

European States' Obligations to Repatriate the Children Detained in Camps in Northeast Syria

A legal briefing paper prepared by the Open Society Justice Initiative to assist legal practitioners in advocating and litigating for the proactive repatriation of children detained in northeast Syria, whose parents are European nationals believed to be affiliated with ISIS, together with their primary caregivers.

July 2021

Acknowledgments

This legal briefing paper was researched and written by Duru Yavan and Georgiana Epure, Aryeh Neier Fellows for the Open Society Justice Initiative, under the supervision of Legal Officer Jana Sadler-Forster and Legal Officer Maité De Rue. The paper benefitted from input from the following Justice Initiative colleagues: Associate Legal Officer Azure Wheeler, Managing Legal Officer Juliana Vengoechea Barrios, Director of Litigation Waikwa Wanyoike, Associate Legal Officer Nora Mbagathi. The paper was reviewed by Erika Dailey and Robert O. Varenik and edited by David Berry.

The Open Society Justice Initiative uses the law to promote and defend justice and human rights through litigation, advocacy, research, and technical assistance. Working as part of the Open Society Foundations, our staff are based in Abuja, Berlin, Brussels, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington DC.
www.JusticeInitiative.org

This publication is available as a PDF on the Open Society Foundations website under a Creative Commons license that allows copying and distributing the publication, only in its entirety, as long as it is attributed to the Open Society Foundations and used for noncommercial educational or public policy purposes.

Published by:
Open Society Foundations
224 West 57th Street
New York, NY 10019
OpenSocietyFoundations.org

For more information, contact:
Info@JusticeInitiative.org



© Open Society Foundations

224 West 57th Street
New York, NY 10019
P. +1 212-548-0600
opensocietyfoundations.org

Contents

Executive Summary	4
Introduction	6
Terminology	8
I. Factual Background	10
A. Dire Living Conditions in the al-Hol and al-Roj Camps.....	10
B. Children and Women in the al-Hol and al-Roj Camps.....	12
C. European States' Repatriation Policies	16
II. European States' Obligations to Repatriate Children Detained in Camps in Northeast Syria	21
A. Extraterritorial Jurisdiction of European States in Syria.....	22
B. The Best Interests of the Child	26
C. The Principle of Non-Discrimination.....	29
D. The Right to Nationality	34
<i>i. Children's Right to Acquire the Nationality of their National Parent(s)....</i>	<i>39</i>
<i>ii. Revocation of Nationality of Parents and/or Children</i>	<i>47</i>
E. The Right to Access Consular Assistance	53
<i>i. Domestic Law</i>	<i>56</i>
<i>ii. European Union Law</i>	<i>57</i>
<i>iii. International Law</i>	<i>58</i>
<i>iv. International Human Rights Law</i>	<i>59</i>
F. The Right to Enter One's Own Country.....	61
<i>i. International and European Human Rights Law</i>	<i>61</i>
<i>ii. International Law</i>	<i>63</i>
<i>iii. International Refugee Law</i>	<i>65</i>
G. The Right to Life	66
H. The Right to Be Free from Torture and Ill-Treatment	70
I. The Right to Liberty and Security	72
J. The Right of Child Victims of Armed Conflict to Reintegration and Recovery. 75	
<i>i. Children in the Camps Should Be Treated as Victims</i>	<i>75</i>
<i>ii. Children Should Have Access to Rehabilitation and Reintegration Policies.....</i>	<i>78</i>
III. European States' Obligations to Repatriate Children Detained in Camps in Northeast Syria together with their Primary Caregivers	80
A. Right to Family Life and Family Unity and the Best Interests of the Child	81
IV. Conclusion	87

Executive Summary

Since the territorial collapse of ISIS in 2019, thousands of women and children believed to be affiliated with ISIS have been held in makeshift detention camps in northeast Syria, under inhumane and life-threatening conditions. An estimated 1,000 European women and children are currently detained in the camps—the vast majority of whom (more than 640)—are children. France, Belgium, Germany, the Netherlands, Sweden, and the UK are among the major European countries of origin for these detainees. An increasing number of voices—including the United Nations Security Council, the European Union, the Council of Europe as well as other actors ranging from security experts and child protection agencies to relatives of the women and children—have been calling on European States to repatriate their child nationals from the camps. The de facto administrator of the detention camps, the Autonomous Administration of North East Syria, and its military branch, the Syrian Democratic Forces, have also repeatedly requested States to repatriate their nationals, insisting on repatriation of children together “with mothers.”¹

Despite repeated calls from national and international actors, European States have invoked legal arguments, logistical difficulties, and security concerns to systematically refuse to repatriate the children. European States have objected in particular to repatriating children together with their primary caregivers. Only a few children have been repatriated to date. Most of the repatriated children were orphans or otherwise unaccompanied children who had proven nationality, were very young, or had particularly acute medical needs. European States have generally addressed the problem on a case-by-case basis, using unclear and non-transparent criteria for determining who is repatriated. This haphazard approach has created an ambiguous and arbitrary delineation of children who somehow “deserve” to be repatriated and those who are left behind. A rights-driven approach is needed.

The repatriation of children together with their primary caregivers is contingent on the support of their countries of nationality. Considering the dire situation in the camps, it is effectively impossible for children in those camps to obtain, retain, or prove their European nationality. If European States do not provide assistance to their nationals, there is, in practice, no way for children, to get travel

¹ Autonomous Administration of North East Syria, 18 March 2021, “[Press Release](#)”.

documents, return to their countries, or contest the arbitrary detention, inhuman and degrading treatment, and other human rights violations they are being subjected to.

Legal challenges are now being filed in various fora in response to the failure of European governments to repatriate their child nationals together with their primary caregivers. This legal briefing paper is intended to assist litigators and other advocates in advancing creative approaches to address this seemingly intractable problem. This paper seeks to provide an overview of the main European and international legal standards that can be invoked by litigators and advocates to argue for the proactive repatriation of the children detained in camps in northeast Syria.

The paper employs, primarily, a child's rights perspective and sets out the legal arguments that can be invoked for the children's repatriation, together with their primary caregivers. The arguments put forward in this briefing paper start with three overarching human rights considerations: the extraterritorial application of European States' human rights obligations in relation to the child nationals detained in northeast Syria, the best interests of the child, and the right to be free from discrimination. Following this, the briefing paper examines several key substantive human rights arguments regarding: the right to nationality, the right to access consular assistance, the right to enter one's own country, the right to life, the right to be free from torture and ill-treatment, the right to liberty and security, and the right of child victims of armed conflict to reintegration and recovery.

In practice, respecting and fulfilling these rights may require States' positive actions in enabling the expeditious return of children. If it is strictly necessary and done with appropriate safeguards, this can mean establishing nationality by facilitating DNA tests to determine paternity or maternity; obtaining regular assurances of the children's physical and psychological health, as well as providing appropriate medical care; issuing administrative documents, including identity and travel documents, to enable children's assisted travel to their country of nationality; and contacting camp authorities, consular representatives located nearby, and NGOs active on the ground to effectively carry out repatriation.

The need to protect the rights of children detained in camps in northeast Syria, the briefing paper asserts, creates an obligation on European States to proactively repatriate all their child nationals together with their primary caregivers.

Introduction

1. Using primarily a child's rights perspective, this legal briefing paper provides an overview of European and international legal standards that can be invoked by litigators and advocates to argue for the proactive repatriation of all children detained in the camps in northeast Syria, whose parents are European citizens, together with their primary caregivers. The focus is on European States' obligations because children of one or more European nationals represent one of the largest groups of foreign nationals in the camps.² In addition, while the level of responsiveness to this issue varies across states, European States³ seem to be particularly reluctant to repatriate their child nationals.⁴ Nevertheless, the international law arguments presented in this paper could also be used to argue for the repatriation of "non-European" children to their countries of nationality.⁵ States' obligations to repatriate the adults detained in the camps, independently from the children, is beyond the scope of this briefing paper and deserves separate analysis. However, some of the arguments listed below may be relevant to their situation as well, particularly regarding the children's primary caregivers.
2. European States' failure to repatriate the children and women from the camps in northeast Syria is embedded within a system of structurally discriminatory policies, laws, and practices, which often results in deprivation of nationality and discriminatory effects regarding the respect, protection and fulfillment of human rights. While recognizing that context, this legal briefing aims to provide a practical legal toolkit for the litigators and advocates on the ground, focusing on European States' obligations under international and European law to repatriate their child nationals.

² See Rights & Security International ("RSI"), "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 3.

³ Alongside Canada and Australia, see: Human Rights Watch, "["Bring Me Back to Canada" Plight of Canadians Held in Northeast Syria for Alleged ISIS Links](#)," 29 June 2020; Human Rights Watch, "[Australia: Bring Home Children of Fighters in Syria Dozens of Australian Children Held in Camps in Dire Conditions](#)," 29 September 2019.

⁴ Since 2017, 85% of repatriations accounted are accounted by Uzbekistan, Kosovo, [Russia](#) and [Kazakhstan](#); see: Letta Tayler and Alison Huyghe, "[Foreign ISIS Suspects, Families: Why a Single "R" Word Matters at the UN](#)," Just Security, 17 June 2021.

⁵ The terms "citizen" and "national" are used interchangeably, to indicate a legal connection between an individual and a state. Where relevant, the terms may take on different meanings, as will be indicated in the text and notes. The term "denationalization" covers multiple forms of involuntary loss of nationality, including denaturalization (loss of citizenship acquired by naturalization) and deprivation of citizenship acquired at birth. See: Open Society Justice Initiative, "[Unmaking Americans: Insecure Citizenship in the United States](#)," 2019, endnote 1.

3. In this briefing paper, reference is made primarily to international and European human rights law, in particular the jurisprudence of the European Court of Human Rights (“ECtHR”), but also to international humanitarian law, international criminal law, international law relating to counter-terrorism, the law of diplomatic and consular relations, and European Union (“EU”) law. The legal standards and arguments examined in this briefing paper are not exhaustive and readers are advised to check the applicable law in each jurisdiction.
4. This briefing paper is structured in three sections followed by concluding remarks. Following a note on terminology and definitions, Section I provides an overview of the situation in the camps where the children are currently held, and of European States’ failures to repatriate their nationals and the children whose parent(s) are European nationals (including undetermined nationals/children of nationals whose nationality is not yet established in law). Section II outlines a series of legal arguments that can be used in advocating and litigating for the proactive repatriation of those children. Section III sets out legal arguments for the repatriation of children together with their primary caregivers. The Conclusion is forward-looking and highlights several key legal avenues through which repatriation cases could be pursued.
5. The Open Society Justice Initiative encourages litigators and advocates to use the research and arguments in this briefing paper to support domestic, regional, and international advocacy and litigation. The Justice Initiative has made every effort to ensure the information presented here is accurate. This brief is provided for information purposes only and does not constitute legal advice.

Terminology

6. The term “child” is generally understood to mean any individual under the age of 18.⁶
7. This briefing paper uses the term “individuals believed to be affiliated with ISIS who are nationals of European countries”⁷ instead of “foreign fighters,”⁸ or “foreign terrorist fighters,”⁹ in order to acknowledge the diversity of those affiliated or perceived to be affiliated with ISIS, including women and children, and their various possible roles within ISIS,¹⁰ as well as to avoid using terms that suggest involvement in alleged crimes that have not been legally proven. It also acknowledges that not all foreign fighters are “terrorists,” and that international humanitarian law may be the more appropriate framework for assessing their conduct.¹¹
8. For the purpose of this briefing paper, the term “primary caregivers” means parent(s), legal guardian(s), or any other person who has the primary care of the child.¹² This includes any individual, regardless of gender and paternal, legal, and citizenship status, who assumed, de facto, the primary role of providing care and attention to a child. This formulation recognizes that while the primary caregivers of some children in the camps are their biological parents, many foreign children detained in the camps are

⁶ Convention of the Rights of the Child (“CRC”) Article 1; Council of Europe (“CoE”), [“The Nationality of Children Recommendation CM/Rec\(2009\)13 and Explanatory Memorandum”](#), 2009/13, 9 December 2009 (7th Sitting), preamble, p. 8.

⁷ This term has been also used by the Council of Europe. See: “children in Syria and Iraq whose parents, believed to be affiliated with Daesh, are citizens of Council of Europe member State,” CoE, Parliamentary Assembly, [“Resolution 2321 \(2020\) on International Obligations Concerning The Repatriation of Children From War and Conflict Zones.”](#) 30 January 2020, para. 1.

⁸ See: Geneva Academy of International Humanitarian Law and Human Rights, [“Academy Briefing No. 7—Foreign Fighters under International Law”](#), 2014, p. 6.

⁹ The term “foreign terrorist fighter” is defined by UN Security Council (“UNSC”), as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. See: UNSC, [“Resolution 2178 \(2014\) on Threats to International Peace and Security Caused by Foreign Terrorist Fighters”](#), S/RES/2178, 24 September 2014, preamble.

¹⁰ Joana Cook and Gina Vale, [“From Daesh to 'Diaspora' II: The Challenges Posed by Women and Minors After the Fall of the Caliphate”](#), CTC-Sentinel Combatting Terrorism Center at West Point, July 2019, Volume 11, Issue 6, pp. 31-32.

¹¹ For criticism of the term from a human rights point of view see: Helen Duffy, [“Foreign Terrorist Fighters”: A Human Rights Approach?](#), Security and Human Rights, Volume 29, Issue 1-4, 12 December 2018, pp. 134-136; Francesca Capone, [“Countering ‘Foreign Terrorist Fighters’: A Critical Appraisal of the Framework Established by the UN Security Council Resolutions.”](#) 25 Italian Year Book of International Law, 2016, p. 227.

¹² For the definition of “caregivers” as “parent(s), legal guardian(s) or any other person who has the care of the child,” see: CommRC, [“General Comment No. 13 on the Right of the Child to Freedom from All Forms of Violence.”](#) CRC/C/GC/13, 18 April 2011, para. 33.

orphaned or unaccompanied and their current primary caregivers may not be biologically related to them.

9. This briefing paper seeks to avoid using the collective term “women and children,” as if they belong to a singular category.¹³ Such terminology is problematic because it conflates women’s mental capacity and, in some cases, criminal liability with that of children.¹⁴ It also suggests that women’s roles in the camps are solely as mothers and underestimates their agency, at least for some of the women, in choosing to be involved in the activities carried out by ISIS and in subscribing to ISIS’ ideology.¹⁵ Therefore, this briefing paper uses the term “primary caregivers” instead of “mothers,” “legal guardians” or “family members” in order to acknowledge the variety of relations between the children and their de facto primary caregivers in the camps and to avoid gender stereotypes regarding caring responsibilities, while acknowledging that the vast majority of primary caregivers in the camps are women.
10. The term “European States”, for the purpose of this briefing paper, refers to the Council of Europe member states.

¹³ Joana Cook and Gina Vale, [“From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State”](#), International Centre for the Study of Radicalisation, 2018, p. 5.

¹⁴ Jessica Davis, [“The Future of the Islamic State’s Women: Assessing their Potential Threat.”](#) ICCT Policy Brief, June 2020, pp. 5-6.

¹⁵ Ibid. Joana Cook and Gina Vale, [“From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State”](#), 2018, pp. 5, 60; Hamoon Khelghat-Doost, [“Women in Jihadist Organizations: Victims or Terrorists?”](#), Women in International Security Policy Brief, May 2017, pp. 1-2; Bidisha Biswas and Shirin Deylami, [“Radicalizing Female Empowerment: Gender, Agency, and Affective Appeals in Islamic State Propaganda”](#), Small Wars and Insurgencies, Volume 30, Issue 6-7, 2019, p. 1193; Meredith Loken and Anna Zelenz, [“Explaining Extremism: Western Women in Daesh”](#), European Journal of International Security, Volume 3, Issue 1, 2017, p. 51.

I. Factual Background

A. Dire Living Conditions in the al-Hol and al-Roj Camps

11. In March 2019, the capture of the Syrian village of Baghouz by the US-backed Syrian Defense Forces (“SDF”)—the military arm of the Autonomous Administration of North East Syria (“AANES”)—marked the territorial collapse of ISIS.¹⁶ Thousands of ISIS fighters and affiliated members were captured and detained. The majority of women and children captured were indefinitely detained, without charge or trial,¹⁷ in the al-Hol and al-Roj camps in northeast Syria, which are de facto detention centers¹⁸ from which they are not allowed to leave.¹⁹ These camps have become known as “Europe’s Guantanamo.”²⁰
12. The conditions in the camps are inhumane and life-threatening.²¹ The camps are massively over-crowded and under-resourced. There is a severe lack of water, food, electricity, and sanitation facilities.²² In 2019 alone it was reported that over 370 children died in the camps,²³ and in 2020, 157 more

¹⁶ Al Jazeera, “[Hundreds of ISIL Fighters Surrender in Syria’s Baghouz: SDF](#),” 7 March 2019.

¹⁷ France, Belgium, Germany, the Netherlands, Sweden, the UK, Spain, Italy and Austria are among the major European countries of origin, see: Thomas Renard and Rik Coolsaet, “[From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria, One Year After the Turkish Offensive](#),” 2020, p. 5.

¹⁸ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 27-38. Human Rights Council, “[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)”, A/HRC/37/72, 1 February 2018, Annex III Internally displaced persons, para. 4.

¹⁹ Alessandra Spadaro, “[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#),” International and Comparative Law Quarterly, 2020, pp. 251-252; Human Rights Council, “[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)”, A/HRC/37/72, 1 February 2018, Annex III Internally displaced persons, para. 4, 9.

²⁰ See: RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020; Thomas Renard and Rik Coolsaet, “[From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria, One Year After the Turkish Offensive](#),” Egmont Institute, No. 13, October 2020, p. 6.

²¹ Human Rights Watch (“HRW”), “[Syria: Dire Conditions for ISIS Suspects’ Families](#)”, 23 July 2019. Liberation, “[En Syrie, le Cimetière des Enfants Perdus du «Califat»](#),” 4 May 2021.

²² Ibid. See also: Council of Europe (“CoE”), Parliamentary Assembly, “[Resolution 2321 \(2020\) on International Obligations Concerning the Repatriation of Children from War and Conflict Zones](#),” 30 January 2020, para. 1.

²³ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 48-49.

children died there.²⁴ Many of these deaths were due to preventable causes, such as diarrhea and malnutrition.²⁵

13. Access to healthcare is extremely limited in the camps, which is of particular concern during the COVID-19 pandemic. Even with limited testing, COVID-19 cases have been reported in the al-Hol camp.²⁶ Given the conditions in the camps, there is a risk of a wider outbreak of COVID-19.²⁷ Furthermore, due to security risks, aid groups have been prevented from providing essential services and the pandemic has further hindered humanitarian actors' ability to travel to the area and conduct their missions.²⁸
14. Physical violence between SDF guards and those detained, as well as among the detainees,²⁹ is endemic and so is psychological trauma.³⁰ The violence that children are exposed to in the camps includes sexual violence, exploitation, trafficking, harassment, and the risk of indoctrination.³¹ There are numerous accounts of adolescent boys who were forcibly removed from their families by SDF authorities and taken away to separate prison facilities,³² some of which have been described as "rehabilitation"³³ or "deradicalisation"³⁴ centers. Furthermore, the security situation in the camps

²⁴ Liberation, "[En Syrie, le Cimetière des Enfants Perdus du «Califat»](#)," 4 May 2021.

²⁵ Paulo Sérgio Pinheiro, "[Statement by Mr. Paulo Sérgio Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)," 41st Session of the Human Rights Council, 2 July 2019, 16 September 2019.

²⁶ UN Office for the Coordination of Humanitarian Affairs ("OCHA"), "[Syrian Arab Republic: COVID-19 Response Update No. 15 - 16](#)," 16 February 2021.

²⁷ For more information regarding COVID-19 in the camps, see: HRW, "[Thousands of Foreigners Unlawfully Held in NE Syria](#)," 23 March 2021.

²⁸ OCHA, "[Syrian Arab Republic North East Syria: Al Hol Camp](#)," 11 October 2020, p. 1; Thomas Renard and Rik Coolsaet, "[From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria. One Year After the Turkish Offensive](#)," 2020, p. 3.

²⁹ RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 40-44.

³⁰ *Ibid.*, para. 39-40; Children's Rights Ombudspersons (Belgium), "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)," no date, p. 4. See also: Médecins Sans Frontières, "[MSF Denounces Unsafe Environment in Al-Hol Camp in Wake of Staff Killing](#)," 2 March 2021; InfoMigrants, "[Syria: 12 Murders in Two Weeks at Al Hol Refugee Camp](#)," 25 January 2021; Arabiya News, "[Syria's al-Hol camp for ISIS families records 31 murders this year](#)," 3 March 2021.

³¹ CoE, Parliamentary Assembly ("PACE"), "[Resolution 2321 \(2020\) on International Obligations Concerning the Repatriation of Children from War and Conflict Zones](#)," 30 January 2020, para. 1.

³² For details see: Fionnuala Ní Aoláin, "[Gendering the Boy Child in the Context of Counterterrorism: The Situation of Boys in Northeast Syria](#)," 8 June 2021, Just Security. See also: RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 48.

³³ Nisan Ahmado, "[Center in Syria Seeks to Deradicalize IS Teens](#)," Voa News, 6 June 2019.

³⁴ International Crisis Group ("ICG"), "[Women and Children First: Repatriating the Westerners Affiliated with ISIS](#)", Middle East Report No. 208, 18 November 2019, p. 3; RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 58-61.

is deteriorating.³⁵ Women still committed to the ISIS cause have threatened, attacked, and violently punished women and children whom they consider to be “infidels.”³⁶ There are numerous warnings about the camps turning into incubators for ISIS resurgence.³⁷ Notably, the camps are situated in an area of armed conflict between Kurdish and Turkish forces, making them dangerous, unstable,³⁸ and at high risk of disintegration due to unrest or return to open conflict in the area.³⁹

B. Children and Women in the al-Hol and al-Roj Camps

15. As of October 2020, an estimated 63,400 women and children are detained in the camps.⁴⁰ Twelve thousands of them—8,000 children and 4,000 women—are believed to be from countries other than Iraq or Syria.⁴¹ It is estimated that more than two-thirds of the foreign children in the camps are under 12 years old, with most under the age of five,⁴² and over 500 of those foreign children are orphaned or otherwise unaccompanied.⁴³ Among the foreigners in the camp, an estimated 1,000 are European women and

³⁵ OCHA, “[Joint Statement on the Deteriorating Security at Al Hol Camp](#),” 21 January 2021; OCHA, “[Syrian Arab Republic North East Syria: Al Hol Camp](#),” 11 October 2020, p. 1; Medicines sans Frontiers, “[Women Treated for Gunshot Wounds amidst Violence and Unrest in Al-Hol Camp](#),” 30 September 2019.

³⁶ HRW, “[Syria: Dire Conditions for ISIS Suspects’ Families](#),” July 2019. Medicines sans Frontiers, “[MSF Denounces Unsafe Environment in Al-Hol Camp in Wake of Staff Killing](#),” 2 March 2021; InfoMigrants, “[Syria: 12 Murders in Two Weeks at al Hol Refugee Camp](#),” 25 January 2021; Al Arabiya News, “[Syria’s al-Hol Camp for ISIS Families Records 31 Murders This Year](#),” 3 March 2021.

³⁷ RTBF, “[Al-Hol Camp in Syria Is Out of Control: ‘Daesh Has Taken Over’](#),” 3 March 2021. The Guardian, “[Inside al-Hawl Camp, the Incubator for Islamic State’s Resurgence](#),” 31 August 2019; Open Letter from National Security Professionals to Western Governments, “[Unless We Act Now, the Islamic State Will Rise Again](#),” 11 September 2019; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#),” 7 November 2019, para. 4; Natasha Turak “[Hundreds of ISIS Prisoners are Escaping from Camps in Northern Syria amid Turkish Offensive](#),” CNBC, 14 October 2019; Al Arabiya “[French Women from Syrian Camp ‘Retrieved’ by ISIS: Relatives](#),” 15 October 2019.

³⁸ ICG, “[Women and Children First: Repatriating the Westerners Affiliated with ISIS](#),” pp. 1-2; Bassem Mroue, “[Turkish invasion raises fears of Islamic State prison break](#),” Associated Press, 11 October 2019.

³⁹ Center for Global Policy, “[The Children of ISIS Detainees: Europe’s Dilemma](#),” Policy Brief, June 2020, p. 8. HRW, “[Syria: Dire Conditions for ISIS Suspects’ Families](#),” July 2019; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#),” 7 November 2019, para. 4.

⁴⁰ OCHA, “[Syrian Arab Republic North East Syria: Al Hol Camp](#),” 11 October 2020, p. 1; Center for Global Policy “[The Children of ISIS Detainees: Europe’s Dilemma](#),” June 2020, p. 4. Note that the exact numbers of the children and women in the camps are subject to continuous changes given States’ ongoing policy changes regarding their repatriation.

⁴¹ HRW, “[Thousands of Foreigners Unlawfully Held in NE Syria](#),” 23 March 2021.

⁴² Ibid; OCHA, “[Syrian Arab Republic, North East Syria: Al Hol Camp](#),” 11 October 2020, pp. 1, 3.

⁴³ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 17.

children, out of which more than 640 are children.⁴⁴ France, Belgium, Germany, the Netherlands, Sweden and the UK are among the major European countries of origin.⁴⁵

16. Monolithic depictions of the children in the camps fail to reflect their multifaceted experiences. Their age, level of maturity, commitment to ISIS ideology, training and engagement in ISIS activities varies.⁴⁶ Many of the children in the camps are reported to have been born inside ISIS territory. For instance, an estimated 70 percent of all Belgian children in the camps were born inside the territory.⁴⁷ Reportedly half of the Dutch and French children in the camps were under five years old in 2018.⁴⁸ While older children's affiliation to ISIS may be tied to the motivations of their guardians, some of them are likely to have been psychologically indoctrinated and physically trained. It is possible that some participated in acts of violence and abuse.⁴⁹ Nevertheless, the idea that they exercised individual agency and informed consent in supporting or conducting violence is highly questionable and they should be considered primarily as victims (see Section II.J. below on the Right of Child Victims of Armed Conflict to Reintegration and Recovery).⁵⁰
17. In the camps, the indoctrination of some children is ongoing.⁵¹ In al-Hol, for example, children have appeared in videos chanting ISIS slogans and praising the group's flag.⁵² Security experts have described the camps as

⁴⁴ Ibid. Thomas Renard and Rik Coolsaet, "[From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria, One Year After the Turkish Offensive](#)," 2020, p. 5.

⁴⁵ Ibid.

⁴⁶ Joana Cook and Gina Vale, "[From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State](#)," 2018, pp. 30-34.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ UNSCR, "[Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 \(2001\) concerning counter-terrorism addressed to the President of the Security Council](#)," S/2015/123, 23 February 2015, para. 14. For an analysis of how children's responsibilities within ISIS differed based on their age, gender, ethnicity, nationality and other identity markers, see: Daniel Milton and Don Rassler, "[Minor Misery: What an Islamic State Registry Says About the Challenges of Minors in the Conflict Zone](#)", Combating Terrorism Center, 2019.

⁵⁰ Joana Cook and Gina Vale, "[From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State](#)," 2018, pp. 30-31.

⁵¹ Gina Vale, "[Women in Islamic State: From Caliphate to Camps](#)", ICCT Policy Brief, October 2019, p. 6; Liesbeth van der Heide Jip Geenen, "[Children of the Caliphate - Young IS Returnees and the Reintegration Challenge](#)", ICCT Research Paper, August 2017.

⁵² Center for Global Policy "[The Children of ISIS Detainees: Europe's Dilemma](#)", Policy Brief, June 2020, p. 8.

breeding grounds for violent extremism thus calling for their repatriation before (see Section I.C. below).⁵³

18. The women in the camps are not a homogenous group either.⁵⁴ A significant proportion of women who originally travelled to the region knew that they were joining ISIS, yet many had limited knowledge about the consequences and the true nature of the ISIS regime.⁵⁵ A considerable number of them were trafficked⁵⁶ or coerced into travelling to ISIS territory.⁵⁷ Some were recruited as minors,⁵⁸ while others were compelled to follow their male family members, including for economic reasons.⁵⁹
19. While not all women in the camps were operationally involved in ISIS activities, some of them played significant roles in the group,⁶⁰ including by: engaging in online and offline recruitment and propaganda,⁶¹ serving in the ISIS intelligence apparatus,⁶² being members of the female religious police brigades and meting out punishments when ISIS behavioral codes were

⁵³ Open Letter from National Security Professionals to Western Governments, [“Unless We Act Now, the Islamic State Will Rise Again”](#), 11 September 2019.

⁵⁴ Women in the camps are at risk of being transferred to jurisdictions where they may be at risk of torture or death penalty, see: Reprieve, [“Trafficked to Syria: British Families Detained in Syria after Being Trafficked to Islamic State,”](#) April 2021, pp. 11-12.

⁵⁵ RSI, [“Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria,”](#) 2020, para. 92.

⁵⁶ Reprieve’s investigations reveal that the majority of British women detained in North East Syria (at least 63%) are victims of trafficking, see: Reprieve, [“Trafficked to Syria: British Families Detained in Syria after Being Trafficked to Islamic State,”](#) April 2021, pp. 11-12.

⁵⁷ Center for Global Policy [“The Children of ISIS Detainees: Europe’s Dilemma”](#), 2020, p. 11; Azadeh Moaveni, [“ISIS Women and Enforcers in Syria Recount Collaboration, Anguish and Escape”](#), The New York Times, 21 November 2015.

⁵⁸ Some of these women were as young as 12 when they were taken to Syria, see: Reprieve, [“Trafficked to Syria: British Families Detained in Syria after Being Trafficked to Islamic State,”](#) April 2021, pp. 11-12.

⁵⁹ RSI, [“Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria,”](#) 2020, para. 93.

⁶⁰ Asaad H. Almohammad and Anne Speckhard, [“The Operational Ranks and Roles of Female ISIS Operatives: From Assassins and Morality Police to Spies and Suicide Bombers,”](#) International Center for the Study of Violent Extremism, 2017, p. 2; Gina Vale, [“Women in Islamic State: From Caliphate to Camps”](#), 2019, p. 4; RSI, [“Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria,”](#) 2020, para. 95.

⁶¹ Alexandra Sims, [“Sally Jones: Isis Recruiter ‘Issues Series of Terror Threats against UK Cities’ over Twitter,”](#) The Independent, 25 May 2016.

⁶² Vera Mironova, Ekaterina Sergatskova, and Karam Alhamad, [“ISIS’ Intelligence Service Refuses to Die,”](#) Foreign Affairs, 22 November 2017; Jessica Davis, [“The Future of The Islamic State’s Women: Assessing their Potential Threat,”](#) p. 3.

- violated,⁶³ or engaging in combat operations.⁶⁴ Regardless of their motivations and roles within ISIS, numerous women have been subjected to egregious human rights abuses, including sexual violence, trafficking, and forced marriage.⁶⁵
20. Significantly, a high proportion of women in the camps either never committed to ISIS or are no longer committed.⁶⁶ Only a minority of women in the camps remains hardline supporters of ISIS.⁶⁷ Among them, some have no desire to be repatriated⁶⁸ and some have replicated ISIS structures, such as the religious police,⁶⁹ continued to enforce the ISIS-imposed dress code, and used verbal and physical violence against people not abiding by their rules.⁷⁰
 21. Many women in the camps condemn the harsh and inhumane conditions of their detention and express their willingness to return to their countries of origin, to bring their children home to safety, and, if necessary, to face justice.⁷¹ Some have formally given up custody of their children, signing away their parental rights in order to offer their children a chance of a better

⁶³ Loulla-Mae Eleftheriou-Smith, “[Escaped Isis Wives Describe Life in the All-female al-Khansa Brigade who Punish Women with 40 Lashes for Wearing Wrong Clothes.](#)” *The Independent*, 20 April 2015. However the brigades functioned under a predominantly male leadership structure, see: Asaad H. Almohammad and Anne Speckhard, “[The Operational Ranks and Roles of Female ISIS Operatives: From Assassins and Morality Police to Spies and Suicide Bombers.](#)” *International Center for the Study of Violent Extremism*, 2017, p. 10.

⁶⁴ For example, *New Straits Times*, “[Female Suicide Bomber Kills 31 in Busy Iraqi Market](#)”, 10 June 2017; ICG, “[Women and Children First: Repatriating the Westerners Affiliated with ISIS](#)”, 2019, p. 6.

⁶⁵ Luisa Dietrich and Simone E. Carter, “[Gender and Conflict Analysis in ISIS Affected Communities of Iraq](#)”, Oxfam, 2017, p. 9; HRW, “[Iraq: ISIS Escapees Describe Systematic Rape](#)”, 14 April 2015. see: Reprieve, “[Trafficked to Syria: British Families Detained in Syria after Being Trafficked to Islamic State](#),” April 2021, pp. 11-12.

⁶⁶ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 95; *Voa News*, “[In Camp of Dihad IS Supporters, Some Women Express Regrets](#)”, 23 April 2019.

⁶⁷ Center for Global Policy, “[The Children of ISIS Detainees: Europe’s Dilemma](#)”, 2020, p. 11. Anne Speckhard and Ardian Shajkovci, “[Waiting for Return of the Caliphate Among ISIS Enforcers in Syria’s al Hol, Ain Issa and Roj Camps](#)”, *Homeland Security Today*, 3 September 2019.

⁶⁸ Center for Global Policy, “[The Children of ISIS Detainees: Europe’s Dilemma](#)”, 2020, p. 11.

⁶⁹ Natalia Sancha, “[ISIS Women Impose their Own Caliphate in Syria’s Al Hol Camp](#)”, *El Pais*, 25 October 2019; Jessica Davis, “[The Future of The Islamic State’s Women: Assessing their Potential Threat.](#)” pp. 4-6; Anne Speckhard and Ardian Shajkovci, “[Waiting for Return of the Caliphate Among ISIS Enforcers in Syria’s al Hol, Ain Issa and Roj Camps](#)”, *Homeland Security Today*, 3 September 2019; Reuters, “[Indonesia Says Probing Report of Death of Pregnant Woman in Syrian camp](#)”, 1 August 2019.

⁷⁰ Anne Speckhard and Ardian Shajkovci, “[Waiting for Return of the Caliphate Among ISIS Enforcers in Syria’s al Hol, Ain Issa and Roj Camps](#)”, 2019.

⁷¹ *Ibid.*

future outside of the camps.⁷² Many women, however, have resorted to paying smugglers to take them and their children out of the camps.⁷³

C. European States' Repatriation Policies

22. After the military defeat of ISIS in 2019, SDF—the de facto administrators of the camps—announced that they will not prosecute “foreign fighters.”⁷⁴ Both SDF and AANES have repeatedly requested States to repatriate their nationals,⁷⁵ insisting on repatriation of children *together* “with mothers.”⁷⁶ SDF and AANES have also indicated multiple times their willingness to cooperate with the appropriate States in regard to the repatriation process.⁷⁷
23. European States' policies regarding the repatriation of their nationals from the camps vary. In general, however, they assert that there is no obligation on them to actively repatriate children from the camps, nor to provide consular assistance to their nationals in Syria,⁷⁸ unless their nationals manage to reach a diplomatic representation, where they can receive travel documents to enable their return⁷⁹—an impossible task for women and children detained in the camps.⁸⁰

⁷² Azeem Ibrahim and Myriam François, “[Foreign ISIS Children Deserve a Home.](#)” International Observatory Human Rights, 8 September 2020.

⁷³ Center for Global Policy, “[The Children of ISIS Detainees: Europe’s Dilemma](#)”, 2020, p. 8.

⁷⁴ *Al Jazeera*, “[SDF Calls for International Tribunal for ISIL Detainees](#),” 25 March 2019.

⁷⁵ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 86.

⁷⁶ AANES, 18 March 2021, “[Press Release](#)”; Library of Congress, “[Germany: Court Obligates Government to Repatriate ISIS Member and Children to Germany](#)”, Global Legal Monitor, 17 December 2019; Kurdistan 24, “[Belgium strikes deal with KRG to repatriate children of ISIS members: Minister](#),” 13 June 2018; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#)”, 7 November 2019, para. 17; Emma Broches, “[What Is Happening With the Foreign Women and Children in SDF Custody in Syria?](#),” Lawfare, 24 March 2020.

⁷⁷ *Ibid.*

⁷⁸ For illustrative purposes see: Norway and the Netherlands, indicated explicitly that while there is a principle of a right to return for these citizens, it does not translate into a duty to proactively repatriate the children or to provide consular assistance, see: NRK, “[Solberg: – Norske IS-krigere har rett til å komme hjem](#)”, 16 February 2019, Tweede Kamer, “[Reactie op het verzoek van het lid Buitenweg, gedaan tijdens de Regeling van Werkzaamheden van 5 februari 2019, over het bericht ‘Nederland onderzoekt terughalen vrouwelijke Syriëgangers en kinderen’](#)”, 21 February 2019, p. 1. For detailed information regarding the European States' repatriation policies see: Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#)”, 7 November 2019 para. 5; RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 58-62.

⁷⁹ Tanya Mehra, “[European Countries Are Being Challenged in Court to Repatriate their Foreign Fighters and Families](#)”, 7 November 2019; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#)”, 7 November 2019, para 5.

⁸⁰ See: NL Times, “[Two Dutch ISIS women, three children escaped Syrian camp, fled to Turkey](#)”, 1 November 2019; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#)”, 7 November 2019, footnote 12.

24. There have been some exceptions to these policies. Some European States have repatriated very young children, those with particularly acute medical needs, and orphans or otherwise unaccompanied children—who had confirmed nationality.⁸¹ In doing so, most European States have adopted an ad hoc and case-by-case approach, based on unclear and non-transparent criteria. This has created an ambiguous dichotomy of children who somehow “deserve” to be repatriated and those who do not and further prolongs the process of their repatriation. Notably, European States have overwhelmingly refused to repatriate the children together with their primary caregivers.⁸²
25. In justifying their stance, many European States invoke logistical difficulties and national security arguments. States have highlighted the security risks involved in sending officials to the camps to repatriate the children, the complexity of establishing the nationality of children,⁸³ and the political sensitivities surrounding their engagement with SDF, a non-state actor, and its treatment as a de facto sovereign.⁸⁴ Yet, it clearly is possible to identify

⁸¹ For illustrative purposes, The UK confirmed it would consider only orphans and unaccompanied minors for repatriation, on a case-by-case basis, see: DW, [“UK to Repatriate British Orphans of 'Islamic State' Fighters”](#), 21 November 2019. France seems to have no confirmed policy but announced in early 2019 that it would seek to repatriate orphans and unaccompanied minors (but not their mothers) and has confirmed all repatriation decisions will be on a case by case basis, see: Rights Watch UK, [“European Women and Children in Syria – Factual and Legal Briefing”](#), 7 November 2019, footnote 11. Throughout March 2019-April 2020, France returned 28 children, most of whom were orphans, see: France 24, [“France Repatriates 10 Children from Syria, Foreign Ministry Says,”](#) 22 June 2020. See also: Thomas Van Poecke, Evelien Wauters, [“The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond,”](#) Working Paper No. 229, KU Leuven, January 2021, pp. 42-43. In Belgium, “[the] federal government decided in December 2017 that the children of Belgian nationals who travelled to Syria aged below ten have the right to return to Belgium. For older children, the situation had to be assessed on a case by case basis. While the Belgian government is in principle unwilling to repatriate adults, the Kurdish authorities do not let children leave without their parents,” see: Thomas Van Poecke, Evelien Wauters, [“The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond,”](#) 2021, pp. 4-5. See also: The Telegraph, [“Belgium Pledges to Repatriate Children of Isis From Syrian Camps,”](#) 14 February 2020. Later in 2021, the Belgian authorities announced that they would [repatriate Belgian](#) children who are 12 years old or younger and some women in the camps on a case-by-case basis. See: Al-Monitor, [“Belgian Children and Some Women To Be Repatriated from IS Camp in Syria,”](#) 4 March 2021.

⁸² See: Emma Broches, [“What Is Happening With the Foreign Women and Children in SDF Custody in Syria?”](#) Lawfare, 24 March 2020; Le Point, [“Syrie: La Belgique pour un Retour Groupé d'Enfants de Jihadistes,”](#) 14 February 2020. Some notable exceptions include Italy, see: US Department of State, [“U.S. Commends Italy for Repatriating Its Citizens from Syria,”](#) 1 October 2020.

⁸³ See: Letta Tayler, [“Western Europe Must Repatriate Its ISIS Fighters and Families,”](#) Al Jazeera, 21 June 2019. Such justifications are problematic. See Section II.D of this report and the [“Citizenship”](#) section of OSJI’s website which links to numerous reports and litigation cases that have pressed for safeguards that prevent governments from shirking responsibilities based on their own inability or refusal to identify nationals and stateless children.

⁸⁴ ICG, [“Women and Children First: Repatriating the Westerners Affiliated with ISIS,”](#) 2019, p. 13.

individuals in the camps and repatriate them safely, as evidenced by several cases of successful repatriation of children and women.⁸⁵

26. The repatriation of children and their primary caregivers is generally presented by politicians and the media as a national security threat. Security concerns must be treated seriously, as repatriation is not without risk. However, leaving children and women in the camps does not serve European States' long-term security interests and may in fact be counter-productive.⁸⁶ Indeed, counter-terrorism experts have called for an approach in which repatriation of nationals—men, women, and children—is only the beginning of a process that continues, as appropriate, with prosecution, rehabilitation, and reintegration.⁸⁷ Counter-terrorism experts indicate that in the long-term, repatriation is the best solution because it enables a controlled and monitored process of return.⁸⁸
27. In addition to counter-terrorism experts,⁸⁹ a growing number of voices has been calling for the repatriation of children together with their primary caregivers, including the Secretary General of United Nations,⁹⁰ the UN Security Council (“UNSC”),⁹¹ numerous UN Special Rapporteurs,⁹² the Council of Europe (“CoE”),⁹³ the European Commissioner for Human

⁸⁵ See: Tanya Mehra, [“European Countries Are Being Challenged in Court to Repatriate their Foreign Fighters and Families”](#), 7 November 2019; Rights Watch UK, [“European Women and Children in Syria – Factual and Legal Briefing”](#), 7 November 2019, para 5.

⁸⁶ Organization for Security and Cooperation in Europe (“OSCE”)/ Office for Democratic Institutions and Human Rights (“ODIHR”), [“Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ within a Human Rights Framework”](#), 2018, p. 50; Elian Peltier and Constant Méheut, [“Europe’s Dilemma: Take In ISIS Families, or Leave Them in Syria?”](#), The New York Times, 28 May 2021; Meghan Benton and Natalia Banulescu-Bogdan, [“Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?”](#), Migration Policy Institute, 3 April 2019.

⁸⁷ Open Letter from National Security Professionals to Western Governments, [“Unless We Act Now, the Islamic State Will Rise Again”](#), 11 September 2019, p. 2

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Report of the UNSG, [“Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy”](#), 29 January 2021, para. 7, 22 and 74. UNSG, [“Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups”](#), April 2019, p. 3.

⁹¹ UNSC, [“Resolution 2427 \(2018\) on Children and Armed Conflict”](#), S/RES/2427, 9 July 2018, para. 26; UNSC, [“Resolution 2396 \(2017\) on Threats to International Peace and Security Caused by Terrorist Acts”](#), S/RES/2396, 21 December 2017; UNSC, [“Resolution 2178 \(2014\) on Threats to International Peace and Security Caused by Terrorist Acts”](#), S/RES/2178, 24 September 2014.

⁹² OHCHR, [“Syria: UN Experts Urge 57 States to Repatriate Women and Children from Squalid Camps”](#), 8 February 2021.

⁹³ PACE, [“Resolution 2321 \(2020\) on International Obligations Concerning the Repatriation of Children from War and Conflict Zones.”](#) 30 January 2020.

Rights,⁹⁴ and the European Parliament,⁹⁵ as well as other actors ranging from relatives of the women and children in the camps to child protection agencies⁹⁶ and terrorism victim groups.⁹⁷ However, despite national and international pressure, European States have repatriated only a limited number of children, overwhelmingly unaccompanied.⁹⁸ Furthermore, in some cases European States have sought to actively prevent the return of their citizens by denationalization (see Section II.D. on the Right to Nationality).

28. In this context, family members of the children and their primary caregivers detained in the camps have started to challenge in courts European governments' decisions to not repatriate them. In some cases, such as in France,⁹⁹ the courts deferred to the government's political competences. However, in other cases, including in Belgium,¹⁰⁰ the Netherlands,¹⁰¹ and

⁹⁴ European Commissioner for Human Rights, "[Intervention de la Commissaire aux Droits de l'Homme du Conseil de l'Europe en Qualité de Tierce Partie devant la Cour Européenne des Droits de l'Homme](#)," Requêtes no 24384/19 et 44234/20 H.F. et M.F. c. France et J.D. et A.D. c. France, 25 June 2021.

⁹⁵ European Parliament, "[Resolution of 26 November 2019 on Children's Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child](#), 2019/2876(RSP), 26 November 2019, para. 61.

⁹⁶ Children's Rights Ombudspersons (Belgium), "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)," no date, p. 2; The Children's Commissioner for England, "[Letter from the Children's Commissioner to the Home Office and the Foreign Commonwealth Office](#)", 2019; The Flemish Office of the Children's Rights Commissioner, "[Standpunt Belgische Kinderen Uit Terroristische Conflictzones Moeten Kunnen Rekenen Op Onze Hulp](#)", Statement, April 2018; The Dutch Children's Ombudsman, "[Nederland Moet Kinderen in Kampen Beschermen](#)", Statement, 19 April 2018; Alice Tidey, "[Six Belgian Orphans of Islamic State Fighters Taken in by Belgium](#)" EuroNews, 19 April 2018.

⁹⁷ Association Française des Victimes du Terrorisme, "[L'AFVT Souhaite Le Rapatriement Des Enfants Français Détenus Dans Les Camps Du Kurdistan Syrien](#)," 24 June 2019; FENVAC, "[Faut-Il Rapatrier les Jihadistes Français? La FENVAC s'exprime](#)", 20 January 2020; Ouest France, "[Une Fédération de Victimes Favorable au Rapatriement de Djihadistes Détenus en Syrie](#)", 13 January 2020.

⁹⁸ Joana Cook and Gina Vale, "[From Daesh to 'Diaspora' II: The Challenges Posed by Women and Minors After the Fall of the Caliphate](#)", 2019, pp. 35-36.

⁹⁹ See: Reuters, "[Top French Court Rejects Syria-Based French Jihadis' Repatriation Demands](#)", 23 April 2019; France 24, "[Families Sue French Foreign Minister Over Children Stuck in Syria](#)", 16 September 2019. For detailed information see: Thomas Van Poecke, Evelien Wauters, "[The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond](#)," 2021, pp. 42-45.

¹⁰⁰ See: Reuters, "[Court Orders Belgium to Take Back Woman and Children from Syria](#)", 31 October 2019. For detailed information see: Thomas Van Poecke and Evelien Wauters, "[The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond](#)," 2021, pp. 5-15. Also see: Alessandra Spadaro, "[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#)", Cambridge University Press, 26 November 2020.

¹⁰¹ See: Associated Press, "[Dutch Court Orders Country to Repatriate Children of Radicalized Women in Syria](#)", 11 November 2019; Thomas Van Poecke and Evelien Wauters, "[The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond](#)," 2021, pp. 35-37; Alessandra Spadaro, "[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#)", Cambridge University Press, 26 November 2020.

Germany,¹⁰² domestic courts have initially requested State authorities to make efforts to repatriate the children and, in some instances, their mothers as well. However, many of these court decisions have been overturned on appeal, reinforcing the States' stance that the repatriation of children and women is a political choice rather than a legal obligation.¹⁰³ Some of these cases are now being adjudicated before supreme courts in different jurisdictions, at the European Court of Human Rights,¹⁰⁴ and before the Committee on the Rights of the Child ("CommRC").¹⁰⁵ In addition, most recently, States' refusal—particularly France's—to repatriate children and their mothers from the camps has been denounced before the International Criminal Court as constituting a war crime, on account of their illegal detention and ill treatment.¹⁰⁶

¹⁰² See: Al Jazeera, "[German Court Rules on Repatriation of Syria's ISIL Fighter's Family](#)", 11 July 2019; Tanya Mehra, "[European Countries Are Being Challenged in Court to Repatriate Their Foreign Fighters and Families](#)", 2019. For detailed information see: Thomas Van Poecke and Evelien Wauters, "[The Repatriation of European Nationals from Syria as Contested Before Domestic Courts in Belgium and Beyond](#)," 2021, pp. 38-42.

¹⁰³ See for example: The Conversation, "[Repatriation of Dutch Children in Syria Now Unlikely – But It Shouldn't Be A Political Choice](#)", 14 May 2020; The Brussels Time, "[Belgium Need Not Repatriate Children of Syria Fighters. Says Court](#)", 22 October 2020; Thomas Renard and Rik Coolsaet, "[From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria. One Year After the Turkish Offensive](#)", 2020, p. 6.

¹⁰⁴ Application to ECtHR, "[H.F. and M.F. v. France](#)," Application No. 24384/19, 6 May 2019; ECtHR, "[Relinquishment to Grand Chamber of two cases H.F. and M.F. v. France and J.D. and A.D. v. France](#)," Press release, 22 March 2021.

¹⁰⁵ The three cases pending before the CommRC are: Finland, Case No. 100/2019; and France, Cases No. 79/2019 and 109/2019. See: CommRC, "[Table of Pending Cases Before the CommRC](#)", 15 March 2021.

¹⁰⁶ [Communication auprès de la Procureure de la Cour Pénale Internationale sur la situation des enfants et femmes français détenus sans droit ni titre dans le Nord-Est de la Syrie](#), 30 March 2021; See Marie Dosé, Gérard Tcholakian and Ludovic Rivière, "[L'adhésion de la France au Statut de Rome nous oblige](#)," Le Club des Juristes, 27 April 2021.

II. European States' Obligations to Repatriate Children Detained in Camps in Northeast Syria

29. This section sets out the sources, under European and international law, of European States' legal obligation to proactively repatriate their child nationals. The arguments put forward here start with three overarching human rights considerations: the extraterritorial application of European States' human rights obligations in relation to their child nationals detained in northeast Syria, the best interests of the child, and the right to be free from discrimination. Following this, the section examines several key substantive human rights arguments regarding: the right to nationality, the right to access consular assistance, the right to enter one's own country, the right to life, the right to be free from torture and ill-treatment, the right to liberty and security, and the right of child victims of armed conflict to reintegration and recovery. In the context of children's detention in the camps in northeast Syria, the effective protection of these rights creates an obligation to proactively repatriate the children, together with their primary caregivers.
30. Proactive repatriation is not the same as simply allowing children and their primary caregivers to enter their country of nationality if they are released or escape from the camps and manage to return to their countries of nationality on their own. Nor does proactive repatriation simply mean repatriating children on a case-by-case basis, thereby prolonging their precarious situation and discriminating against children whose caregivers or relatives do not have the necessary resources to support legal proceedings.
31. Proactive repatriation means that States must arrange for the repatriation of all of their child nationals, in accordance with the principle of "the child's best interests" (see Section II.B. below). In practice, this usually includes: establishing nationality, if it is strictly necessary and with appropriate safeguards, this can mean facilitating DNA tests to determine paternity or maternity (see Section II.D. on the Right to Nationality); obtaining regular assurances of their physical and psychological well-being; providing appropriate medical care; issuing administrative documents, including identity and travel documents, to enable children's assisted travel to their country of nationality; and contacting camp authorities, consular

representatives located nearby, and NGOs active on the ground to effectively carry out repatriation.¹⁰⁷

32. The international and European human rights standards cited in this briefing paper should be assessed together with States' obligations under international criminal law and international counter-terrorism laws. Arguably, the failure to repatriate the detained children and their caregivers in northeast Syria goes against the principle of international cooperation in combating terrorism¹⁰⁸ and undermines States' ability to fulfill their obligation to investigate and prosecute international crimes and/or terrorist offenses.¹⁰⁹

A. Extraterritorial Jurisdiction of European States in Syria

33. The application of human rights obligations is dependent on States' jurisdiction.¹¹⁰ Under European and international human rights law, jurisdiction is primarily territorial¹¹¹—but not exclusively so. States' jurisdiction can be exercised extra-territorially under three models: a) the spatial model, conceived as a State's effective control over territory;¹¹² b) the personal model, which considers States' authority or control over an individual outside the States' own territory;¹¹³ and, more recently, c) the

¹⁰⁷ UNHCR guidance on voluntary repatriation addressing the duty of country of origin to take affirmative action towards making this right actionable should be also used by analogy: e.g. dialogue between the major parties must be established at the earliest possible stage, and return must be orderly and in safety and dignity. See: UNHCR, [Discussion Note on Protection Aspects of Voluntary Repatriation](#), EC/1992/SCP/CRP.3, 1 April 1992; para. 8(c) and 8(d); UNHCR, [Handbook - Voluntary Repatriation: International Protection](#), January 1996, 2.6 Responsibilities of the Country of Origin."

¹⁰⁸ UNSC, "[Resolution 2178 \(2014\) on Threats to International Peace and Security Caused by Foreign Terrorist Fighters](#)", S/RES/2178 (2014), 24 September 2014, para. 11-14. UNSC, "[Twenty-Third Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2368 \(2017\) Concerning ISIL \(Da'esh\), Al-Qaida and Associated Individuals and Entities](#)," S/2019/50, 15 January 2019, para. 93.

¹⁰⁹ PACE, "[Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?](#)", Resolution 2263 (2019), para. 8.

¹¹⁰ International Covenant on Civil and Political Rights ("ICCPR"), Article 2; CRC, Article 2; Convention Against Torture ("CAT"), Article 2; ECtHR, Article 1.

¹¹¹ ECtHR, "Bankovic et al v. Belgium," Application No. 52207/99, 12 December 2001, para. 59-61.

¹¹² ECtHR, "Bankovic et al v. Belgium," para. 70; ECtHR, "[Ilaşcu et al v Moldova and Russia](#)," Application No. 48787/99, 8 July 2004, para. 314-316; ECtHR, "[Loizidou v. Turkey](#)," Application No. 15318/89, para. 52; See also: Human Rights Committee ("HRCComm"), "[General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the ICCPR](#)," CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

¹¹³ ECtHR, "[Al Skeini and others v. UK](#)," Application No. 55721/07, para. 131-140; HRCComm, "[General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the ICCPR](#)," para. 10.

functional model, which depends on States' capacity to protect individuals from "immediate and foreseeable" threats.¹¹⁴

34. Even in the absence of effective control over foreign territory, European States may have a positive obligation under Article 1 of the European Convention on Human Rights ("ECHR") to take measures within their power to ensure respect for human rights outside of their territory. It is well established, for example, that a State may have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders.¹¹⁵ The ECtHR has recognized that State Parties can be held responsible for the extraterritorial consequences of their decisions if they lead to a risk of torture or ill-treatment.¹¹⁶ Furthermore, the ECtHR has recognized that a State Party's jurisdiction may arise from the actions or omissions of its diplomatic or consular officials when, in their official capacity, they exercise abroad their authority in relation to that State's nationals.¹¹⁷
35. International human rights treaty bodies have also recognized several concrete ways in which States exercise jurisdiction despite not having any territorial control. For example, CommRC has recognized that States have jurisdiction in respect of acts that are performed, or that produce effects, outside their national borders. In the context of migration, the Committee has held that under the Convention on the Rights of the Child ("CRC"), States "should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection."¹¹⁸ Similarly, the Human Rights

¹¹⁴ Special Rapporteur on extrajudicial, summary or arbitrary executions, "[Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr. Jamal Khashoggi](#)," 2019, para. 360; The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions, "[Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northeast Syrian Arab Republic – Legal Analysis](#)," 2020, para. 14-17, 35, 36; CommRC, "[L.H. et al v. France](#)," communications no. 79/2019 and no. 109/2019, CRC/C/85/D/79/2019-CRC/C/85/D/109/2019, 2 November 2020, para. 9.6 and 9.7; HRCComm, "[S. and others v. Malta](#)," Communication No. 3043/2017, CCPR/C/128/D/3043/2017, 27 January 2021, para. 6.5, 6.7; HRCComm, "[S. and others v. Italy](#)," Communication No. 3042/2017, CCPR/C/130/D/3023/2017, 27 January 2021, para. 8.5.

¹¹⁵ ECtHR, "[Ilaşcu et al v. Moldova and Russia](#)," Application No., para. 314; ECtHR, "[Medvedev and others v. France](#)," Application No. 3394/03, para. 64; ECtHR, "[Al Skeini and others v. UK](#)," Application No. 55721/07, para. 131; ECtHR, "[Güzelyurtlu and others v. Cyprus and Turkey](#)," Application No. 36925/07, para. 178.

¹¹⁶ ECtHR, "[Soering v. UK](#)," Application No. 14038/88, para. 96-98.

¹¹⁷ ECtHR, "[Al Skeini and others v. UK](#)," Application No., para. 133, 134; ECtHR, "[X v. UK](#)," Application No. 7547/76, Commission decision of 15 December 1977, Decisions and Reports 12, p. 73; ECtHR, "[S. v. Germany](#)," Application No. 10686/83, Commission decision of 5 October 1984, D.R. 40, p. 191.

¹¹⁸ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CMW"), "[Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the CommRC on State](#)

Committee (“HRCComm”), has found that States have jurisdiction over their nationals living abroad in relation to the State’s exercise of the power to issue passports.¹¹⁹

36. The consistent trend in the abovementioned cases is for courts to examine the extent of a State’s control over particular rights, noting that a State may have jurisdiction over some of a person’s rights while not having jurisdiction over others.¹²⁰ According to two UN Special Rapporteurs, the assessment of whether States exert de facto control over the rights of the children in the camps must take into consideration factors such as: (1) the proximity between the acts of the State and the alleged violation; (2) the degree and extent of cooperation, engagement, and communications with the authorities detaining children and their guardians; (3) the extent to which the home State is able to put an end to the violation of the individual’s rights by exercising or refusing any positive interventions to protect and promote the rights of their nationals; and (4) the extent to which another State or non-state actor has control over the rights.¹²¹
37. There are, as such, multiple ways in which it can be argued that European States have jurisdiction over their child nationals in the camps, by exercising control over their rights. First, some States have a presence in the camps through their diplomatic, military, and intelligence personnel and have a degree of control over their nationals there.¹²² As two UN Special Rapporteurs have stressed, while this occurs outside of formal recognition of the status of the authorities managing the camps, this engagement signals “a degree and substance of capacity and influence on the lives of those under their control which ought not to be ignored.”¹²³ Notably, the ECtHR, in order

[Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return](#),” CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 17(e) and 19, cited in: CommRC, “[L.H. et al v. France](#),” Communications no. 79/2019 and no. 109/2019, CRC/C/85/D/79/2019-CRC/C/85/D/109/2019, 2 November 2020, para. 9.6.

¹¹⁹ HRCComm, “[Vidal Martins v. Uruguay](#),” Communication No. 57/1979, 23 March 1982, para. 7.

¹²⁰ ECHR rights can be “divided and tailored,” see: ECtHR, “[Al-Skeini and others v. United Kingdom](#),” para. 137.

¹²¹ The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions, “[Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northeast Syrian Arab Republic – Legal Analysis](#),” 2020, para. 36.

¹²² RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, p. 5.

¹²³ The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions, “[Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northeast Syrian Arab Republic – Legal Analysis](#),” 2020, para. 21; RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 84.

to give effect to the Convention rights, has not allowed States to rely on formalistic arguments regarding the lack of diplomatic relations to avoid their obligations under the right to life, when in reality cooperation was possible.¹²⁴

38. Second, State authorities are exercising public powers when deciding whether to repatriate or whom to repatriate from the camps, which affects the rights of the children in a “direct and reasonably foreseeable manner.”¹²⁵ European States cannot convincingly argue that they are not aware of the risks and human rights violations that the children in the camps are exposed to and of the likely, foreseeable, and serious harm children are exposed to if they remain in the camps, considering the large number of children that have already died in the camps (see para. 12 above).
39. Third, the children are European States’ nationals in need of the protection of their States of nationality, which have the ability and the obligation¹²⁶ to provide necessary travel documentation. From a functional, capacity perspective, it is within the material power of European States to repatriate their nationals from the camps; some have already done so (see Section I.C. above). Notably, based on principles of international cooperation, States that have difficulties in repatriating their children can do so through a third-party State, as has happened in at least one case.¹²⁷ The SDF is willing to cooperate with European States in order to repatriate their nationals and has already done so in some cases (see Section I.C. above).
40. The factual situation, taken together with European States’ capacity to protect their child nationals in the camps, gives rise to a positive obligation to prevent serious human rights violations. Notably, in two cases against France, the CommRC has recognized such a functional model of extraterritorial jurisdiction over the child nationals in the camps because, based on numerous contextual factors such as those described above, the State “has the capability and the power to protect the rights of the children

¹²⁴ ECtHR, “[Güzelyurtlu and others v. Cyprus and Turkey](#),” Application No. 36925/07, 29 January 2019, para. 244.

¹²⁵ See: HRCComm, “[General Comment No. 36 \(2018\) on Article 6 of the ICCPR](#),” CCPR/C/G/36, 30 October 2018, para. 63; Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions, “[Extra-territorial Jurisdiction of States Over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northeast Syrian Arab Republic – Legal Analysis](#),” 2020, para. 15.

¹²⁶ See: HRCComm, “[Vidal Martins v. Uruguay](#),” Communication No. 57/1979, 23 March 1982, para. 7.

¹²⁷ With the support of France, the Netherlands repatriated two Dutch children in June 2019, see: Reuters, “[French, Dutch Islamic State Orphans Repatriated from Syria](#),” 10 June 2019.

in question by taking action to repatriate them or provide other consular responses.”¹²⁸

B. The Best Interests of the Child

41. Given that this briefing paper focuses on the repatriation of European child nationals, the principle of the “best interests of the child” is of crucial importance in devising legal arguments.
42. Because of children’s particular vulnerabilities—including dependency, maturity, legal status, and, often, voicelessness¹²⁹—international law requires¹³⁰ that a child’s best interests must be a primary consideration in all actions and decisions (including inaction and failure to take action)¹³¹ that directly or indirectly affect children.¹³² This covers actions undertaken by courts of law, administrative authorities, or legislative bodies,¹³³ including actions concerning the repatriation of children.
43. The best interests of the child is a fundamental principle in the protection of children’s rights and is one of the core provisions of the CRC.¹³⁴ As stressed by the CommRC, “the best interests of the child” is a threefold concept: it is a substantive right, a fundamental interpretative legal principle, and a rule of procedure.¹³⁵ Assessing and determining the best interests of the child requires procedural guarantees.¹³⁶ States must explain what criteria have been used and how the child’s best interests have been weighed against other considerations.¹³⁷
44. The CommRC underlines that when assessing and determining the child’s best interests, several key elements must be taken into account.¹³⁸ First, the assessment of a child’s best interests must include respect for the child’s

¹²⁸ CommRC, “[L.H. et al v. France](#),” 2020, para. 9.7. See: Marko Milanovic, “[Repatriating Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights](#),” EIJL Talk!, 10 November 2020.

¹²⁹ CommRC, “[General Comment No. 14 \(2013\) on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration \(Article 3, para. 1\)](#),” 29 May 2013, CRC/C/GC/1, Article 37.

¹³⁰ Most states have domesticated and some constitutionalized the “best interests of the child” principle.

¹³¹ CommRC, “General Comment No. 14 (2013),” para. 18.

¹³² *Ibid.*, para. 19.

¹³³ CRC, Article 3(1).

¹³⁴ CRC, Article 3(1).

¹³⁵ CommRC, “General Comment No. 14 (2013),” para. 6.

¹³⁶ *Ibid.*, para. 6 (c).

¹³⁷ *Ibid.*

¹³⁸ As stated in CommRC, “General Comment No. 14 (2013),” para. 52-79, the key elements that must be taken into account are: the child’s views; the child’s identity – including national origin; the preservation of the family environment and maintaining relations; the care, protection and safety of the child; the situation of vulnerability; the child’s right to health; and the child’s right to education.

right to express their views in all matters affecting them, including in judicial and administrative proceedings,¹³⁹ such as in the context of separation from parents, unaccompanied children, asylum-seeking and refugee children, victims of armed conflict and other emergencies, and decisions about protection.¹⁴⁰ There is no age limit on the right of the child to express their views and States are discouraged from “introducing age limits either in law or in practice that would restrict the child’s right to be heard in all matters affecting her or him.”¹⁴¹ The child’s comprehensive knowledge of all aspects of the matter affecting them is not necessary.¹⁴² What is necessary is that the child has sufficient understanding to be capable of appropriately forming her or his own views on the matter.¹⁴³ In assessing and determining the best interests of the children in the camps, it appears that European States have overwhelmingly failed to take into account those children’s views.

45. Second, according to the CommRC, for collective decisions, the concept of the child’s best interests must be assessed and determined in light of the circumstances of the particular group of children.¹⁴⁴ Thus, in addition to individual characteristics of the children concerned,¹⁴⁵ States should also take into consideration the extreme vulnerability of the children arbitrarily detained in the camps, and the many roles that children associated with “foreign fighters” may have served, while recognizing that such children

¹³⁹ CRC, Article 12; CommRC, “General Comment No. 14 (2013),” para. 43-45; CommRC, “[General Comment No. 12 \(2009\): The Right of the Child to Be Heard](#),” CRC/C/GC/12, 20 July 2009, para. 32.

¹⁴⁰ CommRC, “General Comment No. 12 (2009),” para. 32

¹⁴¹ *Ibid.*, para. 21; See, for example: CommRC, “[C.E. v. Belgium](#),” CRC/C/79/D/12/2017, 27 September 2018, para. 8.6 – 8.9.

¹⁴² CommRC, “General Comment No. 12 (2009),” para. 21; See also: CommRC, “[C.E. v. Belgium](#),” 2018, para. 8.6 – 8.9.

¹⁴³ *Ibid.*

¹⁴⁴ CommRC, “General Comment No. 14 (2013),” Article 32.

¹⁴⁵ Such as, *inter alia*, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc. See: CommRC, “General Comment No. 14 (2013),” para. 48.

may be victims of terrorism¹⁴⁶ or trafficking¹⁴⁷ and the impact of terrorism¹⁴⁸ or trafficking on children and their rights.

46. Third, when determining and assessing the child's best interests, the CommRC notes that special attention should be paid to key safeguards and guarantees. These include children's time perception and how delays in decision making negatively affect children as they mature.¹⁴⁹ Thus, procedures impacting children should be prioritized and completed in the shortest time possible¹⁵⁰ and children's needs must be assessed by professionals with expertise in matters related to child and adolescent development.¹⁵¹ European States appear to have failed to take into consideration the time perception of the children in the camps in northeast Syria since case-by-case repatriations are prolonged proceedings, which, in turn, prolong the violation of the children's rights.
47. Fourth, if a child's best interests, once assessed and determined, conflict with interests or rights of other individuals or the public-at-large, such as public safety interests, decision-makers have to analyze and weigh the rights of all those concerned, taking into account that the child's interests have comparatively high priority.¹⁵² Thus, European States must take the best interests of the child as the primary consideration¹⁵³ when deliberating on the issue of their repatriation from the camps, even when such interests are perceived to conflict other interests.
48. Leaving the children in the camps; in continued detention; in life-threatening conditions; with a severe lack of basic healthcare, access to food, water, sanitation facilities, and education; at risk of indoctrination into ISIS ideology; and at risk of statelessness (see Section II.D. below, on the Right to Nationality),¹⁵⁴ is undoubtedly contrary to their best interests. In

¹⁴⁶ Annex to the letter dated 28 December 2018 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, "[2018 Addendum to the 2015 Madrid Guiding Principles](#)," S/2018/1177, Guiding Principle 7 (b).

¹⁴⁷ Reprieve, "[Trafficked to Syria: British Families Detained in Syria after Being Trafficked to Islamic State](#)," April 2021.

¹⁴⁸ Annex to the letter dated 28 December 2018 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, "[2018 Addendum to the 2015 Madrid Guiding Principles](#)," S/2018/1177, Guiding Principle 7 (c).

¹⁴⁹ CommRC, "General Comment No. 14 (2013)," para. 93.

¹⁵⁰ Ibid.

¹⁵¹ Ibid, para 94-95.

¹⁵² Ibid, para. 39 and 6(a).

¹⁵³ Ibid, para. 6(a), 39.

¹⁵⁴ See: Institute on Statelessness and Inclusion and Open Society Justice Initiative, "[Principles on Deprivation of Nationality as a Security Measure](#)," para. 9.7.1.

response, numerous European and international resolutions have called for the repatriation of the children. For instance, the CoE Parliamentary Assembly Resolution on international obligations concerning the repatriation of children from war and conflict zones noted that “continued stays in camps or detention facilities cannot be considered to be in the best interest of the child” and called for the repatriation of children and their mothers from the camps.¹⁵⁵ The European Parliament’s Resolution on children’s rights urged EU Member States to “repatriate all European children, taking into account their specific family situations and the best interests of the child as a primary consideration.”¹⁵⁶ The Madrid Guiding Principles on “foreign terrorist fighters” required States to “fully respect and promote the rights of the child, taking into account the best interests of the child as a primary consideration,”¹⁵⁷ and the Report of the Special Representative of the Secretary-General for Children and Armed Conflict underlined that “denying children the opportunity to return to their countries of origin, rescinding their nationality or detaining them solely for their alleged association with armed groups runs counter to the best interests of the child and international protection standards.”¹⁵⁸

49. The European States should proactively take the necessary legislative, administrative and other appropriate measures in order to bring to an end the current situation in which their child nationals in northeast Syria find themselves (including undetermined nationals and children of nationals whose nationality is not yet established in law). Current repatriation practices and their subsequent effects are contrary to children’s best interests (see also Section III.A. on the Right to Family Unity and the Need to Repatriate the Children Together with Their Primary Caregivers).

C. The Principle of Non-Discrimination

50. Widespread racist, Islamophobic, and xenophobic narratives in Europe, and the ever-expanding body of laws, policies, and practices that are justified on national security grounds, often serve as vehicles for both direct and indirect

¹⁵⁵ PACE, “[Resolution 2321 \(2020\)](#),” 30 January 2020, para. 4 and 8.1.

¹⁵⁶ European Parliament, “[Resolution of 26 November 2019 on Children’s Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child](#),” 2019/2876(RSP), para. 61.

¹⁵⁷ Annex to the letter dated 28 December 2018 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, “[2018 Addendum to the 2015 Madrid Guiding Principles](#),” para. 27 and Guiding Principle 7.

¹⁵⁸ UNGA, “[Report of the Special Representative of the Secretary-General for Children and Armed Conflict](#),” A/73/278, 30 July 2018, para. 13.

discrimination towards the Muslim minorities in Europe. European States' failure to repatriate the children and women from the camps in northeast Syria, has its roots in structural discrimination against Muslims and, those perceived to be Muslim, who are often presented as a threat to security in Europe (see Sections II.D., II.E., and II.F.).¹⁵⁹

51. While recognizing the discriminatory roots of European States' repatriation policies, it must be said that these policies, which generally result in a case-by-case approach based on unclear criteria regarding which children are "entitled to" repatriation, may also constitute a violation of the non-discrimination principle.
52. The right to equality and non-discrimination is recognized as part of international customary law and widely reflected in international and regional human rights treaties, and is therefore binding on all States.¹⁶⁰ International human rights norms and standards place obligations on States to ensure that their laws, policies, and practices are designed and implemented in a way that does not lead to discrimination on any grounds. Depending on the particular human rights protection instrument, the prohibition on discrimination may apply only to certain substantive rights (i.e. as an "accessory" to those rights) or regardless of whether another substantive right is engaged (i.e. as a "free standing" right).¹⁶¹ For instance, under the ECHR, non-discrimination is prohibited only when other substantive rights, such as the right to life or prohibition of torture, are engaged.¹⁶²

¹⁵⁹ See: Open Society Foundations ("OSF") and Amnesty International ("AI"), "[A Human Rights Guide for Researching Racial and Religious Discrimination in Counterterrorism in Europe](#)," 2021, p. 10; See also: UNGA, "[Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance](#)," A/HRC/38/52, 25 April 2018, para. 6.

¹⁶⁰ Universal Declaration of Human Rights ("UDHR"), Articles 2 and 7; ICCPR, Articles 2(1) and 26; International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Article 2(2); CRC, Article 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("ICRMW"), Article 7; Convention on the Rights of Persons with Disabilities ("CRPD"), Article 5; ECHR, Article 14; ECHR Protocol No. 12, Article 1; EU Charter of Fundamental Rights, Articles 20 and 21; Treaty on European Union ("TEU"), Articles 2, 3(3), and 9; Treaty on the Functioning of the European Union ("TFEU"), Article 10. Two UN human rights conventions focus explicitly on combatting discrimination: International Convention on the Elimination of All Forms of Racial Discrimination on the ground of race and Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") on the ground of gender.

¹⁶¹ See: OSF and AI, "[A Human Rights Guide for Researching Racial and Religious Discrimination in Counterterrorism in Europe](#)," 2021, pp. 23-24.

¹⁶² Article 14, ECHR. Protocol No. 12 to the ECHR sets out a free-standing prohibition on discrimination, but to this date it has only been ratified by 20 out of the 47 States that are parties to the ECHR.

53. Discrimination is the act of treating persons who are in similar situations differently,¹⁶³ or a failure to treat differently persons who are in relevantly different situations, based on their identifiable characteristics or status.¹⁶⁴ In particular circumstances, a difference in treatment does not constitute discrimination only if it has an objective and reasonable justification, i.e. if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the desired aim.¹⁶⁵
54. The prohibition on discrimination applies to laws, policies, and practices by States to combat terrorism and uphold national security.¹⁶⁶ While European and international law allows States to derogate from some of their human rights obligations in particular emergencies—which can include emergencies arising from acts of terrorism—this is permitted only in certain narrowly defined circumstances as set out by law.¹⁶⁷ According to the HRCComm, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.¹⁶⁸

¹⁶³ The ECtHR interprets direct discrimination as a “difference in the treatment of persons in analogous, or relevantly similar, situations,” which is “based on an identifiable characteristic,” see: ECtHR, [“Carson and Others v. UK,”](#) Application No. 42184/05, 16 March 2010, para. 61; ECtHR, [“D.H. and Others v. the Czech Republic,”](#) Application No. 57325/00, 13 November 2007, para. 175; ECtHR, [“Burden v. UK,”](#) Application No. 13378/05, 29 April 2008, para. 60. Note that direct discrimination is defined similarly under the EU law: EU Racial Equality Directive Article 2(2) states that “direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin,” see: [“EU Racial Equality Directive,”](#) 27 November 2000, Official Journal L 180, 19/07/2000 P. 0022 – 0026. Similarly, see: [“EU Employment Equality Directive,”](#) Article 2(2)(a), 27 November 2000, Official Journal L 303, 02/12/2000 P. 0016 – 0022.

¹⁶⁴ ECtHR case law recognizes indirect discrimination, stating that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group,” see: ECtHR, [“D.H. and Others v. the Czech Republic,”](#) Application No. 57325/00, 13 November 2007, para. 184; ECtHR, [“Biao v. Denmark,”](#) Application No. 38590/10, 24 May 2016, para. 103. Similarly, Article 2(2)(b) of the EU Racial Equality Directive states that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”; See, also: EU Employment Equality Directive, Article 2(2)(b).

¹⁶⁵ See: CoE/ECtHR, [“Guide on Article 14 of the Convention \(Prohibition of Discrimination\) and on Article 1 of Protocol No. 12 \(General Prohibition of Discrimination\),”](#) 31 August 2020, para. 49. See also: ECtHR, [“Molla Sali v. Greece \[GC\],”](#) Application No. 20452/14, 19 December 2018, para. 135; ECtHR, [“Fábián v. Hungary \[GC\],”](#) Application No. 78117/13, 5 September 2017, para. 113. However, note that while the approach of the ECtHR is to operate a generally phrased defence, in the context of both direct and indirect discrimination, “EU law provides only for specific limited defences to direct discrimination, and a general defence only in the context of indirect discrimination. In other words, under the non-discrimination directives, direct discrimination will only be capable of being justified where it is in pursuit of particular aims expressly set out in those directives,” see: CoE and European Union Agency for Fundamental Rights, [“Handbook on European Non-Discrimination Law,”](#) July 2010, p. 43.

¹⁶⁶ OSF and AI, [“A Human Rights Guide for Researching Racial and Religious Discrimination in Counterterrorism in Europe,”](#) 2021, pp. 27-28.

¹⁶⁷ See: ICCPR, Article 4; ECHR, Article 15.

¹⁶⁸ HRCComm, [“CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency,”](#) 2001, CCPR/C/21/Rev.1/Add.11, para. 8.

55. Notably, the prohibition of discrimination has also been recognized as a guiding principle for the effective protection of children's rights. States, in all of their actions, must respect and ensure that all children are free from any kind of discrimination based on their or their parents' race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status.¹⁶⁹ In particular, States must take all appropriate measures to ensure that the child is protected against all forms of discrimination and punishment on the basis of their status, activities, expressed opinions, or beliefs of the child's family members and the impugned conduct of parents that may have adverse consequences on children.¹⁷⁰ In practical terms, States must take proactive measures where necessary to guarantee the principle of non-discrimination, which may require positive measures aimed at a particular group of persons in order to redress a situation of inequality.¹⁷¹
56. In light of the abovementioned legal standards, European States must ensure that respect for equality and non-discrimination is a central feature of all decisions related to the repatriation of children detained in northeast Syria.¹⁷²
57. So far, most European States have adopted a case-by-case approach regarding repatriation, based on unclear criteria regarding which children are entitled to repatriation, such as being below a certain age, being orphaned or otherwise unaccompanied, or having particularly acute medical needs (see Section I above, on Factual Background). This kind of approach results in different treatment between children in the camps based on their age, their parental and/or maternal links, and the degree of their or their parents' alleged affiliation with ISIS. This differential approach may amount to discrimination.¹⁷³ In order to ensure that their repatriation policies are not

¹⁶⁹ CRC, Article 2(1); ICCPR, Article 24(1).

¹⁷⁰ CRC, Article 2(2). See also: HRCComm, "[MMM. et al. v. Australia](#)," Communication No. 2136/2012, 2013, para. 10(4): "the detention of a minor child whose parent was deemed a security risk was arbitrary and contrary to Article 9, para. 1 of the ICCPR."

¹⁷¹ CommRC, "General Comment No. 14 (2013)," para. 41.

¹⁷² OSCE/ODIHR, "[Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework](#)," 2018, p. 62. See also the EU "[Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA](#)," 15 March 2017, which refers specifically to the general prohibition of discrimination, in particular on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion. For a guide on how to demonstrate discrimination in counter-terrorism context see: Open Society Foundations and Amnesty International, "[A Human Rights Guide for Researching Racial and Religious Discrimination in Counterterrorism in Europe](#)," 2021.

¹⁷³ CRC, Article 2. See also: Andrea Olivares Jones and Karin Frod , "[Children of Foreign Fighters: Australia's Responsibility to Repatriate](#)," 2019.

discriminatory, European States must be transparent about their decision-making criteria and explain how these measures achieve a legitimate aim and how they meet the human rights criteria of necessity, appropriateness, and proportionality in relation to that legitimate aim.

58. While European States may have legitimate national security concerns regarding the repatriation of a certain group of children, their selective repatriation will likely fail to meet the proportionality test. The rationale behind the policies favoring the repatriation of young children, mainly those who are orphans or otherwise unaccompanied, seems to be based on the assumptions that they are more “vulnerable” because they are left without a guardian or less “threatening” and more open to reintegration because they were probably subjected to less ISIS indoctrination and probably did not engage in ISIS activities. Nevertheless, the inhumane and life-threatening conditions in the camps pose a critical threat to *all* children’s right to life, security, and development. In addition, from a security perspective, it is widely acknowledged that regardless of children’s age, commitment to ISIS ideology and/or engagement in ISIS activities, failure to repatriate creates a higher security risk than not repatriating, especially where appropriate measures can be taken to facilitate rehabilitation and reintegration.¹⁷⁴ Furthermore, international law stresses that children located in conflict-affected areas who are not associated with any armed groups should not be at a disadvantage vis-à-vis those who have been associated with such groups, as they should all be considered victims (see Section II.J. on the Right of Child Victims of Armed Conflict to Reintegration and Recovery).¹⁷⁵ Thus, policies favoring the repatriation of children who appear to be the “most helpless and unthreatening” arguably establish an “arbitrary hierarchy of victimhood,”¹⁷⁶ does not seem to demonstrate a reasonable

¹⁷⁴ Both the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UNSC Special Representative for Children and Armed Conflict urged States to extend their repatriation policies to *all* children, i.e. all those under 18 years of age. The UN Special Rapporteur emphasized this to be in the interest of the children affected and in the long-term security interests of (the Belgian society and) the international community, see: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, “[Visit to Belgium](#)”, A/HRC/40/52/Add.5, May 2019, para. 84; UNSC, “[Eighth Report of the Secretary-General 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/2019/103, 1 February 2019, para. 63.

¹⁷⁵ UNICEF, “[The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#)”, 2007, para. 3(1)-3(3).

¹⁷⁶ Joana Cook and Gina Vale, “[From Daesh to 'Diaspora' II: The Challenges Posed by Women and Minors After the Fall of the Caliphate](#)”, 2019, p. 32.

relationship of proportionality between the means employed and the aim sought to be realized.

59. Finally, in justifying policies that favor the repatriation of unaccompanied children, some European States explained that this is to ensure that their parents are not given a legal avenue for repatriation.¹⁷⁷ However, as set out above, international law prohibits children from being punished, treated differently, or discriminated against because of the beliefs, activities, or status of their parents.¹⁷⁸ Therefore, State policies that do not allow for the repatriation of children with their parents—in order to punish or prevent the return of their parents—violate the principle of non-discrimination, and may amount to a form of collective punishment,¹⁷⁹ unless there is a legitimate aim and the decision is proportionate. Given that security experts agree that parents pose more of a security risk in the camps than if returned to their country of nationality,¹⁸⁰ it is difficult to see how this test could be satisfied.

D. The Right to Nationality

60. The scope of numerous European States' policies on repatriation is limited to children with confirmed nationality. Therefore, European States' obligations regarding the right to nationality are critically important for the repatriation of children detained in the camps, who are facing a significant risk of being arbitrarily precluded from obtaining, retaining, or proving their European nationality.
61. As reflected in numerous, widely ratified international treaties, everyone has the right to acquire a nationality and no one shall be arbitrarily deprived of

¹⁷⁷ For example, Sajid Javid, the former UK home secretary said that he was concerned that “bringing the children home would provide the parents with a legal argument to return to the UK,” see: The Independent, [“Children of British Isis Members Will Not Be Allowed to Return to Britain, Government Rules”](#), 13 August 2019.

¹⁷⁸ CRC, Article 2(2).

¹⁷⁹ UNCCT, [“Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach”](#), 2019, para. 52.

¹⁸⁰ Open Letter from National Security Professionals to Western Governments, [“Unless We Act Now, the Islamic State Will Rise Again”](#), 11 September 2019. Also see: OSCE/ODIHR, [“Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ within a Human Rights Framework”](#), 2018, p. 50. Meghan Benton and Natalia Banulescu-Bogdan, [“Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?”](#), Migration Policy Institute, 3 April 2019; Joana Cook and Gina Vale, [“From Daesh to ‘Diaspora’ II: The Challenges Posed by Women and Minors After the Fall of the Caliphate”](#), 2019, pp. 30-45. Note that reports indicate that a high proportion of women in the camps were either never committed to ISIS or are no longer committed, or that they do not pose an overwhelming security risk to European countries or a risk of abuse or neglect their children, see: RSI, [“Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria.”](#) 2020, para. 95.

their nationality.¹⁸¹ In principle, questions of nationality fall within the domestic jurisdiction of each State. However, States must enact their laws governing the acquisition, renunciation, or loss of nationality in a manner that is consistent with their international obligations,¹⁸² including in particular, with their human rights obligations.

62. Since nationality is a core component of children's social identity and personal development, and because the right to nationality is an enabling right to the exercise and enjoyment of other human rights, ensuring nationality from birth is critical in protecting the rights of children. International law recognizes the particular needs and vulnerability of children, provides for specific protections, and accordingly places specific obligations on States with respect to children's right to nationality.¹⁸³
63. Every child has the right to acquire and preserve their nationality.¹⁸⁴ States, in all of their actions, have an obligation to recognize the special needs and circumstances of each child for protection against arbitrary deprivation of nationality, with the best interests of the child as a primary consideration.¹⁸⁵
64. Children's right to acquire nationality obliges States to implement this right, especially where the child would otherwise be stateless. Because "being stateless as a child is generally an antithesis to the best interests of

¹⁸¹ UDHR, Article 15; ICCPR, Article 24; CEDAW, Article 9(2); European Convention on Nationality ("ECN"), Articles 4 and 6: The ECN does not use the language of "rights" but does set out rules for States Parties to follow concerning acquisition of nationality that are intended to prevent statelessness. Although the ECHR does not guarantee the right to nationality as such, the recent case law of the ECtHR shows that some aspects of this right are protected under Article 8 of the Convention, which enshrines the right to respect for private and family life. See: PACE, Resolution 2263(2019), para. 3.

¹⁸² The Permanent Court of International Justice ("PCIJ"), "[Advisory Opinion of 1923 by the Permanent Court of International Justice in the Tunis and Morocco Nationality Decrees Case](#)", 1923, PCIJ Series B, No. 4, p. 24; where the Court stresses that "[t]he question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations"; 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Articles 1 and 2; 1930, the Convention on Certain Questions Relating to the Conflict of Nationality Laws Article 15. See also: UN General Assembly ("UNGA"), "[Resolution on the Office of the United Nations High Commissioner for Refugees](#)", A/RES/50/152, 9 February 1996, para. 16 and Human Rights Council, "[Resolution on the Right to A Nationality: Women and Children](#)", A/HRC/RES/20/4, 16 July 2012, paras. 2, 9.

¹⁸³ CRC, Article 2, 7 and 8(1); ICCPR, Article 24; 1961 UN Convention on the Reduction of Statelessness, Articles 1-6; ICRMW, Article 29; CRPD, Article 18(2), ECN, Article 6. See also: HRCComm, "[General Comment No. 17: Article 24 \(Rights of the Child\)](#)", 7 April 1989, para. 8. See: UNICEF and ISI, "[The Child's Right to a Nationality and Childhood Statelessness: Texts And Materials](#)". See also: Gerard-René De Groot, "Children, Their Right to a Nationality and Child Statelessness," Nationality and Statelessness under International Law (eds. Alice Edwards, Laura van Waas), Cambridge University Press, 2014, p. 144 ff.

¹⁸⁴ Ibid. See also: OSJI/ISI, "[Principles on Deprivation of Nationality as a Security Measure](#)," 2020, Principle 9.7.1.

¹⁸⁵ Human Rights Council, "[Resolution on Human Rights and Arbitrary Deprivation of Nationality](#)", A/HRC/RES/13/2, 14 April 2010, para. 8; Human Rights Council, "[Resolution on Human Rights and Arbitrary Deprivation of Nationality](#)", A/HRC/RES/26/14, 11 July 2014, para. 8.

children,”¹⁸⁶ States have a special and positive obligation to introduce safeguards to prevent and reduce statelessness, in particular the statelessness of children.¹⁸⁷ Statelessness occurs when an individual is “not considered as a national by any State under the operation of its laws.”¹⁸⁸ The “laws,” in this regard, should be understood “broadly, to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.”¹⁸⁹ It would follow that statelessness is a “mixed question of law and fact” and can occur in several ways:¹⁹⁰ when a person cannot access (because of barriers in practice or in law) the nationality of any State, when nationality has not been formally recognized by a State, when they have been deprived of their only nationality, and when they are at risk of being rendered stateless by lacking the means to prove their nationality.¹⁹¹

65. In the context of the protection to be granted to children, especially against childhood statelessness, special attention should be paid to the fact that every child’s right to acquire a nationality begins at birth.¹⁹² States must establish their laws on nationality with a view to granting children better access to nationality and, in practical terms, take every appropriate measure, both internally and in cooperation with other States,¹⁹³ to ensure that every

¹⁸⁶ African Committee of Experts on the Rights and Welfare of the Child, “[General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality](#)”, ACERWC/GC/02, 16 April 2014, para. 86. See also: OSJI/ISI, “[Principles on Deprivation of Nationality as a Security Measure](#),” 2020, Principle 9.7.4: “It can never be in the best interest of a child to be made stateless or be deprived of nationality.”

¹⁸⁷ 1954 UN Convention Relating to the Status of Stateless Persons; 1961 Convention on the Reduction of Statelessness; 1973 Convention to Reduce the Number of Cases of Statelessness of the International Commission on Civil Status; 1990 ICRMW; 1997 ECN; 2006 CoE Convention on the Avoidance of Statelessness in Relation to State Succession; 2008 European Convention on the Adoption of Children (revised). See also: European Network on Statelessness, “[Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?](#),” Discussion Paper 09/14; UNHCR, “[Handbook on Protection of Stateless Persons](#),” 30 June 2014, para. 7 and ff.

¹⁸⁸ 1954 UN Convention Relating to the Status of Stateless Persons; 1961 Convention on the Reduction of Statelessness, Article 1(1).

¹⁸⁹ UNHCR, “[Handbook on Protection of Stateless Persons](#),” 30 June 2014, para. 22 citing on footnote 15 that “a similar approach is taken in Article 2(d) of the 1997 European Convention on Nationality”.

¹⁹⁰ *Ibid.*, paras. 22-24.

¹⁹¹ Note that “[b]eing undocumented is not the same as being stateless. However, lack of birth registration can put people at risk of statelessness as a birth certificate provides proof of where a person was born and parentage – key information needed to establish a nationality.” See: UN High Commissioner for Refugees (“UNHCR”), “[What is Statelessness?](#)”, #IBELONG The Campaign to End Statelessness by 2024, p. 1.

¹⁹² Article 6(3) of the African Charter on the Rights and Welfare of the Child, stating that “children should have a nationality beginning from birth.”

¹⁹³ See: UNGA, “[Resolution on the Office of the United Nations High Commissioner for Refugees](#)”, A/RES/61/137, 25 January 2007, para. 7; Human Rights Council, “[Resolution on Human Rights and Arbitrary Deprivation of Nationality](#)”, A/HRC/RES/26/14, 11 July 2014, paras. 8-10. HRCComm, “[General Comment No. 17: Article 24 \(Rights of the Child\)](#)”, 7 April 1989, para. 8. This may require, for example, States to exchange information on the nationality of children in order to ensure that

child acquires a nationality at birth or as soon as possible after birth,¹⁹⁴ and that no children are left stateless—or with their nationality status undetermined¹⁹⁵—for an extended period of time.¹⁹⁶ In this respect, “no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.”¹⁹⁷ Notably, the obligations imposed on States are not only applicable to the child’s country of birth, but to all countries with which a child has a link, such as through parentage.¹⁹⁸

66. Birth registration is another critical component of children’s right to acquire nationality. All children have the right to birth registration, regardless of where they were born and of their parents’ status (i.e. nationality, refugee, stateless, married).¹⁹⁹ States must take all necessary measures to ensure that all children are immediately registered at birth, are issued birth certificates, and have a proof of legal identity.²⁰⁰ Since the lack of birth registration and

a child has access to a nationality. See: CoE, Committee of Ministers, [“The Nationality of Children Recommendation CM/Rec\(2009\)13 and Explanatory Memorandum”](#), 2009/13, 9 December 2009 (7th Sitting), preamble.

¹⁹⁴ HRCComm, [“General Comment No. 17 on Article 24 Rights of the Child”](#), 7 April 1989, para. 8. Note also: “The Committee also urges the State party to undertake all measures necessary for ensuring that all children have the right, from birth and to the greatest extent possible, to know and be cared for by their parents,” see: CommRC, [“Concluding Observations: Czech Republic”](#), CRC/C/CZE/CO/3-4, 4 August 2011, para. 38.

¹⁹⁵ See: ECtHR, [“Mennesson v. France”](#), Application No. 65192/11, 26 September 2014, para. 97. HRCComm, [“Zhao v. The Netherlands”](#), CCPR/C/130/D/2918/2016, 19 October 2020.

¹⁹⁶ CRC, Articles 3 and 7. African Committee of Experts on the Rights and Welfare of the Child (ACERWC), [“Nubian Minors v. Kenya”](#), 22 March 2011, para. 29.; UNHCR, [“Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness”](#), HCR/GS/12/04, 21 December 2012.

¹⁹⁷ HRCComm, [“General Comment No. 17: Article 24 \(Rights of the Child\)”](#), 7 April 1989, para. 8.

¹⁹⁸ UN High Commissioner for Refugees (“UNHCR”), [“Expert Meeting Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children Summary Conclusions”](#), para. 5.

¹⁹⁹ UDHR, Article 6; CRC, Article 7(1); ICCPR, Article 24(2); ICRMW, Article 29; UNICEF, [“Every Child’s Birth Right: Inequities and trends in birth registration”](#), December 2013, p. 4.

²⁰⁰ Office of the UN High Commissioner for Human Rights (“OHCHR”), [“Report on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law”](#), A/HRC/27/22, 17 June 2014, para. 3-4; Human Rights Council, [“Resolution on The Right to a Nationality: Women and Children”](#), A/HRC/RES/20/4, 16 July 2012, para. 5; Human Rights Council, [“Resolution on Human Rights and Arbitrary Deprivation of Nationality”](#), 15 July 2016, A/HRC/RES/32/5, para. 11-12; CMW and CommRC, [“Joint General Comment No. 4 \(2017\) of the CMW and No. 23 \(2017\) of the CRC on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return”](#), CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, pp. 20-22. See also: UNICEF, [“Every Child’s Birth Right: Inequities and Trends in Birth Registration”](#), December 2013, p. 4; UNICEF, [“A Passport to Protection: A Guide to Birth Registration Programming”](#), December 2013; UN Department of Economic and Social Affairs, [“Principles and Recommendations for a Vital Statistics System”](#), Revision 2, Series M/19, 2001; UNHCR, [“UNHCR Action to Address Statelessness: A Strategy Note”](#), March 2010, p. 11. For birth registration as a right under customary international human rights law see: Kathryn Hampton, [“Born in the Twilight Zone: Birth Registration in Insurgent Areas”](#), International Review of the Red Cross, No. 911, August 2019.

documentary proof of birth may create a risk of statelessness or arbitrary deprivation of nationality,²⁰¹ States must remove legal and practical obstacles to birth registration²⁰² and establish effective and accessible registration systems²⁰³ that are responsive to the specific circumstances of families.²⁰⁴

67. Finally, children must not be arbitrarily deprived of their nationality. Deprivation of nationality may be considered arbitrary and/or violate international law, especially when it results in statelessness²⁰⁵ and is discriminatory on any grounds.²⁰⁶ Consequently, States must ensure that effective and appropriate remedies are available to all persons whose right to a nationality has been violated,²⁰⁷ including restoration of nationality and expedient provision of documentary proof of nationality.²⁰⁸ Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, particularly children.²⁰⁹ A child who has been illegally deprived of some or all elements of their identity must be provided with appropriate assistance and protection in order to speedily re-establish their identity.²¹⁰

²⁰¹ UNHCR, [“Quick Reference Guide - Statelessness and Human Rights Treaties”](#), p. 2;

UNHCR, [“Nationality and Statelessness: Handbook for Parliamentarians N° 22”](#), July 2014, p. 37.

²⁰² CMW and CommRC, [“Joint General Comment No. 4 \(2017\) of the CMW and No. 23 \(2017\) of the CRC on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return”](#), CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, pp. 20-22.

²⁰³ OHCHR, [“Birth Registration and the Right of Everyone to Recognition Everywhere as A Person Before the Law”](#), 17 June 2014, A/HRC/27/22, paras. 3-4; CommRC, [“General Comment No. 11 \(2009\): Indigenous Children and their Rights Under the Convention on the Rights of the Child.”](#) CRC/C/GC/11, 12 February 2009, para. 41.

²⁰⁴ CommRC, [“General Comment No. 7 \(2005\): Implementing Child Rights in Early Childhood.”](#) CRC/C/GC/7/Rev.1, 20 September 2006, para. 25.

²⁰⁵ 1961 Convention on the Reduction of Statelessness, Article 8 (1); ECN, Article 7 (3). CRC, Article 3(1); European Charter, Article 24; 1961 Convention on the Reduction of Statelessness, Article 7 and 8. See also: Human Rights Council, [“Human rights and arbitrary deprivation of nationality: Report of the Secretary-General”](#), 19 December 2013, A/HRC/25/28, para. 4; ECJ, [“Rottmann v Freistaat Bayern”](#), Case C-135/08, ECR I-01449, 2010, para. 57; Carol A. Batchelor, [“Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness”](#), *Refugee Survey Quarterly*, Volume 25, Issue 3, 2006, pp. 8-25; Brad K. Blitz, [“Statelessness, Protection and Equality”](#), Forced Migration Policy Briefing 3, Oxford Refugee Studies Centre, September 2009.

²⁰⁶ 1961 Convention on the Reduction of Statelessness, Article 9.

²⁰⁷ UDHR, Articles 8 and 10; ICCPR, Articles 2(3) and 14(1).

²⁰⁸ HRCComm, [“General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”](#), CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-19; Human Rights Council, [“The right to a nationality: women and children”](#), 16 July 2012, A/HRC/RES/20/4, para. 10. See also: OSJI/ISI, [“Principles on Deprivation of Nationality as a Security Measure”](#), 2020, Principle 9.7.1.

²⁰⁹ HRCComm, [“General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”](#), CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15.

²¹⁰ Article 8 (2) of CRC, and CRC, [“General Comment No. 11 \(2009\): Indigenous children and their rights under the Convention \[on the Rights of the Child\].”](#) 12 February 2009, CRC/C/GC/11, para. 45.

68. Currently, many children in the camps in northeast Syria who have European nationality—or whose parent(s) are European nationals—face a significant risk of being arbitrarily precluded from obtaining, retaining, or proving their European nationality, and are thus at risk of not only remaining in the camps but also becoming stateless, which constitutes a violation of European States' international legal obligations. The risk arises mainly from the two scenarios examined below: (1) children having difficulties in acquiring and/or proving their nationality; and (2) children facing a risk of being directly or indirectly stripped of their nationality.

i. Children's Right to Acquire the Nationality of their National Parent(s)

69. Many children in the camps, whose parent(s) are European nationals, have difficulties in acquiring the nationality of their parents and/or of proving the nationality that they have already acquired. Thus, they are facing a significant risk of becoming stateless.
70. European States widely follow a *jus sanguinis* tradition and have established norms that safeguard children's right to acquire the nationality of their parent(s).²¹¹ While under European and international law States following the *jus sanguinis* tradition are allowed to provide for a special procedure for children born out of wedlock and to make exceptions for children born abroad, these exceptions must be consistent with the human rights obligations explained above.²¹² This means, for example, that States cannot regulate any ground for the acquisition of nationality in a way that would result in discrimination,²¹³ such as on the basis of maternal or paternal

²¹¹ ECN, Article 6 (1-a). CoE, Committee of Ministers, [“The Nationality of Children Recommendation CM/Rec\(2009\)13 and Explanatory Memorandum”](#), 9 December 2009 (7th Sitting), Principle 1, pp. 13-14.

²¹² Ibid. The UNSG, [“Advisory Opinion of 1923 by the Permanent Court of International Justice in the Tunis and Morocco Nationality Decrees Case”](#), 1923, PCIJ Series B, No. 4, p. 24. Also see: UNHCR, [“UNHCR and De Facto Statelessness”](#), April 2010, LPPR/2010/01, p. i. See also: Gerard-René de Groot and Olivier Vonk, [“Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Ius Sanguinis and Ius Soli.”](#) Netherlands International Law Review 65, 2018, p. 323. Gerard-René de Groot and Maarten Peter Vink, [“The Relationship Between Citizenship and Residence in the Citizenship Laws of the Member States of the European Union”](#), CARIM-India Research Report 2013/25, European University Institute, 2013, p. 7.

²¹³ ECN, Article 5; CERD, Article 5; 1961 Convention on the Reduction of Statelessness, Article 9. Human Rights Council [“Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality.”](#) A/HRC/13/34, 14 December 2009, para. 3-18.

parentage²¹⁴ or based on the child being born inside or outside of marriage.²¹⁵ Most importantly, if a child would be otherwise stateless,²¹⁶ States have an obligation to grant the nationality of the parent to the child “as soon as possible,”²¹⁷ including in situations in which the child is born abroad.²¹⁸

71. Only a limited number of European States which follow the *jus sanguinis* tradition accept that a child who was born abroad to a national parent can automatically acquire nationality, i.e. by operation of law without any formal act of the executive being required, under the terms outlined in the State’s legislation on nationality.²¹⁹ Legally speaking, when nationality is acquired automatically at birth, birth registration becomes a procedural matter, tied to documentation of identity—but not a condition to acquisition of nationality, as that is automatic (although it should be noted that the process might not be that simple in practice). In many European States, however, a child who was born abroad to a national parent can acquire nationality only subsequent to birth, usually through a decision made by the relevant authorities and under certain conditions. In this regard, some European States place restrictions on the conferral of nationality by parents for specific categories of children born abroad,²²⁰ while in other European

²¹⁴ CEDAW, Article 9(2); 1961 Convention on the Reduction of Statelessness, Article 1(3). HRCComm, “[General Comment No. 28: Article 3 \(The Equality of Rights Between Men and Women\)](#)”, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 25; ECtHR, “[Genovese v. Malta](#),” Application No. 53124/09, 11 January 2012), para. 42-45.

²¹⁵ HRCComm, “[General Comment No. 17: Article 24 \(Rights of the Child\)](#)”, 7 April 1989, para. 8. See also: UNHCR, “[Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness](#)”, HCR/GS/20/05, May 2020, paras. 19-21.

²¹⁶ For more information about the concept of “otherwise stateless” see: UNHCR, “[Expert Meeting Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children Summary Conclusions](#)”, para. 12.

²¹⁷ Human Rights Council, “[Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality](#)”, A/HRC/25/28, 19 December 2013, para. 43.

²¹⁸ CRC, Article 2(2); CEDAW, Article 9(2); 1961 Convention on the Reduction of Statelessness, Article 4 (1-2). Human Rights Council, “[Resolution on the Right to a Nationality: Women and Children](#)”, A/HRC/RES/20/4, 16 July 2012; ECtHR, “[Genovese v. Malta](#),” Application No. 53124/09, 11 January 2012, para. 42-45; in which ECtHR, for the first time clearly ruled that access to nationality falls under the scope of protection of the ECHR as part of a person’s social identity, which in turn is part of that person’s private life (ECHR, Article 8). See also: Gerard-René de Groot and Olivier Vonk, “[Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Ius Sanguinis and Ius Soli](#),” *Netherlands International Law Review* 65, 2018, p. 323.

²¹⁹ These countries include Austria, Belarus, Bulgaria, Czech Republic, Estonia, France, Greece, Hungary, Italy, Lithuania, Liechtenstein, Luxembourg, Moldova, Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden, Switzerland, Ukraine. See GLOBALCIT, “[Global Database on Modes of Acquisition of Citizenship](#)”, version 1.0. San Domenico di Fiesole: Global Citizenship Observatory / Robert Schuman Centre for Advanced Studies / European University Institute, 2017; Human Rights Council, “[Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality](#)”, A/HRC/25/28, 19 December 2013, para. 29.

²²⁰ Gerard-René de Groot and Maarten Peter Vink, “[The Relationship Between Citizenship and Residence in the Citizenship Laws of the Member States of the European Union](#)”, CARIM-India Research Report 2013/25, European University Institute, 2013, p. 7; Costica Dumbrava, “[Nationality, Citizenship and](#)

States the acquisition of nationality by a child born to a national abroad is conditional on meeting additional criteria and can be granted only upon registration or declaration of the birth.²²¹ Notably, some European States have also enacted laws to make exceptions to the automatic acquisition of nationality in case of birth abroad, specifically targeting children born in conflict areas to national parents believed to be affiliated with ISIS (see Section II.C. on structural discrimination).²²² When the nationality is acquired subsequent to birth through a decision made by the relevant authorities, registration or declaration often becomes a condition of the acquisition of nationality. This means that, despite the fact that a child who was born abroad to a national parent is entitled to acquire the nationality of their parent's State of nationality, they are not recognized by that State as a national until the official birth registration procedure is completed.²²³

72. Currently, many European children detained in the camps in northern Syria face a significant risk of being arbitrarily precluded from obtaining or retaining their European nationality, leaving them at risk of becoming stateless. Some of the children born in Syria of unknown parentage have an “undetermined/unknown nationality,”²²⁴ a problem faced especially by orphaned, abandoned, or otherwise unaccompanied children.²²⁵ The situation

[Ethno-Cultural Membership. Preferential Admission Policies of EU Countries](#)”, PhD thesis, European University Institute, December 2012, p. 127; Maarten Vink, “[Citizenship Policies in the EU](#)” in eds. D. Besharov and M. Lopez, “Adjusting to a World in Motion: Trends in Migration and Migration Policy,” Oxford University Press, 2016, pp. 212-214.

²²¹ These countries include for example Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Germany, Iceland, Ireland, Kosovo, Latvia, Macedonia, Malta, Montenegro, Portugal, Russia, Serbia, Slovenia, United Kingdom, Turkey. See: Globalcit, “[Global Database on Modes of Acquisition of Citizenship](#)”, version 1.0. San Domenico di Fiesole: Global Citizenship Observatory / Robert Schuman Centre for Advanced Studies / European University Institute, 2017.

²²² For example, in Denmark, the parliament recently approved legislation which provides that children of Danish parents who are born in areas where a ‘terrorist organization’ is fighting in an armed conflict should no longer automatically become Danish citizens. See: DW, “[Denmark Approves Stripping IS Fighters of Citizenship](#)”, 24 October 2019; France 24, “[Denmark to deprive jihadists' children of citizenship](#),” 28 March 2019; Meghan Benton and Natalia Banulescu-Bogdan, “[Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?](#)”, Migration Policy Institute, 3 April 2019.

²²³ UNHCR, “[Nationality and Statelessness: Handbook for Parliamentarians N° 22](#)”, July 2014, pp. 10-11.

²²⁴ See Human Rights Committee’s first decision on the right of children to a nationality that addresses the matter of unknown nationality: HRCComm, “[Zhao v. The Netherlands](#),” CCPR/C/130/D/2918/2016, 19 October 2020, para. 8

²²⁵ For more information about the term “unaccompanied children” see: CRC, “[General Comment No. 6 \(2005\): Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#)”, CRC/GC/2005/6, 1 September 2005, para. 7-8. “More than 500 children (in the camps) are orphaned or otherwise unaccompanied.” See: RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)”, 2020, para. 17. See also: N. Houry, “[Children of the Caliphate: What to Do about Kids Born under ISIS](#)”, HRW, 23 November 2016; OCHA, “[Syria: Humanitarian Response in Al Hol Camp, Situation Report No. 4 – As of 29 May 2019](#),” OCHA, May 2019, p. 2. The subsequent OCHA report found that by mid-June 502 of these children had been identified, and 207 of them had been “reunified”; 77 were, as of June 2019, still in interim care centres

is particularly acute when the child is too young to provide information about their origins. Some of the children born abroad, on the other hand, are “unregistered children” who have failed to acquire a nationality because they cannot be registered in the camps, which, as mentioned above, is a condition for the State’s recognition of nationality. Therefore, children detained in the camps who were born in Syria face a particular risk of becoming stateless²²⁶ due to barriers to acquiring the nationality of European countries as well as to accessing birth registration and nationality in Syria.²²⁷

73. Furthermore, almost all children in the camps, including those who have acquired nationality either earlier in their country of origin or automatically by birth abroad, are currently having difficulties proving or establishing their nationality,²²⁸ because they lack official identity documents (passports, ID cards, birth certificates etc.), or they only have the documents issued by ISIS authorities, which are not recognized.²²⁹ Thus, most children in the camps are at risk of not being able to prove they have acquired nationality

waiting for family tracing and reunification. See: ICG, [“Women and Children First: Repatriating the Westerners Affiliated with ISIS”](#), Middle East Report No 208, 18 November 2019, pp. 8-9.

²²⁶ The Equal Rights Trust, [“Chapter 2: Critiquing the Categorisation of the Stateless”](#), in *Unravelling Anomaly Detention, Discrimination and the Protection Needs of Stateless Persons*, July 2010, p. 56.

²²⁷ Also note most of the children born in Syria cannot acquire the Syrian nationality either. Syrian nationality law adopts the principle of *jus sanguinis*, which holds that nationality is determined solely by the parent’s nationality and the place of birth is irrelevant. Therefore, the law does not grant nationality to children born in Syria, unless their father is a Syrian national, except in some specific circumstances, such as when a child is born to a Syrian mother and whose family relationship to his/her father has not yet been established, when a child is born in Syria to unknown parents or to parents whose nationality is unknown, or when a child is born in Syria and was not, at the time of birth, entitled to acquire a foreign nationality by virtue of his parentage. Moreover, in Syria, the safeguards against statelessness under Syrian nationality law are not systematically implemented and the existing provision only applies to children born in Syria with unknown parentage and does not include children who were born in European countries or who, at the time of birth, were entitled to acquire a foreign nationality by virtue of their parentage. See: Syrian Nationality, [“Nationality, Documentation, and Statelessness in Syria”](#); Article 3 of [“Legislative Decree 276 - Nationality Law”](#), Syrian Arab Republic, Legislative Decree 276, 24 November 1969. In any case, the burden of proof should lie with the State to establish that an individual will not be rendered stateless and that loss or deprivation can therefore proceed. Also see: UNHCR, [“Expert Meeting on Interpreting Articles 5-9 of the 1961 Statelessness Convention and Preventing Statelessness Resulting from Loss and Deprivation of Nationality”](#), Tunis, 31 October–1 November 2013.

²²⁸ “[...] they will have difficulty proving their Dutch nationality. In order to return by their own means, they will need a passport. To be considered for a passport, the child will have to prove that he or she is Dutch. [...] strictly speaking it is not impossible that those children born in Syria, Turkey and Iraq may be able to prove their nationality. However, without assistance from the Dutch authorities in supplying proof, reporting to consular services (in the surrounding countries), as far as that is in itself possible, does not seem to be worthwhile.” See: Chrisje Sandelowsky-Bosman and Ton 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”](#), *Nordic Journal of Human Rights*, Volume 38, Issue 2, 2020, p. 146.

²²⁹ UN, [“Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups”](#), April 2019, p. 3.

and are, therefore, unable to avail themselves of the protection of the State, which places them at extreme risk of statelessness.²³⁰

74. European States have an obligation towards children born abroad, to confer the nationality of their parent where they are entitled to acquire this nationality; otherwise that would constitute arbitrary deprivation of nationality, especially where it results in statelessness. Therefore, European States must take every appropriate measure, without delay and, if necessary, in cooperation with other States, to overcome the legal or practical obstacles that may impede access to the protection or assertion of nationality.²³¹ Under no circumstances, by act or omission, should States implement laws or policies that render children stateless.²³² If necessary, European States must take immediate steps to reform their nationality laws accordingly.²³³
75. There are also some practical implications of these obligations, which are critical for children detained in the camps who are facing difficulty in proving they have acquired nationality and/or in proving their “otherwise stateless” status. In this regard, when trying to establish proof of nationality or statelessness, European States must develop and implement fast, effective, flexible, and accessible identification mechanisms for children in the camps, and, when necessary, must provide resources to the relevant local administrations, request support from the international community, and seek the assistance of UN entities operating in the region.²³⁴
76. However, most European States seem unwilling to facilitate the process of identifying their child nationals and in most cases strictly require the verification of children’s nationality through DNA testing as a condition of repatriation.²³⁵ The viability of a systematic DNA test requirement,

²³⁰ For more information see: UNHCR, [“UNHCR and De Facto Statelessness”](#), LPPR/2010/01, April 2010, pp. 32-53.

²³¹ OSCE/ODIHR, [“Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ within a Human Rights Framework”](#), 2018, p. 70.

²³² UN, [“Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups”](#), April 2019, p. 4.

²³³ In particular if the law discriminates with regard to the transmission or acquisition of nationality on the basis of parents’ alleged links with ISIS, as it is the case of Denmark. See: DW, [“Denmark Approves Stripping IS Fighters of Citizenship”](#), 24 October 2019; Meghan Benton and Natalia Banulescu-Bogdan, [“Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?”](#), Migration Policy Institute, 3 April 2019.

²³⁴ UNHCR, [“Nationality and Statelessness: Handbook for Parliamentarians N° 22”](#), July 2014, p. 37 ff; CommRC, [“Concluding observations on the combined 5th and 6th periodic reports of Belgium”](#), CRC/C/BEL/CO/5-6 (80th session) 14 January - 1 February 2019, para. 50(a); UNCCT, [“Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach”](#), 2019, para. 96.

²³⁵ Vivian Yee, [“Thousands of ISIS Children Suffer in Camps as Countries Grapple With Their Fate”](#), The New York Times, 8 May 2019.

however, has been called into question given the legal obstacles, practical constraints,²³⁶ and privacy concerns.²³⁷ First and crucially, in the vast majority of cases, DNA testing is simply unnecessary and prolongs an already lengthy process of repatriation for no valid reason, since European States already have a clear idea of which of their nationals are on the ground and where they are located in the camps.²³⁸ Second, the use of DNA testing is not always conclusive if one or both parents is missing, detained, or no longer alive.²³⁹ Furthermore, a positive DNA result may be insufficient in some jurisdictions if the marriage of biological parents was not recognized by the national administration or if the father did not officially recognize the child.²⁴⁰ Third, in practice, without assistance from European States, conducting a DNA test in the camps is extremely difficult, if not impossible, due to the lack of resources, while most European governments remain reluctant to provide consular assistance or send officials to the camps to collect DNA samples for legal, political, and safety reasons (see Section II.E. on Right to Access to Consular Assistance).²⁴¹

77. In addition, access to effective remedies relating to the right to nationality often relies on providing proof of personal identification, a task frequently hampered by the effects of deprivation of nationality.²⁴² Therefore, especially in the context of children without documentation of identity, States must not place unreasonable demands on children and expect them to

²³⁶ For an analysis about possible legal obstacles and practical limitations of DNA testing see: Peter Gunn, [“No, Mr Dutton, DNA Testing ISIS Brides Won’t Tell You Who’s an Australian Citizen”](#), The Conversation, 24 October 2019.

²³⁷ The DNA testing requirement without proper safeguards may violate a child’s right to privacy (Article 16 of CRC). For more information see: UNCCT, [“Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach”](#), 2019, para. 99.

²³⁸ Center for Global Policy, [“The Children of ISIS Detainees: Europe’s Dilemma”](#), 2020, p. 12.

²³⁹ Laura van Waas, [“The Children of Irregular Migrants: A Stateless Generation?”](#), Netherlands Quarterly of Human Rights, Volume 25, Issue 3, 2007, pp. 437-458; Letta Tayler, [“Western Europe Must Repatriate Its ISIS Fighters and Families”](#), Al Jazeera, 21 June 2019.

²⁴⁰ Thomas Renard and Rik Coolsaet, [“Children in the Levant: Insights from Belgium on the Dilemmas of Repatriation and the Challenges of Reintegration”](#), Security Policy Brief No. 98, Egmont Royal Institute for International Relations, 11 July 2018, p. 5.

²⁴¹ Although, note that in December 2020, the Belgian Government has decided to send a team of doctors to take DNA samples from four children in the al-Hol camp, following a decision of the Brussels Court of Appeal. This has been interpreted as a possible turning point in the government’s policy on the repatriation of Belgian children detained in the camps. See: Colin Miller, [“Belgium will take DNA from children in Syrian camp”](#), Netherland News Live, December 2020; De Morgen, [“België gaat DNA afnemen van kinderen in Syrisch kamp”](#), 2 January 2021. Also note that Russia for example, has already collected DNA samples of at least 49 orphan children to establish their nationality in 2019: The Moscow Times, [“Russia Tests ISIS Orphans’ DNA Ahead of Repatriation”](#), 14 November 2019.

²⁴² Human Rights Council, [“Report of the Secretary-General on Arbitrary Deprivation of Nationality”](#), A/HRC/10/34, 26 January 2009, para. 59.

meet burdensome administrative requirements to acquire a nationality.²⁴³ The highly burdensome DNA requirement in itself is an unreasonably high threshold of evidence and requiring it runs against the protective mandate States have over the best interest of the child, creating a policy that is virtually impossible for individuals in the camp to meet, thus making any legal protection practically inexistent. The UN High Commissioner for Refugees (“UNHCR”), in establishing guidelines for the protection of stateless populations, has delineated an obligation by States “to consider all available evidence, oral and written, regarding an individual’s claim,”²⁴⁴ and underlined that special consideration is needed in situations that require shifting the burden of proof to the party with access to said evidence. Generally in the case of statelessness determination “the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts.”²⁴⁵ Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence, let alone DNA evidence. This applies to both the process of repatriating the children from the camps and the process of determining their parentage, where the applicant has a duty to be “truthful and to submit all evidence reasonably available,”²⁴⁶ but where securing a DNA test is an unsurmountable task. UNHCR has noted that “further flexibility is also warranted where it is difficult for individuals to obtain documents,”²⁴⁷ advising States to adopt a “reasonable” standard of proof, as required in refugee status determination.²⁴⁸

78. Therefore, European States should lower their standard of evidence of nationality and adopt flexible rules of evidence.²⁴⁹ European States should,

²⁴³ HRCComm, “[X.H.L. v. Netherlands](#),” Views on Communication No. 1564/07, CCPR/C102/D/1564/2007, 22 July 2011, para. 10.2.

²⁴⁴ UNHCR, “[Handbook on Protection of Stateless Persons](#),” 30 June 2014, para. 87.

²⁴⁵ *Ibid.*, para. 89.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*, para. 91.

²⁴⁹ Note that sometimes a country may be willing to lower its standard of evidence for proving nationality, e.g. in the context of a readmission agreement with another country, see: “List of Documents for Indirect Evidence of Nationality” in Annex 3 to the 2006 Agreement between the European Community and the Russian Federation on Readmission, cited in UNHCR, “[Handbook on Protection of Stateless Persons](#),” 30 June 2014, footnote 163. Also note that: “Definite proof of nationality, which frequently cannot be supplied by the requesting state, or only at disproportionately high cost, cannot be demanded, as this would constitute a frustration of the state’s obligation to admit. As a result, a state is not permitted to refuse the readmission of persons, whose nationality has been substantiated, for purely formal reasons,” see: Kay Hailbronner, “[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#),” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Heidelberg Journal of International Law, Volume 57, Issue 1, 1997, pp. 14-15. See, also:

prima facie, consider the children to be nationals,²⁵⁰ considering the particular circumstances in the detention camps that make it nearly impossible for detainees to provide evidence of nationality and the fact that prolonging an already lengthy process of repatriation would pose a critical threat to children's right to life, security, and development.²⁵¹ Accordingly, States must allow the children and their primary caregivers to provide witness testimony and various sources of documentary evidence to prove their nationality,²⁵² including documents issued by ISIS or other non-state actors.²⁵³ European States, therefore, should not resort to DNA testing unless it is strictly necessary, for example if there is no other way to prove nationality. In cases where DNA testing is strictly necessary, European States should remove physical and practical barriers to access such testing²⁵⁴ with the aim of ensuring the DNA test option is accessible for all children in the camps who claim the nationality of a European State. In particular, the DNA testing requirement should not be used as a pretext to hinder the repatriation of children. Finally, if implementing DNA testing, States should

UNSC, "[Resolution 2331 \(2016\) on Trafficking in Persons in Armed Conflicts](#)", S/RES/2331(2016), 20 December 2016, para. 3(b); CMW and CommRC, "[Joint General Comment No. 4 \(2017\) of the CMW and No. 23 \(2017\) of the CRC on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return](#)", CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 22; UNCCT, "[Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach](#)", 2019, para. 99.

²⁵⁰ In its assessment, the First Instance Court in Brussels has taken into account the particularly difficult context in which Mrs. X finds herself (armed conflict, situation of detention in the camp) and the impossibility with which she is confronted to bring the elements of proof generally required to establish the link between her and, Y and Z (her children); and based on the factual elements the Court considered Y and Z prima facie Mrs X's children, i.e. Belgian nationals. See: Ordonnance, 19/129/C (Tribunal de première instance francophone de Bruxelles, Section civile) 30 October 2019, Section 5, p. 13.

²⁵¹ CRC, Article 6. See also: ECtHR, "[Menesson v. France](#)", Application No. 65192/11, 26 June 2014, para. 97, in which the ECtHR stated that children whose legal relationship with their parent is not established "face a worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code [...] That uncertainty is liable to have negative repercussions on the definition of their personal identity."

²⁵² See, for example: Mr. Bernard De Vos and Mr. Vanobbergen Bruno, "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)", Kinderrechtencommissariaat and Délégué Général aux Droits de L'Enfant, p. 3: "[...] it is necessary that Belgium [...] grant systematic passes for all children. The issue about the identification of the Belgian nationality cannot be a brake to repatriate the children. And if a DNA test is necessary, it can be supported by a cluster of clues, collected over there (and maybe in Belgium) such as photos, videos, exchange of letters, special physical signs and other administrative documents. And it cannot be a financial barrier."

²⁵³ UNCCT, "[Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach](#)", 2019, para. 96.

²⁵⁴ *Ibid.*, para. 104.

also make sure that the best interests of the children and their right to privacy are respected.²⁵⁵

ii. Revocation of Nationality of Parents and/or Children

79. Revocation of nationality is an extreme measure for individuals and those around them, because it directly and indirectly interferes with the enjoyment of a broad range of rights and significantly hampers individuals' ability to claim and secure their rights.²⁵⁶ Therefore, it can be used only in the most exceptional circumstances and, accordingly, is subject to strict limits.²⁵⁷
80. Under international law, revocation of nationality is permitted only on limited and specific grounds, including when individuals have conducted themselves in a manner seriously prejudicial to the vital interests of the state.²⁵⁸ While the term "vital interests" is sometimes constructed broadly as covering threats to national security,²⁵⁹ as a rule, States shall not deprive persons of nationality for the purpose of safeguarding national security.²⁶⁰ Any exception to this rule should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, proving that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state.²⁶¹ The exercise of this narrow exception to deprive a person of nationality is further limited by other standards of international law, including the avoidance of statelessness; the prohibition of discrimination; the rights to a fair trial, remedy, and reparation; and the prohibition of arbitrary deprivation of nationality.²⁶²

²⁵⁵ Ibid, para. 99. See also: Jonny Taitz, Jacqueline Weekers and Davide T. Mosca, "[The Last Resort: Exploring the Use of DNA Testing for Family Reunification](#)," Health and Human Rights, Volume 6, Issue 1, 2002, pp. 20-32.

²⁵⁶ See: Helen Duffy "[Foreign Terrorist Fighters: A Human Rights Approach?](#)", Security and Human Rights Volume 29, Issue 1-4, 2018, p. 149; OSCE/ODIHR, "[Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework](#)", 2018, p. 48. A detailed report of the impact of deprivation of nationality on the enjoyment of human rights is contained in Human Rights Council, "[Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality](#)," A/HRC/19/43, 19 December 2011.

²⁵⁷ Helen Duffy "[Foreign Terrorist Fighters: A Human Rights Approach?](#)", 2018, p. 149.

²⁵⁸ For more information on various grounds for loss or deprivation of nationality see: *ibid.* and Human Rights Council, "[Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality](#)", 19 December 2013, A/HRC/25/28, para. 7-12. See also: UNHCR, "[Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness](#)", HCR/GS/20/05, May 2020.

²⁵⁹ Jules Lepoutre, "[Citizenship Loss and Deprivation in the European Union \(27 + 1\)](#)", EUI Working Paper RSCAS2020/29, May 2020.

²⁶⁰ OSJI/ISI, "[Principles on Deprivation of Nationality as a Security Measure](#)", 2020, Principle 4.1.

²⁶¹ *Ibid*, Principle 4.3.

²⁶² *Ibid*, Principle 4.3.

81. In order to not be considered arbitrary, any kind of involuntary loss or deprivation of nationality²⁶³ must serve a legitimate purpose that is consistent with the objectives of international human rights law,²⁶⁴ must have a clear basis in law, be necessary, proportionate to the interest to be protected,²⁶⁵ and follow due process.²⁶⁶ In particular, when assessing the proportionality of a measure entailing the revocation of nationality, States must consider whether loss or deprivation of nationality is proportionate to the interest to be protected by the loss or deprivation (e.g. national security) and must consider alternative measures that could be adopted.
82. The deprivation of nationality may be considered arbitrary and/or violate international law when it results in statelessness—in law or in fact²⁶⁷—and is discriminatory on any grounds.²⁶⁸ Notably, where safeguards to prevent loss or deprivation of nationality leading to statelessness are present, individuals with dual or multiple nationalities are more vulnerable to loss or deprivation than those with a single nationality, which may cause a discriminatory effect between individuals with single and dual nationality.²⁶⁹ Similarly, nationality acquired by naturalization is often less secure than one acquired

²⁶³ Human Rights Council, [“Report of Secretary-General on Human Rights and Arbitrary Deprivation of Nationality.”](#) A/HRC/13/34, 14 December 2009, para. 23.

²⁶⁴ International law allows States to revoke nationality only on very specific grounds, such as when individuals have conducted themselves in a manner “seriously prejudicial to the vital interests of the state”. See: Human Rights Council, [“Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality.”](#) A/HRC/13/34, 14 December 2009, para. 25; Human Rights Council, [“Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality.”](#) A/HRC/25/28, 19 December 2013, para. 4. For the European Court of Justice (“ECJ”) cases related to the loss of the nationality of an EU Member State, see: ECJ, [“Rottmann v Freistaat Bayern”](#), Case C-135/08, 2010, para. 56; ECJ, [“Tjebbes and Others v. Minister van Buitenlandse Zaken Tjebbes”](#) Case C-221/17, 2019. For ECtHR cases related to the arbitrary denial or revocation of citizenship that raises an issue under Article 8 of the Convention see: ECtHR, [“K2 v. the United Kingdom.”](#) Application No. 42387/13, 7 February 2017 (decision on the admissibility); ECtHR, [“Ramadan v. Malta”](#), Application No. 76136/12, 17 October 2016.

²⁶⁵ Human Rights Council, [“Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality.”](#) A/HRC/13/34, 14 December 2009, para. 25; Human Rights Council, [“Resolution on Human Rights and Arbitrary Deprivation of Nationality”](#), 15 July 2016, A/HRC/RES/32/5, para. 16; ECtHR, [“Karashev and Family v. Finland”](#), Application No. 31414/96, 12 January 1999; ECJ, [“Rottmann v Freistaat Bayern”](#), Case C-135/08, ECR I-01449, 2010, para. 57.

²⁶⁶ OSJI/ISI, [“Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure.”](#) 2020, p. 7.

²⁶⁷ 1961 Convention on the Reduction of Statelessness, Article 8 (1); ECN, Article 7 (3). CRC, Article 3(1); European Charter, Article 24; 1961 Convention on the Reduction of Statelessness, Article 7 and 8. See also: Human Rights Council, [“Human rights and arbitrary deprivation of nationality: Report of the Secretary-General”](#), 19 December 2013, A/HRC/25/28, para. 4; ECJ, [“Rottmann v Freistaat Bayern”](#), Case C-135/08, ECR I-01449, 2010, para. 57.

²⁶⁸ 1961 Convention on the Reduction of Statelessness, Article 9.

²⁶⁹ Human Rights Council, [“Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General”](#), 19 December 2013, A/HRC/25/28, para. 6. See also: OSJI/ISI, [Principles on Deprivation of Nationality as a Security Measure](#), 2020, Introduction, p. 3.

- by birth;²⁷⁰ therefore differentiation between nationals by birth and nationals by naturalization in domestic laws may lead to a violation of the non-discrimination principle.²⁷¹
83. The number and range of grounds for involuntary loss and deprivation of nationality vary significantly from one State to another across Europe.²⁷² Worryingly, in the past few years, a significant number of European States have introduced and/or expanded their rules on revocation of nationality. Most of them now consider offenses against national security, including terrorism-related crimes, as legitimate grounds for deprivation of nationality,²⁷³ and some of the new laws lack safeguards against statelessness or fail to maintain equality among nationals.²⁷⁴
84. European States' practice of revoking—as a national security measure—the nationality of individuals believed to be affiliated with ISIS is likely to be arbitrary and can result in statelessness.²⁷⁵ In addition, it disproportionately

²⁷⁰ Human Rights Council, [“Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality”](#), A/HRC/25/28, 19 December 2013, para. 6.

²⁷¹ Note that Article 5(2) of the European Convention on Nationality. “Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.”

²⁷² For more information see: Jules Lepoutre, [“Citizenship Loss and Deprivation in the European Union \(27 + 1\)”](#), EUI Working Paper RSCAS2020/29, May 2020.

²⁷³ See: Alessandra Spadaro, [“Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?”](#), Cambridge University Press, 26 November 2020, p. 264. For further information, see: Center for Global Policy, [“The Children of ISIS Detainees: Europe’s Dilemma”](#), 2020, p. 12; Thomas Renard and Rik Coolsaet, [“From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria, One Year After the Turkish Offensive”](#), 2020, p. 6; Meghan Benton and Natalia Banulescu-Bogdan, [“Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?”](#), Migration Policy Institute, 3 April 2019; Maarten P. Bolhuis and Joris van Wijk, [“Citizenship Deprivation as a Counterterrorism Measure in Europe: Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism”](#), European Journal of Migration and Law 22, 2020, p. 338–365. Jules Lepoutre, [“Citizenship Loss and Deprivation in the European Union \(27 + 1\)”](#), EUI Working Paper RSCAS2020/29, May 2020, p. 8. For illustrative purposes, see Denmark: DW, [“Denmark Approves Stripping IS Fighters of Citizenship”](#), 24 October 2019; The Defense Post, [“Denmark Strips 2 ISIS Adherents of Citizenship Under New Law”](#), 26 November 2020. See The Netherlands: Nationaal Coördinator Terrorisbestrijding en Veiligheid [“Rapportage Integrale Aanpak Terrorisme”](#), 18 April 2019; Tom Land Boekestein and Gerard-René de Groot, [“Discussing the Human Rights Limits on Loss of Citizenship: a Normative-Legal Perspective on Egalitarian Arguments Regarding Dutch Nationality Laws Targeting Dutch-Moroccans”](#) Citizenship Studies, Volume 23, Issue 4, 2019, p. 323. See the UK: The Guardian, [“Red Cross Criticises UK For Stripping Isis Recruits Of Citizenship”](#), 30 November 2019; The Independent, [“Ministers Refuse to Reveal How Many Extremists They Have Stripped of British Citizenship”](#), 9 February 2020. See Germany: Guy Chazanm [“Germany to Strip Dual-Nationals Who Fight for Isis of Citizenship”](#), Financial Times, 4 March 2019.

²⁷⁴ Between naturalized citizens and birth right citizens; or between people with dual and single citizenship. For example, “because of concerns over statelessness, most countries differentiate between dual/naturalized citizens and citizens by birth. But in some cases, new policies have pushed the bounds of international law. The UK expanded the scope of its existing laws on revoking citizenship to allow them to be applied even if individuals are made stateless, provided they have a reasonable chance of acquiring citizenship elsewhere.” See: Meghan Benton and Natalia Banulescu-Bogdan, [“Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?”](#), Migration Policy Institute, 3 April 2019.

²⁷⁵ OSJI/ISI, [Principles on Deprivation of Nationality as a Security Measure](#), 2020, Introduction, p. 2.

targets those of minority and migrant heritage and, therefore, is likely to be discriminatory on grounds such as race, ethnicity, religion, political or other opinion, and national origin.²⁷⁶ There is also no evidence to support the use of such measures as an effective means of protecting national security, and there is growing concern that such actions may actually be counterproductive.²⁷⁷ Moreover, there are significant concerns related to the permanent nature of deprivation of nationality, its disproportionate impact on individuals, families, and communities, and the detrimental impact on other fundamental human rights.²⁷⁸ In particular, blanket provisions in European States' legislation constitute arbitrary deprivation of nationality because the proportionality and necessity of deprivation of nationality must be assessed on a case-by-case basis, taking into consideration the risk of statelessness, the principle of non-discrimination, the right to a fair trial, and other international legal standards.²⁷⁹ In addition, international law clearly prohibits States from depriving an individual of nationality so as to arbitrarily prevent their return;²⁸⁰ and European governments have made no secret of their intention to prevent their nationals from returning to Europe by depriving them of their nationality,²⁸¹ and of "using revocation as a modern form of exile or banishment"²⁸² Finally, the practice of revocation of nationality as a national security measure, in particular when coupled with the refusal to repatriate and the imposition of entry bans, runs counter to the States' duty to cooperate with each other and to act responsibly and in accordance with international law to maintain international peace and security and to promote and encourage respect for human rights and

²⁷⁶ Ibid.

²⁷⁷ Ibid.; OSCE/ODIHR, "[Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework](#)", 2018, pp. 50-51. Meghan Benton and Natalia Banulescu-Bogdan, "[Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?](#)", Migration Policy Institute, 3 April 2019.

²⁷⁸ OSJI/ISI, [Principles on Deprivation of Nationality as a Security Measure](#), 2020, Introduction, p. 2.

²⁷⁹ Ibid., Principle 4.3; OSCE/ODIHR, "[Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework](#)", 2018, pp. 49-51; Involuntary Loss of European Citizenship (ILEC), "[Guidelines Involuntary Loss of European Citizenship](#)", 2015, p. 4.

²⁸⁰ HRCComm, "[General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", CCPR/C/21/Rev.1/Add.9, 1 November 1999, para. 21.

²⁸¹ Meghan Benton and Natalia Banulescu-Bogdan, "[Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?](#)", Migration Policy Institute, 3 April 2019. For example, Prime Minister of Denmark clearly stated that this piece of legislation was meant to target disloyal citizens who "are unwanted in Denmark" and that "[t]he government will therefore do everything possible, to prevent them from returning to Denmark," see: Reuters, "[Denmark to Strip Foreign Fighters of Danish Citizenship](#)," 14 October 2019.

²⁸² Jules Lepoutre, "[Citizenship Loss and Deprivation in the European Union \(27 + 1\)](#)", EUI Working Paper RSCAS2020/29, May 2020, p. 8; Audrey Macklin, "[The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?](#)" in "Debating Transformations of National Citizenship, IMISCOE Research Series," Bauböck R. (eds). Springer, 2018, p. 172.

fundamental freedoms, which can result in the “exporting” of a problem for other States to deal with.²⁸³

85. European children detained in the camps are affected by these measures in different ways. In some jurisdictions, the effect is direct, as when children are themselves targeted for revocation of nationality on the grounds that they are believed to be affiliated with ISIS. Sometimes, children are affected indirectly, as when their parents or other family members are stripped of their nationality.

a) Revocation of Children’s Nationality

86. While much of the European legislation extending nationality revocation to cases of terrorism-related activities targets adults, some States have also extended their legislation to include the revocation of nationality from children believed to be affiliated with a terrorist organization.²⁸⁴

87. Legislation aimed at revoking the nationality of children allegedly affiliated with ISIS clearly violates international law.²⁸⁵ The revocation of nationality is never in the best interests of a child²⁸⁶ and is particularly harmful when it results in statelessness, which is “an antithesis to the best interests of children.”²⁸⁷ But even when it does not result in statelessness, revocation of nationality can cause economic, emotional, social, and immigration consequences and can have a profound impact on children’s future and the protection of their rights.²⁸⁸ Further, automatically depriving children of nationality due to their alleged affiliation with a terrorist group—instead of

²⁸³ OSJI/ISI, “[Principles on Deprivation of Nationality as a Security Measure](#),” 2020, Introduction, p. 2.

²⁸⁴ For example, The Netherlands extended its law in 2015 to denationalize “individuals above the age of 16 whose conduct indicates that they have joined a terrorist organization while residing outside the Netherlands”. See: Tom L. Boekestein and Gerard-René de Groot, “[Discussing the Human Rights Limits on Loss of Citizenship: a Normative-Legal Perspective on Egalitarian Arguments Regarding Dutch Nationality Laws Targeting Dutch-Moroccans](#),” *Citizenship Studies*, 23(4), 2019, p. 323; Jules Lepoutre, “[Citizenship Loss and Deprivation in the European Union \(27 + 1\)](#)”, EUI Working Paper RSCAS2020/29, May 2020, p. 9. Some European States have also sought to strip the nationality of individuals who were themselves children when they joined ISIS. See for the example of Shamina Begum in the UK: Meghan Benton and Natalia Banulescu-Bogdan, “[Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?](#)”, Migration Policy Institute, 3 April 2019.

²⁸⁵ The CoE Parliamentary Assembly also called on the member States of the Council of Europe to refrain from depriving minors of their nationality, see: PACE, “[Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?](#)”, Parliamentary Assembly Resolution 2263 (2019), para. 9(8).

²⁸⁶ OSJI/ISI, [Principles on Deprivation of Nationality as a Security Measure](#), 2020, Principle 9.7.4.

²⁸⁷ African Committee of Experts on the Rights and Welfare of the Child, “[General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality](#)”, ACERWC/GC/02, 16 April 2014, para. 86.

²⁸⁸ See: OSCE/ODIHR, “[Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ within a Human Rights Framework](#)”, 2018, pp. 70-71; Interregional Crime and Justice Research Institute, “[Report on Children and Counter-Terrorism](#)”, 2016, p. 42.

engaging in a case-by-case analysis—runs contrary to the necessity and proportionality requirement.²⁸⁹ Besides the fact that this strategy is ineffective, revocation may also have additional security implications, because children without a nationality are more at risk of being exploited by or recruited by terrorist groups.²⁹⁰ In the necessity and proportionality analysis, special attention should be also paid to the fact that children who have been recruited or used by armed groups, such as ISIS, must be considered primarily as victims (see section *The Right of Child Victims of Armed Conflict to Reintegration and Recovery*). Therefore, simply being suspected of being affiliated with ISIS cannot be grounds for the revocation of children's nationality.²⁹¹

b) Extension of Parent's Revocation of Nationality to their Children

88. Extending the revocation of nationality of a parent who is believed to be affiliated with a terrorist organization to their children is also not in the best interest of the child and is therefore prohibited.²⁹² International law recognizes the independent nationality rights of children,²⁹³ and requires that children must be protected from “all forms of discrimination or punishment” based on the occupation, activities, views or beliefs of their parents, and the conduct of parents should have no adverse consequences on children.²⁹⁴ Therefore, States must refrain from extending the loss or deprivation of nationality to a person's children,²⁹⁵ even when the ground for the parent's revocation is “conduct seriously prejudicial to the vital interests of the State.”²⁹⁶

²⁸⁹ UNCCT, [“Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach”](#), 2019, para. 94.

²⁹⁰ *Ibid.*, para. 84.

²⁹¹ Note that this element is also relevant regarding the stripping of nationality of individuals who were children when they joined ISIS.

²⁹² OSJI/ISI, [“Principles on Deprivation of Nationality as a Security Measure,”](#) 2020, para. 9.7.3.

²⁹³ CRC, Article 8.

²⁹⁴ CRC, Article 2(2). See also: OSJI/ISI, [“Principles on Deprivation of Nationality as a Security Measure,”](#) 2020, Principle 9.7.5.

²⁹⁵ Human Rights Council, [“Resolution on Human Rights and Arbitrary Deprivation of Nationality”](#), A/HRC/RES/32/5, 15 July 2016, para.17; ILEC, [“Guidelines Involuntary Loss of European Citizenship”](#), 2015, Article 6(e).

²⁹⁶ The ECN actually allows the extension of revocation of nationality to children in cases when the ground for the deprivation is a ‘conduct seriously prejudicial to the vital interests of the State’ or ‘voluntary service in a foreign military force’, unless one of their parents retains the nationality. Yet, the Explanatory Report to the Convention stresses that these are not possible grounds to extend the deprivation to the children, especially because ‘the impugned conduct of parents should have no adverse consequences on children’ and best interest of the children should be a primary consideration. See CoE, [“Explanatory Report to the European Convention on Nationality,”](#) European Treaty Series - No. 166, 6.XI.1997, p. 75.

89. Even if the revocation of nationality of a parent does not extend to their children under the domestic legislation of the State concerned, any decision on the revocation of parents' nationality should also take into account the impact on any children involved.²⁹⁷ Deprivation of nationality is an extreme measure for the individuals targeted and especially for any children associated with them.²⁹⁸ The best interests of the child must be the primary consideration in all proceedings affecting the nationality of children, including in any possible nationality proceeding against their parents.²⁹⁹ Indeed, at the very least, the revocation of nationality of a parent may result in less secure legal status and a higher risk of statelessness for their children, including those born after the deprivation. This may render the revocation of nationality, on otherwise lawful grounds, nonetheless unlawful or arbitrary.³⁰⁰ Even where the parent is in possession of another nationality or may be able to acquire another nationality, the loss of nationality may render children stateless in case of birth after the loss of nationality.

E. The Right to Access Consular Assistance

90. The possibility of repatriation of European children and their primary caregivers detained in the camps is contingent on the provision of consular services.³⁰¹ Considering the current situation in the camps, if European States do not provide consular assistance, there is, in practice, no real way for most of the children to acquire or prove their nationality, to get their travel documents, return to their own countries, or to contest their arbitrary

²⁹⁷ OSCE/ODIHR, [“Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters’ within a Human Rights Framework”](#), 2018, p. 70.

²⁹⁸ Helen Duffy [“Foreign Terrorist Fighters”: A Human Rights Approach?](#), 2018, p. 149 ff. See also: CommRC, [“Concluding Observations: Australia”](#), CRC/C/15/Add.79, 21 October 1997, para. 14 and 30, expressing concern that in some instances children can be deprived of their citizenship in situations in which one of their parents loses his or her citizenship; and recommends States that no child be deprived of his/her citizenship on any ground, regardless of the status of his/her parent(s).

²⁹⁹ 1961 Convention on the Reduction of Statelessness; ISI/OSJI, [“Principles on Deprivation of Nationality as a Security Measure”](#), 2020, Principle 9.7.3, p. 15; UNHCR, [“Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness”](#), HCR/GS/20/05, May 2020.

³⁰⁰ Andrea Olivares Jones and Karin Frod , [“Children of Foreign Fighters: Australia’s Responsibility to Repatriate”](#), Castan Centre in Australia, 20 November 2019. See also, for example: Samantha Maiden, [“Kids of Jihadi Bride Zehra Duman May Have Lost Right to Claim Australian Citizenship”](#), The New Daily, 9 October 2019.

³⁰¹ UNSG, [“Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups”](#), April 2019, p. 3.

detention, inhuman and degrading conditions of confinement, and other human rights violations they are being subjected to.³⁰²

91. However, most European States' official position is that they are not legally obliged to provide consular assistance to their nationals detained in northern Syria, arguing that they are free to determine the scope of their own national consular assistance.³⁰³ Some States, on the other hand, contextualize their reluctance to repatriate their citizens by citing the lack of consular presence in Syria³⁰⁴ and offer consular assistance only when their nationals present themselves at embassies or consulates in different regions.³⁰⁵ Since 2012, the region where the al-Hol and al-Roj camps are located has been autonomously controlled and enjoys no official diplomatic recognition.³⁰⁶ Many European States have cut off diplomatic relations with Syria and have no embassy or consulate in the country. However, European States still have the ability to provide consular assistance to their nationals detained in northern Syria through the embassies/consulates located in neighboring countries as well as by collaborating with NGOs that have access to the camps, as evidenced by the successful repatriation of several children and women.³⁰⁷

³⁰² A significant number of European children need to receive consular assistance not only to be repatriated but also to establish their nationality and get issued with their identity and travel documents, and avoid becoming stateless.

³⁰³ See, for example: The National News, "[Denmark Announces End to Consular Assistance for Its Extremist Fighters](#)", Arthur Scott-Geddes, 18 November 2019. In 2018, Belgium modified its law on consular assistance, which emphasizes that "consular assistance will be refused to a Belgian who would decide to contravene a travel advisory of the Ministry of Foreign Affairs, travel to a warzone or take disproportionate risks without taking the necessary insurance." See: Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, "[Approval of a Draft Law on Consular Assistance to Belgians Abroad](#)", 12 January 2018.

³⁰⁴ Rights Watch UK, "[European Women and Children in Syria – Factual and Legal Briefing](#)", 7 November 2019, para. 6.

³⁰⁵ However, for example a Dutch woman who managed to escape from Al Hol, was stripped of her nationality after seeking consular assistance at the embassy in Ankara. See: NL Times, "[Two Dutch ISIS Women, Three Children Escaped Syrian Camp, Fled to Turkey](#)", 1 November 2019; Tanya Mehra, "[European Countries Are Being Challenged in Court to Repatriate Their Foreign Fighters and Families](#)", 7 November 2019; Rights Watch UK, "[European Women and Children in Syria – Factual and Legal Briefing](#)", 7 November 2019, footnote 12.

³⁰⁶ RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)", 2020, para. 16.

³⁰⁷ This was also the finding of the Tribunal of First Instance of Brussels in regard to the Belgian State's obligation to repatriate two children detained in Syria together with their primary caregiver. See: Ordonnance, 19/129/C (Tribunal de première instance francophone de Bruxelles, Section civile) 30 October 2019; Arrêt, 2019/KR/60 (Cour d'appel Bruxelles, 18, chambre affaires civiles) 5 March 2020, Section 4, cited in: Alessandra Spadaro, "[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#)", Cambridge University Press, 2020, p. 253.

92. Consular assistance³⁰⁸ is a tool to ensure that the rights of nationals abroad are protected, which has a preventive function.³⁰⁹ Consular assistance refers to various kinds of help, advice, and support that diplomatic agents of a State provide to its nationals abroad, especially when nationals face hardship and need to obtain appropriate assistance.³¹⁰ It may include: providing information, arranging for legal representation, issuing emergency identity or travel documents, protecting the interests of children or others with limited capacity, and repatriating distressed citizens.³¹¹ Regarding detention, consular assistance also involves provision of certain rights:³¹² when a national is arrested or detained abroad, they must be advised of their right to have their consulate notified without delay and have a right to regular consultation with consular officials during detention.³¹³
93. States' obligation to provide consular assistance, and therefore citizens' right to receive consular assistance, can arise from domestic law, regional law, and international law.

³⁰⁸ Note that “[Diplomatic protection] differs from consular assistance in that it is conducted by representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interest of the individual, acting in accordance with the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed, while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.” See: ILC, [“The Report of the International Law Commission on the Work of its 58th Session A/61/10, Chapter IV \(2006\): Draft Articles on Diplomatic Protection and Commentaries, adopted by the ILC on Second Reading”](#), Commentary to Article 1, p. 28, para. 9. For further information on the distinction between diplomatic protection and consular assistance, see: Annemarieke Vermeer-Künzli, [“Exercising Diplomatic Protection, the Fine Line Between Litigation, Demarches and Consular Assistance”](#), Journal for Comparative Public Law and International Law ZaöRV, Volume 66, 2006, pp. 321-350.

³⁰⁹ Vienna Conventions on Diplomatic and on Consular Relations (“VCCR”), 24 April 1963, Article 5(a) and (e); Citizens Consular Assistance Regulation in Europe (CARE) Project, [“Consular and Diplomatic Protection. Legal Framework in EU Member States”](#), 2010, p. 10.

³¹⁰ Sanna Mustasaari, [“Finnish Children or Cubs of the Caliphate: Jurisdiction and State Response-Ability in Human Rights Law, Private International Law and the Finnish Child Welfare Act”](#), Oslo Law Review, 2020, p. 32.

³¹¹ ILC, [“Draft Articles on Consular Relations, with Commentaries.”](#) Yearbook of the International Law Commission (1961) vol. II, commentary to Article 5 on “Consular Functions”. For example: EU, [“Council Directive \(EU\) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing”](#), Decision 95/553/EC, Article 9.

³¹² International Bar Association Human Rights Institute [“A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk”](#), drafted by the Honourable Professor Irwin Cotler, 16 November 2020, p. 49.

³¹³ VCCR, Article 36(b)(1). See also: Reema Omer, [“Do Alleged “Terrorists” and Spies Have the Right to Consular Access Under the VCCR?”](#), Opinion Juris, 22 February 2019.

i. Domestic Law

94. The scope of consular obligations owed to citizens under domestic laws varies across Europe, but consular access is typically granted at the discretion of the national authorities.³¹⁴ While some European States explicitly refuse to recognize the existence of a right to receive consular assistance in their consular laws,³¹⁵ some do grant their own nationals the right to consular assistance, in one form or another, as a constitutional right, or in their foreign policies for nationals detained abroad.³¹⁶ Notably, when States—in their domestic legislation—grant their nationals the right to receive consular assistance, this may also produce consequential obligations under international law. That is, States' consular laws and their implementation should respect the principles of non-discrimination, the best interest of the child, the principle of international co-operation in combating terrorism,³¹⁷ the obligation to investigate/prosecute terrorist offenses,³¹⁸ and the obligation to distinguish foreign fighters from their accompanying family members.³¹⁹ In this regard, international law provides specific norms for the consular assistance provided to children. The Vienna Convention on Diplomatic and Consular Relations (“VCCR”) recognizes that consular functions include safeguarding the interests of children who are nationals of the sending State.³²⁰ The UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (“CMW”), and the CommRC have also stressed that children should be guaranteed the right to have effective access to communication with consular officials and consular assistance, and emphasized States' obligation to develop and implement effective consular protection policies, including specific measures directed

³¹⁴ Rights Watch UK, [“European Women and Children in Syria – Factual and Legal Briefing”](#), 7 November 2019, para. 9.

³¹⁵ For example Switzerland, see: Swiss Federal Law on Swiss Persons Abroad of 26 September 2014, Article 43(1).

³¹⁶ For example Germany, see: German Law on Consular Officers, Their Functions and Powers of 11 September 1974, Articles 5(1) and 7. Also see: UN Special Rapporteur on extrajudicial, summary or arbitrary executions, [“Report on the Application of the Death Penalty to Foreign Nationals and the Provision of Consular Assistance by the Home State,”](#) A/74/318, 20 August 2019, para. 44.

³¹⁷ UNSC, [“Resolution 2178 \(2014\) on Threats to International Peace and Security Caused by Foreign Terrorist Fighters”](#), S/RES/2178 (2014), 24 September 2014, para. 11-14.

³¹⁸ PACE, [“Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?”](#), Parliamentary Assembly Resolution 2263 (2019), para. 8.

³¹⁹ UNSC, [“Resolution 2396 \(2017\) on Threats to International Peace and Security Caused by Terrorist Acts”](#), S/RES/2396, 21 December 2017, para. 4.

³²⁰ UN, [“Vienna Convention on Consular Relations,”](#) 24 April 1963, Article 5(a).

at protecting children's rights and encompassing promotion of protocols on consular protection services.³²¹

ii. European Union Law

95. States' obligation to provide consular assistance may also arise from EU law. Article 23 of the Treaty on the Functioning of the European Union ("TFEU") provides that all EU citizens in the territory of a third country where their country of nationality is not represented are "entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State."³²² Some argue that this article "does not simply reflect a non-discrimination clause [...] but rather creates a right to consular assistance to which each EU citizen is entitled, and further provides that States must treat all EU citizens the same as their nationals."³²³ Furthermore, in recent years the EU has attempted to improve standards on consular assistance and establish a common framework for consular protection within the EU, particularly for EU citizens who lack representation in the specific third country.³²⁴ Accordingly, in 2012 the EU Directive 2012/13 established rules concerning the right to information of suspects or accused persons, and provided that they must promptly be given information concerning various procedural rights, including the right to have consular authorities and one person informed about their detention.³²⁵ In 2015, EU Directive 2015/637 expanded the right by providing consular protection to unrepresented citizens on the same conditions as would be provided to their own nationals.³²⁶

³²¹ CMW and CommRC, "[Joint General Comment No. 4 \(2017\) of the CMW and No. 23 \(2017\) of the CRC on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return](#)", CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 17(e), 19.

³²² TFEU, Article 23. See EU, "[Consolidated Version of the Treaty on the Functioning of the European Union](#)", 2008/C 115/01, 13 December 2007.

³²³ See in Alessandra Spadaro, "[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#)", Cambridge University Press, 26 November 2020, p. 258.

³²⁴ David P. Stewart, "[The Emergent Human Right to Consular Notification, Access and Assistance](#)", in "The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric," edited by Andreas von Arnould, Kerstin von der Decken, and Mart Susi, Cambridge University Press, 2020, p. 448.

³²⁵ Council of the EU, "[Directive 2012/29/EU of the European Parliament and of the Council of October 2012 - Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA.](#)" 14 November 2012, L 315/57; see also: David P. Stewart, "[The Emergent Human Right to Consular Notification, Access and Assistance](#)", p. 448.

³²⁶ Council of the EU, "[Directive of EU 2015/637 of 20 April 2015 on the Coordination and Cooperation Measures to Facilitate Consular Protection for Unrepresented Citizens of the Union in Third Countries and Repealing](#)", Decision 95/553/EC, 20 April 2015. See also: David P. Stewart, "[The Emergent Human Right to Consular Notification, Access and Assistance](#)", p. 448.

iii. International Law

96. When it comes to the international law, views are divided on whether a national has a legally enforceable right to receive consular assistance or merely a legitimate expectation.³²⁷ Under a restrictive and traditional view, nationals abroad have no individual right to receive consular assistance or bring a claim against their State of nationality, based on the understanding that the provision of such assistance is at that State's discretion. However, understanding that international law and the rules that govern it are living instruments that evolve with time, this view has been challenged on the grounds that customary international law establishes a responsibility of States to provide consular assistance to their nationals detained abroad; moreover there is an emerging recognition of the access to consular assistance as a human right.³²⁸
97. That consular assistance is considered an indispensable aspect of the fair trial rights of detainees abroad³²⁹ suggests that it is emerging as a human right under customary international law. The recognition of access to consular assistance as an individual right is primarily based on Article 36(b)(1) of VCCR, which specifies the information and legal assistance that can be provided by the consulate for the benefit of a national. A similar right has also been highlighted in the UN Standard Minimum Rules for the Treatment of Prisoners, which states that "prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they

³²⁷ Francesca Capone, ["Is Trump Right? Foreign Fighters and the States' Obligation to Repatriate Them."](#) Verfassungs Blog, 10 March 2019.

³²⁸ The Special Rapporteur on extrajudicial, summary or arbitrary executions, ["Report on the Application of the Death Penalty to Foreign Nationals and the Provision of Consular Assistance by the Home State"](#) A/74/318, 2019. See also: David P. Stewart, ["The Emergent Human Right to Consular Notification, Access and Assistance"](#), 2020. Note also while there are fundamental differences between diplomatic protection and consular assistance, the doctrinal origins of the right to consular access lie in the theory of state responsibility and diplomatic protection. The historical premise on which the diplomatic protection was based is that it is the State that is injured as a result of a prejudice to a person of its nationality. This regime has evolved over time and now it is widely accepted that the individuals may have their own rights under international law and the States may invoke responsibility for the violations of their citizens' rights through diplomatic protection. This evolution should also shed light to the nature of the individuals' right to consular assistance. See e.g. ILC, ["The Report of the International Law Commission on the Work of its 58th Session A/61/10, Chapter IV \(2006\): Draft Articles on Diplomatic Protection and Commentaries, adopted by the ILC on Second Reading"](#), Commentary to Article 3, p. 28, para. 3. First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur, U.N. Doc. A/CN.4/506 and Add. 1 (Apr. 20, 2000).

³²⁹ David P. Stewart, ["The Emergent Human Right to Consular Notification, Access and Assistance"](#), p. 451.

belong.”³³⁰ While the right to “consular information” during detention abroad does not confer a right to receive consular assistance per se, state practice, UN General Assembly resolutions,³³¹ and domestic, regional, and international judicial opinions³³² have widely recognized that consular assistance contributes to fair trial rights.³³³ In 2017, the UNSC specifically urged States to ensure consular access for their own detained nationals, in accordance with applicable domestic and international law, in particular international human rights law.³³⁴ More recently, in 2019, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, asserted that a rule of customary international law concerning the responsibility of the nationals’ State to provide consular assistance is emerging.³³⁵

iv. International Human Rights Law

98. States have a positive obligation under international human rights law to provide consular assistance to their nationals at who are at risk abroad.³³⁶ This obligation stems from States’ obligation to ensure that their nationals have access to effective remedies when their human rights are violated.³³⁷ The right to an effective remedy for serious human rights violations,

³³⁰ UN, “[Standard Minimum Rules for the Treatment of Prisoners](#),” 30 August 1955, para. 38(1). See also: UNGA, “[UN Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\)](#)”, A/RES/70/175, 8 January 2016, Rule 62.

³³¹ UNGA, “[United Nations Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\)](#)”, Rule 62; UNGA, “[Resolution on Moratorium on the Use of the Death Penalty](#)”, A/RES/69/186, 4 February 2015, para. 5(b); UNGA, “[Note by Secretary General on Extrajudicial, Summary or Arbitrary Executions](#)”, A/70/304, 7 August 2015, para. 91-94.

³³² See: Inter-American Court of Human Rights, “[The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law](#)”, Advisory Opinion OC-16/99 Series A no. 16, requested by the United States of Mexico, para. 80: “[...] the provision [VCCR Article 36(1)] recognizing consular communication serves a dual purpose: that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance[...]; International Court of Justice (“ICJ”), “[LaGrand \(Germany v United States of America\)](#)”, Judgment, ICJ Rep (2001) 466, para 74; “[Avena and Other Mexican Nationals \(Mexico v United States of America\)](#)”, Judgment, ICJ Rep (2004) 12, para 40.; ICJ, “[Jadhav \(India v Pakistan\)](#)”, Judgment, ICJ Rep (2019) 418, para. 102, 107, 118, 133.

³³³ For more information see: David P. Stewart, “[The Emergent Human Right to Consular Notification, Access and Assistance](#)”, 2020.

³³⁴ UNSC, “[Resolution on Threats to International Peace and Security Caused by Terrorist Acts – Foreign Terrorist Fighters](#)” S/RES/2396, 21 December 2017, preamble and para. 6.

³³⁵ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “[Report on the Application of the Death Penalty to Foreign Nationals and the Provision of Consular Assistance by the Home State](#),” 20 August 2019, A/74/318.

³³⁶ International Bar Association Human Rights Institute “[A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk](#)”, 16 November 2020, p. 65; Rights Watch UK, “[European Women and Children in Syria – Factual and Legal Briefing](#)”, 7 November 2019, para. 10.

³³⁷ International Bar Association Human Rights Institute “[A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk](#)”, pp. 65-66.

including right to life, right to be free from torture and ill-treatment, and right to personal liberty and security, is clearly established in international law (see Sections II.G, H and I on the Right to Life, Right to be Free from Torture and Ill-treatment and Rights to Liberty and Security).³³⁸ States also have a specific obligation to ensure that effective and appropriate remedies are available to all persons, in particular children whose right to a nationality has been violated, including restoration of nationality and expedient provision of documentary proof of nationality.³³⁹ Notably, in some cases and jurisdictions, consular assistance may be the only avenue for protection against or redress for these human rights violations, particularly in places where there is no adequate legal system to protect people from statelessness, arbitrary detention, torture and ill-treatment, or prolonged detention by non-state actors.³⁴⁰ In these cases, the refusal to provide consular assistance may be impossible to reconcile with human rights obligations under various international treaties.³⁴¹

99. In light of the abovementioned facts and legal standards, European States are able to, and arguably have an obligation to, provide consular assistance to their nationals detained in northern Syria, and particularly to children, either under customary international law, under EU law, or under domestic law in some cases,³⁴² which may also produce consequential obligations under international human rights law. The lack of access to consular services is a primary obstacle to children who wish to return to their countries of nationality. Consular assistance is the only way for children to avoid being subject to further human rights abuses and for European States

³³⁸ See: UDHR, Article 8; CAT, Article 14; ICCPR, Articles 2(3)(a), 9(5) and 14(6); CRC, Article 39; ECHR, Article 13.

³³⁹ CRC, Article 8 (2). See also: CommRC, "[General Comment No. 11 \(2009\): Indigenous Children and their Rights Under the Convention on the Rights of the Child](#)," CRC/C/GC/11, 12 February 2009, para. 45; Human Rights Council, "[Resolution on the Right to a Nationality: Women and Children](#)", A/HRC/RES/20/4, 16 July 2012, para. 10. For detailed information on the role of consulates in the context of statelessness see: UNHCR, "[Handbook on Protection of Stateless Persons](#)", 30 June 2014, paras. 39-40.

³⁴⁰ International Bar Association Human Rights Institute "[A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk](#)", 2020, p. 65.

³⁴¹ See, OHCHR, "[Canada Urged to Repatriate Orphaned Five-Year Old Girl Held in Syrian Camp](#)", 20 May 2020.

³⁴² Some States have modified their laws concerning the consular assistance with an aim to prevent claims to be made by their nationals detained in the camps. For example, Belgium's Consular Code provides a subjective right to consular assistance for Belgian nationals when they find themselves in extreme circumstances. Yet the Consular Code has been modified recently resulting in the loss of the right to claim consular assistance for persons who have travelled to an area of armed conflict or to a region for which authorities have issued a notice discouraging travel, or are deemed to take "disproportionate risks" without adequate insurance arrangements. See: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "[Visit to Belgium](#)", A/HRC/40/52/Add.5, 8 May 2019, para. 80.

to remedy the human rights violations the children have been subjected to. Therefore, the human rights obligations of States strongly encourage (if not require) providing consular assistance and facilitation of their repatriation. The legal discussions around whether there is an enforceable right to receive consular assistance under international law do not exclude European States' human rights obligations, which require them to provide prompt and effective consular assistance to their citizens detained in the camps, in the form of administrative and logistical support.³⁴³

F. The Right to Enter One's Own Country

100. Children detained in the camps in northeast Syria are unable to return to, or in the case of children born in the camps, travel to their country without the assistance of their country of origin. Therefore, establishing whether States' obligations regarding the right to enter one's own country include proactively repatriating their citizens is critical for securing children's return.

i. International and European Human Rights Law

101. Under international and European human rights law, everyone has a right to enter their own country.³⁴⁴ While the ECHR Protocol No. 4 limits the scope of this right, the HRCComm interprets the term "one's own country" broadly.³⁴⁵ It implies a set of ties and connections that together make up "a genuine and effective link"³⁴⁶ to a country, which can be composed of various elements, including: language, center of interests, habitual residence, cultural identity, and family ties.³⁴⁷ At the very least, the term

³⁴³ Some domestic courts in Europe have already ruled that Governments are obliged to deliver consular assistance to their citizens detained in the camps, in order to ensure their physical and psychological integrity and provide them with administrative documents necessary for repatriation. See: Rights Watch UK, "[European Women and Children in Syria – Factual and Legal Briefing](#)", 7 November 2019, para. 11.

³⁴⁴ UDHR, Articles 9 and 13(2); ICCPR, Article 12(4); ECHR Protocol No. 4, Article 3(2); CRC, Article 10(2). Article 9 of the UDHR includes the prohibition of exile; but neither the ICCPR nor ECHR expressly include this prohibition "because it is presumed that the guarantees enshrined in the right to freedom of movement, including the right to return to one's own country, renders exile impossible in practice." See: Sandra Krähenmann, "[The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination](#)" in *Foreign Fighters under International Law and Beyond* (eds.) Andrea de Guttry, Francesca Capone, Christophe Paulussen, Asser Press 2016, p. 250.

³⁴⁵ HRCComm, "[General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 20. However, note that Article 2 of ECHR Protocol No. 4 limits the right to return to nationals of the State concerned.

³⁴⁶ The "genuine and effective link" criterion arose from ICJ, "[Nottebohm Case \(Liechtenstein v. Guatemala\)](#)", Second Phase, Judgment, I.C.J. reports 1955, Rep 4.

³⁴⁷ HRW, "[Right to Return - Relevant Background](#)," 4 April 2004.

encompasses an individual who, because of their special ties to a given country, cannot be considered a mere alien. This includes, for example, nationals of a country who have been stripped of their nationality in violation of international law.³⁴⁸ The right also entitles a person to come to the country for the first time if they were born outside the country.³⁴⁹

102. In no case may a person be arbitrarily deprived of the right to enter their own country.³⁵⁰ This means that any limitations to the right must be lawful, pursuant to a legitimate aim, necessary and proportionate to achieve that aim.³⁵¹ The concept of arbitrariness is applied to all legislative, administrative, and judicial actions of the States that are relevant for this right. Even if the interference is provided for by law, it must take into account the individual circumstances of the person concerned; general and virtually automatic restrictions are insufficient.³⁵² While there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable, States are prohibited from arbitrarily preventing a person from returning to their own country by stripping them of nationality or by expelling them to a third country.³⁵³ Notably, States' human rights obligations stemming from the right to enter to one's own country include both a negative obligation on the State not to impede entry to the country and a positive obligation, which in the majority of cases means the issuance of all the necessary travel documents, noting that the greater practical importance for the return are the restrictions placed by procedural demands.³⁵⁴

³⁴⁸ HRCComm, "[CCPR General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 20. For more information about HRC's interpretation of "his/her own country," see: Rutsel Martha and Stephen Bailey, "[The Right to Enter his or her Own Country](#)", EJIL:Talk!, 23 June 2020.

³⁴⁹ HRCComm, "[CCPR General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 19.

³⁵⁰ UDHR Article 13(2); ICCPR Article 12(4); ECHR Protocol No 4 Article 3(2); CRC Article 10(2).

³⁵¹ UNSG, "[Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups](#)", April 2019, p. 5.

³⁵² ECtHR Article 2 of Protocol No. 4, see: ECtHR, "[Stamose v. Bulgaria](#)", Application No. 29713/05, 27 November 2012, para. 35-36; ECtHR, "[Nalbantski v. Bulgaria](#)", Application No. 30943/04, 10 May 2011, para. 66. Also note that "[...] even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances," see: HRCComm, "[General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 20.

³⁵³ HRCComm, CCPR/C/21/Rev.1/Add.9, "[General Comment No. 27: Article 12 \(Freedom of Movement\)](#)", 2 November 1999, para. 19 and 21. See also: ILC, "[Draft Articles on the Expulsion of Aliens, with Commentaries](#)", 2014, Article 8: "A State shall not make its national an alien by deprivation of nationality for the sole purpose of expelling him or her".

³⁵⁴ Kay Hailbronner, "[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#)", Heidelberg Journal of International Law, Volume 57, Issue 1, 1997, p. 6.

103. Applying these standards to the European children detained in northern Syria, while it is difficult to argue that the right to enter one's own country itself provides for an individual right to be actively repatriated by one's own country, it does include at least the right to be issued identity and travel documents.³⁵⁵ Recalling the ECtHR's grounding jurisprudence emphasizing the importance of interpretation and application of rights in a manner that renders them practical and effective,³⁵⁶ European States have an obligation to ensure the effective protection of the right to return to one's own country and cooperate to ensure that this right can be enforced.³⁵⁷ As the children are in de facto detention (see Section I on Factual Background) and most of them lack identity and travel documents, European States are required to provide necessary documents without undue delay and to work in cooperation with SDF authorities for the children's return,³⁵⁸ as an effective right to enter one's own country does not exist if there is no practical ability to return.³⁵⁹ This applies both to children and their primary caregivers who had their citizenship arbitrarily stripped to prevent their return,³⁶⁰ as well as to children who were born abroad to European parents, or have never been in their countries of nationality.

ii. International Law

104. Moreover, States' obligation to allow the return of their own nationals—including the facilitation thereof—goes beyond the individual, and can be

³⁵⁵ Alessandra Spadaro, [“Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?”](#), Cambridge University Press, 2020, p. 264-265.

³⁵⁶ ECtHR, [“Christine Goodwin v. the United Kingdom”](#), Application No. 28957/95, 11 July 2002, para. 74. See also: Daniel Rietiker, [“The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis”](#) Nordic Journal of International Law, 2010.

³⁵⁷ See: Peter Van Krieken, [“Return and Responsibility”](#), Volume 38, Issue 4, 2000, p. 29.

³⁵⁸ UNHCR guidance on voluntary repatriation addressing the duty of country of origin to take affirmative action towards making his right actionable should be used by analogy: e.g. dialogue between the major parties must be established at the earliest possible stage, and return must be orderly and in safety and dignity. See: UNHCR, [“Discussion Note on Protection Aspects of Voluntary Repatriation,”](#) EC/1992/SCP/CRP.3, 1 April 1992; para. 8(c) and 8(d); UNHCR, [“Handbook - Voluntary Repatriation: International Protection,”](#) January 1996, 2.6 Responsibilities of the Country of Origin.

³⁵⁹ See: “In our view, this option is comparable to showing a detainee the key to his or her cell – after all, most of the people we are talking about are detained and cannot leave their detention facilities – and then telling the person he or she is entitled to this key, but keeping it out of grasp.” See: Tanya Mehra and Christophe Paulussen, [“The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking”](#), 2019; and Ana Luquerna, “The Children of ISIS: Statelessness and Eligibility for Asylum under International Law,” 2020, p. 176; Chrisje Sandelowsky-Bosman and Ton 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”](#), Nordic Journal of Human Rights, Volume 38, Issue 2, 2020, p. 153.

³⁶⁰ See: Naomi Wayne et al., [“Shamima Begum Citizenship Decision Sets a Dangerous Precedent”](#), The Guardian, 21 February 2019.

found in States' responsibilities and obligations to other countries.³⁶¹ Under international law, States have a duty vis-à-vis other States to readmit nationals to their territory.³⁶² The foundation of this obligation lies in the personal and territorial sovereignty of States, as "international order presupposes that each state takes care at least of its own nationals."³⁶³ Accordingly, the principle of reciprocity assumes that "the State of residence has the right to demand that the return to the State of origin of such aliens whom, for valid reasons it does not intend to keep on its territory, remains possible."³⁶⁴ While States' duty vis-à-vis other States to readmit their own nationals should be distinguished from whether there exists an individual right to return,³⁶⁵ according to the principle of good faith, the obligation to readmit is linked to a duty not to prevent the return of the nationals.³⁶⁶ Therefore, under international law, States cannot compel any other State to keep their nationals through measures such as revocation of nationality³⁶⁷ and cancellation of travel documents,³⁶⁸ or by refusing to issue substitute documents,³⁶⁹ or by refusing to repatriate.³⁷⁰ Notably, preventing the return of nationals believed to be affiliated with a terrorist organization would also go against the principle of international cooperation

³⁶¹ Peter Van Krieken, "[Return and Responsibility](#)", Volume 38, Issue 4, September 2000, p. 30.

³⁶² Paul Weis, "Nationality and Statelessness in International Law," Sijthoff and Noordhoff, 2nd edition, 1979, pp. 45-46. OSJI/ISI, "[Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure](#)," 2020, para. 143; Alice Edwards, "[The Meaning of Nationality in International Law in an Era of Human Rights](#)" in Alice Edwards and Laura van Waas (eds), "Nationality and Statelessness under International Law," Cambridge University Press, 2014, pp. 11 and 35; Atle Grahl-Madsen, "[Protection of Refugees By Their Country of Origin](#)", Yale Journal of International Law, Volume 11, Issue 2, 1986, p. 376; Kay Hailbronner, "[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#)", Heidelberg Journal of International Law, Volume 57, Issue 1, 1997, p. 1.

³⁶³ Kay Hailbronner, "[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#)", 1997, p. 1.

³⁶⁴ *Ibid.*, p. 7.

³⁶⁵ *Ibid.*, p. 1.

³⁶⁶ *Ibid.*, p. 15.

³⁶⁷ "The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalization this duty were to be extinguished," See: Paul Weis, "Nationality and Statelessness in International Law," Alphen aan den Rijn: Sijthoff and Noordhoff, 2nd Edition, 1979, pp. 125-126 cited in Guy S. Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," revised draft of a paper presented at a Seminar at Middlesex University on 14 February 2014, p. 12. See also: Alessandra Spadaro, "[Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?](#)," International and Comparative Law Quarterly, 2020, p. 263; Francesca Capone, "[Is Trump Right? Foreign Fighters and the States' Obligation to Repatriate Them.](#)" Verfassungs Blog, 10 March 2019.

³⁶⁸ See: Francesca Capone, "[Is Trump Right? Foreign Fighters and the States' Obligation to Repatriate Them.](#)" 2019.

³⁶⁹ Kay Hailbronner, "[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#)", 1997, p. 15.

³⁷⁰ See also: OSJI/ISI, [Principles on Deprivation of Nationality as a Security Measure](#), 2020, Principle 11.

in combating terrorism³⁷¹ and undermines States' ability to fulfill their obligation to investigate and prosecute international crimes and/or terrorist offenses.³⁷² Applying these standards to the situation of European children detained in northern Syria, it can be said that European States' obligation to admit or readmit their nationals detained in Syria in fulfillment of a right to return under international human rights law also serves to fulfill their obligations under international counter-terrorism laws, as well as their "international obligation derived from the international regulation of responsibilities between the state of origin and state of residence, and between personal sovereignty and territorial sovereignty."³⁷³ Therefore, European States "must not undermine the principle of reciprocity or commitments to international cooperation, by stripping a person of nationality, expelling a person to a third country or subjecting a person to removal proceedings, thereby exporting the stated security risk to a third country and failing to take responsibility for their own nationals."³⁷⁴

iii. International Refugee Law

105. Finally, some argue that the foreign children detained in northern Syria meet the requirements for refugee status "because they are being persecuted as a particular social group, which is defined as children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country."³⁷⁵ Under international refugee law, the right of refugees to return to their country of origin is fully recognized.³⁷⁶ In this regard, while the non-refoulement principle protects refugees against forced return, the right-to-return principle allows refugees to be voluntarily repatriated.³⁷⁷ While an

³⁷¹ UNSC, "[Resolution 2178 \(2014\) on Threats to International Peace and Security Caused by Foreign Terrorist Fighters](#)", S/RES/2178 (2014), 24 September 2014, para. 11-14. UNSC, "[Twenty-Third Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2368 \(2017\) Concerning ISIL \(Da'esh\), Al-Qaida and Associated Individuals and Entities](#)," S/2019/50, 15 January 2019, para. 93.

³⁷² PACE, "[Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?](#)", Resolution 2263 (2019), para. 8.

³⁷³ Kay Hailbronner, "[Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals](#)", 1997, p. 4.

³⁷⁴ OSJI/ISI, "[Principles on Deprivation of Nationality as a Security Measure](#)," 2020, Principle 11.2.

³⁷⁵ Ana Luquerna, "The Children of ISIS: Statelessness and Eligibility for Asylum under International Law," 2020, pp. 178-190.

³⁷⁶ UNHCR, "[Handbook on Voluntary Repatriation: International Protection](#)," 1996, Subsection 2.1.

³⁷⁷ See: UNHCR, "[The International Law of Voluntary Repatriation](#)," pp. 1-2; UNHCR, "[Handbook on Voluntary Repatriation: International Protection](#)," 1996. Note the emphasis on: "[r]epatriation of women and children detained in the camps in northern Syria, must not come at the cost of violating the principle of non-refoulement. Member States are obliged not to expel, return, extradite or otherwise remove a person to another State, when there are substantial grounds for believing that they would be at risk of being subjected to serious violations of human rights, including torture or cruel, inhuman and degrading

obligation on States to actively repatriate refugees remains uncodified, it is widely recognized that the obligation to return refugees, more specifically “voluntary repatriation of refugees,”³⁷⁸ constitutes at least an emerging customary international legal norm.³⁷⁹ The HRCComm has also stressed the particular importance of the right to return for refugees seeking voluntary repatriation.³⁸⁰ In this context, States have a duty vis-à-vis other States to assist in finding durable and protection-oriented solutions to refugee problems, and they should provide refugees with the necessary travel documents,³⁸¹ and ensure their sustainable, timely, voluntary, safe, and dignified return, which encompasses repatriation, reintegration, rehabilitation, and reconstruction activities.³⁸² Accordingly, European States should actively repatriate the detained children in northern Syria who are their nationals, if the detainees wish so, consistent with their duty to receive back their own nationals under international refugee law, including the facilitation thereof, vis-à-vis other States.

G. The Right to Life

106. The children’s right to life in the camps in northeast Syria has been violated or is under threat. Based on the abovementioned factual circumstances (see

treatment or punishment,” see: UN, [“Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with links to UN listed Terrorist Groups.”](#) 2019, p. 6.

³⁷⁸ The European Council on Refugees and Exiles describes voluntary repatriation as “the return of Convention (1951 Convention Relating to the Status of Refugees) refugees, other persons with a complementary or temporary protection status, or persons still in the asylum procedure who freely choose to exercise their right to return to their country of origin or habitual residence,” see, [“Position on Return by the European Council on Refugees and Exiles.”](#) PO1/10/2003/Ext/MP, October 200, para. 7.

³⁷⁹ Vic Ullom, [“Voluntary Repatriation of Refugees and Customary International Law.”](#) Denver Journal of International Law and Policy, Volume 29, Issue 2, 2001; UNHCR, [“The International Law of Voluntary Repatriation.”](#) p. 1; Ana Luquerna, “The Children of ISIS: Statelessness and Eligibility for Asylum under International Law,” 2020, p. 176; Susan Musarrat Akram and Terry Rempel, [“Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees”](#), Boston University International Law Journal, Volume 22, Issue 1, 2004, Public Law Research Paper No. 04-21, p. 72; Peter Van Krieken, [“Return and Responsibility.”](#) Volume 38, Issue 4, September 2000, pp. 29-31. See also: UNGA, [“Resolution on the Office of the United Nations High Commissioner for Refugees.”](#) A/RES/72/150, 17 January 2018, para. 42; UNHCR, [“Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\).”](#) October 2017, HCR/IP/3/Eng/REV. 2017, pp. 331, 338.

³⁸⁰ HRCComm, [“General Comment No. 27: Article 12 \(Freedom of Movement\).”](#) CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 19.

³⁸¹ UNHCR, [“Handbook on Voluntary Repatriation: International Protection.”](#) 1996, Subsection 2.6., p. 13. See also: HRW, [“Right to Return - Relevant Background.”](#) 4 April 2004.

³⁸² Francesca Capone, [“Is Trump Right? Foreign Fighters and the States’ Obligation to Repatriate Them.”](#) 2019.

Sections I and II.A.), States' positive obligations under the right to life require the children's repatriation.

107. The right to life is a fundamental human right, whose “effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.”³⁸³ International and European human rights law place a positive duty on States to protect the right to life.³⁸⁴ Under international law, States have a duty to exercise due diligence to protect the right to life from all reasonably foreseeable threats, even in cases where conduct that is not attributable to the State can result in loss of life.³⁸⁵
108. European human rights law also requires the interpretation and application of the right to life so as to make its safeguards practical and effective for those within their jurisdiction,³⁸⁶ which includes the obligation to take preventative operational measures.³⁸⁷ The ECtHR has interpreted this obligation in a way that does not impose “an impossible or disproportionate burden on the authorities.”³⁸⁸ In cases of allegations of authorities' violation of their positive obligations to protect the right to life, the ECtHR has had to assess whether “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals [...]” and whether they “failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”³⁸⁹ To satisfy this test, the ECtHR has found it is sufficient to show the authorities “did not do all that could be reasonably expected of them to avoid a real and immediate risk to life” of which they “have or ought to have knowledge.”³⁹⁰

³⁸³ HRCComm, “[General Comment No. 36 \(2018\) on Article 6 of the ICCPR on the Right to Life.](#)” CCPR/C/G/36, 30 October 2018, para. 2.

³⁸⁴ ECHR, Article 2; See also: ECtHR, “[Osman v. UK](#),” Application No. 23452/94, 28 October 1998, para. 116; ICCPR, Article 6; see: HRCComm, “General Comment No. 36 (2018),” para. 18.

³⁸⁵ HRCComm, “General Comment No. 36 (2018),” para. 6, 7, 18 and 23; See, for example: HRCComm, “[S. and others v. Italy](#),” Communication No. 3042/2017, CCPR/C/130/D/3023/2017, 27 January 2021, para. 8.5, 8.7.

³⁸⁶ ECtHR, “[McCann and Others v UK](#),” Application No. 18984/91, 27 September 1995, para. 146; ECtHR “[Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania](#),” Application No. 47848/08, 17 July 2014, para. 30; ECtHR “[L.C.B. v. the United Kingdom](#),” 14/1997/798/1001, 9 June 1998, para. 36.

³⁸⁷ ECtHR, “[Osman v. UK](#),” para. 116; ECtHR, “[Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania](#),” para. 130.

³⁸⁸ ECtHR, “[Osman v. UK](#),” para. 116.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

109. Children in particular are entitled to State measures of protection as required by their status as minors,³⁹¹ especially those in situations of vulnerability and children in situations of armed conflict.³⁹² Accordingly, the HRCComm has noted that in addition to the general measures required to protect and respect the right to life, States are required to adopt special measures of protection in relation to children, in accordance with the best interest of the child and the need to ensure the survival, development, and well-being of all children.³⁹³
110. States' positive obligations to take "necessary and reasonable steps" also arise in relation to their nationals abroad when there are reasonable grounds to believe that they face treatment in flagrant violation of international human rights law.³⁹⁴ As highlighted by two UN Special Rapporteurs, in order to determine whether States have acted with due diligence in preventing unlawful death and have exercised their positive duty to protect the right to life extra-territorially, it is necessary to assess: a) how much the State knew or ought to have known at the time of the existence of a real and immediate risk to life of an identified individual or individuals; b) whether the State knew the risks or likelihood of foreseeable harm; and c) whether the State knew the seriousness of the harm.³⁹⁵
111. Regarding the children in the camps, their fundamental right to life is arguably violated by the real and immediate risk of death caused by the inhumane conditions of their arbitrary detention. International human rights law recognizes that extreme forms of arbitrary detention that are themselves life-threatening violate the right to personal liberty and security and are incompatible with the right to life.³⁹⁶ In addition, the conditions of the children's detention amount to ill-treatment, which seriously affects their physical and mental health, which can also generate the risk of deprivation of life.³⁹⁷ Hundreds of children have already died of preventable illnesses and hunger, and the COVID-19 pandemic puts their health and life at further risk (see Section I on Factual Background). Above all, the children find

³⁹¹ ICCPR, Article 24(1).

³⁹² HRCComm, "General Comment No. 36 (2018)," para. 23.

³⁹³ *Ibid.*, para. 60. See also: CRC, Article 6(2).

³⁹⁴ The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions, "[Extra-Territorial Jurisdiction of States Over Children and their Guardians in Camps, Prisons, or Elsewhere in the Northeast Syrian Arab Republic – Legal Analysis](#)," 2020, para. 3.

³⁹⁵ *Ibid.*, para. 15. See also: ECtHR, "[Osman v. UK](#)," para. 32-33; ECtHR, "[Gongadze v. Ukraine](#)," Application No. 34056/02, 8 February 2006, para. 165.

³⁹⁶ HRCComm, "General Comment No. 36 (2018)," para. 57.

³⁹⁷ *Ibid.*, para. 54.

themselves in an area of armed conflict, which exposes them to significant risk of death and serious injury. In these circumstances, European States cannot convincingly argue that they are not aware of the risks and harm that the children are exposed to.

112. European States must act with requisite due diligence and put in place preventative operational measures to protect the right to life of the children in the camps. Repatriation is both a “necessary” and a “reasonable” operational measure. First, repatriation is necessary because the children’s lives are currently at significant risk and repatriation is in their best interests. Other operational preventive measures that States could take to protect the right to life, such as humanitarian aid, would not effectively prevent the risk of deprivation of life from materializing, since even if the sanitary conditions in the camps improve and children have better access to water and food, they still remain in an area of armed conflict, which threatens their lives. Second, repatriation is a reasonable course of action because it is an available measure for European States to use and some have already done so through their own means or in collaboration with other States.³⁹⁸ Finally, repatriation has been repeatedly encouraged by the authorities controlling the camps,³⁹⁹ the UNSC, the European Parliament, and the Council of Europe.⁴⁰⁰
113. By failing to repatriate the children in the camps, European States fail to meet their obligations under international human rights law because they are not doing all that could be reasonably expected from them in order to prevent the real and immediate risk to the life of the children from materializing.⁴⁰¹

³⁹⁸ With the support of France, The Netherlands repatriated two Dutch children in June 2019, see: Reuters, [“French, Dutch Islamic State Orphans Repatriated from Syria,”](#) 10 June 2019.

³⁹⁹ See, for example, Kurdistan 24, [“Syrian Kurds Call on Foreign Countries to Take Back IS Fighters,”](#) 7 October 2018.

⁴⁰⁰ UNSC, [“Resolution 2427”](#) (2018), para. 26; European Parliament, [“Resolution of 26 November 2019 on Children’s Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child,”](#) para. 61; PACE, [“Resolution 2321 \(2020\) on International Obligations Concerning the Repatriation of Children From War and Conflict Zones”](#).

⁴⁰¹ See: ECtHR, [“Osman v. UK,”](#) para. 116.

H. The Right to Be Free from Torture and Ill-Treatment

114. Human dignity and the right to physical and psychological integrity and to equal protection under the law are widely recognized in international and European human rights law. States have an obligation to respect and ensure that no one shall be subjected to torture or other cruel or inhuman treatment or punishment.⁴⁰² Freedom from torture and inhuman treatment is an absolute⁴⁰³ and non-derogable⁴⁰⁴ human right.
115. Children in particular must be protected from torture and other cruel, inhuman or degrading treatment or punishment.⁴⁰⁵ Under international human rights law, States must take all appropriate legislative, administrative, and social measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s), or any other person who has the care of the child.⁴⁰⁶
116. Accordingly, States have the duty to ensure that no one shall be subjected to torture or cruel or inhuman treatment,⁴⁰⁷ including by taking preventive measures.⁴⁰⁸ States must take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under their jurisdiction⁴⁰⁹ and to implement safeguards against torture and ill-treatment.⁴¹⁰ Such safeguards include: access to legal and medical assistance, notification of detention and communication with the outside world, and the right of individuals deprived of their liberty in any situation to challenge the

⁴⁰² ICCPR, Article 7; CAT, Article 2; ECHR, Article 3.

⁴⁰³ ECtHR, “[Ireland v. UK](#),” Application No. 5310/71, 18 January 1978, para. 163.

⁴⁰⁴ HRComm, “[CCPR General Comment No. 20: Article 7 \(Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment\)](#),” 1992, para. 3.

⁴⁰⁵ CRC, Article 37(a).

⁴⁰⁶ CRC, Article 19; CommRC, “[General Comment No. 8 \(2006\): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment \(Arts. 19; 28, Para. 2; and 37, inter alia\)](#),” 2007, CRC/C/GC/8, para. 18.

⁴⁰⁷ ECHR, Article 3 (see, for example, ECtHR, “[A. v the UK](#),” 23 September 1998, para. 22); ICCPR, Article 7; CRC, Article 37(a).

⁴⁰⁸ CAT, Article 2(1); HRComm, CCPR “[General Comment No. 20: Article 7](#),” para. 8, 11; ECtHR, “[A. v the UK](#),” para. 22.

⁴⁰⁹ CAT, Article 2(1).

⁴¹⁰ UNGA, “[Note by the Secretary-General on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General](#),” A/70/303, 7 August 2015, para. 37; UNGA, “[Resolution 55/89 on Torture and other cruel, inhuman or degrading treatment or punishment](#)” A/RES/55/89, 22 February 2001; Aisling Reidy, “[The Prohibition of Torture: A Guide to the Implementation of Article 3 of the ECHR](#),” Human Rights Handbooks no. 6, CoE, 2002.

arbitrariness or lawfulness of their detention and receive remedies without delay.⁴¹¹ Notably, negative obligations under the Convention against Torture are not spatially limited or territorially defined, nor are obligations to cooperate to end torture and other ill-treatment.⁴¹²

117. Under European human rights law, ill-treatment does not necessarily have to be inflicted,⁴¹³ but it must attain a minimum of level of severity, which depends on facts such as: duration of the treatment, its physical and mental effects, and the sex, age, and state of health of the victim.⁴¹⁴ Because the children's detention in the camps is indefinite, so is the duration of their ill-treatment, which has serious physical and mental effects, including potential deprivation of life. Furthermore, the children in the camps are young, and are especially vulnerable due to the lack of sanitary conditions, food, and medical treatment (see Section I on Factual Background). There is a strong argument that the children's arbitrary and indefinite detention, in combination with the appalling detention conditions and their lack of access to any procedural rights as de facto detainees, constitutes torture or other cruel, inhuman or degrading treatment or punishment, because of the "cumulative infliction of serious psychological harm,"⁴¹⁵ as well as physical harm.
118. The children are arbitrarily and collectively detained because of the perceived security risk they pose as being formerly affiliated, or being perceived to be so, with ISIS. However, while States face difficulties in protecting their communities from the risk of terrorist violence, the victims' conduct is irrelevant with regard to the prohibition on torture or inhuman or degrading treatment or punishment.⁴¹⁶ Under European human rights law, European States are obliged to safeguard individuals from risks of torture or ill-treatment however undesirable or dangerous their activities might be.⁴¹⁷ Arguably, in the case of the children in the camps, European States have an obligation to prevent children's exposure to the risks of ill-treatment and inhuman punishment, given the knowledge they have of the risks to which children are exposed in the camps.

⁴¹¹ UNGA, "[Note by the Secretary-General on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)," 7 August 2015, A/70/303, para. 37.

⁴¹² *Ibid.*, para. 28.

⁴¹³ ECtHR, "[D. v. UK](#)," Application No. 30240/96, para. 53.

⁴¹⁴ ECtHR, "[Ireland v. UK](#)," Application No. 5310/71, 18 January 1978, Series A, No. 25, para. 162.

⁴¹⁵ See, HRCComm, "[F.K.A.G. et al. v. Australia](#)," CCPR/C/108/D/2094/2011, 20 August 2013, para. 9(8).

⁴¹⁶ ECtHR, "[Chahal v. UK](#)," Application No. 22414/93, 11 November 1996, para. 79-80.

⁴¹⁷ *Ibid.*, para. 80.

119. Violations of the prohibition against torture or other ill-treatment and of States' preventive obligations can be committed by perpetration, omission, and acts of complicity.⁴¹⁸ By leaving the children in the camps and not repatriating them or providing them with consular assistance, European States are denying their access to any of safeguards meant to protect them from torture and ill-treatment.
120. Considering the fundamental importance of the right to be free from torture or inhuman treatment or punishment, European States, in accordance with their positive duties, must take effective steps to bring children's ill-treatment to an end. The repatriation of the children is a reasonable means that is available to States and a necessary one considering the nature of the risks and the children's best interests.⁴¹⁹

I. The Right to Liberty and Security

121. European States have a positive duty to put an end to the arbitrary deprivation of liberty of the children detained in the camps and they have the means to do so by repatriating the children to their countries of nationality, in accordance with the children's best interests.
122. Under international human rights law, everyone has the right to liberty and security of the person and no one shall be subjected to arbitrary arrest or detention.⁴²⁰ With specific reference to children, the CRC dictates that no child may be deprived of their liberty unlawfully or arbitrarily and their detention must be used only as a measure of last resort and for the shortest appropriate period of time.⁴²¹
123. Under the International Covenant on Civil and Political Rights (ICCPR), the right to personal security also obliges States to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.⁴²² Similarly, under European human rights law, European States have a positive duty to take appropriate steps to

⁴¹⁸ UNGA, "[Note by the Secretary-General on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)," para. 21.

⁴¹⁹ See, for example: European Commissioner for Human Rights, "[Intervention de la Commissaire aux Droits de l'Homme du Conseil de l'Europe en Qualité de Tierce Partie devant la Cour Européenne des Droits de l'Homme](#)," Requête no 24384/19 et 44234/20 H.F. et M.F. c. France et J.D. et A.D. c. France, 25 June 2021, para. 38.

⁴²⁰ ICCPR, Article 9; ECHR, Article 5.

⁴²¹ CRC, Article 37(b).

⁴²² HRCComm, "[General Comment No. 35 – Article 9 \(Liberty and security of person\)](#)," CCPR/C/GC/35, 16 December 2014, para. 9.

provide protection against unlawful interference with the right to liberty and security to everyone within their jurisdiction of which authorities have or ought to have knowledge of,⁴²³ especially vulnerable persons. The ECtHR has previously ruled that an authority's failure to put an end to arbitrary deprivation of liberty when it had the means to do so constituted a breach of the State's positive obligation to protect the right to liberty and security.⁴²⁴

124. Although children in the camps have had different experiences and roles growing up in the custody of ISIS-affiliated members, they are collectively punished by being detained in the camps. Despite being minors, who should be treated primarily as victims, they are treated as criminals and have been detained for a long and undetermined period of time, without the benefit of key safeguards, such as the presumption of innocence and the possibility of appealing their de facto detention, and having no prospect in sight for release.⁴²⁵ This amounts to collective and arbitrary deprivation of liberty, in a place with inhumane living conditions, where they face death, violence, and other abuses.
125. According to the HRCComm, detaining family members of an alleged criminal, who are not themselves accused of any wrongdoing, is an egregious example of arbitrary detention.⁴²⁶ Furthermore, security detention that is not in contemplation of prosecution on a criminal charge presents severe risks of arbitrary deprivation of liberty when other effective measures addressing the threat are available.⁴²⁷ The detention of children in the camps is in violation of international human rights law not only because their restriction of liberty is disproportionate, indefinite, and potentially discriminatory (see Section I.A. above), but also because effective alternatives to their detention, which could address national security concerns, are available, including States' repatriation, rehabilitation, and reintegration of the children from the camps.

⁴²³ ECtHR, "[El-Masri v. the former Yugoslav Republic of Macedonia](#)," Application No. 39630/09, 13 December 2012, para. 239; ECtHR, "[Storck v. Germany](#)," Application No. 61603/00, 16 September 2005, para. 102.

⁴²⁴ ECtHR, "[Medova v. Russia](#)," Application No. 25385/04, 5 June 2009, para. 124.

⁴²⁵ See: RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 27. For a discussion on the detention conundrum regarding States' reliance on non-state actors for counterterrorism operations and their simultaneous reluctance to accept the return of terrorists captured and detained by non-state actors in the course of those operations, see Dan E. Stigall, "[The Syrian Detention Conundrum: International and Comparative Legal Complexities](#)," Harvard National Security Journal, Volume 11, Issue 1, 2020, pp. 54-105.

⁴²⁶ HRCComm, "[General Comment No. 35 on Article 9](#)," para. 16.

⁴²⁷ *Ibid.*, para. 15.

126. Because the camps are operating in the context of the armed conflict in northeast Syria, there is a question as to whether international humanitarian law applies, and the interaction between those rules and human rights law. Given that SDF and ISIS are non-state armed groups,⁴²⁸ and there has been protracted armed violence between them, the situation is (or at least was)⁴²⁹ likely to be properly classified as a non-international armed conflict (“NIAC”).⁴³⁰ The main source of international humanitarian law governing NIACs is common Article 3 of the four Geneva Conventions,⁴³¹ which specifically refers to persons in detention.⁴³² Whereas in international armed conflicts, international humanitarian law would permit detention for security purposes,⁴³³ in NIACs the rules governing detention are ambiguous⁴³⁴ and SDF’s legal basis for detention is questionable. As a non-state armed group in a NIAC, it is not clear that, legally, SDF has the authority to detain,⁴³⁵ and, factually, it has not provided a legal basis for its detention of the children and women in the camps.⁴³⁶ Furthermore, the authority to detain during a NIAC is constrained by the concurrent application of human rights law.⁴³⁷ For instance, in a landmark judgment, the ECtHR underlined that by reason of the co-existence of the safeguards provided by international

-
- ⁴²⁸ See, for example, Conrad Nyamutata, “[Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood](#),” *Journal of Conflict and Security Law*, 2020, Volume 25, Issue 2, p. 246.
- ⁴²⁹ There is a factual and legal question as to whether, given the decline in hostilities in the area, the conflict can still properly be considered to be a NIAC.
- ⁴³⁰ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 24-30; Monika Hakimi, 2008, “[International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide](#),” *Yale Journal of International Law*, Volume 33, p. 381.
- ⁴³¹ The 1977 Additional Protocol II to the Geneva Conventions relating to the protection of victims of non-international armed conflicts does not apply because Syria has not ratified it.
- ⁴³² Common Article 3 of the [Geneva Convention \(III\) Relative to the Treatment of Prisoners of War](#) and [Geneva Convention \(IV\) Relative to the Protection of Civilian persons in Time of War](#).
- ⁴³³ See: [Geneva Convention \(III\)](#), Articles 21 and 118; [Geneva Convention \(IV\)](#), Article 42.
- ⁴³⁴ See: Frédéric Mégret, “[Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights Law and the Question of Right Authority](#),” in Ezequiel Heffes, Marcos D. Kotlik and Manuel Ventura (eds.), “*International Humanitarian Law and Non-State Actors: Debates, Law and Practice*,” T.M.C. Asser/Springer, 2019/forthcoming, pp. 2-3; Monika Hakimi, “[International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide](#),” 2018, p. 381; RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 31.
- ⁴³⁵ Frédéric Mégret, “[Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights Law and the Question of Right Authority](#),” pp. 2-3, 9-12; RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 32-33.
- ⁴³⁶ RSI, “[Europe’s Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#),” 2020, para. 33.
- ⁴³⁷ Monika Hakimi, “[International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide](#),” 2008, p. 381; Knut Dormann, “[Detention in Non-International Armed Conflicts](#),” in Kenneth Watkin and Andre J. Norris (eds.) “*Non-International Armed Conflict in the Twenty First Century*, *International Law Studies*,” Volume 88, pp. 348-349; ECtHR, “[Hassan v. UK](#),” para. 104.

humanitarian law and the ECHR in times of armed conflict, “the grounds of permitted deprivation of liberty [...] should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions [...] It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 [the right to liberty and security] could be interpreted as permitting the exercise of such broad powers.”⁴³⁸

J. The Right of Child Victims of Armed Conflict to Reintegration and Recovery

i. Children in the Camps Should Be Treated as Victims

127. Children in armed conflict should be treated primarily as victims. The victim-first approach is widely recognized in international law,⁴³⁹ and the UNSC explicitly states that “children who have been recruited in violation of applicable international law by armed forces and armed groups and are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law.”⁴⁴⁰ As such, the children in the camps are entitled to protection.⁴⁴¹
128. International humanitarian law and customary international law prohibit the recruitment and use of children under the age of 15 as soldiers.⁴⁴² In addition, under international criminal law, recruitment of child soldiers, both

⁴³⁸ ECtHR, “[Hassan v. UK](#),” para. 104; Ana Luquerna, “The Children of ISIS: Statelessness and Eligibility for Asylum under International Law,” 2020, p. 171.

⁴³⁹ UN, “[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; UNICEF, “[The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#),” 2007; UNSC, “[Resolution 1314](#)”, S/RES/1314 (2000); UNSG, “[Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups](#),” April 2019, p. 7.

⁴⁴⁰ UNSC, “[Resolution 2427](#),” (2018), para. 20, and UNSC, “[Resolution 2396](#),” (2017), para. 31.

⁴⁴¹ Of particular relevance here may be the Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, on the “[Implementation of the Non-Punishment Principle](#),” A/HRC/47/34, 17 May 2021: “The principle of non-punishment constitutes the cornerstone of an effective protection of the rights of victims of trafficking, however, its non-implementation or deficient implementation measures that deviate the principle from its intended result are still common practice,” p. 1, see also para. 40.

⁴⁴² Additional Protocol I to the Geneva Conventions, Article 77(2); International Committee of the Red Cross, “[Customary International Humanitarian Law](#),” Customary Rules 136 and 137.

voluntary and forced, is a war crime.⁴⁴³ International Criminal Court jurisprudence notes that, in the context of children in armed conflict, the line between voluntary and forced recruitment is “legally irrelevant” and “practically superficial” given that children under the age of 15 are unable to give genuine and informed consent when enlisting in an armed group.⁴⁴⁴ Notably, international human rights law bans armed groups from recruiting or using in hostilities persons under the age of 18 under any circumstances⁴⁴⁵ and places an obligation on States to take “feasible measures” to ensure that persons under the age of 18 do not take direct part in hostilities.⁴⁴⁶

129. Significantly, not all “child soldiers” who join, or find themselves part of, an armed group are used as fighters. The variety of the roles children undertake in armed groups are recognized in the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, which instead of using the term “child soldiers” employs the more nuanced terminology: “children associated with armed groups,” which encompasses any person under the age of 18 who has been recruited or used by an armed group in any capacity, including as fighters, cooks, porters, messengers, spies, or for sexual purposes.⁴⁴⁷
130. In general, children can become associated with armed groups in a number of ways: abduction or coerced conscription, enlisting, or being born into the groups.⁴⁴⁸ The recruitment and militarization of children was part of ISIS’s strategy to ensure continuation of the Caliphate as both a physical and ideological resource.⁴⁴⁹ Studies show that between 2015 and 2016, more than

⁴⁴³ International Criminal Court (“ICC”), “[Rome Statute](#),” Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

⁴⁴⁴ ICC, “Prosecutor v. Thomas Lubanga Dyilo,” [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/06-2842, T.Ch. I, 5 April 2012, para. 612-613.

⁴⁴⁵ UN, “[Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict](#),” 25 May 2000, A/RES/54/263, Article 4(1).

⁴⁴⁶ The CRC Article 38 refers to persons under the age of 15, whereas Article 1 of the “[Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict](#)” refers to persons under the age of 18.

⁴⁴⁷ UNICEF, “[The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#),” 2007, para. 2(1).

⁴⁴⁸ Marc Drumbl, “Reimagining Child Soldiers in International Law and Policy,” 2012, Oxford University Press; John Horgan and Mia Bloom, “[This Is How The Islamic State Manufactures Child Militants](#),” Vice News RSS, 8 July 2015.

⁴⁴⁹ Human Rights Council, “[Report of the Independent International Commission of Inquiry on Syria](#),” A/HRC/27/60, 2014, para. 95. National Coordinator for Security and Counterterrorism and the General Intelligence and Security Service, “[The Children of ISIS: The Indoctrination of Minors in ISIS-Held Territory](#),” 26 April 2017; Gina Vale, “[Cubs in the Lions’ Den: Indoctrination and Recruitment of Children within Islamic State Territory](#),” 2018.

one-third of the children eulogized by ISIS as “martyrs” were not from Syria or Iraq.⁴⁵⁰

131. Notably, the conscription and enlisting of children as “child soldiers” are offenses which are recognized in international criminal law as being “continuous in nature” due to the severe long-term consequences of having witnessed or experienced acts of violence.⁴⁵¹ Thus, arguably, adults who were “child soldiers” do not lose their victim status once they reach adulthood⁴⁵² and the fact that child soldiers are no longer under the custody of ISIS should not relieve them of their victim status.⁴⁵³
132. Although some of the ISIS-affiliated children showed commitment to the causes of the group, the role of grooming, manipulation, and coercion cannot be ignored. Infants, in particular, had no choice in being born into ISIS. Importantly, while some former ISIS-affiliated children are now over the age of 18, the fact that they joined ISIS as children is key. Regardless of their age and gender, children were conscripted and enlisted to participate in various ISIS activities that rendered them potential targets.⁴⁵⁴
133. Among European States, there is no consistent approach to how children formerly affiliated with ISIS, or perceived to be so, should be treated. In general, they have been regarded as young terrorists that would threaten public safety if repatriated (see Section I.B. and C. above). However, children in the camps should be considered children associated with armed groups or, if appropriate, child soldiers. Thus, they should be treated primarily as victims of violations of international law⁴⁵⁵ and/or victims of terrorism.⁴⁵⁶
134. European States could not protect the children from being recruited by ISIS before their departure from Europe⁴⁵⁷ and, now, the children in the camps are at continuous risk of indoctrination, which may lead to their recruitment to

⁴⁵⁰ Mia Bloom, John Horgan and Charlie Winter, “[Depictions of Children and Youth in the Islamic State’s Martyrdom Propaganda](#),” CTC Sentinel, 2020, Volume 9, Issue 2, p. 30.

⁴⁵¹ ICC, “Prosecutor v. Thomas Lubanga Dyilo,” [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/06-2842, T.Ch. I, 5 April 2012, para. 618.

⁴⁵² Conrad Nyamutata, “[Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood](#),” pp. 253-257.

⁴⁵³ *Ibid.*, pp. 257-258.

⁴⁵⁴ See: ICt, “Prosecutor v. Thomas Lubanga Dyilo,” [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/06-2842, T.Ch. I, 5 April 2012, para. 628.

⁴⁵⁵ See: UNSC, “[Resolution 2427](#),” (2018), para. 20.

⁴⁵⁶ UNSC, “[Resolution 2396](#),” (2017), para. 31.

⁴⁵⁷ Children’s Rights Ombudspersons (Belgium), “[Recommendations From the Children’s Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#),” no date, p. 6.

participate, directly or indirectly, in hostilities. By leaving them in the camps, European States are failing to take “feasible measures”⁴⁵⁸ to prevent them from becoming committed, or further committed, to ISIS ideology and possible recruitment.

ii. Children Should Have Access to Rehabilitation and Reintegration Policies

135. International human rights law places an obligation on States to take all appropriate measures to promote the 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 conflict.⁴⁵⁹
136. States must treat children separated from armed groups as victims and provide them with access to specialized and quality rehabilitation and reintegration services,⁴⁶⁰ in accordance with their best interests.⁴⁶¹ International law stresses that children’s recovery and reintegration must take place in an environment that fosters the health, self-respect, and dignity of the child.⁴⁶²
137. Recovery and rehabilitation support is essential to ensure that children in the camps can enjoy their fundamental rights.⁴⁶³ The UNSC has highlighted that States should pay particular attention to the treatment of children associated or allegedly associated with non-State armed groups, including those who commit acts of terrorism, by establishing standard operating procedures for the rapid handover of these children to relevant civilian child protection actors.⁴⁶⁴ In the same vein, the CoE Parliamentary Assembly stressed that European States have both a human rights obligation and a humanitarian

⁴⁵⁸ CRC Article 38 refers to persons under the age of 15, whereas Article 1 of the “[Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict](#)” refers to persons under the age of 18.

⁴⁵⁹ CRC, Article 39. See also: “[Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict](#),” Article 6(3), which dictates that States must take “all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to [the] Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration”.

⁴⁶⁰ UNSC, “[Resolution 2427 \(2018\)](#),” (2018), p. 2.

⁴⁶¹ UNSG, “[Key Principles For The Protection, Repatriation, Prosecution, Rehabilitation And Reintegration Of Women And Children With Links To United Nations Listed Terrorist Groups](#),” April 2019, pp. 5, 7.

⁴⁶² CRC, Article 39; UNSC, “[Resolution 2427 \(2018\)](#),” p. 2.

⁴⁶³ UNCCT, “[Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring a Child Rights-Based Approach](#),” 2019, p. 65.

⁴⁶⁴ UNSC, “[Resolution 2427](#)” (2018), para. 19 and 21.

duty to actively repatriate, rehabilitate, and reintegrate the children,⁴⁶⁵ without discrimination on the basis of their age or degree of involvement in the conflict.⁴⁶⁶

138. States should follow a whole-of-government approach to provide timely and appropriate reintegration and rehabilitation assistance to children associated with individuals believed to be affiliated with ISIS returning or relocating from conflict zones.⁴⁶⁷ This includes access to age and gender appropriate services, including mental health and psychosocial support, education, legal assistance, and working with communities to avoid the stigmatization of these children and facilitate their return,⁴⁶⁸ in a manner that addresses their developmental needs, their degree of indoctrination, and the numerous different roles they might have played when affiliated with ISIS.⁴⁶⁹ Children's best interests require prioritization of rehabilitation and reintegration in any contact they have with the law.⁴⁷⁰
139. The camps in northeast Syria do not represent an environment where children can rehabilitate and recover in accordance with their best interests. The denial of repatriation is contrary to normative approaches to child victims of armed conflict.⁴⁷¹ Consistent with their obligations to ensure that their child nationals have access to specialized and quality reintegration, recovery and rehabilitation services, European States must repatriate them to their country of nationality.

⁴⁶⁵ PACE, "Resolution 2321" (2020), para. 6.

⁴⁶⁶ Ibid, para. 8(2).

⁴⁶⁷ UNSC, "[Resolution 2396](#)" (2017), para. 31.

⁴⁶⁸ Ibid, p. 3 and para. 31; UNSC, "[Resolution 2427](#)," (2018), para. 26; UNSG, "[Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups](#)," p. 6.

⁴⁶⁹ UNSC, "[Resolution 2396](#)," (2017), para. 31.

⁴⁷⁰ UNSG, "[Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations listed Terrorist Groups](#)," p. 7.

⁴⁷¹ Conrad Nyamutata, "[Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood](#)," 2020, p. 241.

III. European States' Obligations to Repatriate Children Detained in Camps in Northeast Syria together with their Primary Caregivers

140. Children in the camps should be repatriated together with their primary caregivers in accordance with their best interests and the right to family life and family unity. Thus, the repatriation of children requires repatriation of some women in the camps, because of their role as primary caregivers.⁴⁷² As such, children's rights experts⁴⁷³ and European political bodies have also called for the repatriation of the children *together* with their primary caregivers. For example, the CoE Parliamentary Assembly urged European States to "repatriate children together with their mothers or primary caregivers, unless it is not in the best interest of the child,"⁴⁷⁴ and the European Parliament urged EU Member States to "repatriate all European children, taking into account their specific family situations and the best interests of the child as a primary consideration."⁴⁷⁵
141. While European States may have an obligation to repatriate all adults in the camps, this briefing paper employs a child's rights perspective. Thus, according to the right to family life and family unity, children in the camps should be repatriated together with those adults who have been their primary caregivers, unless this is not in the children's best interests. The principle of best interest of the child and the right to family life and family unity are interrelated and will be analyzed together, below.

⁴⁷² This does not mean that States have no obligation to repatriate the adults detained in the camps, independently from the children. However, this issue is beyond the scope of this briefing paper and deserves separate analysis.

⁴⁷³ See, for example, Children's Rights Ombudspersons (Belgium), "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)," no date, p. 2.

⁴⁷⁴ PACE, "[Resolution 2321 \(2020\)](#)," 30 January 2020, para. 8.1.2.

⁴⁷⁵ European Parliament, "[Resolution of 26 November 2019 on Children's Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child](#)," para. 61.

A. Right to Family Life and Family Unity and the Best Interests of the Child

142. International law provides for a right to family life, which applies to all human beings regardless of their status. The right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance.⁴⁷⁶ International law prohibits arbitrary or unlawful interference with one's family life.⁴⁷⁷
143. The family is considered the natural environment for the growth and well-being of its members, particularly children.⁴⁷⁸ Accordingly, children have the right to preserve family relations as part of their identity without unlawful and arbitrary interference.⁴⁷⁹ Preventing family separation and preserving family unity are considered important components of this right, and international law stresses that children must not be separated from their parents against their will, unless a competent authority with judicial review determines it to be in the children's best interests.⁴⁸⁰
144. The term "family" must be interpreted in a broad sense, and separation should be avoided not only from biological parents, but also from any person holding custody rights, any legal or customary primary caregivers, foster parents, members of the extended family or community, or other persons with whom the child has a strong personal relationship.⁴⁸¹
145. Separating a child from their parents should be considered only when there are "reasonable grounds" to believe that a child is, or is likely to be, exposed to severe abuse or neglect by their parents.⁴⁸² Given the gravity of the impact on the child, separation should only occur as a measure of last resort—for example when the child is "in danger of experiencing imminent harm or when otherwise necessary"—and separation should not take place if less intrusive measures could protect the child.⁴⁸³ Moreover, States have an

⁴⁷⁶ UDHR, Article 16(3); ICCPR, Article 23(1), ICESCR, Article 10(1), ICMW, Article 4 and 44, CRC, preamble; ECHR, Article 8. See also: UNHCR, "[Summary Conclusions: Family Unity](#)", Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, 8–9 November 2001, in "Refugee Protection in International Law: UNHCR's Global Consultations on International Protection," Feller et al. (eds), CUP, 2003, pp. 604-608, para. 1.

⁴⁷⁷ ICCPR, Article 17(1); ECHR, Article 8.

⁴⁷⁸ CRC, preamble.

⁴⁷⁹ CRC, Articles 8(1) and 16.

⁴⁸⁰ CRC, Article 9(1).

⁴⁸¹ CRC, Article 4. CommRC, "General Comment No. 14 (2013)," para. 59-60; HRCComm, "[General Comment No. 16: Article 17 \(Right to Privacy\), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation](#)", 8 April 1988, para. 5.

⁴⁸² CRC, Article 9(1).

⁴⁸³ CommRC, "General Comment No. 14 (2013)," para. 61.

obligation to provide support to the parents so they can resume their parental responsibilities and restore or enhance the family's capacity to take care of the child.⁴⁸⁴ If a child's separation from their parents becomes necessary, the decision-makers must ensure that the child maintains relations with their parents and family unless this is contrary to the child's best interests.⁴⁸⁵ These legal requirements apply regardless of whether a child has been recognized as a refugee or has crossed a national border.⁴⁸⁶

146. In some circumstances, States may also have positive obligations inherent in ensuring effective "respect" for family life,⁴⁸⁷ which requires States to not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including the reunion of separated family members.⁴⁸⁸ The importance of family reunification in international law, in particular in relation to reuniting children with their parents, is reflected in treaties, case law, resolutions, and other international instruments.⁴⁸⁹ This may require States to trace the parents or other family members of children in order to obtain information necessary for reunification.⁴⁹⁰
147. Finally, while it is indispensable to carry out the assessment and determination of the child's best interests in the context of potential

⁴⁸⁴ Ibid, para. 61.

⁴⁸⁵ Ibid, para. 65.

⁴⁸⁶ UNODC, "[Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System](#)", pp. 131-132.

⁴⁸⁷ See ECtHR cases where the Court has found States have a positive obligation under Article 8 of the ECHR to admit persons to its territory for family reunification: ECtHR, "[Sen v. Netherlands](#)," Application No. 31465/96, 21 December 2001, para. 29-42; ECtHR, "[Tuquabo-Tekle and Ors v. Netherlands](#)," Application No. 60665/00, 1 March 2006, para. 41-42; ECtHR, "[Mubilanzila Mayeka And Kaniki Mitunga v. Belgium](#)," Application No. 13178/03, 12 October 2006, para. 82.

⁴⁸⁸ CMW and CommRC, "[Joint General Comment No. 4 \(2017\) of the CMW and No. 23 \(2017\) of the CRC on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return](#)," CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 27; ECtHR, "[El Ghatet v. Switzerland](#)," Application No. 56971/10, 8 February 2017, para. 43.

⁴⁸⁹ UDHR, Article 16(3); ICCPR, Article 23; ICESCR, Article 10(1); CRC, Articles 10 and 22; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), Article 27 (1); UNHCR, "[Guiding Principles on Internal Displacement](#)," 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, Principle 17(3); UNGA, "[Resolution on the Rights of the Child](#)," 20 February 1997, A/RES/51/77, para. 42; Commission on Human Rights, "[Resolution on the Rights of the Child](#)," 28 April 1999, E/CN.4/RES/1999/80, para. 21(c); UNHCR, Executive Committee of the High Commissioner's Programme, "[Family Reunification No. 24 \(XXXII\) – 1981](#)," conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees, Conclusion No. 24 (XXXII); ICRC, "[Customary International Humanitarian Law Database, Rule 105 on Respect for the Family Life](#)"; ECtHR, "[Gnahoré v. France](#)," Application No. 40031/98, 17 January 2001, para. 59.

⁴⁹⁰ UNODC, "[Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System](#)," pp. 131-132.

separation of a child from their parents, the elements mentioned above are concrete rights and not simply factors in the determination of the best interests of the child.⁴⁹¹

148. In light of the abovementioned legal standards, repatriations of children detained in the camps without their primary caregivers may be against the best interests of the child and amount to arbitrary or unlawful interference with family life.
149. Children detained in northeast Syria must be repatriated with their primary caregivers, unless the parents give their free and informed consent for the separation, or a competent authority subject to judicial review determines that it is in the best interests of the child to be separated from their family⁴⁹² and that no other option can fulfill the child's best interests.⁴⁹³
150. While some primary caregivers refuse to give consent for their children to be repatriated alone, others have formally given up custody of their children in order to save them from the camps. Yet, whether the caregivers' consent can be considered "free and informed" is open to question. In the absence of the primary caregivers' free and informed consent, a competent authority in European States must determine that it is in the best interests of the child to be repatriated without their primary caregiver. If the best-interest determination is absent, inaccurate, or incomplete, repatriation of children detained in the camps without their primary caregivers may amount to unlawful or arbitrary interference with family life.⁴⁹⁴
151. In the context of children affected by armed conflict, in the vast majority of cases it is in the best interest of the child not to be separated from their parents.⁴⁹⁵ In the assessment and determination of children's best interests, European authorities should consider that children in the camps are generally very young, affected by armed conflict with high levels of trauma and emotional/psychological health problems,⁴⁹⁶ and dependent on their

⁴⁹¹ CRC, Articles 9, 18 and 20. See also CommRC, "General Comment No. 14 (2013)," para. 58.

⁴⁹² UNCCT, "[Handbook Children Affected by the Foreign-Fighter Phenomenon: Ensuring A Child Rights-Based Approach](#)," 2019, para. 138.

⁴⁹³ CommRC, "General Comment No. 14 (2013)," para. 64.

⁴⁹⁴ See: ECtHR, "[X v. Latvia](#)," Application No. 27853/09, 26 November 2013, para. 92-108; ECtHR, "[Vojnity v. Hungary](#)," Application No. 29617/07, 12 May 2013, para. 38-42.

⁴⁹⁵ See: "(...) close bonds and relationships, either with their parents, or with other caregivers. A close relationship helps children to develop trust in other people and in their surroundings, which is also seen as crucial for healthy emotional development; (...)," see: ICRC, "[Workshop Report – Children Affected by Armed Conflict and Other Situations of Violence](#)," Geneva, 14-16 March 2011, p. 15.

⁴⁹⁶ RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 39-40.

primary caregivers' protection.⁴⁹⁷ Their primary caregivers are the sole stable reference that these children have had in a very chaotic and precarious young life,⁴⁹⁸ as most of them have never known life outside of the Caliphate and the camps, and some have already been traumatized by witnessing their loved ones being harassed and assaulted.⁴⁹⁹ Thus, separating them from their primary caregivers is likely to be detrimental.⁵⁰⁰

152. In addition, repatriating children together with their primary caregivers provides the best opportunity for supporting children's successful rehabilitation and reintegration, for which the involvement of parents and caregivers is vital.⁵⁰¹
153. Because SDF authorities may refuse to allow States to repatriate children without their primary caregivers,⁵⁰² the fact that the repatriation of the children may be contingent on the repatriation of their primary caregivers must also be considered in the assessment and determination of children's best interests.
154. When assessing the best interest of the child in the context of separation from parents, States should also consider that while the primary caregivers of some children in the camps are their biological parents, many foreign children detained in the camps are orphaned or unaccompanied and their current primary caregivers may lack a biological link to them. In these situations, to the extent possible, States should interpret the term "family" in

⁴⁹⁷ Library of Congress, "[Germany: Court Obligates Government to Repatriate ISIS Member and Children to Germany](#)," Global Legal Monitor, 17 December 2019.

⁴⁹⁸ Children's Rights Ombudspersons (Belgium), "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)," no date, p. 2.

⁴⁹⁹ Anne Speckhard and Molly Ellenberg, "[Perspective: Can We Repatriate the ISIS Children?](#)," 2020.

⁵⁰⁰ Children's Rights Ombudspersons (Belgium), "[Recommendations From the Children's Rights Ombudspersons of Belgium to Deal with the Children Returning in Belgium from Jihadist Zones](#)," no date, p. 2.

⁵⁰¹ "Keys to providing effective psychosocial support for children affected by armed conflict: (...) Involvement of parents/caregivers: It is vital that parents or caregivers, and other community members, be as involved as possible in psychosocial activities. Their involvement provides children with an external resource, and also increases opportunities for adults to provide support for one another." See: ICRC, "[Workshop Report – Children Affected by Armed Conflict and Other Situations of Violence](#)," Geneva, 14-16 March 2011, p. 17. See also: Radicalisation Awareness Network, "[Child Returnees from Conflict Zones](#)," Issue Paper, November 2016, p. 3; Ivelina I. Borisova, Theresa S. Betancourt, and John B. Willett, "[Efforts to Promote Reintegration and Rehabilitation of Traumatized Former Child Soldiers](#)" [Reintegration of Former Child Soldiers in Sierra Leone: The Role of Caregivers and Their Awareness of the Violence Adolescents Experienced During the War](#)," J. Aggress Maltreat Trauma, Volume 22, Issue 8, 2013, pp. 803–828.

⁵⁰² See: Library of Congress, "[Germany: Court Obligates Government to Repatriate ISIS Member and Children to Germany](#)," Global Legal Monitor, 17 December 2019.

a broader sense in light of the relevant international standards and in accordance with the best interest of the child.⁵⁰³

155. To justify the repatriation of children without primary caregivers, European States mainly invoke national security arguments (see Section I.B. and C. above). While States have a certain measure of discretion when evaluating threats to national security and how to combat them, they are required to verify that threats have a reasonable basis in fact.⁵⁰⁴ In particular, there must be a reasonable relationship of proportionality between the restrictions imposed and the legitimate aim of protecting national security.⁵⁰⁵ The margin of appreciation of competent national authorities in regard to the right to family life varies in accordance with the nature of the issues and the importance of the interests at stake.⁵⁰⁶ However, the blanket arguments put forward by some European States invoking national security as a justification for not repatriating the primary caregivers (see section I.C.), which ignore the child's best interests principle and restrict children's right to family life, fall short of these requirements. Reports indicate that a high proportion of women in the camps were either never committed to ISIS or are no longer committed, or that they do not pose an overwhelming security risk to European countries or a risk of abusing or neglecting their children.⁵⁰⁷ Notably, for those who remain committed to ISIS ideology, it is now widely accepted that their repatriation, prosecution, rehabilitation, and reintegration remain the most effective and feasible option for ensuring sustainable long-term security and that leaving the perceived threat outside of the borders may even be counter-productive.⁵⁰⁸

⁵⁰³ ECtHR, "[Schneider v. Germany](#)", Application No. 17080/07, 15 December 2011, (contact between a child and non-legally recognised father), para. 79-82. HRCComm, "[General Comment No. 16](#)", 1988, para. 5, noting that the term "family" should be given a broad interpretation to include those understood as family in the society of the State concerned. HRCComm, "[General Comment No. 19: Article 23 \(The Family\) Protection of the Family, the Right to Marriage and Equality of the Spouses](#)", 27 July 1990, para. 2; CommRC, "[Concluding Observations, Nepal](#)", CRC/C/15/Add.261, 21 September 2005, para. 51-52, noting that adequate alternative care for a child includes placement with their extended family. UNICEF, "[Implementation Handbook for the Convention on the Rights of the Child](#)", September 2007, p. 124.

⁵⁰⁴ ECtHR, "[Janowiec and Others v. Russia](#)" Application No. 55508/07 and 29520/09, 21 October 2013, para. 213-214. See also: CoE, "[National security and European case-law](#)", 2013, p. 3.

⁵⁰⁵ ECtHR, "[Konstantin Markin v. Russia](#)" Application No. 30078/06, 22 March 2012, para. 137.

⁵⁰⁶ ECtHR, "[Sahin v. Germany](#)", Application No. 30943/96, 8 July 2003, para. 65.

⁵⁰⁷ RSI, "[Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria](#)," 2020, para. 95.

⁵⁰⁸ Open Letter from National Security Professionals to Western Governments, "[Unless We Act Now, the Islamic State Will Rise Again](#)", 11 September 2019. OSCE/ODIHR, "[Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework](#)", 2018, p. 50..

156. Finally, before resorting to separation, States have an obligation to do everything in their power to preserve personal relations between children and their parents⁵⁰⁹ and to support parents to restore or enhance the family's capacity to take care of the child. While authorities enjoy a wide margin of appreciation when deciding on custody matters or the necessity of taking a child into care, stricter scrutiny is called for when State actions risk effectively curtailing family relations between parents and a young child.⁵¹⁰ While primary caregivers may face criminal proceedings upon repatriation, a child's physical proximity to them would allow them to maintain family relationships in a way that would be practically impossible should their primary caregivers not be repatriated.⁵¹¹ In addition, consistent with States' obligation to support parents to restore the family's capacity to take care of the child before resorting to separation, European States should prioritize the rehabilitation and reintegration of the primary caregivers in their countries of origin.

⁵⁰⁹ ECtHR, "[Gnahoré v. France](#)", Application No. 40031/98, 17 January 2001, para. 59.

⁵¹⁰ ECtHR, "[Sahin v. Germany](#)", Application No. 30943/96, 8 July 2003, para. 65; ECtHR, "[Elsholz v. Germany](#)", Application No. 25735/94, 13 July 2000, para. 49.

⁵¹¹ UNCCT, "[Handbook: Children Affected by the Foreign-fighter Phenomenon. Ensuring a Child Rights-based Approach.](#)" para. 126.

IV. Conclusion

157. Under international and European law, European States have an extraterritorial obligation to protect their child nationals in the camps in northeast Syria from violations of their right to nationality, right to consular assistance, right to enter their own country, right to life, right to be free from torture and ill-treatment, right to liberty and security, and right to reintegration and recovery as victims of armed conflict, in accordance with the best interests of the child, the principle of non-discrimination, and the principle of family unity.
158. Taking into consideration European States' legal obligations, security arguments, the SDF's explicit request for States to repatriate their citizens and willingness to cooperate in that process, as well as European States' capacity to do so, the proactive repatriation of the children to their country of nationality together with their primary caregivers appears to be the only effective way for European States to protect the rights of children detained in the camps. This is a remarkable situation where the protection of human rights and addressing national security concerns converge and repatriation is encouraged by human rights advocates as well as security experts.
159. This briefing paper has developed a series of legal arguments, based on international and European legal standards, that can be used to advocate for the proactive repatriation of the children, together with their primary caregivers. Litigators and advocates are encouraged to use these arguments as appropriate, taking into consideration each State's relevant domestic laws and policies, the ratification status of relevant international and European treaties, and the specific factual circumstances of their nationals in the camps. Such arguments can be invoked before national, as well as regional and international, judicial and quasi-judicial bodies.
160. At the international level, legal avenues where such cases may be pursued include: the Committee on the Rights of the Child,⁵¹² the Human Rights Committee,⁵¹³ the Committee against Torture,⁵¹⁴ and the Committee on

⁵¹² States must have ratified the "[Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure](#)". Currently there are four cases before the CommRC, regarding the repatriation of European children from the camps in northeast Syria. See: Finland, Case No. 100/2019, and France, Cases No. 77/2019, 79/2019 and 109/2019, CRC, [Table of pending cases](#), 15 March 2021.

⁵¹³ The "[1976 First Optional Protocol to the ICCPR](#)" establishes the competence of the Human Rights Committee to receive individual communications in relation to violations of the ICCPR.

⁵¹⁴ See Article 22 of the CAT.

Economic Social and Cultural Rights.⁵¹⁵ At the regional level, possible legal avenues include: the European Court of Human Rights,⁵¹⁶ the European Court of Justice,⁵¹⁷ and the often overlooked European Committee of Social Rights.⁵¹⁸ Depending on each legal mechanism, litigation could take numerous forms, including individual and/or collective communications, requests for interim measures, or requests for the instigation of inquiries.

161. In the past year, the failure of European governments to repatriate their child nationals together with their primary caregivers from the camps has started to be legally challenged in various fora. Whether it is used for litigation before domestic or regional courts or before human rights treaty bodies, this legal briefing paper is intended to assist advocates and litigators in advancing creative approaches to address this seemingly intractable problem.

⁵¹⁵ Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party to the "[Optional Protocol to the ICESCR](#)," claiming to be victims of a violation of any of the rights set forth in the CESCR.

⁵¹⁶ See: ECtHR, "[H.F. and M.F. v. France](#)".

⁵¹⁷ When they act in the sphere of application of EU law, the EU member states should fully comply with the [EU "Charter of Fundamental Rights"](#) (Article 6(1) TEU). They also must take into account the fundamental rights included among the general principles of EU law, which derive from the ECHR and the constitutional traditions common to the member states (Article 6(3) TEU).

⁵¹⁸ The European Committee of Social Rights monitors the implementation of the 1961 European Social Charter, the 1988 Additional Protocol extending the social and economic rights guaranteed by the European Social Charter of 1961, and the 1996 Revised European Social Charter. Under Article 1 of the "[Additional Protocol to the European Social Charter Providing for a System of Collective Complaints](#)," several types of organizations are entitled to lodge complaints to the ECSR, including international NGOs registered on the Governmental Committee of the European Social Charter's "[List of International Non-Governmental Organisations Entitled to Submit Collective Complaints](#)" (1 October 2020). States may also give permission to national NGOs to lodge complaints before the Committee; however, Finland is the only State to have done so. The Revised Charter's relevant legal standards for making the case for the repatriation of children from the camps may include: the right to protect of health, strongly interrelated with the right to life as set out in this briefing paper; the right of children and young persons to protection against physical and moral dangers to which children and young persons are exposed; the right of the family to social, legal and economic protection; the right of children and young persons to social, legal and economic protection, and non-discrimination. See: "[1996 Revised European Social Charter](#)," Articles 7.10, 11, 16, 17 and E. The ECSR is unique among regional human rights mechanisms for its collective - as opposed to individual - complaint mechanism, and the flexibility it allows States in deciding which provisions of the Charter to accept.