carefully planned before you take legal action. This is even more important in relation to strategic litigation as test cases or novel claims can take considerable time to research and prepare for court, and are more likely to be considered by more than one level of court. It is important to work out the worst possible financial impact of bringing a case before committing to it. Still, there are many ways to reduce the cost of children's rights litigation, including state legal aid, pro bono and other funding. For further information, see CRIN's strategic litigation guide section 'How do you pay for your lawyer?'¹²⁴ and legal assistance toolkit.¹²⁵

4. What legal remedies are available?

As previously mentioned, courts' powers to grant a remedy vary based on the type of case they are hearing.

Criminal courts are empowered to impose prison sentences and fines to those convicted of negligence in performing official duties. For example, in Albania serious child abuse in the Shkodra orphanage revealed by an investigation

110 Official website available at: www.hcav.am.

111 Official website available at: www.crlc.az.

112 Official website available at: www.monitoring.az.

113 Official website available at: www.bghelsinki.org/en/.

114 Official website available at: <https://gyla.ge/en/>.

115 Official website available at: <https://promolex.md/>.

116 Official website available at: <http://actedo.org/the-pro-bono-network-for-human-rights/>.

117 Official website available at: www.crlj.ro.

118 See chapter III for more details.

119 Official website available at: www.praxis.org.rs.

120 Official website available at: www.cpd.org.rs.

121 Official website available at: www.yucom.org.rs.

122 Official website available at: <http://ulaf.org.ua/>.

123 One example from the United Kingdom is "CrowdJustice": www.crowdjustice.co.uk.

124 Available at: www.crin.org/en/node/38860.

125 Available at: www.crin.org/en/node/38869.

led by the Ombudsman¹²⁶ led to the convictions of several employees, including the former director.¹²⁷ In Moldova, the prosecutor filed criminal charges for abuse of power and child abuse against the director of the Orhei institution for boys; she was dismissed after the allegations came to light.¹²⁸ Similarly, in Armenia, an employee of one of the boarding schools was accused of sexual assaulting children and was sentenced to two years' imprisonment in 2010.¹²⁹ Other possible remedies include a prohibition on engaging in certain activities or assuming particular duties. A civil action can be brought within criminal proceedings in all countries examined in this report.¹³⁰ The civil claim can be filed by the victim or by a legal representative. The benefits of this type of claim over a freestanding civil complaint are that proving the case will be easier as there are more investigative resources in criminal proceedings and criminal proceedings are generally resolved more quickly than those taking place in the civil setting.

Civil courts on the other hand typically have a wider array of remedies at their disposal, including powers to declare a right has been violated. To order that the victim receives compensation for harm, including moral damages, means ordering that the violation ceases or is not repeated in the future and covers a range of violations that may not amount to criminal offences. However, filing a civil claim appears to be a less common method of securing redress for rights violations of children in institutional care. In Moldova, children who have suffered abuse in state institutions are more likely to access justice through the criminal courts, because victims of crime are entitled to legal aid and there are a number of lawyers who take this kind of case. In contrast, if a child wants to bring a civil case, their representative would have to be the guardianship authority, which cannot provide adequate legal expertise due to a lack of staff and resources.¹³¹

In administrative proceedings, courts are able to end violations by the government or public bodies by preventing them from acting unlawfully or making orders requiring them to meet their obligations. In addition, courts may order that a piece of legislation is invalid - typically, the

Constitutional Court. This type of legal challenge can be used to improve legislative provisions for children in institutions.

It may also be possible to obtain a preliminary remedy, meaning that the court can order the defendant to do something while the case is being examined, when the circumstances warrant. Moldova's administrative courts can impose a provisional remedy on the request of the party to prevent imminent harm.¹³² Romanian law also provides for injunctions and immediate remedial action where deemed necessary to prevent an ongoing violation.¹³³

Civil, administrative and constitutional court challenges remain underused to challenge rights violations of children in institutional care. Criminal cases on the other hand have been more common. While criminal sanctions condemn the violation and have an important deterrent effect, they do not represent full access to justice if the victim does not also receive a remedy. Your case should be brought to the court that is most well placed to remedy the rights of the plaintiff, but you can also consider the long-term effect of a decision in your favour. Criminal sentences send a strong message that abuses against children in institutions are unacceptable and can have the effect of deterring others from doing the same. On the other hand, a number of civil compensation claims arising from a large-scale violation of the rights of a number of children may push the State to improve legislative protections for children or to establish a redress scheme to provide compensation to all children affected.

When preparing a strategic case, you should consider the possibility that your claim may be unsuccessful at the first instance and be prepared to launch an appeal. Sometimes courts can even decide that the claim is not admissible and it takes time to convince judges to consider certain cases. New types of claim are more likely to progress through several instances before the law is clarified. If you are looking to bring about a significant change in the law or policies, this is more likely to happen at the higher levels of the judicial system. Likewise, even if you win the case, you should be prepared to defend an appeal by the opposing party.

If your case has been unsuccessful at the highest court of appeal in the country, a complaint may be possible at the international level - to the Council of Europe's human rights mechanisms¹³⁴ or one of the treaty bodies of the United Nations.

126 Ora news, "Shkodra orphanage: teachers caught abusing children, director says she is shocked", 7 July 2015. Available at: <http://www.oranews.tv/ora-english/shkodra-orphanage-teachers-caught-abusing-children-director-says-she-is-shocked/>.

127 Albeu, "Those involved in the Shkoder orphanage sex scandal to remain in prison", 20 May 2016. Available at: <http://english.albeu.com/news/news/those-involved-in-the-shkoder-orphanage-sex-scandal-to-remain-in-prison/245769/>.

128 NewsMaker, "Orphanage director dismissed for abuse of children is suing the Ministry of Labour", 21 October 2015. Available at: <http://newsmaker.md/rus/novosti/uvolennaya-zanasilie-nad-detmi-direktor-internata-podala-v-sud-na-mintruda-18894>.

129 Information provided to CRIN by Armenian Child Protection Network, Armenia.

130 It is not clear if claims can be simultaneous in Azerbaijan (Criminal Procedure Code, Article 36) and Georgia (Criminal Procedure Code, Article 38). In Russia civil claims are to be made after criminal proceedings have been concluded (Criminal Procedure Code, Article 44).

131 Information provided to CRIN by Arina Turcan, law firm "Turcan Arina", Moldova.

132 Law on Administrative Courts, Article 21.

133 New Civil Code, Article 255; New Civil Procedure Code, Articles 998, 1001.

134 For all countries examined except Belarus.

Quasi-judicial mechanisms and other bodies

Apart from the courts, other national bodies can respond to rights violations of children in institutions - national human rights institutions and other child protection bodies. Access to justice through state inquiries or other bespoke redress schemes is a further possibility.

1. How to use national human rights institutions to make a complaint

All countries featured in this report have a national human rights institution that is empowered to review complaints about violations of children's rights,¹³⁵ except Belarus, where the National Commission on the Rights of the Child has functions similar to that of a human rights body.¹³⁶ In some States, there is a general institution dealing with human rights issues, but in some countries there is also a separate institution specialising in children's rights.

Complaints to NHRIs can be an effective way of putting an end to an ongoing violation. There is a simplified procedure to lodge a complaint and the time period for resolution is typically much shorter than a court case. However, these mechanisms appear to be underused - in Russia, only one percent of complaints received by the Children's Rights Commissioner's office comes from orphans and even less from children in care institutions.¹³⁷



135 People's Advocate of Albania; Human Rights Defender of Armenia; Commissioner for Human Rights of Azerbaijan; Ombudsman of Bulgaria; Public Defender of Georgia; People's Advocate of the Republic of Moldova; People's Advocate of Romania; Commissioner for Human Rights and Children's Rights Commissioner for the President in Russia; Protector of Citizens of Serbia; Parliament Commissioner for Human Rights and Commissioner of the President for Children's Rights in Ukraine.

136 Decree of the President of the Republic of Belarus dated 16.11.2006 №675 "On the National Commission on Child Rights".

137 Children's Rights Commissioner's annual report 2014. Available at: <http://rfdeti.ru/upload/UPR%20doklad%202015%20A4%20preview%20postr-4%20v%20pe4at.pdf>.

National human rights institutions in the region

General human rights institutions:

Azerbaijan: Commissioner for Human Rights.¹³⁸

Romania: People's Advocate (*Avocatul Poporului*) includes a Deputy People's Advocate on children's rights.¹³⁹

Serbia: Protector of Citizens includes a Deputy Protector of Citizens for Children's Rights and Gender Equality.¹⁴⁰

Specialised children's rights institutions or departments within general human rights institutions:

Albania: The Office of the People's Advocate (Ombudsperson) has a Department for the Protection and Promotion of Children's Rights, which can review and investigate complaints and claims related to violations of children's rights.¹⁴¹

Armenia: Children's Rights Protection Department under the Human Rights Defender.¹⁴²

Bulgaria: Children's Rights, Disability and Discrimination Department within the Ombudsman's office.¹⁴³

Georgia: The Child Rights Centre established under the Public Defender.¹⁴⁴

Moldova: The People's Advocate (Ombudsperson) on children's rights is empowered to receive complaints directly from children and bring the case to court on behalf of a child if needed.¹⁴⁵

Russian Federation: Children's Rights Commissioner for the President of the Russian Federation has the right to access care institutions and launch investigations into violations of children's rights.¹⁴⁶

Ukraine: The Department for Observance of the Rights of Child, Non-discrimination and Gender Equality within the office of the Parliament's Commissioner for Human Rights can receive complaints directly from children and bring the case to court on behalf of a child.¹⁴⁷ In 2015, the mandate of the Commissioner of the President of Ukraine for Children's Rights was extended - he/she can now access care institutions and has recourse to the prosecutor or police to address violations of children's rights.¹⁴⁸

138 Official website: www.ombudsman.gov.az.

139 Official website: www.avp.ro.

140 Official website: www.ombudsman.org.rs.

141 Official website: www.avokatipopullit.gov.al.

142 Official website: www.ombuds.am.

143 Official website: www.ombudsman.bg.

144 Official website: www.ombudsman.ge.

145 Official website: www.ombudsman.md. Law on the People's Advocate (Ombudsman), Article 5(1).

146 Official website: www.rfdeti.ru.

147 Official website: www.ombudsman.gov.ua.

148 Presidential Decree №528/2015 On Amendments to the Regulations on the Commissioner of the President of Ukraine for Children's Rights, Articles 3, 8. Available at: <http://www.president.gov.ua/documents/5282015-19390>.

Other specialised institutions:

Albania: The Commissioner for Protection from Discrimination¹⁴⁹ has the competence to represent children who are victims of discrimination in civil cases with the court's approval.

Bulgaria: The Commission for Protection against Discrimination¹⁵⁰ can bring legal proceedings in its name and intervene in ongoing cases related to discrimination.

Moldova: Council on the Prevention and Elimination of Discrimination and Ensuring Equality¹⁵¹ examines complaints about alleged acts of discrimination and adopts decisions, ex-officio action notes and consultative opinions.

Romania: The National Council for Combating Discrimination¹⁵² can intervene before the court in discrimination cases.

Serbia: The Commissioner for the Protection of Equality¹⁵³ can file lawsuits for protection against discrimination in his/her own name and initiate mediation processes.

The formal requirements for submitting such a complaint are far more straightforward than filing a court case. Complaints to ombudspersons can usually be submitted by post, email, over the phone or online; there is usually no prescribed format and filing is always free of charge. It must be noted that the time limit to file this kind of complaint is much shorter than for court proceedings - usually a maximum of one year.¹⁵⁴

Some countries allow NGOs to submit the complaint: Azerbaijan,¹⁵⁵ Bulgaria,¹⁵⁶ Georgia,¹⁵⁷ Albania,¹⁵⁸ Moldova,¹⁵⁹ Romania¹⁶⁰ and Russia.¹⁶¹ However, there may also be obstacles to the admissibility of a complaint. For a complaint to be submitted to a NHRI, there usually needs to be an identified victim. In some instances, a complaint without the name of the victim may also be accepted

at the discretion of the ombudsman - for example, in Armenia¹⁶² and Azerbaijan.¹⁶³ In Bulgaria, the identity of any complainant contacting the ombudsman can be omitted from the register of complaints on their request, meaning that the complaint remains strictly confidential.¹⁶⁴ Serbia's Protector of Citizens may, however, keep the identity of the complainant secret.¹⁶⁵

Because the decision to launch an investigation rests with the ombudsperson, you should try to include as much information as possible to provide substantial evidence that the intervention is needed. In some countries, complaints can be lodged with the NHRI only after the same matter has already been addressed in legal or administrative proceedings (Russia¹⁶⁶ and Serbia¹⁶⁷), otherwise claims should be made to either the courts or the national human rights body as the ombudsperson may refuse to investigate a case that is already filed before the court (Albania,¹⁶⁸ Azerbaijan¹⁶⁹ Armenia¹⁷⁰ and Ukraine¹⁷¹).

NHRIs in all countries examined in this report can launch an investigation on their own initiative if they receive information about violations of children's rights on a large-scale (for example, through media outlets).

2. Powers of the NHRIs

A general principle of NHRIs is that they are put in place to ensure everyone's equal protection before the law, including the most vulnerable members of society. For that purpose they usually have unparalleled access to closed institutions, including residential homes for children without parental care. In one case in Russia, law enforcement agencies had not received any complaints from the children directly, but began investigating physical abuse in the Bratsk boarding school for orphans after the Children's Rights Commissioner conducted a visit to the home.¹⁷² The Ombudsman of Bulgaria is empowered by the National Preventative Mechanism to access institutions without prior notice and conduct interviews with children and the staff¹⁷³ and further

149 Official website: www.kmd.al.

150 Official website: www.kzd-nondiscrimination.com.

151 Official website: www.egalitate.md.

152 Official website: www.cncd.org.ro.

153 Official website: www.ravnopravnost.gov.rs.

154 In Bulgaria, complaints to the Ombudsman must be filed within 2 years from the time violation occurred. Ombudsman Act, Article 25.3.

155 Constitutional law on the Human Rights Commissioner (Ombudsman), Article 8.2.

156 Ombudsman Act, Article 24.2.

157 Law on the Public Defender, Article 3.

158 The Law on the People's Advocate, Article 12.

159 Law on the People's Advocate (Ombudsman), Article 19.2.

160 Law No. 35/1997 On the Organization and Functioning of the People's Advocate Institution, Article 14.1.

161 The Presidential Decree on the Children's Rights Commissioner under the President of the Russian Federation N986 does not specify if NGOs can submit complaints to the Commissioner, however from practice it follows that all kinds of complaints are considered.

162 Law of Republic on the Human Rights Defender, Articles 10.2, 11.4.

163 Constitutional Law on the Human Rights Commissioner (Ombudsman), Article 9.3.

164 Rules of Procedure of the Ombudsman, Rule 7.

165 Law on the Protector of Citizens, Article 29.

166 Law on the Human Rights Commissioner, Article 16.

167 Only legal proceedings. Law on the Protector of Citizens, Article 25.

168 The Law on the People's Advocate, Article 14.

169 Constitutional law on the Human Rights Commissioner (Ombudsman), Article 11.1.4.

170 Law on the Human Rights Defender, Article 10.1.

171 Law on the Parliament Commissioner for Human Rights, Article 17.4.

172 Baikal Info, "Criminal case opened after complaints received from Bratsk orphanage", 25 February 2016. Available at: <http://baikal-info.ru/v-bratske-vozbuzhdeno-ugolovnoe-delo-posle-zhalob-vospitannikov-shkoly-internata-no25>.

173 Annual Report of the Bulgarian Ombudsman as National Preventative Mechanism (2012), pp. 3-4. Available at: www.ombudsman.bg/documents/Report%20NPM%202012.pdf.

provisions making it an administrative offence to interfere or obstruct the work of the Ombudsman.¹⁷⁴ These kind of provisions preclude the possibility of the State trying to limit external scrutiny of the institution, as was the case during the Moldovan Ombudsperson's working visit to Orhei boarding house for boys with mental disabilities where the Deputy Minister of Labor, Social Protection and Family restricted the contact of the ombudsperson's representatives with children on the pretext that the visit was not coordinated with the ministry.¹⁷⁵

Typically, after an investigation exposes a human rights violation, the ombudsperson will make recommendations to the body responsible on how to remedy the situation and prevent future breaches. They may also make recommendations to the legislature when law reform is needed to secure protection of children's rights. For example in Moldova, following a large number of complaints from the same institution, the People's Advocate initiated a visit to the boarding school for boys with mental disabilities in Orhei in 2015.¹⁷⁶ In Romania, the Ombudsman investigated grave violations in the Galati orphanage exposed by journalists and ordered an administrative investigation which concluded with the termination of employment of staff responsible.¹⁷⁷ It is important to bear in mind that, unlike court decisions, the ombudsperson's recommendations are not legally binding. You must, therefore, consider carefully whether it is more appropriate to use the court or the NHRI in relation to the circumstances of the case you are working on.

The NHRI can also be a valuable partner if you bring your own case as their findings and opinions are considered highly authoritative. A brief submitted by the Public Defender in Georgia to the Tbilisi City Court Administrative Board helped shut down a plan for cemeteries to be built in the vicinity of facilities for children outside of family care.¹⁷⁸ The Ukrainian Ombudsperson intervened in a case regarding the unnecessary institutionalisation of children at the

European Court of Human Rights.¹⁷⁹ In 2015, the Ombudsman of Moldova intervened in a case where a child was physically abused by teachers.¹⁸⁰ His investigation led to the institution of criminal proceedings against the perpetrators.

Furthermore, NHRIs may be able to bring a matter to the court system themselves. When litigation is beyond the capacity of your organisation, approaching a sympathetic ombudsperson could be an alternative. For example, ombudspersons in Armenia,¹⁸¹ Azerbaijan,¹⁸² Moldova,¹⁸³ Russia¹⁸⁴ and Ukraine¹⁸⁵ can bring proceedings in their own name and represent children in courts. In Georgia, the ombudsman can intervene in cases as a 'friend of the court' in the common courts.¹⁸⁶ Furthermore, NHRIs in all countries examined in this report can apply to the Constitutional Court to challenge the constitutionality of laws and ordinances violating human rights and freedoms.¹⁸⁷

While ombudspersons in Albania, Bulgaria, Romania and Serbia might have limited powers before the courts, this is not the case for other specialised human rights institutions in these countries. The Serbian Commissioner for the Protection of Equality,¹⁸⁸ the Commission for Protection against Discrimination in Bulgaria¹⁸⁹ and Albania¹⁹⁰ can initiate proceedings before the court in cases of discrimination and/or represent children in courts cases; the National Council for Combating Discrimination in Romania¹⁹¹ can intervene in such cases.



174 Ombudsman Act, Articles 29-31.

175 The People's Advocate of Moldova, "The rights of beneficiaries from Orhei Boarding House for Children (Boys) with Mental Disabilities were violated...", 8 September 2015. Available at: www.ombudsman.md/en/content/rights-beneficiaries-orhei-boarding-house-children-boys-mental-disabilities-were-violated.

176 The People's Advocate of Moldova, Preliminary report on the rights of beneficiaries of Orhei Boarding House for Children from the monitoring visit on the 8th September, 2015. Available at: http://www.ombudsman.md/sites/default/files/acte_de_reactionare/raportul_vizitei_orhei_2015r.pdf.

177 Annual Report of the People's Advocate (2014), p. 7. Available at: http://www.avp.ro/rapoarte-anuale-engleza/raport_2014_eng_summary.pdf.

178 Public Defender of Georgia, "Amicus Curiae Brief of the Public Defender on the Issue of Arrangement of the Vicinity of Childcare Facilities", 7 July 2015. Available at: <http://www.ombudsman.ge/en/recommendations-Proposal/amicus-curiae2/amicus-curiae-brief-of-the-public-defender-on-the-issue-of-arrangement-of-the-vicinity-of-childcare-facilities.page>.

179 See Chapter III of this report. *Saviny v. Ukraine* [2009] Application No. 39948/06. Available at: <http://hudoc.echr.coe.int/eng/?i=001-90360>.

180 The People's Advocate of Moldova, "The Ombudsperson's Office reviewed the case of an alleged physical abuse...", 25 November 2015. Available at: <http://www.ombudsman.md/en/content/ombudspersons-office-reviewed-case-alleged-physical-abuse-against-pupil-committed-hisher>.

181 Law on the Human Rights Defender (2003), Article 15.

182 Constitutional Law on Human Rights Commissioner (Ombudsman), Article 13.2.7.

183 Law on the People's Advocate (Ombudsman), Articles 11, 17.

184 However, only after the same matter has previously been unsuccessfully addressed by a criminal or administrative body. Law on the Human Rights Commissioner, Articles 16, 29.

185 Law on the Parliament Commissioner for Human Rights, Article 13.10.

186 Law on the Public Defender of Georgia, Article 21(e).

187 Except for Bulgaria and Albania, where Ombudspersons can only provide a recommendation to invalidate such acts. Sources: Ombudsman Act, Bulgaria, Article 19.7.; The Law on the People's Advocate of the Republic of Albania, Article 24(c).

188 Law on Prohibition of Discrimination, Article 33.3.

189 Law on Protection against Discrimination, Article 47.5.

190 Law No. 10 221 on Protection from Discrimination, Article 32(i).

191 European Network of Equality Bodies (Equinet), Profile on National council for Combating Discrimination - Romania (2012). Available at: http://www.equineteurope.org/IMG/pdf/PROFILE_CNCD_RO.pdf.

Using NHRI to fight for compensations for maltreatment of children in care in Bulgaria

In late 2014 a small organisation in Bulgaria, supported by Mental Disability Advocacy Centre (MDAC) filed a complaint with the Bulgarian Commission for Protection against Discrimination. The complaint indicated that there had been maltreatment of children in homes for children with disabilities in Mogilino and Krushary municipalities. The plaintiff requested that the Commission recognise the placement in the institution as a discriminatory measure equal to torture and inhuman and degrading treatment, further arguing that children were entitled to compensation for the abuse they had suffered. The Commission accepted the case, however, recognising only the lack of personnel in both institutions as discrimination. The mayors of both municipalities were fined for failing to manage services for children and youth with disabilities with due care and responsibility. The case is currently pending before the Administrative court of Sofia City.¹⁹²

Using NHRI to end the overrepresentation of Roma and Egyptian children in institutional care in Albania

Official statistics show that 58.8 percent of children in the Shkodra home are from Roma or Egyptian origin, but these groups make up less than one percent of Albania's overall population. Children are frequently removed from their families because of poverty without any attempt to provide them with financial assistance. Once admitted into the institution, the children have a slight chance of returning to their parents, compared to non-Roma or non-Egyptian children, while being exposed to a higher risk of abuse.

A report by the ombudsman revealed serious levels of abuse in the institution, as well as discrimination against children of Romani and Egyptian ethnicity. Four civil society organisations - the European Roma Rights Centre, the Centre for Legal Civic Initiatives, the Children's Human Rights Centre of Albania and Tirana Legal Aid Society - filed a complaint with the Commissioner for Protection from Discrimination. The complaint alleges that the State's policy amounts to indirect discrimination on the basis of ethnic origin and relies on domestic and international legislation prohibiting discrimination, including the Convention on the Rights of the Child and the European Convention on Human Rights.¹⁹³

Although NHRIs have substantial powers, national NGOs nevertheless have reported that their work is often ineffective and inadequate.¹⁹⁴ For example, monitoring visits of ombudspersons do not always cover all care institutions and there is usually a lack of direct contact between the residents and the ombudsperson's staff conducting such visits.¹⁹⁵ In Bulgaria, the ombudsperson's report (2013) on monitoring of care homes for children with intellectual disabilities showed a lack of a rights-based approach as it does not assess each child's individual mental, physical and emotional state or raise the issue of contact with the outside world.¹⁹⁶ The failure of human rights bodies to implement their duties properly usually stems from a lack of financial resources, a lack of expertise and often an unwillingness to be particularly active. Furthermore, NHRIs in post-communist democracies are often powerless to investigate complaints properly or enact their own decisions due to inadequate or restrictive responses and delays from government institutions.

3. What can other child protection bodies do?

Urgent alerts about children's rights violations can be submitted through telephone hotlines which operate in every country examined in this report,¹⁹⁷ although there are no hotlines that would provide advice and information specifically to children in care or care leavers. Not all hotlines keep statistics on the number of calls received from children in institutions. Even if they do, the help sought is most often related to conflicts with other residents or seeking advice for mental health issues, rather than providing reports of abuse.¹⁹⁸ NGOs in some countries warn that awareness among children about these complaints channels remains low and there is a general reluctance of victims to come forward during institution inspections by human rights bodies.¹⁹⁹

There might be specialised state bodies charged with protecting children's rights, for example: the Commission on Guardianship and Trusteeship and Commission for Affairs

¹⁹² Marginalia, "Remember Mogilino, or about the responsibility of those in power", 7 December 2016. Available at: <http://www.marginalia.bg/analizi/pomnite-li-mogilino-ili-za-otgovornostta-na-vlastimashite>.

¹⁹³ Read more about this case on the website of the European Roma Rights Centre: <http://www.errc.org/article/discrimination-against-roma-in-albanian-childrens-home/4495>.

¹⁹⁴ Information provided to CRIN by National Network for Children, Bulgaria; Center for Legal Resources, Romania; Armenian Child Protection Network, Armenia.

¹⁹⁵ Information provided to CRIN by National Network for Children, Bulgaria; Center for Legal Resources, Romania; Armenian Child Protection Network, Armenia; Partnership for Human Rights, Georgia.

¹⁹⁶ Annual Report of the Bulgarian Ombudsman as National Preventative Mechanism (2013), p. 25. Available at: <http://www.ombudsman.bg/documents/prevantivenmechanism-2014.pdf>

¹⁹⁷ List of children's hotlines in Europe: <http://www.childhelplineinternational.org/where-we-work/#r1119-Europe>

¹⁹⁸ Bulgarian State Agency for Child Protection, "National Child Hotline: Signs of children at risk double in 2015", 9 March 2016. Available at: <http://sacp.government.bg/bg/prescentar/novini/dvojno-narastvane-na-signalite-za-deca-v-risk-na-n/>

¹⁹⁹ Information provided to CRIN by INGO "Understanding", Belarus; Partnership for Human Rights, Georgia; Foundation "Future for Orphans", Ukraine; Armenian Child Protection Network, Armenia.

and Protection of Rights of Minors in Azerbaijan; Guardianship and Trusteeship Committees in Armenia; the Social Service Agency in Georgia; National Council on Child Rights Protection in Moldova; the State Agency for Child Protection and Child Protection Departments in Bulgaria; Child Protection Commissions and General Directorate for Social Assistance and Child Protection in Romania; the State Agency for Protection of Children's Rights and Child Protection Units in Albania; the National Commission on the Rights of the Child in Belarus.

These child protection bodies usually function at national and municipal levels and can receive complaints concerning children's rights violations. They also have recourse to the prosecutor or police to resolve the complaint. In Bulgaria, the chair of the State Agency for Child Protection can investigate any report of violations of children's rights and impose obligatory recommendations and administrative sanctions.²⁰⁰ In Romania any child living in an orphanage can contact the local General Directorate for Social Assistance and Child Protection; this agency also accepts anonymous complaints from outside care institutions, provided "they contain enough information identifying children who are victims of violence".²⁰¹ These complaints usually give enough ground for direct intervention and investigation of violations by relevant authorities.

The main obstacle for children residing in institutions to contact these authorities is a low level of access to internet, email, telephone or other secure means of communication. In addition, children reportedly lack trust in the system and are reluctant to report abuse because they regard the monitoring body and the care institution as part of the same structure that inflicts the violation.

Reporting rights abuses to these state bodies should be the easiest way for children to assert their rights. However, these institutions can be ineffective in protecting children's rights as they are often understaffed, operate on low budgets and are constrained in their actions due to rigidity of the child protection system. Furthermore, care homes and child protection agencies often do not interact, especially where care homes are located in remote areas.²⁰² Where it is not possible to get help from a child protection body, a complaint should be submitted to the ombudsperson, alternatively a legal action can be pursued.

200 Information provided to CRIN by Velina Todorova (Bulgaria), UN Committee on the Rights of the Child.

201 VICE, "I spoke about how some institutionalised children are beaten up and it broke my heart", 10 June 2016. Available at: <http://www.vice.com/ro/read/copiii-institutionalizati-sunt-batuti>.

202 Information provided to CRIN by Velina Todorova (Bulgaria), UN Committee on the Rights of the Child; World Vision, Evaluation Study of Child Protection Units, January 2013, p. 26. Available at: http://www.wvi.org/sites/default/files/WVI_MANUAL%20CPU_ENG_WEB_1.pdf.

Other options: public inquiries, apologies and redress schemes

1. Inquiries and redress schemes

Public inquiries and redress schemes are widely used in a number of countries around the world to provide compensation for historic rights abuses of children in care - see Chapter I. Where such schemes are in place, the State has already assumed responsibility for the violation and is extending a simplified and expedited way to obtain compensation.

No public inquiries or redress schemes in response to children's rights violations have been implemented in any country in Eastern and Southeastern Europe and the Caucasus. However, these should be considered.

In many cases, a public inquiry or a large-scale investigation is the basis of a comprehensive redress scheme. As discussed in Chapter I, the triggers for a public inquiry can vary. These can include: pending lawsuits, including collective actions; advocacy campaigns; media coverage; previous unsuccessful inquiries; and international pressure.

In most countries, associations of adult care leavers have been central to the development of social policy responses, such as public inquiries and redress schemes to address harm that children experienced when growing up in institutions. At the time of writing, CRIN is aware of only one adult care leavers organisation established in Romania. Association 'Federeii'²⁰³ was founded in late 2014 by a group of Romanian adults who grew up in state care. The organisation is working to raise awareness of human rights violations of children and implements other soft advocacy activities. However, the Association 'Federeii' has not attempted to bring strategic cases before the courts or lobbied the government to conduct a public inquiry, mostly due to lack of funds.

Civil litigation suits brought by survivors are another catalyst for a public inquiry as these put direct pressure on the government to be held accountable for institutional neglect and abuse. There were some remarkable efforts in recent years on behalf of NGOs from the region to seek justice in courts for children whose right to life was violated in care (see Chapter III), thus it can be assumed that strategic litigation is becoming a reliable mechanism to seek redress. Nevertheless, civil litigation cases initiated by adult care leavers in the region remain extremely rare.

203 Official website available at: www.federeii.ro.

For authorities to demonstrate political will, the issue has to gain wide public support or even a 'moral panic' to demand accountability and justice for the victims. For example, in Ireland the issue of abused children in institutions gained so much public awareness that it turned into a movement: in 2009 thousands of people participated in a silent march of solidarity leaving children's shoes at the Parliament entrance to symbolise the innocence of child victims of institutional abuse.²⁰⁴

In both Romania and Bulgaria, the situation of children in institutions has entered public discourse after active pressure from the European Union made membership contingent on reform. In 2007, a film about the appalling treatment of children with disabilities in a Bulgarian institution caused an international outcry and public demands for reform.²⁰⁵ However the priority for NGO advocacy at the time was the implementation of deinstitutionalisation programmes in order to prevent future cases of neglect, rather than a demand for large-scale investigations to look into historical institutional abuse.

Survivors' firsthand personal accounts in the media give a 'human face' to institutional abuse and can serve as one of the triggers for a public inquiry. In Romania, one of the vocal activists lobbying for access to justice for children in care is Visinel Balan - media outlets have written extensively about his experience of growing up in a state care institution.²⁰⁶ Still, survivors who 'come out' with their stories mostly focus on physical abuse; speaking out about sexual abuse remains a taboo, also due to the fact that there is often no psychological therapy available.

While redress mechanisms for victims of institutional abuse are not available, other accessible compensation mechanisms could be used by children and adults whose rights were violated while in care. In Bulgaria, victims of serious crimes such as intentional grievous bodily harm, rape and murder are entitled to emergency medical care, psychological counselling and free legal support, and can submit an application for financial compensation to the National Council for Assistance and Compensation without going through the courts.²⁰⁷ In Moldova, a similar law allowing victims to apply directly to the government for financial compensation and other forms of support was adopted in

2016.²⁰⁸ The Romanian scheme for victim protection similarly entitles victims of serious crimes to compensation and support, but requires them to approach their local court for consideration.²⁰⁹

From desk research and interviews conducted by CRIN it can be concluded that embryonic efforts by advocates in some countries examined in this report (specifically, Romania and Bulgaria) could potentially lead to demands for a large-scale investigation similar to those described in Chapter I. However, it is too early to speak about redress schemes. It is also important to note that even if all the necessary triggers and/or elements seem to be present, the factor of 'right place, right time' may still play a part. Redress for children who fell victim to institutional abuse in Ireland, for instance, would have been much less likely if their cases were to have been brought during the economic crisis as political priorities and available funds would have played into the decision.²¹⁰

2. Apologies and other forms of acknowledgement

There have been no instances where a public apology was issued by the State over rights abuses of children in institutional care in the countries in the region examined in this report, despite the scale of rights violations in institutions. A public apology by a representative body is 'a means of recognising that an injustice has been done and a means of accepting responsibility for the harm and suffering brought by that injustice'.²¹¹ This kind of official recognition of large-scale injustices promises that the violations will not recur and allows survivors to continue their lives with dignity. For this reason, although it does not constitute a full measure of redress, children's rights advocates and adult care leavers should advocate for public apologies by the State to everyone who was subject to abuse while institutionalised. International practice shows that public apologies can play a crucial role in improving public policy and recognising the rights of children. For example, the establishment of a public inquiry in Sweden in 2006 led to an official apology in 2011 – and the subsequent passing of the Financial Redress Act in 2012.²¹²

204 Murray, p. 53.

205 For more details see the text box "Bulgaria and Ukraine: a failed apology".

206 The Guardian, "Ceausescu's children", 10 December 2014. Available at: www.theguardian.com/news/2014/dec/10/sp-ceausescu-children.

207 Victims of a crime have a right to compensation if the offender is convicted, pleads guilty, where a prosecution has been closed or where an investigation has been closed because it was not possible to identify the perpetrator. Applications must be made within the specified time period. Law on Assistance and Financial Compensation for Victims of Crime, Article 12. Available at: <http://lex.bg/laws/ldoc/2135540550>.

208 Law on the Rehabilitation of Victims of Crime, Article 14.

209 Applications should include information on the crime and harm suffered, and are determined by a Commission formed of two judges in the presence of the victim and the prosecutor. Law on Measures to Ensure the Protection of Crime Victims, Articles 28-31. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/law_no_211_2004.

210 Murray, p. 62.

211 Ibid, p. 67.

212 Full title of the public inquiry: Swedish Commission to Inquire into Child Abuse and Neglect in Institutions and Foster Homes. Linköping University, Limits of State Responsibility: Redress to Victims of Historical Child Abuse in Out-of-home Care (project description). Available at: <https://www.tema.liu.se/tema-b/forskning/projektinformation/projekt-granser-for-upprattelse/granser-for-upprattelse?l=en>.

Other forms of acknowledgement and remembrance of harms in care include memorials, museum exhibitions and other forms of public education. The Romanian care leavers network (Association 'Federei') is currently working to establish a museum dedicated to the victims of institutional abuse and neglect which would feature the stories, photographs and personal possessions of those who lived in state care.

Bulgaria and Ukraine: a failed apology

In 2007, *Bulgaria's Abandoned Children* - a hard hitting documentary about abuse and neglect at the Mogilino institution for children with disabilities in Bulgaria²¹³ caused significant international outcry and with pressure from advocacy groups was followed by deinstitutionalisation initiatives in the country, supported by the EU.²¹⁴ In 2012, a similar shocking documentary titled *Ukraine's Forgotten Children* about an orphanage for abandoned children with disabilities was released.²¹⁵ While there have been a number of closures of institutions and an increase in the number of alternative care services in Ukraine in recent years and a major reform of the child protection system in Bulgaria, the governments of both countries did not officially acknowledge or guarantee measures to guard against the repetition of violations of children's rights in care institutions.

3. Why push for the establishment of inquiry and redress mechanisms?

In countries examined in this report, most advocacy efforts, with a few exceptions, are focused on prevention of future violations of children's rights in care, yet lobbying for recognition and redress for historical institutional abuse has so far been lacking.

Bringing court cases on behalf of children while they are in care can be very challenging due to various limitations listed in this report. However seeking redress for violations that occurred in the past - through courts, special compensation mechanisms or redress schemes - is an important avenue which is yet to be fully explored by care leavers in the region. The most significant benefit of inquiry and redress mechanisms for institutional abuse is that they can lead to reparations for the harm caused in the past as well as important changes in the child protection systems today. By providing relevant precedents of success in different countries in Chapter I we encourage lobbying for redress schemes and structural change in the legal systems to tackle the issue of neglect and abuse in care institutions.

Lobbying for the establishment of inquiry and redress mechanisms

Pros:

- Independent, detailed investigation which can lead to the disclosure of wide-ranging and systematic abuse in care institutions;
- Alternative to traditional forms of litigation which can be costly and traumatising;
- Public inquiry recommendations can lead to different initiatives: from changes in current policy and practice related to children in care, to the provision of support to adult care leavers which is practically non-existent in the region. The latter can include acknowledgement of harm caused and apology to victims; provision of specialist support services (for example, mental health therapy); and financial compensation schemes for victims for the harm they have suffered while in care;
- Confidential and less intimidating process to minimise re-traumatisation of victims. Survivors can choose to participate in private hearings with no personal details (names of survivors, perpetrators or institutions) made public without their consent;
- Formation of collective identity for survivors of institutional harm.

Cons:

- Public inquiry recommendations are usually non binding and only some may be implemented (for example, provision of services but not financial compensations);
- It can take many years to create the political will to take action.

²¹³ BBC, "New lives for Bulgaria's abandoned children", 15 October 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/8307256.stm>

²¹⁴ Child Pact, *Reform Steps Towards Child Protection in Bulgaria and Romania: A Comparative Approach*, 2014, p. 11. Available at: http://www.childpact.org/wp-content/uploads/2014/04/Reform_steps_Romania-and-Bulgaria.pdf

²¹⁵ The Guardian, "TV review: Ukraine's Forgotten Children", 18 June 2012. Available at: <https://www.theguardian.com/tv-and-radio/2012/jun/18/ukraines-forgotten-children-tv-review>

Chapter III:

How to get justice at the regional and international level



Europe has some of the best developed regional human rights mechanisms that can be used to challenge the full range of abuses of the rights of children in institutions. Each mechanism has its strengths and weaknesses as well as its own process and may be particularly useful for challenging certain types of abuses. With the exception of the European Committee on Social Rights, it is necessary to exhaust domestic remedies in order to bring a complaint to these bodies. This means that in order to bring a complaint to the European Court of Human Rights or one of the UN's treaty bodies, it is necessary to first bring a complaint through any national complaint mechanism that is available.

Using regional complaints mechanisms

1. Submitting a complaint to the European Court on Human Rights (ECHR)

The complaint mechanism is available in: Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia and Ukraine.

The European Court of Human Rights is the most well established regional human rights court with a strong track record of its judgments being enforced. For rights abuses that fall under the jurisdiction of the court - that is, those that violate the provisions of the European Convention on Human Rights²¹⁶ - it is likely to be the most effective regional mechanism for providing redress.

Any person, non-governmental organisation or group of individuals can bring a case to the ECHR, but they must first exhaust domestic remedies and will generally be required to allege that they have been a victim themselves of a violation of their rights under the Convention.²¹⁷ In very limited circumstances it is possible for an NGO to file a complaint on behalf of another person, but the Court has been very strict in limiting these kinds of cases.²¹⁸ Any complaint must be brought within six months of the conclusion of national court proceedings.²¹⁹

NGO complaints to the ECHR: *Campeanu v. Romania*

Valentin Campeanu had lived in orphanages and other state institutions in Romania since he was abandoned at birth by his Roma mother. He was diagnosed as HIV positive and as having a profound intellectual disability from an early age. Mr

Campeanu subsequently died while in state care in conditions that indicated severe neglect. A non-governmental organisation (the Centre for Legal Resources - CLR) sought to prosecute the government and health officials who contributed to his death. The Centre for Legal Resources was allowed to bring a complaint before the ECHR as representatives of Mr Campeanu despite the fact that they were not themselves claiming to be victims. The Court emphasised that the particular facts of the case were particularly relevant, namely that Mr. Campeanu had no next of kin or legal representative and was unable to initiate proceedings while alive because of his disabilities and lack of legal representative. The court also found it relevant that the CLR had represented him before Romanian authorities.²²⁰

NGO complaints to the ECHR: *Bulgarian Helsinki Committee v. Bulgaria*

The Bulgarian Helsinki Committee filed a complaint with the ECHR about two adolescent girls with mental disabilities who had died after being admitted to hospital. Both girls had been abandoned shortly after birth and placed in institutional care. The Court found the complaint inadmissible, distinguishing it from *Campeanu v. Romania* on the grounds that the organisation had not been involved in the specific cases of the victims and had not been in contact with them prior to their deaths. The court also found it relevant that in this case, the organisation had not had formal status in any domestic proceedings.²²¹

The scope of the Convention, however, is limited and most of the challenges to abuses of the rights of children in institutions have related to the most extreme forms of violence. The major provisions that have been used to protect the rights of children in institutions have been the right to life,²²² the prohibition on torture, inhuman and degrading treatment²²³ and the right to private and family life.²²⁴

The right to life can only be violated in the context of treatment of a child held in an institution where that child has died as a result of institutional abuse or neglect and its application is therefore limited. In 2014, for example, Romania was held responsible for the death of Valentin Campeanu following years of neglect in state care.²²⁵

216 European Convention on Human Rights, available at: www.crin.org/node/6607.

217 European Convention on Human Rights, Article 34.

218 See *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania* [2014] Application No. 47848/08. Summary and full judgment available at: www.crin.org/node/41242; case study available at: www.crin.org/node/42836. *Bulgarian Helsinki Committee v. Bulgaria* [2016] Applications Nos. 35653/12 and 66172/12. Available at: <http://hudoc.echr.coe.int/eng-press?i=003-5444580-6823724>.

219 European Convention on Human Rights, Article 35(1).

220 *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania* [2014] Application No. 47848/08. Summary and full judgment available at: www.crin.org/node/41242; case study available at: www.crin.org/node/42836.

221 *Bulgarian Helsinki Committee v. Bulgaria* [2016] Applications Nos. 35653/12 and 66172/12. Available at: <http://hudoc.echr.coe.int/eng-press?i=003-5444580-6823724>.

222 European Convention on Human Rights, Article 2.

223 European Convention on Human Rights, Article 3.

224 European Convention on Human Rights Article 8.

225 *Centre for Legal Resources on Behalf of Valentin Campeanu v. Romania* [2014] Application No. 47848/08.

NGO complaints to the ECHR: Nencheva and others v. Bulgaria

Fifteen children died at a state institution for children with serious mental disabilities in Bulgaria over the winter of 1996/7. The winter was particularly harsh and the budget allocation to the institution had been cut following hyperinflation in the country. Heating was only on for two hours a day, food provided to the children was inadequate and the post of doctor at the facility was vacant. The parents of seven of the children brought a complaint that eventually reached the European Court of Human Rights. The ECHR found that the State had violated the children's right to life, ruling that national authorities had a duty to protect these children and could have prevented the deaths as information about the serious risk to their lives had been available as early as September 1996, three months before the first child died.²²⁶

The prohibition on torture, inhuman or degrading treatment under the Convention is absolute. This means any ill-treatment of a child that reaches this level must be prohibited under national law and where national law does not provide a remedy for this kind of abuse, the Convention will have been violated.²²⁷ The three types of violence have different tests. Torture is the most extreme form of violence covered by the article and the decision about whether ill-treatment constitutes torture will be made based on the circumstances of a case, including the duration of treatment, the physical or mental effects and in some cases the sex, age and state of health of the victim.²²⁸ Treatment may be considered "inhuman" where it is premeditated, applied for a long period of time or caused bodily injury or intense physical or mental suffering.²²⁹ Treatment is degrading where it was imposed to arouse feelings of fear, anguish and inferiority capable of humiliating or degrading a person.²³⁰

The high threshold for ill-treatment required to invoke the right to life or prohibition on torture has resulted in many of the cases before the ECHR. The right to private and family life, however, has the potential to challenge broader violations of the rights of children, including restrictions on contact with family members, censoring of correspondence or other measures that might impact the privacy of children.

To date, many of the cases brought under this provision relate to the decision to take children into state care and have been brought by the parents of children who have been removed from their care.²³¹ Article 8 has also been used to impose an obligation on the State to prevent ill-treatment of children in state care, for example to guarantee the prosecution of sexual abuse of children with disabilities cared for in institutions.²³²

NGO complaints to the ECHR: Saviny v. Ukraine

The parents of seven children were blind and neither was in work. The family lived in two two-bedroomed flats with no drains or hot water. Four of the children were initially removed from the home and placed in a boarding school on the grounds that the parents were unable to provide adequate care. Care orders were later made for the remaining three children.

The ECHR found that the removal of the children violated the parent's right to respect for private and family life. The precarious situation of the parents alone could not justify removal of the children,²³³ nor did the fact that the children could be placed in a more beneficial environment.²³⁴ There was no evidence that national courts considered whether the reported inadequacies of the parents could be remedied with targeted financial and social assistance or effective counselling. The court also noted that at no stage of the proceedings were the children heard by the judges.

2. Submitting a complaint to the European Committee on Social Rights

The complaint mechanism is available in Bulgaria.

The European Social Charter sets out social and economic rights within the jurisdiction of all States covered by this report with the exception of Belarus. Each State must accept at least six of the core provisions of the Charter and no fewer than 16 articles. This means that the obligations of States vary under the treaty.²³⁵

A number of provisions under the Charter cover the rights of children in institutions. Article 17 of the Charter is perhaps the most relevant provision and requires States to provide protection and special aid to children and young

226 *Nencheva v. Bulgaria* [2013] ECHR Application No. 48609/06. Summary and link to full judgment available at: www.crin.org/node/40143.

227 Torture requires four elements: (i) severe pain or suffering; (ii) intent; (iii) purpose; and (iv) state involvement. Where it is not possible to demonstrate intent, treatment may still be prohibited as cruel, inhuman or degrading treatment or punishment.

228 *Ireland v. the United Kingdom* [1978] Application No. 5310/71, para. 162. Available at: <http://hudoc.echr.coe.int/eng?i=001-57506>.

229 *Labita v. Italy* [2000] Application No. 26772/95, para. 120. Available at: <http://hudoc.echr.coe.int/eng?i=001-58559>.

230 Ibid.

231 See, for example, *Saviny v. Ukraine* [2009] Application No. 39948/06. Available at: <http://hudoc.echr.coe.int/eng?i=001-90360>. See also *Buchberger v. Austria* [2001] Application No. 32899/96. Available at: <http://hudoc.echr.coe.int/eng?i=001-59998>.

232 See, for example, *X and Y v. the Netherlands* [1985] Application No. 8978/80.

233 See, for example, *Moser v. Austria* [2006] Application No. 12643/02, para. 68.

234 See for example, *K.A. v. Finland* [2003] Application No. 27751/95, para. 61.

235 For a full breakdown of the provisions accepted by States, see: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090001680482dab>.

persons deprived of family support and requires States to protect children and young persons against negligence, violence and exploitation.²³⁶ These provisions recognise the obligation of States to care for children who are temporarily or permanently without the care of parents and includes a broader prohibition of violence and ill-treatment than that covered by the European Convention on Human Rights.

A complaints procedure exists under the treaty to allow international NGOs, employers and trade unions to bring complaints that a State has violated provisions of the Charter. The complaints procedure is designed in a way that can make it very simple to file a complaint - there is no need to exhaust domestic remedies and NGOs can file complaints to challenge widespread violations of the rights of children without relying on the case of individual victims. However, of the States covered by this report, only Bulgaria has signed up to the complaints procedure for the Charter. For more information on how to use the European Social Charter, see CRIN's European Social Charter Complaints Procedure Briefing.²³⁷

NGO complaints to the European Committee on Social Rights: MDAC v. Bulgaria

The Mental Disability Advocacy Centre (MDAC) brought a complaint to the European Committee of Social Rights alleging that children living in homes for intellectually disabled children in Bulgaria were not receiving an education. The complaint related to 28 residential homes for children with moderate, severe or profound intellectual disabilities. In the 18 homes that MDAC had visited, only 6.2 percent of children residing in these homes were attending mainstream schools or special schools for children with disabilities. The Committee unanimously found that Bulgaria had violated article 17 of the European Social Charter, which requires States to establish and maintain an education system that is accessible and effective. The majority of the Committee also found that the State had violated the prohibition on discrimination because of its failure to justify the disparity between school attendance rates for children with intellectual disabilities and the population at large.²³⁸

Using UN treaty body complaints

The nine core human rights treaties of the UN all have a complaints mechanism. These present another option for bringing a complaint in relation to the rights they protect

when national legal systems have failed. As is the case with the ECHR, to bring a complaint under one of these procedures, it is necessary to “exhaust domestic remedies”, requiring anyone complaining of a violation to attempt to use the national legal system to resolve the issue first. It is only possible to bring a complaint under these procedures when a State has ratified the relevant treaty.

The complaints procedure under the Convention on the Rights of the Child, which came into force in 2014, is available for the broadest range of violations of children's rights, from the rights to education and healthcare to the prohibition on all forms of violence. For this reason it may provide a means of bringing an international complaint when no other mechanism is available.

Across the region, however, only Albania, Georgia and Ukraine have accepted this complaints procedure. Because the complaints procedure recently entered into force, and because it is necessary to exhaust domestic remedies before filing a complaint, to date the Committee has heard only one complaint, which was dismissed because the alleged violation took place before the complaints procedure entered into force.²³⁹ For some violations it may be possible to expedite this process, as the Committee is able to hear complaints without the exhaustion of domestic remedies when “the application of remedies is unreasonably prolonged or unlikely to bring effective relief”.²⁴⁰ The CRC is yet to establish what it will require of applicants in order to exhaust domestic remedies or what would constitute an “unreasonably prolonged” procedure, but there is scope to bring a complaint under these grounds without exhausting all possible routes for redress at the national level. For more details, see CRIN's CRC complaints mechanism toolkit.²⁴¹

While the complaints procedure under the CRC is likely to be the most relevant for children, the other treaty bodies also have complaints mechanisms, many of which are more widely ratified. To date, none of these treaty bodies has considered a case on the rights of children in institutions in any of the countries covered by this report and the only cases internationally on children in state care relate to decisions to remove children from their families.²⁴²

²³⁶ European Social Charter (Revised), available at: <http://crin.org/en/node/6617>.

²³⁷ Available at: www.crin.org/node/41882.

²³⁸ *Mental Disability and Advocacy Center (MDAC) v. Bulgaria*, European Committee of Social Rights, Complaint No. 41/2007. Available at: <http://hudoc.esc.coe.int/eng/i=cc-41-2007-dmerits-en>.

²³⁹ To date, only one complaint has been filed to the Committee on the Rights of the Child and it was ruled inadmissible as the violation took place before the complaints procedure entered into force in Spain. See Communication 001/2014, CRC/C/69/D/1/2014, available at: <http://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date>.

²⁴⁰ Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure, Article 7(e).

²⁴¹ Available at: www.crin.org/en/node/38898.

²⁴² See, for example, *Buckle v. New Zealand*, Human Rights Committee, Communication No. 858/1999, available at: <http://juris.ohchr.org/Search/Details/905>; *Tcholatch v. Canada*, Human Rights Committee, Communication No. 1052/2002, available at: <http://juris.ohchr.org/Search/Details/1339>.

Nonetheless, despite the underuse of these complaints mechanisms, they present opportunities for advocacy on the rights of children in institutions. The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have almost identical protections on the right to privacy, home and correspondence, which would allow children to file similar complaints to the Human Rights Committee when their State has not ratified the complaints procedure under the CRC. The ICCPR also guarantees the right of children to such measures of protection as are required by their status as minors,²⁴³ which could be a provision allowing complaints to be filed on a broad range of potential rights violations. The complaints procedures under the Convention on the Elimination of Discrimination Against Women and the Convention on the Elimination of Racial Discrimination both offer avenues of complaint particularly well tailored to children experiencing discrimination on the basis of their race or gender.

How to pick the right mechanism

The European Court of Human Rights is likely to provide the most effective remedy where it is available as the court has a strong track record of enforcing its judgments. The court is only able to hear cases of alleged

violations of rights under the European Convention on Human Rights, which means it has a more limited scope than some other complaint mechanisms. Most cases of rights violations of children in institutions have related to serious forms of violence, particularly resulting in the death of children, but it would also be available for cases involving privacy or the family life of children.

In comparison, the complaints procedure under the Convention on the Rights of the Child, where it is available, and other ***UN treaty body complaints*** ultimately rely on the pressure that comes from international criticism to challenge a violation. For this reason, they are likely to be at their most effective when used as part of a broader campaign, drawing on national campaigning and media work alongside the complaint itself.

The European Committee on Social Rights could be one of the easiest avenues for redress as it is the only regional mechanism that does not require exhausting domestic remedies and because of the lack of formal court hearings it may be an ideal option for organisations with less substantial legal experience. However, currently it is only available in Bulgaria and only for international NGOs registered with the Council of Europe.

Available UN complaints mechanisms*

Committee on the Rights of the Child (CRC) Albania, Georgia, Ukraine.	Human Rights Committee (HRC) Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia, Ukraine.	Committee on Economic, Social and Cultural Rights (CESCR) No State in the region has ratified this complaints mechanism.	Committee against Torture (CAT) Azerbaijan, Bulgaria, Georgia, Moldova, Russia, Serbia, Ukraine. Only inquiries: Albania, Armenia, Belarus, Romania.
Committee on the Elimination of Discrimination against Women (CEDAW) Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia, Ukraine.	Committee on the Elimination of Racial Discrimination (CERD) Azerbaijan, Bulgaria, Georgia, Moldova, Romania, Russia, Serbia, Ukraine.	Committee on Enforced Disappearances (CED) Albania, Serbia, Ukraine. Only inquiries: Armenia.	Committee on the Rights of Persons with Disabilities (CRPD) Azerbaijan, Serbia, Ukraine.

*As of March 2017, up to date details of ratifications available through the UN treaty database: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en>

Resources

CRIN materials

- Child Rights International Network, *Guide to Strategic Litigation*. Available at: www.crin.org/en/node/38840/
- Child Rights International Network, *Legal assistance toolkit for children and children's rights organisations*. Available at: www.crin.org/en/node/38869/
- Child Rights International Network, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016. Available at: www.crin.org/en/node/42383
- Child Rights International Network, *Country reports on access to justice for children*. Available at: www.crin.org/en/node/42362/
- Child Rights International Network, *Romania: The 'Legal Black Hole' for Children in Institutions*. Case study, 2016. Available at: <https://www.crin.org/en/library/publications/romania-legal-black-hole-children-institutions>
- Child Rights International Network (CRIN), *Bulgaria: No more excuses on education for children with mental disabilities*. Case study, 2015. Available at: <https://www.crin.org/en/library/publications/bulgaria-no-more-excuses-education-children-mental-disabilities>

Summaries of decisions by regional complaints mechanisms

- *Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [2014] European Court of Human Rights, Application No. 47848/08. Available at: <https://www.crin.org/en/library/legal-database/centre-legal-resources-behalf-valentin-campeanu-v-romania>
- *Bulgarian Helsinki Committee v. Bulgaria* [2016] European Court of Human Rights, Applications Nos. 35653/12 and 66172/12. Available at: <http://hudoc.echr.coe.int/eng-press?i=003-5444580-6823724>
- *Nencheva v. Bulgaria* [2013] European Court of Human Rights Application No. 48609/06. Summary and link to full judgment available at: www.crin.org/node/40143/
- *Mental Disability and Advocacy Centre (MDAC) v. Bulgaria*, European Committee of Social Rights, Complaint No. 41/2007. Available at: <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dmerits-en>

Relevant guides, handbooks, toolkits

- Mental Disability Advocacy Centre, *Litigating the right to community living for people with mental disabilities. A handbook for lawyers*, 2014. Available at: <http://www.mdac.org/en/books/litigating-right-community-living-people-mental-disabilities>
- Mental Disability Advocacy Centre, *Access to Justice for Children with Mental Disabilities: Standards and Findings*, 2015. Available at: <http://www.mdac.org/en/resources/access-justice-children-mental-disabilities-standards-and-findings-english-o>

- Council of Europe, *Children and young people in care – Discover your rights!* 2009. Available in English, Azeri, Bosnian, Bulgarian, Croatian, Czech, Estonian, Polish, Romanian, Russian and Ukrainian: <https://www.coe.int/en/web/children/alternative-care>
- Disability Rights International, *A Mandate to End Placement of Children in Institutions and Orphanages: The duty of governments and donors to prevent segregation and torture*, 2017. Available at: <http://www.driadvocacy.org/wp-content/uploads/Rosenthal-Torture-seg-Feb16.pdf>

Inquiries and redress schemes into institutional abuse of children

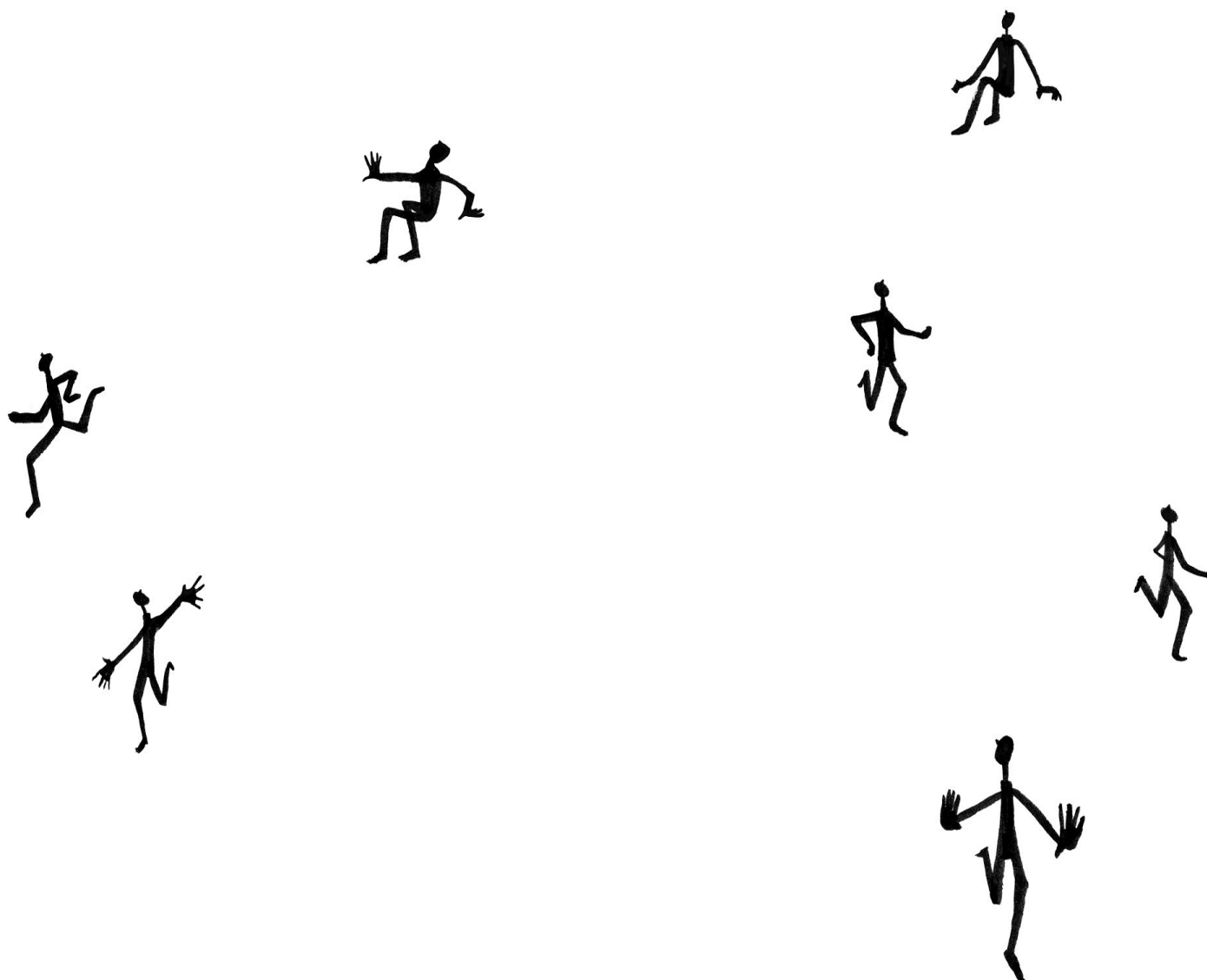
- Suellen Murray, *Supporting Adult Care Leavers. International Good Practice*, Bristol Policy Press, 2015.
- Kathleen Daly, *Conceptualising Responses to Institutional Abuse of Children*, Current Issues in Criminal Justice, Volume 26, No 1, July 2014. Available at: <http://www.austlii.edu.au/au/journals/CICrimJust/2014/10.pdf>
- Johanna Sköld, *Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide*, 2013. Available at: <http://liu.diva-portal.org/smash/get/diva2:615800/FULLTEXT01.pdf>

Pro bono

- Lash, Karen A., “Pitching Pro Bono: Getting to First Base with the ‘Big Firm’”, 2008 (Vol. 2) DePaul Journal for Social Justice. Available at: <http://ssrn.com/abstract=1417526>
- Australian Pro Bono Centre, “Tips for making an attractive and effective pitch to a law firm or in-house legal team to start a new pro bono project”, March 2006. Available at: <http://probonocentre.org.au/wp-content/uploads/2015/09/TipsfromEstherLardent.pdf>

Relevant stories from around the world

- The Guardian, “Mexican government accused of torture at disabled care home”, 9 March 2017. Available at: <https://www.theguardian.com/global-development-professionals-network/2017/mar/09/ending-abuse-institutions-charity-case-mexican-government>
- The Irish News, “Inquiry into historical institutional abuse finds victims of child abuse should get up to £100,000 compensation”, 20 January 2017. Available at: <http://www.irishnews.com/news/northernirelandnews/2017/01/20/news/abuse-covered-up-at-children-s-homes-hia-inquiry-finds-895244/>
- ABC News, “Child sexual abuse statutory time limits removed for Queensland (Australia) victims after new laws pass”, 8 November 2016. Available at: <http://www.abc.net.au/news/2016-11-09/statutory-time-limits-removed-for-victims-child-sex-abuse-qld/8007836>
- Associated Press News, “Girl’s death uncovers crisis in care of children in Chile”, 3 November 2016. Available at: <http://bigstory.ap.org/article/51ec0282b4434cdb80c73fc33851c14/girls-death-uncovers-crisis-care-children-chile>



Contact CRIN at info@crin.org or visit our website at www.crin.org
