

International legal issues arising from repatriation of the children of Islamic State

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International Legal Issues Arising from Repatriation of the Children of Islamic State

Saeed Bagheri* and Alison Bisset†

Abstract

The detention of children of Islamic State within Kurdish-controlled camps in Syria presents a complex dilemma for national authorities and the international community. Although a small number of states have repatriated their nationals, overall, little progress has been made and thousands of children continue to languish in deplorable conditions. Resolution has been urged from both humanitarian and international security perspectives, but Western states, in particular, have sought to avoid responsibility, often using legal mechanisms to impede repatriation efforts. This article asks whether international legal frameworks can provide a route to resolution. It argues that by centralizing the international law and policy on children's rights, repatriation becomes the priority rather than domestic political and security objectives. Conceptual light is shed on the ways in which international human rights law standards can be mobilized for the protection of conflict-affected children as individual rights holders.

1. Introduction

The defeat of Islamic State (IS) has left thousands of foreign fighter children indefinitely detained in camps and prisons in Iraq, Libya and Syria. Conditions are, infamously, desperate,¹ with experts warning that the situation will result in future radicalization.² Repeated calls by the United Nations (UN) Secretary General for governments to facilitate repatriation

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¹ UNICEF, 'UNICEF Urges Repatriation of All Children in Syria's Al-Hol Camp Following Deadly Fire' *UN News* (28 February 2021) <<https://news.un.org/en/story/2021/02/1085982>> accessed 19 April 2022.

² A Athie, 'The Children of ISIS Foreign Fighters: Are Protection and National Security in Opposition?' *IPI Global Observatory* (18 December 2018) <<https://theglobalobservatory.org/2018/12/children-isis-foreign-fighters-protection-national-security-opposition/>> accessed 6 July 2021; FD Ní Aoláin, 'Time to Bring Women and Children Home from

of women and children³ have yielded little. Few governments have shown willingness to address the situation by repatriating those with nationality or citizenship claims to their jurisdiction,⁴ and there is no international consensus on how best to tackle a situation that seems likely to pose a threat to future international peace and security. Instead, the children of IS have been abandoned to wide-scale human rights abuses, security risks, indefinite detention without charge and potential statelessness. In recent months, the situation has appeared to worsen, with reports of IS sleeper cells within the camps and an inability of Kurdish Syrian Defence Forces (SDF) to maintain order in the camps purportedly under their control.⁵ Moreover, as IS now focuses its efforts in the Sahel, in what it terms its 'West Africa Province',⁶ there should be real concern that the situation currently prevailing in the Middle East will not be an isolated event.

This article asks whether and how international law can be utilized to motivate and improve efforts to realize protection for the children of IS as the victims of their parents' atrocities. It considers how international legal standards can be mobilized for the protection of conflict-affected children, conceptualizing the protection of children connected to armed non-state actors as an obligation under international law. It demonstrates that while there is a considerable volume of international law on this topic, it has never been operationalized to respond to a problem of this nature and that existing models must be reimagined in order to respond to the unique situation presented by IS foreign fighter children.

The situation is, admittedly, fraught with difficulty. Beyond the political reluctance to commit resources to unpopular repatriation programs,⁷ there are

Iraq and Syria' *Just Security* (4 June 2019) <www.justsecurity.org/64402/time-to-bring-women-and-children-home-from-iraq-and-syria/> accessed 6 July 2021.

³ Report of the Secretary General, Children and Armed Conflict, A/74/845-S/2020/525 (9 June 2020) para 184 <https://reliefweb.int/sites/reliefweb.int/files/resources/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 6 July 2021.

⁴ On the limited efforts by some, see R van Ark and F Gordon, 'Repatriating the Forgotten Children of ISIS Fighters: A Matter of Urgency' *EUI Global Citizen Observatory* (8 May 2020); A Speckhard and M Ellenberg, 'Can We Repatriate the ISIS Children?' *International Center for the Study of Violent Extremism* (July 2020) 5; 'Belgium to Repatriate Children of Jihadists Held in Syrian Refugee Camp' *Euronews* (5 March 2021) <www.euronews.com/2021/03/05/belgium-to-repatriate-children-held-in-al-hol-syrian-refugee-camp> accessed 6 July 2021.

⁵ D Sabbagh, 'Kurdish Forces Enter Detention Camp in Syria to Eliminate ISIS Cells' *The Guardian* (28 March 2021) . <<https://www.theguardian.com/world/2021/mar/28/kurdish-forces-enter-refugee-camp-in-syria-to-eliminate-isis-cells>> accessed 19 April 2022; also the concerns raised in B McKernan, V Mironova and E Graham-Harrison, 'How Women of ISIS in Syrian Camps Are Marrying Their Way to Freedom' *The Guardian* (2 July 2021) <www.theguardian.com/world/2021/jul/02/women-isis-syrian-camps-marrying-way-to-freedom> accessed 6 July 2021.

⁶ M Al-Lami, 'Africa's Sahel Becomes Latest Al-Qaeda-IS Battleground' *BBC News* (11 May 2020) <www.bbc.co.uk/news/world-africa-52614579> accessed 6 July 2021.

⁷ A Dworkin, *Beyond Good and Evil: Why Europe Should Bring ISIS Foreign Fighters Home* (European Council on Foreign Relations, 25 October 2019).

practical problems which can make the process of repatriation slow and difficult. To date, repatriation efforts have centered on nationality,⁸ driven, it seems, by assertions from international⁹ and regional¹⁰ human rights bodies that states of nationality are best placed to provide protection to the individuals involved. Where repatriation proceeds on grounds of nationality, determining it can be complex in a situation where few children have birth registration documents and where many have parents of different nationalities. It is relatively common for women to have multiple children with fathers of different nationalities, raising questions as to which state should bear the responsibility of repatriation. Many states would prefer to repatriate children only, leaving behind their mothers, generally considered a national security risk. However, even apart from the best interests considerations¹¹ this would raise for separated children, the SDF, which controls the camps in which children are detained, will not permit separation of children from their mothers against the mother's wishes.¹²

The lack of a coordinated international effort to deliver a solution has given rise to a small number of legal challenges at national¹³ and international¹⁴ levels, alleging that the extra-territorial obligations of states parties under different international human rights treaty regimes require the repatriation of children from camps.¹⁵ These have done little to compel governments to take action. At national levels, cases have been dismissed on various grounds, from highly technical findings on lack of enforcement jurisdiction, to refusal of courts

⁸ V Mironova, 'What to do about the children of the Islamic State' *Foreign Policy* (25 November 2020) <<https://foreignpolicy.com/2020/11/25/islamic-state-isis-repatriation-child-victims/>> accessed 6 July 2021.

⁹ See, eg, 'Extra-territorial Jurisdiction of States over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic', para 35 <www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf> accessed 6 July 2021.

¹⁰ Council of Europe Commissioner for Human Rights, 'Council of Europe Member States Should Urgently Repatriate their Under-age Nationals Stranded in Northern Syria' Statement of 28 May 2018.

¹¹ Convention on the Rights of the Child (1989) art 3.

¹² Dworkin (n 7).

¹³ A Hope, 'No Automatic Right of Return for Widows and Orphans of Dead Syria Fighters, Rules Court of Appeal' *The Brussels Times* (Brussels, 28 February 2019); Conseil d'Etat Décision No 429668, Ordonnance du 23 avril 2019; 'Dutch State Does Not Have to Repatriate IS Women and Children: Advocate General' *DutchNews.nl* (24 April 2020) <www.dutchnews.nl/news/2020/04/dutch-state-does-not-have-to-repatriate-is-women-and-children-advocate-general/> accessed 6 July 2021.

¹⁴ Committee on the Rights of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No 79/2019 and No 109/2019, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (2 November 2020).

¹⁵ Third-Party Intervention by the Council of Europe Commissioner for Human Rights before the European Court of Human Rights, App Nos 24384/19 and 44234/20, *H.F. and M.F. v France* and *J.D. and A.D. v France*, 25 June 2021, Strasbourg.

to adjudicate on what they consider to be political issues.¹⁶ Neither have these cases brought clarity on state obligations under international law. Indeed, recent communication from the Committee on the Rights of the Child has created confusion on the nature and scope of extra-territorial obligations vis-à-vis foreign fighter children due to its failure to clearly articulate the basis on which states of nationality incur positive obligations to protect the rights of child nationals in camps.¹⁷ There is a wealth of international law and policy, across international human rights law, international humanitarian law and international refugee law, dedicated to the protection of children and promotion of their rights, much of it focused particularly on how children ought to be treated during and post-conflict.¹⁸ Yet, to date, none of it appears to have proved useful or effective in developing a solution.

In order to assess whether and how international law can improve efforts to provide protection for the children of IS, this article explains the situation facing children in Kurdish-controlled camps and identifies the difficulties inherent in relying upon nationality as a route to repatriation. It will then consider the international legal frameworks which protect children's rights and demonstrate that, together, these legal instruments provide a strong foundation on which to base the repatriation of children. The article argues that the factors behind state reluctance to repatriate are, in many respects, ill-conceived and are at variance with their international legal obligations on children's rights. It contends that by centralizing the international law and policy on children's rights, and recognizing children in camps as victims of their parents' actions, repatriation becomes the priority as a means of ensuring their rights under international law.

2. Children in camps

The complex and chaotic situation in which the rise and fall of the IS occurred makes it difficult to ascertain exact numbers of those involved and affected. It is estimated that between 2013 and 2018 some 41,490 foreign citizens across 80 countries became affiliated with IS. Approximately 13% of them are women and 12% are children meaning that one in four of IS's affiliates are women and children.¹⁹ There are likely many more children not included in this tally:

¹⁶ For an overview, see C Sandelowsky-Bosman and T Liefwaard, 'Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child' (2020) 38 *Nordic Journal of Human Rights* 141.

¹⁷ M Milanovic, 'Repatriating the Children of Foreign Fighters and the Extraterritorial Application of Human Rights' *EJIL: Talk!* (10 November 2020) <www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> accessed 6 July 2021. This will be discussed further below.

¹⁸ These legal frameworks will be discussed in detail below.

¹⁹ See UNSC, 'ISIL Now "A Covert Global Network" Despite Significant Losses, United Nations Counter-Terrorism Head Tells Security Council' 8330th Meeting (PM), UN Doc SC/13463 (23 August 2018) <www.un.org/press/en/2018/sc13463.doc.htm> accessed 6

children who were born in or are currently in besieged areas; children born without proper civil registration; children of whom authorities have lost track, and children who are merely unknown to authorities.²⁰ However, according to UN reports, around 28, 000 children of foreign fighters are living in SDF-controlled camps in Syria, 20, 000 of them from Iraq.²¹ Half of the children living in three northern Syrian camps are under the age of 5 years, and 80% are under 12 years.²² The conditions within these camps are deplorable. Violence is serious and ongoing as the camps continue, in large part, to operate under a form of IS rule, imposed by women faithful to the group's ideology, and the resource constrained SDF is unable to provide adequate security.²³ There is overcrowding, giving rise to a public health crisis, and an absence of medical care. Infrastructure is poor, food, clean water and sanitation are inadequate and children lack access to education.²⁴ Within the camps, children's international legal rights to protection from violence²⁵ and inhuman or degrading treatment²⁶ and to provision of health care,²⁷ education²⁸ and decent standards

July 2021; J Cook and G Vale, *From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State* (ICSR Publications 2018) 21; L Loveluck and others, 'After The Caliphate: Castaway from the Islamic State' *Washington Post* (23 December 2019) <www.washingtonpost.com/world/2019/12/23/how-isis-women-their-children-are-being-left-stranded-desert/?arc404=true&itid=lk_inline_manual_1> accessed 6 July 2021.

²⁰ Athie (n 2).

²¹ 'UNICEF Urges Governments to Repatriate Thousands of Foreign Children Stranded in Northeast Syria' *UN News* (4 November 2019) <<https://news.un.org/en/story/2019/11/1050561>> accessed 6 July 2021.

²² See 'The World Must Do Something About the Children of ISIS Fighters' *Washington Post* (12 January 2022) <www.washingtonpost.com/opinions/the-world-must-do-something-about-the-children-of-isis-fighters/2020/01/12/5dae27c8-316e-11ea-91fd-82d4e04a3fac_story.html> accessed 6 July 2021.

²³ S Khani, 'Al-Hawl Camp and the Potential Resurgence of ISIS' *Fikra Forum* (Washington Institute, 29 June 2020) <www.washingtoninstitute.org/policy-analysis/al-hawl-camp-and-potential-resurgence-isis> accessed 6 July 2021.

²⁴ *ibid.*

²⁵ Convention on the Rights (n 11) art 19; European Social Charter (1961, revised 1966) art 17; African Charter on the Rights and Welfare of the Child (1990) art 15; Charter of Fundamental Rights of the European Union (2012) art 24.

²⁶ Universal Declaration of Human Rights (1948) art 5; International Covenant on Civil and Political Rights (1966) art 7; Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 3; American Convention on Human Rights (1969) art 5; African (Banjul) Charter on Human and Peoples' Rights (1981) art 5; Convention against Torture (1984); Inter-American Convention to Prevent and Punish Torture (1985); Charter of Fundamental Rights *ibid* art 3.

²⁷ International Covenant *ibid* art 12; European Social Charter (n 25) art 11; African Charter on Human and Peoples' Rights (1981) art 16; Convention on the Rights (n 11) art 24; African Charter on the Rights and Welfare of the Child (1990) art 14.

²⁸ Universal Declaration (n 26) art 26; International Covenant (n 26) arts 13 and 14, Convention on the Rights (n 11) arts 28 and 29; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) art 2; African Charter on Human and Peoples' Rights (1981) art 17; African Charter on the Rights and Welfare of the Child (1990) art 11.

of living²⁹ are therefore seriously compromised. Children remain subject to IS indoctrination, often from their mothers, many of whom remain fiercely loyal to the organization. There are concerns that children born to IS fighters may have been radicalized³⁰ and that some may even have participated in fighting or in terror attacks.³¹ Studies suggest that insecure internally displaced persons (IDPs) and refugee camps are breeding grounds for child recruitment and abduction by armed groups and that where family units are weak or where they are aligned with an armed group, children are also more likely to join that group.³²

The situation experienced by these children as a result of their parents' association with IS should be regarded as a vital concern of the international community, both in terms of the threats to the development of the children themselves and the dangers they pose to regional and international security and stability. Indeed, the latter issue raises questions as to whether a policy of non-repatriation can be considered consistent with international legal obligations to combat terrorism, which constitutes a threat to human rights and democracy.³³ Today, we know that these children are victimized by a combination of various factors. Beyond the immediate dangers of survival and existence within the camps and potential recruitment into the operational arms of IS, they face long-term challenges of discrimination and potential statelessness. Children born in territories under the control of IS were mostly given birth documents by the IS authorities.³⁴ However, the documents have never been recognized by any Member State of the UN.³⁵ Many children, whether born in or brought to the territories, have since lost one or both parents, making

²⁹ Universal Declaration (n 26) art 25; International Covenant (n 26) art 11; Convention on the Rights (n 11) art 11.

³⁰ On 'radicalization', see C McCauley and S Moskalenko, 'Mechanisms of Political Radicalization: Pathways Toward Terrorism' (2008) 20 *Terrorism and Political Violence* 415; BL Smith and others, *Identity and Framing Theory, Precursor Activity, and the Radicalization Process* (US Department of Justice 2016).

³¹ See Council of Europe Parliamentary Assembly Resolution 2263 (2019), 'International Obligations Concerning the Repatriation of Children from War and Conflict Zones' Committee on Social Affairs, Health and Sustainable Development, Provisional Version (28 January 2020) para 9.

³² S O'Neil and K Van Broeckhoven (eds), *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (United Nations University 2018) 52.

³³ See UN Security Council Resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2322 (2016), 2396 (2017). See also Council of Europe Convention on the Prevention of Terrorism (CETS No 196) (2005) art 3; Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 217) (2015).

This will be discussed further below.

³⁴ R Callimachi and A Rossback, 'The ISIS Files: Extreme Brutality and Detailed Record-Keeping' *New York Times* (4 April 2018) <www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents> accessed 6 July 2021.

³⁵ Insurgent administrations are typically not recognized by states as an authority for the human rights obligation of registration at birth. See K Hampton, 'Born in the Twilight Zone: Birth Registration in Insurgent Areas' (2019) 911 *International Review of the Red Cross* 513, arguing that in domestic territories not under State control, the

determination of nationality difficult. Some states will not recognize children born to foreign fighter fathers.³⁶ Thus, if nationality is to provide the route out of the camps, many children will be in a precarious position unless there is meaningful international commitment and effort to find solutions. Moreover, the lack of identity and belonging presents a potential danger in that children may seek opportunities for community, identity and significance within IS.³⁷

3. International Law

A. International Law of Children's Rights

Although many states continue to shy away from it, the need to protect children's rights and interests in all matters is reflected across the spectrum of international law and policy.³⁸ The obligation to protect the rights of children takes its source from civil-political and social-economic rights enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). There can be no doubt that the protection of civil and political, and socio-economic human rights including the right to be free from torture and inhuman or degrading treatment, right not to be arbitrarily detained, right to economic inclusion, and right to education is an imperative component of keeping societies peaceful.³⁹ Of note is Article 24 of the ICCPR, which states:

1. Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

obligation to ensure recognition under the law should take the form of an obligation to recognise insurgent-issued birth documents.

³⁶ T Renard and R Coolsaet, 'Children in the Levant: Insights from Belgium on the Dilemmas of Repatriation and the Challenges of Reintegration' Security Policy brief, Egmont Royal Institute for International Relations (July 2018); Athie (n 2).

³⁷ RF Baumeister and MR Leary, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117 *Psychological Bulletin* 497; B Beber and C Blattman, 'The Logic of Child Soldiering and Coercion' (2013) 67 *International Organization* 65, 87.

³⁸ Universal Declaration (n 26) arts 25(2) and 26; International Covenant on Civil and Political Rights (n 26) arts 10 and 24; International Covenant on Economic, Social and Cultural Rights (n 26) arts 10(3) and 13.

³⁹ See M Denov and A Buccitelli, 'Child Soldiers: The Challenges and Opportunities in Addressing the Rights of Children Affected by War' in MD Ruck, M Peterson-Badali and M Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017) 472–473.

It is commonly accepted that the right to special measures of protection enshrined in Article 24, belong to every child because of their status as a minor.⁴⁰ The right to registration is considered linked to the right to recognition as a person before the law,⁴¹ and its denial leads to an inability to access legal protections.⁴² Under the ICCPR, derogation from the right to recognition as a person under the law is non-derogable.⁴³ Similarly, the Human Rights Committee considers that Article 24 requires states parties to adopt appropriate measures to ensure that every child has a nationality when he or she is born, including through cooperation with other states, and without discrimination based on the nationality status of one or both parents.⁴⁴ Appropriate measures have been argued as likely to encompass repatriation to the country of origin or potential nationality is likely to be one such measure.⁴⁵

These fundamental rights have elaborately been included alongside others in the CRC, which provides a central, normative framework for the promotion of children's rights. The CRC enjoys near universal ratification⁴⁶ and obligates states parties to respect and ensure to all children within their jurisdiction⁴⁷ a full range of civil, political, economic, social and cultural rights. It is underpinned by four guiding principles: nondiscrimination;⁴⁸ the best interests of the child;⁴⁹ the right to life, survival and development;⁵⁰ and the right to be heard.⁵¹ The CRC contains no general derogation clause, meaning that the rights of children are to be respected at all times, including during public emergencies and armed conflict. Under the Convention, children have rights to birth registration, names and nationality and, as far as possible, to be cared for and to

⁴⁰ According to the UN Human Rights Committee, 'the rights provided for in art. 24 of the are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to states measures to be adopted with a view to affording minors greater protection than adults.' See The UN Human Rights Committee, 'CCPR General Comment No 17: Article 24 (Rights of the Child)' UN Doc CRC/GC/1989/17 (7 April 1989) para 2.

⁴¹ *ibid* para 7.

⁴² Working Group on Enforced or Involuntary Disappearances, 'General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances' <www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf> accessed 6 July 2021.

⁴³ ICCPR art 4(2).

⁴⁴ Human Rights Committee, General Comment No 17 (n 40) para 8.

⁴⁵ UN Office of Counter-Terrorism and UN Counter Terrorism Center, *Children Affected by the Foreign Fighter Phenomenon: Ensuring a Child Rights-Based Approach* (2018) 61.

⁴⁶ Only the USA is a nonstate party.

⁴⁷ art 2.

⁴⁸ *ibid*.

⁴⁹ art 3.

⁵⁰ art 6.

⁵¹ art 12. Committee on the Rights of the Child, General Comment No 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6), CRC/GC/2003/5 (27 November 2003) para 12.

know their parents. States are obligated to ensure those rights, especially in cases where the child would otherwise be stateless.⁵² The CRC also contains a number of provisions aimed at protecting and maintaining family units and connections.⁵³ With regard to economic, social and cultural rights, states parties are required to be proactive and to take all possible measures⁵⁴ in providing children with the rights to education;⁵⁵ the highest attainable standard of health, freedom from disease and malnutrition, access to clean drinking water;⁵⁶ social security;⁵⁷ a standard of living adequate for physical, mental, spiritual, moral and social development;⁵⁸ and rest, play and leisure.⁵⁹ The CRC therefore encapsulates an internationally agreed set of standards designed to protect all children and provide for their vital needs and interests.

Internationally, there is a high level of state commitment to these standards. They are also included within the UNCCT's Handbook on responding to children affected by the foreign fighter phenomenon,⁶⁰ which is directed at legal professionals and policy makers and 'seeks to contextualize States' counter-terrorism obligations under United Nations Security Council Resolutions within the broader international human rights and humanitarian normative frameworks'.⁶¹ Yet, their applicability and enforceability vis-à-vis the children in Syrian camps, is far from straightforward in legal terms. The Committee on the Rights of the Child has considered the situation facing the children of IS through the state reporting procedure⁶² and through its individual communications mechanism.⁶³ To date, very few states have included repatriation efforts within their initial state report, and only a small number have been requested to supply information in response to the Committee's List of Issues.⁶⁴ Responses, to date, have been vague and brief, and are often lost in the myriad of other domestic issues considered via the state reporting procedure. A recent Dutch report stated simply that 'Dutch policy does not actively focus on repatriation'.⁶⁵ The Committee's response is forthcoming. In 2019, in its concluding

⁵² art 7.

⁵³ arts 9, 10 and 16.

⁵⁴ General Comment No 5 (n 51) paras 5–8.

⁵⁵ arts 28 and 29.

⁵⁶ art 24.

⁵⁷ art 26.

⁵⁸ art 27.

⁵⁹ art 31.

⁶⁰ UN Office of Counter-Terrorism and UN Counter Terrorism Center (n 45).

⁶¹ *ibid* 16.

⁶² Convention on the Rights of the Child (n 11) arts 44–45.

⁶³ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/Res/66/139 (27 January 2012).

⁶⁴ Committee on the Rights of the Child, List of Issues in Relation to the combined fifth and sixth periodic reports of Belgium, Replies of Belgium to the List of Issues, CRC/C/BEL/Q/5-6/Add.1 (19 November 2018) paras 80–84.

⁶⁵ Committee on the Rights of the Child, Combined fifth and sixth periodic reports submitted by the Netherlands under art 44 of the Convention pursuant to the simplified reporting procedure, due in 2019, CRC/C/NLD/5-6 (7 May 2020) para 209.

observations to Belgium on the implementation of the Optional Protocol to the Convention on the Rights of the Child (CRC) on the involvement of children in armed conflict, the Committee recommended that Belgium ‘promptly facilitate the repatriation of all Belgian children, and whenever possible, their families, regardless of age or the degree of suspected involvement in the armed conflict and in compliance with Article 9 of the Convention’.⁶⁶ However, the nonbinding nature of concluding observations and the Committee’s lack of enforcement powers makes further action difficult should the state be unwilling to implement the recommendation.

Under the Third Optional Protocol, the Committee considered the applicability of the CRC for IS children in a 2020 Communication⁶⁷ brought against France by the grandparents of children of French nationality who had been taken to or born in Syria by their parents and were subsequently held in camps in Syrian Kurdistan. It found that states of nationality have positive obligations to protect the human rights of child nationals in Syrian camps, despite their control by a non-state armed group.⁶⁸ This aligned with previous findings in which the Committee affirmed the extraterritorial reach of the CRC in certain situations,⁶⁹ a position supported by the International Court of Justice (ICJ).⁷⁰ While the decision concerned jurisdiction only, it seems likely that when it considers the merits, the Committee will find that consequently there is an obligation to repatriate. The position expounded in the decision is similar to that found in a report of the UN Special Rapporteurs on the Promotion and Protection of Human Rights while Countering Terrorism and on Extrajudicial, Summary and Arbitrary Executions.⁷¹

Serious doubts have been cast on the strength and coherence of the legal reasoning in these cases, and their departure from the accepted tests of extraterritoriality.⁷² Neither the spatial or personal models of jurisdiction, used to test

⁶⁶ Committee on the Rights of the Child, concluding observations: Belgium (2019) (CRC/C/BEL/CO/5-6) para 50(b).

⁶⁷ Committee on the Rights of the Child (n 14).

⁶⁸ Committee on the Rights of the Child (n 14).

⁶⁹ Committee on the Rights of the Child, ‘General Comment No 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights’ UN Doc CRC/C/GC/16 (17 April 2013) para 43; Committee on the Rights of the Child, ‘General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ UN Doc CRC/GC/2005/6 (1 September 2005) para 28.

⁷⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 ICJ Reports 163 (9 July) para 113; Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) Judgment of 19 December 2005, paras 216–217.

⁷¹ Extra-territorial jurisdiction of States over children and their guardians in camps, prisons or elsewhere in the northern Syrian Arab Republic <www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf> accessed 6 July 2021.

⁷² H King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 *Human Rights Law Review* 521, 522; A Orakhelashvili, ‘Restrictive Interpretation of Human

extraterritorial jurisdiction, are fulfilled here as neither the camps nor the children are under French control. Both the Committee and the Special Rapporteurs seem to rely on a functional test to extraterritoriality, whereby states owe obligations of protection where they are capable of providing it.⁷³ This is considered alongside a series of contextual factors, such as the children's nationality and the willingness of the Kurdish authorities to cooperate in repatriation. Nationality is therefore a determinative factor triggering state obligations.⁷⁴ However, as Milanovic notes, centralizing nationality in repatriation decisions risks arbitrariness and uncertainty, not least due to the lack of common approach and peculiarities of individual legal systems on how nationality is regulated.⁷⁵ Thus, approaching repatriation as an extraterritorial obligation appears fragile in strict legal terms. Nonetheless, even if the legal conclusions on the basis of state obligation are unsound, the underpinning principle, that children should be protected, provided for and, by inference, should not be subjected to the conditions within the camps of Syria, is one that all states are committed to by virtue of their ratification of the CRC. Repatriation of children from Syrian camps would demonstrate commitment and adherence to those principles.

B. The law on children and armed conflict

The international consensus that children should be protected and provided for is further reflected in the international law on children and armed conflict. Indeed, there is perhaps no other area of children's rights so heavily regulated in international law. Under international humanitarian law, all states have an obligation to treat the children affected by armed conflict with special respect and protection under the customary rules of international humanitarian law.⁷⁶ Furthermore, states have an obligation to ensure the humane treatment of detained persons,

Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529, 538; R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 *Israel Law Review* 503; R Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese Journal of International Law* 639, 663.

⁷³ Milanovic (n 17).

⁷⁴ *ibid*; see also L Raible's comments in 'Latest Developments in the Extraterritorial Application of International Human Rights Law' (*BIICL*, 17 March 2021) <www.youtube.com/watch?v=nOQQdYXxqRU&t=5s> accessed 6 July 2021.

⁷⁵ Milanovic (n 17).

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) (Additional Protocol I to the Geneva Conventions) arts 77 and 78; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (Additional Protocol II to the Geneva Conventions) art 4(3); J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law - Volume I: Rules* (CUP 2005) Rule 135, 479.

including detained children,⁷⁷ respect for family life as much as possible,⁷⁸ and the right of persons in detention to correspond with their families.⁷⁹ Similar standards can be found in international human rights law, within the CRC, which obligates all states parties to protect and care for all children affected by armed conflict.⁸⁰ Indeed, states parties are further required to:

take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁸¹

Important for its object and protective feature, this provision might be considered as a basis for a duty to repatriate the children associated with armed non-state actors as the victims of conflict who need to be reintegrated with society. While ‘reintegration’ is not the primary focus of this study, we argue that governments’ refusal to repatriate the children linked with armed non-state actors will deprive them of ‘the right to recovery and social reintegration’ from the outset. Indeed, even in their responses to children associated with terrorist groups, states are urged to treat them as victims.⁸²

Much of the attention on children and armed conflict focuses on children associated with armed forces and armed groups (CAAFAG), those often termed ‘child soldiers’. On first consideration, these frameworks might not appear relevant as although the children under scrutiny here are connected with IS, they do not fall within the widely accepted definition of CAAFAG.⁸³ Undoubtedly, there are such children associated with IS, but they are not the focus here. However, when one considers the vulnerability and predisposition of children in Syrian camps to future recruitment and use by IS,⁸⁴ it is clear that these instruments too bear relevance. Indeed, these instruments are premised on the notion that armed conflict is not

⁷⁷ Geneva Conventions of 12 August 1949, Common art 3; Additional Protocol II to the Geneva Conventions, art 5; Henckaerts and Doswald-Beck, *ibid* 306–308.

⁷⁸ See, among other things, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), art 27; Henckaerts and Doswald-Beck (n 76) 379–383.

⁷⁹ See Geneva Convention (IV) (1949) arts 106 and 107; Additional Protocol II to the Geneva Conventions (1977) art 5 (2)(b); Convention on the Rights (n 11) art 37 (c). See also Henckaerts and Doswald-Beck (n 76) Rule 125, 445–447.

⁸⁰ art 38.

⁸¹ art 39.

⁸² See United Nations Office on Drugs and Crime (UNODC), *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (UNODC 2017) ch 2

⁸³ Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (February 2007) 2.1.

⁸⁴ See S O’Neil, ‘Trajectories of Children into and Out of Non-State Armed Groups’, in S O’Neil and K Van Broeckhoven (eds), *Cradled by Conflict: Child*

only harmful for the children it impacts, but is a threat to wider peace, security and development.⁸⁵ There is therefore a focus on preventing the future recruitment of children into armed forces and armed groups, something which, as discussed above, children within camps are particularly vulnerable to. Thus, under the Optional Protocol to the CRC on Children in Armed Conflict, states parties are obligated to take all feasible measures to prevent recruitment and use of children by armed groups.⁸⁶ Unlike other obligations under the Optional Protocol, there is no jurisdictional nexus in relation to this obligation. Moreover, the Optional Protocol requires states parties to cooperate in implementation of its objectives, including through technical cooperation and financial assistance in consultation with relevant organizations.⁸⁷ With 171 states parties,⁸⁸ the requirements of the Optional Protocol are binding on most countries and ought to guide states in their efforts to address the issues under consideration here. In a similar vein, universally ratified ILO Convention No 182 on the Worst Forms of Child Labour obligates its Member States to prevent the worst forms of child labour,⁸⁹ including the recruitment and use of children in armed conflict,⁹⁰ and to cooperate internationally to achieve this.⁹¹

These binding international legal instruments are bolstered by soft law sources, which aim to facilitate the realization of CRC standards for children in practice. The Paris Principles, primarily concerned with CAAFAG, constitute globally accepted norms on the immediate, medium and long-term standards of best practice in relation to affected children.⁹² The Paris Principles make clear that prevention of unlawful recruitment and use of children by armed groups ought to be a priority for states and that particular attention ought to be paid to children in nonconventional settings, such as refugee and IDP camps.⁹³ The Paris Principles also identify statelessness as a particular risk factor for recruitment or use and urge registration of all children within the jurisdiction of a state as a means of prevention.⁹⁴ Maintaining family unity, including extended family, is urged and institutionalization discouraged, where possible, due to its connection to increased vulnerability to recruitment.⁹⁵ The Paris Principles are endorsed by 111 states.⁹⁶

Involvement with Armed Groups in Contemporary Conflict (United Nations University 2018) 38–77.

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/Res/54/263 (25 May 2000), Preamble, para 3.

⁸⁶ art. 4(2).

⁸⁷ art 7(1).

⁸⁸ Fiji is the latest state to ratify the OP, as of March 2021.

⁸⁹ art 7.

⁹⁰ art 3(a).

⁹¹ art 8.

⁹² Cape Town Principles and Best Practices on the prevention of the recruitment of children into the armed forces and on the demobilization and reintegration of child soldiers in Africa (April 1997); The Paris Principles(n 83).

⁹³ Paris Principles *ibid* 14–18.

⁹⁴ *ibid* 6.9–6.13.

⁹⁵ *ibid* 6.33.

⁹⁶ As of February 2021, 111 states had endorsed the Paris Principles.

Evidence of the international consensus around the need to focus on children impacted by armed conflict can be seen in the Millennium Declaration, which includes an international commitment to assist and protect children affected by armed conflict.⁹⁷ This was further emphasized at the Millennium Summit, which reaffirmed the need to promote and protect the rights of children in armed conflict, to ensure their receipt of timely and effective humanitarian assistance, and to provide for their education, rehabilitation and reintegration into society.⁹⁸ Moreover, the UN Security Council,⁹⁹ General Assembly¹⁰⁰ and Economic and Social Council¹⁰¹ have repeatedly adopted resolutions and issued reports calling for the safeguarding of children's rights both during and after conflict, recognizing the protection of children as a key aspect of humanitarian assistance, conflict resolution and development.

In short, the numbers of state ratifications and endorsements of international instruments aimed at protecting children suggests a clear international consensus and commitment to safeguard conflict affected children and to break cycles of violence that threaten durable peace. Even if states do not identify these instruments as the sources of strict legal obligations to repatriate, they nevertheless provide uncontroversial sources upon which to base national initiatives and international cooperation policies for repatriation. Rather than using legal mechanisms as a means of avoiding responsibility, states ought to focus on the principles that underpin their legal obligations and act accordingly.

C. Repatriation in international law

The protection of nationals abroad and any necessary repatriation is often dealt with via the law of diplomatic¹⁰² and consular¹⁰³ relations; a broad area of law, primarily concerned with maintaining inter-state relations.¹⁰⁴ The protection of

⁹⁷ United Nations Millennium Declaration, A/Res/55/2/ (8 September 2000) para 26.

⁹⁸ 2005 World Summit Outcome, A/Res/60/1 (25 October 2005) para 117.

⁹⁹ Security Council Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011), 2068 (2012), 2143 (2014), 2225 (2015), 2427 (2018).

¹⁰⁰ UN General Assembly Declaration, 'A World Fit for Children', appended to A/Res/S-27/2 (11 October 2002); UN General Assembly Resolution, 'Rights of the Child', A/Res/62/141 (22 February 2008), UN General Assembly, 'Right of the Child', A/Res/63/241 (13 March 2009).

¹⁰¹ Report of the Economic and Social Council for 1999, A/54/3/Rev 1, Part VI Humanitarian Affairs, paras 21–22.

¹⁰² Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 June 1964) 500 UNTS 95, art 3.

¹⁰³ Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, art 5.

¹⁰⁴ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 29.

nationals and their interests is one component.¹⁰⁵ This has led to questions as to whether diplomatic protection might provide a basis for repatriation. However, its operation is heavily dependent on state discretion;¹⁰⁶ formal diplomatic protection¹⁰⁷ is a right belonging to States and any decisions on whether and when to take action lie with the state concerned.¹⁰⁸ Some national judicial decisions have suggested that State discretion is not absolute and that executive orders can be challenged, particularly in cases where fundamental rights are violated abroad.¹⁰⁹ However, diplomatic assistance has not, to date, proved a successful route to repatriation for children in Kurdish controlled camps. The French Conseil d'Etat rejected claims by two French nationals for repatriation of their daughter and grandchildren on the basis that this would necessitate intervention in a foreign territory, which is outside its judicial remit.¹¹⁰ Likewise, the Belgian Appeals Court held that Belgian authorities, including diplomatic and consular services, have no legal obligation to repatriate children or their mothers, overturning a decision by a lower court that the best interests of the children required Belgium to do everything in its power to bring them back and an order to arrange travel within 40 days.¹¹¹ Thus, the law on diplomatic protection, with its connection to nationality, looks unlikely to provide a solution, but neither is its individualized nature appropriate for dealing with a collective, international problem involving many thousands of people.

Interestingly, the French cases have since been the subjects of a Grand Chamber Hearing of the European Court of Human Rights, with judgment expected shortly.¹¹² The applicants allege that refusal to repatriate their daughters and grandchildren exposes them to conditions amounting to a violation of Article 3 and a further violation of Protocol 4, para 2, the right to enter the territory of a State of which the person concerned is a national.¹¹³ They further

¹⁰⁵ Vienna Convention on Diplomatic Relations (n 102) art 3(1)(c); Vienna Convention on Consular Relations (n 103) art 5.

¹⁰⁶ Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 *European Journal of International Law* 37-68.

¹⁰⁷ ILC, 'Draft Articles on Diplomatic Protection' (6 November 2006) UN Doc A/CN.4/L 684.

¹⁰⁸ Vermeer-Künzli (n 106).

¹⁰⁹ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598; Constitutional Court of South Africa, *Kaunda v President of the Republic of South Africa* (2005) 4 South African L Reports 235 (CC), 44 I.L.M. 173, 35; Federal Constitutional Court (*Bundesverfassungsgericht*) 2 BvR419/80 (16 December 1980) 395-398.

¹¹⁰ Conseil d'Etat Décision (n 13).

¹¹¹ *Royaume de Belgique, Affaires étrangères, Commerce extérieur et Coopération au Développement*, 'Ordonnance du 26 décembre 2018 dans l'affaire Tatiana Wielandt et Bouchra Abouallal contre l'Etat belge' (29 January 2019); Capone (2019) 88.

¹¹² C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' *Questions of International Law*, 30 June 2021, 7 January 2022.

¹¹³ Press Release, Grand Chamber Hearing *H.F. and M.F. v France* and *J.D. and A.D. v France*, ECHR 284 (2021), 29 September 2021.

allege lack of an effective remedy by which to challenge French refusal to repatriate their family members, invoking Article 13. Seven Member States of the Council of Europe (Norway, Denmark, UK, Netherlands, Belgium, Spain and Sweden) have sought leave to intervene and leave to intervene has also been granted to a range of nongovernmental organizations and UN bodies and the Council of Europe Commissioner for Human Rights has submitted written comments.¹¹⁴ The level of interest and attempts to intervene are indicative of the pressing importance of the issues presented by the ongoing detention of IS associates and the competing interests at stake. While human rights and counter-terrorism bodies demand the repatriation of those detained to protect rights and prevent terrorism, States seek to prevent a judicial floodgate which would oblige blanket repatriation on human rights grounds.

Repatriation has also been carried out in the context of post-conflict transitions. Indeed, the international challenges of returning and relocating large numbers of people displaced by conflict are not new. Numerous peace agreements have included clauses providing for the right of refugees and displaced persons to return to their homes, places of habitual residence or other part of their country.¹¹⁵ The right to return is a customary rule under international humanitarian law.¹¹⁶ It is based on the international human right of all persons to enter the territory of the state of which they are a national, which is recognized in most international and regional human rights instruments,¹¹⁷ and the notion that all displaced persons should be able to return to their homes in safety and dignity. It includes the right to come to a country of nationality even if the individual concerned was born abroad.¹¹⁸ Return of refugees and displaced persons is also recognized as a fundamental element of long-lasting peace and stability within affected regions.¹¹⁹

¹¹⁴ Council of Europe Commissioner for Human Rights (n 10).

¹¹⁵ See, eg, General Framework Agreement for Peace in Bosnia and Herzegovina (1996) 35 I.L.M. 89, Annex 7, art 1, Annex 6, art II.5; Final Act of the Paris Conference on Cambodia, art 20.1, pt V, UN Doc A/46/608 (1991); Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons [part of political settlement of Georgia/Abkhazia conflict], Annex II, UN Doc S/1994/397 (1994). For a comprehensive list, see <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule132_sectionb> accessed 6 July 2021.

¹¹⁶ Henckaerts and Doswald-Beck (n 76) Rule 132, 468.

¹¹⁷ UDHR art 13(2); ICCPR art 12; CERD art 5(d)(ii); Banjul Charter on Human and Peoples Rights 1969, art 12(2); American Convention on Human Rights opened for signature 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978), art 22(5); Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 16 September 1963, Europ. T.S. No 46, entered into force 2 May 1968, art 3.

¹¹⁸ Human Rights Committee, 'General Comment No 27: Article 12 (Freedom of Movement)' UN Doc CCPR/C/21/Rev 1/Add.9 (2 November 1999) paras 11–18.

¹¹⁹ E Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' (1998) 19 *Michigan Journal of International Law* 1091, 1136.

When it comes to repatriating children, the international policies governing repatriation are, at least in theory, informed by the CRC¹²⁰ and identify children as a vulnerable group whose needs and rights must be considered in any repatriation program.¹²¹ The CRC, in setting out the right to family unity, also provides for the right of the child and his or her parents to leave any country and to enter his or her own country.¹²² Serious concerns have been raised about how child protection concerns are embedded within refugee practice and policy¹²³ and claims made that the interests of child refugees and asylum seekers are an afterthought, caught in the tension between state sovereignty and humanitarian imperatives.¹²⁴ In most instances, children are simply one component of the returning community. It is not unusual for child dependents of ex-combatants or those associated with armed forces or groups to be repatriated along with their parents. Programs following the conflicts in Sierra Leone, Liberia, Rwanda and DRC, and many others, involved repatriation of individuals who had taken part in hostilities.¹²⁵ However, in most of these instances, amnesty programs were established in countries of origin¹²⁶ and, sometimes following completion of Disarmament, Demobilization and Reintegration schemes, former combatants were received back into their countries of origin along with their families.

These models offer little by way of example here. Repatriation programs, which are frequently administered by the UN, require the consent of the sending and receiving states. The SDF, a non-state actor, is not a sending 'state',

¹²⁰ Considered in detail below.

¹²¹ Refugee Children: Guidelines on Protection and Care, UNHCR, 1994, Geneva; Voluntary Repatriation: International Protection Handbook, UNHCR, 1996, Geneva, 7.2.

¹²² CRC art 10(2).

¹²³ V Digidiki and J Bhabha, *Child Repatriation in the Time of Covid-19, Rethinking Refuge* (Refugee Studies Center, University of Oxford 5 June 2020) <www.rethinkingrefuge.org/articles/child-repatriation-in-the-time-of-covid-19> accessed 6 July 2021.

¹²⁴ V Digidiki and J Bhabha, *Emergency within an Emergency: The Growing Epidemic of Sexual Exploitation and Abuse of Migrant Children in Greece* (FXB Center for Health and Human Rights, Harvard University 2017); V Digidiki and J Bhabha, 'Sexual Abuse and Exploitation of Unaccompanied Migrant Children in Greece: Identifying Risk Factors and Gaps in Services During the European Migration Crisis' (2018) 92 *Children and Youth Services Review* 114.

¹²⁵ See, eg, Tripartite Agreement for the Voluntary Repatriation of Liberian Refugees between the Governments of the Republic of Sierra Leone and the Republic of Liberia and the Office of the United Nations High Commissioner for Refugees, 27 September 2004; ICRC, 'Liberia/Sierra Leone: Former Liberian Fighters and their Families Go Home, News Release 05/18 (4 April 2005).

¹²⁶ *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, UN SCOR, Annex 15, UN Doc S/1999/777 (1999); International Justice Resource Center, 'DR Congo Parliament approves New Amnesty Law for Insurgency and Other Crimes, as Part of Agreement with M23 Rebel Group' (10 February 2014) <<https://ijrcenter.org/2014/02/10/dr-congo-parliament-approves-new-amnesty-law-for-insurgency-and-other-crimes-as-part-of-agreement-with-m23-rebel-group/>> accessed 6 July 2021.

although it has conveyed its willingness to assist in the repatriation of women and children to their countries of nationality and, indeed, has facilitated return in a number of cases.¹²⁷ Moreover, many of the potential receiving states present an obstacle to repatriation through their unwillingness to receive, certainly in large numbers, women and children associated with IS. Pre-requisites such as DNA testing¹²⁸ are likely to hinder smooth and timely return and also raise questions around what will happen to children whose nationality cannot be easily established or where there are claims of nationality to different states. Thus, the traditional relationship between nationality and the right to return becomes problematic in this context. Instead of acting as a conduit to return, nationality and its dependence on national legal rules can be used by states to exclude those considered a threat to national security and public safety.¹²⁹ Despite calls from the UN Secretary General for Member States to accept their nationals and children born to their nationals, grant those children nationality and take actions to prevent them from becoming stateless, including through the issuing of appropriate documentation,¹³⁰ a number of states have instead expended their energy on utilizing legal mechanisms to remove citizenship¹³¹ and its related rights from a number of individuals. The rules on repatriation under international law, with their practical dependence on and connection to domestic considerations of nationality and sovereignty are therefore of limited utility in formulating a solution to the issues under consideration here.

4. The reluctance to repatriate versus the repatriation imperative

As with ascertaining the numbers of foreign fighters associated with IS, it is difficult to derive accurate figures on how many repatriations have been carried out. States have been accused of both over and under reporting to suit their own ends.¹³² It is clear, however, that to date, national efforts to repatriate foreign

¹²⁷ Autonomous Administration of North and East Syria, Executive Council, Press Release (18 March 2021).

¹²⁸ UN Office of Counter-Terrorism and UN Counter Terrorism Center (n 45) 46–49.

¹²⁹ See, for instance, *Begum (Respondent) v Secretary of State for the Home Department (Appellant)*; *Begum (on the application of Begum) (Appellant) v Special Immigration Appeals Commission (Respondent)*; *R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant)* [2021] UKSC 7 on Appeal from: [2020] EWCA Civ 918 (26 February 2021) <www.supremecourt.uk/cases/docs/uksc-2020-0156-judgment.pdf> accessed 6 July 2021.

¹³⁰ Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups (April 2019) 4.

¹³¹ See the Begum cases (n 129); T Laine, “‘Passing the Buck’: Western States Race to Denationalise Foreign Terrorist Fighters” (2017) 12 *Journal of Peacebuilding and Development* 22.

¹³² L Hassan, ‘Repatriating ISIS Foreign Fighters Is Key to Stemming Radicalization, Experts Say, but Many Countries Don’t Want Their Citizens Back’ *Frontline* (6 April 2021) <www.pbs.org/wgbh/frontline/article/repatriating-isis-foreign-fighters-key-to>

fighter children and women have been erratic. A number of Central Asian states have repatriated hundreds of their nationals, mostly women and children.¹³³ Kosovo has taken back large numbers¹³⁴ and Russia has also repatriated many orphaned children, whose identities were confirmed by DNA analysis.¹³⁵ These efforts demonstrate the relative logistical ease with which children can be repatriated where there is national political will to do so. Far less progress has been made by Western states, with small numbers of mainly orphaned children repatriated, often on an individual basis.¹³⁶ This is despite the existence of domestic programs in many of these states to manage the return and monitoring of foreign fighters and their families and for child psychiatric support.¹³⁷ Moreover, studies estimate that for the Western states reluctant to repatriate, the actual numbers of individuals eligible are relatively small.¹³⁸ As discussed above, this reluctance to repatriate has spurred a spate of, largely unsuccessful, domestic legal challenges within Western European states. On occasion, decisions have been made in favor of repatriation on the basis that national governments of home states are obligated under national and international human rights law to protect children from the conditions within the camps.¹³⁹ On the whole, however, national governments have robustly contested these legal challenges in an effort to avoid judicial decisions that would provide a blanket right to return.¹⁴⁰

The roots of the reluctance of states' authorities to repatriate the children associated with IS lie in a series of interconnected challenges that would come along with repatriation. These include violent extremism, foreign fighter threat and national security of states, in conjunction with public perceptions of these issues, which may be the initial considerations taken by states to avoid accepting

stemming-radicalization-experts-say-but-many-countries-dont-want-citizens-back> accessed 6 July 2021.

¹³³ Human Rights Watch, 'Western Europe Must Repatriate Its ISIS Fighters and Families' (21 June 2019) <www.hrw.org/news/2019/06/21/western-europe-must-repatriate-its-isis-fighters-and-families> accessed 6 July 2021.

¹³⁴ A Gilmour, 'The Children of ISIS Don't Belong in Cages, Either' *New York Times* (9 December 2019) <www.nytimes.com/2019/12/09/opinion/isis-children.html> accessed 19 April 2022

¹³⁵ S Kajjo, 'US-Backed Syrian Forced Hand over 34 Children of IS Fighters to Russia' *Voice of America* (19 April 2021) <www.voanews.com/extremism-watch/us-backed-syrian-forces-hand-over-34-children-fighters-russia> accessed 6 July 2021.

¹³⁶ Gilmour (n 134).

¹³⁷ Esprit de Justice, 'Le Retour des Enfants de la Zone Irako-Syrienne' *France Culture* (26 May 2021).

¹³⁸ Dworkin (n 7).

¹³⁹ T Mehra, *European Countries are being Challenged in Court to Repatriate their Foreign Fighters and Families* (International Center for Counter Terrorism, 7 November 2019) <<https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/>> accessed 7 January 2022; 'IS Wife and Children Must be Repatriated, Rules German Court', *BBC News* (11 July 2019) <www.bbc.co.uk/news/world-europe-48958644> accessed 6 July 2021.

¹⁴⁰ Conseil d'Etat Décision (n 13); Hope (n 13).

the children of IS. On the national security front, there are worries that children who have been indoctrinated or radicalized into the IS's extremist ideology, may incorporate this ideology into their sense of self, their conceptions of community and their perceptions of the west.¹⁴¹ It has been contended that repatriating such children is tantamount to importing a ticking time bomb.¹⁴² However, deeper analysis of states' motivations in refusing repatriation suggests that it is perhaps not the children themselves who present the greatest concerns, but the Pandora's box that their repatriation may open.¹⁴³ Children can seldom be repatriated in the absence of their mothers, where they have one, and these women too are considered to have been radicalized, potentially constituting a threat to the receiving state. Longer term, there are concerns that the fathers of repatriated children could seek access to the state of repatriation in exercise of the right to the enjoyment of family life, protected under international and regional human rights laws.¹⁴⁴ This is of particular concern to Western European states, many of which have obligations vis-à-vis family reunification under both the ECHR¹⁴⁵ and EU law,¹⁴⁶ as well as national statutes of family reunification in place.¹⁴⁷

Refusal to repatriate may appear to provide an immediate solution to states seeking to avoid the short and long-term domestic challenges of dealing with those associated with IS and the threats they may pose to national security. However, abandoning children to lives in Kurdish-controlled camps contravenes states' international legal obligations on children's rights and falls far short of the protective purpose of those laws. Yet, international law's dependence upon and interplay with domestic laws for effective implementation, as well as the legal uncertainty surrounding the extent to which states owe their human rights obligations abroad,¹⁴⁸ make it relatively easy for states to sidestep their obligations to children. While it is children who stand to lose most from states' refusal to repatriate, those children are not at the center of the decisions, rather it is the adults with whom they are connected and the threat those adults may pose to the national security of states that informs states' policies on repatriation.

¹⁴¹ Radicalization Awareness Network (2016), 'Child Returnees from Conflict Zones' Issue Paper of RAN Center for Excellence 2; C Nyamutata, 'Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood' (2020) 25(2) *Journal of Conflict & Security Law* 251.

¹⁴² Renard and Coolsaet (n 36) 3.

¹⁴³ Speckhard and Ellenberg (n 4) 2; Dworkin (n 7).

¹⁴⁴ UDHR art 16(3); ICCPR art 23(1); ICESCR art 10(1); CRC arts 7–9; International Convention on the Protection of the Rights of All Migrant Workers and their Families, 18 December 1990, A/RES/45/158, art 44.

¹⁴⁵ See ECHR art 8.

¹⁴⁶ See EU Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. See also E Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) 21 *European Journal of Migration and Law* 358.

¹⁴⁷ Speckhard and Ellenberg (n 4) 2.

¹⁴⁸ King (n 72); Orakhelashvili (n 72); Wilde (n 72).

There have also been repeated warnings that failure to address the situation of the camps, in a region which is unstable and in which IS remains active, presents a serious threat to long-term international and regional security.¹⁴⁹ Refusal to repatriate is increasingly understood to be counterproductive to national security aims for a number of reasons. Notably, such measures can prevent return, rehabilitation and reintegration of individuals who may want to leave a violent armed group and who do not, or no longer, constitute a threat, while conferring the risk of threat to the national security of the host states and local populations.¹⁵⁰ In the case of children, extreme circumstances like hunger, lack of access to socio-economic opportunities, poverty, abandonment, the death of parents and family, disease and lack of even essential medical services and the threat of violence or property confiscation leave them few choices and compel them to involvement in extremism.¹⁵¹ It is well documented that being in chronic life conditions often leads to children (re)joining violent armed groups as a means of escaping those conditions.¹⁵² Exclusionist national policies that leave children stigmatized and rejected pave the route to involvement with criminal networks and radical groups as children seek new support networks, within a hostile context.¹⁵³ The cycle of violence therefore continues. Thus, there is an emerging consensus that addressing the concerns of children is crucial in halting cyclical, cross-generational violence¹⁵⁴ that threatens long-term peace and stability. This is not to discredit 'national security' as a legitimate concern in the dilemmas around the repatriation of IS children. However, in this context, traditional notions of national security, which are preoccupied with the duty to protect territory and integrity of governments, must give way to a people-centered perspective that insists that individual rights and freedoms are no less important than the national security of states and the rights of the individual are at least as important as the territorial integrity and sovereignty of

¹⁴⁹ See, eg. Eleventh report on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, S/2020/774 (4 August 2020).

¹⁵⁰ See UN Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance to States on human rights-compliant responses to the threat posed by foreign fighters (2018) 22–23; Council of Europe Parliamentary Assembly Resolution 2263, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?' Assembly debate on 25 January 2019 (9th Sitting) para. 8.

¹⁵¹ S Freeland, 'Mere Children or Weapons of War - Child Soldiers and International Law' (2008) 29 *University of La Verne Law Review* 19, 27. See also A Özerdem and S Podder, 'Disarming Youth Combatants: Mitigating Youth Radicalization and Violent Extremism' (2011) 4(4) *Journal of Strategic Security* 69.

¹⁵² O'Neil and Van Broeckhoven (n 32) 47.

¹⁵³ Denov and Buccitelli (n 39) 473–75; Özerdem and Podder (n 151) 63–80, 74.

¹⁵⁴ C Aptel and V Ladisch, *Through a New Lens: A Child Sensitive Approach to Transitional Justice* (International Center for Transitional Justice 2011) 6.

the state.¹⁵⁵ In doing so, of course, the focus of security must be broadened beyond the level of the state and shifted towards individuals.¹⁵⁶ Nonetheless, difficult questions remain to be answered on how best to proceed and which frameworks should guide decision making.

5. Charting a way forward

It is clear from the foregoing that there is no unequivocal, concrete set of obligations under international law that require states to proactively exercise jurisdiction to repatriate children from the SDF-controlled camps in Syria. Yet, it is equally clear that from humanitarian, child rights and peace and security perspectives this is a situation in urgent need of resolution. While nationality has, to date, served as the means of ensuring repatriation, it cannot continue as the sole route out of the camps. Beyond the complexity and time pressured processes associated with establishing nationality, it is ill suited as a solo solution here, due to its dependence upon domestic legal systems, consequent vulnerability to manipulation to suit national, political priorities and likely creation of unequal outcomes for children.

To ensure fair, consistent and effective treatment for children, a collective response is required to respond to a problem of international consequence. The international legal and policy frameworks on the rights of children, to which almost all nations are committed, provide states with a basis on which to proceed. By centralizing those frameworks and the principles upon which they are founded, rather than national security concerns and domestic political objectives, priorities are altered and the rights and best interests of children become the focus. The interests of children are not served by national policies to exclude them, rather by international and national efforts to remove them from the conditions in which they currently exist, to ensure their fundamental social and economic rights and to create conditions in which the risk of their recruitment into and use by armed groups is minimized.

Of course, this will raise new challenges at domestic levels. It is likely that a child focused approach will necessitate repatriation of children with their mothers, something a number of Western European states have been keen to avoid. How best to respond to those women and how to provide the psycho-social support that repatriated children will need require careful consideration. Nationality may still provide a basis on which to repatriate some children. However, by looking beyond nationality and approaching the situation from a child rights perspective, the door is opened for states without a nationality connection, but with an interest in protecting children and contributing to international and regional stability and security to provide a place of settlement.

¹⁵⁵ RB Babu, 'From National Security to Human Security' (2016) 20(1) *Journal of International Issues* 36, 40.

¹⁵⁶ *ibid* 36.

It is time for states to stop using legal frameworks as a means of avoiding the difficulties and challenges associated with repatriation of children, embrace the international principles that guide the treatment of children and bring an end to this shameful period in which children have been left to suffer unimaginably as a result of the decisions and actions of their parents.