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**CHILDREN IN OVERSEAS SITUATIONS OF VIOLENCE:  
THE RIGHT OF CHILDREN TO BE REPATRIATED AND  
STATES' CORRESPONDING OBLIGATIONS**

LAWS523: Children's Rights

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**Abstract**

*Children around the world suffer in situations of violence outside their country of origin. Although the children's rights framework contains a number of rights and obligations relevant to children who are in such situations, states' current normative conception of those rights and their corresponding obligations are inadequate, with detrimental effects on children. A synthesis of rights and obligations within the international children's rights framework reveals in relation to children in such overseas situations of violence a more powerful right of children to be repatriated and a more active corresponding obligation on states to take real efforts to repatriate their child nationals from such situations. The right and obligation are positive, in the sense they necessitate action on the part of duty-holders to uphold, and non-derogable, in the sense that the right and obligation apply at all times in relation to all children, regardless of any criminal or other activity on their part. This paper aims to further the realisation of children's rights by presenting more clearly states' active and necessary obligations towards children in overseas situations of violence, and to demonstrate the current and ongoing potential application and utility of the right and obligation articulated in this paper to all children in such situations of violence as meaningful contributions to the recognised existing children's rights framework.*

**Key Words**

children's rights — protection from violence — state obligations — repatriation — positive and negative rights — non-derogable rights

***Table of Acronyms and Abbreviations***

CAT	—	Convention Against Torture
Committee	—	Committee on the Rights of the Child
COVID-19	—	Coronavirus Disease 2019
CRC	—	Convention on the Rights of the Child
CRIN	—	Child Rights International Network
FTF	—	foreign terrorist fighter
GA	—	General Assembly
GC	—	General Comment
ICCPR	—	International Covenant on Civil and Political Rights
ICESCR	—	International Covenant on Economic, Social and Cultural Rights
IHL	—	International Humanitarian Law
IHRL	—	International Human Rights Law
ISIS	—	Islamic State of Iraq and Syria
MACR	—	minimum age of criminal responsibility
ODIHR	—	Office for Democratic Institutions and Human Rights
OHCHR	—	Office of the High Commissioner for Human Rights
RAN	—	Radicalisation Awareness Network
SC	—	Security Council
SDF	—	Syrian Democratic Forces
UDHR	—	Universal Declaration of Human Rights
UN	—	United Nations
UNHCR	—	United Nations High Commissioner for Refugees
UNICRI	—	United Nations Interregional Crime and Justice Research Institute
UNODC	—	United Nations Office on Drugs and Crime
UNSC	—	United Nations Security Council

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## *I Introduction*

[N]o violence against children is justifiable; all violence against children is preventable.<sup>1</sup>

Whereas most of the literature and international legal standards relating to the return of children from overseas settings of violence frame a child's right of return to their country of nationality negatively and focus mainly on the duties of host nations, upon examination a synthesis of rights and obligations within the international children's rights framework reveals in such circumstances a more powerful right of children to *be repatriated* and a more active corresponding obligation on states to take real efforts *to repatriate* their child nationals (the right and obligation).

Such situations of violence in context to which the right and obligation exist include circumstances where children have been illegally recruited for use in or are otherwise exposed to war and armed conflict, where children are denied access to fundamental human rights such as health and education, and where children are denied necessary justice standards applicable to children.<sup>2</sup> Specifically, the right and obligation exist in relation to any extraterritorial set of circumstances which comes within the definition of "violence" that informed the 2006 UN Study on Violence Against Children, which definition this paper adopts:<sup>3</sup>

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<sup>1</sup> *Report of the independent expert for the United Nations study on violence against children* UN Doc A/61/299 (29 August 2006) at [91].

<sup>2</sup> See also *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [4].

<sup>3</sup> United Nations Convention on the Rights of the Child (signed 20 November 1989, entered into force 2 September 1990), art 19; see Paulo Sérgio Pinheiro *World Report on Violence Against Children* (United Nations Publishing, Geneva, 2006) at 4 and 33; UN Doc CRC/C/GC/13 at [4]; Wouter Vandenhoe, Gamze Erdem Türkelli and Sara Lembrechts *Children's Rights* (Edward Elgar Publishing, 2019) at [19.04]; UN Doc A/61/299 at [8]; Etienne G Krug and others *World report on violence and health* (2002) at 5.

... all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse ... the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity.

In presenting this thesis, this paper therefore makes two necessary contentions. The first is that the right and obligation are *positive* in nature, in the sense that they require states not only to refrain from taking action contrary to the child's right to return but in fact to act *positively* to take real efforts to ensure the child's right to return is upheld. Such measures will usually involve the actual repatriation of the child, though this wording allows for circumstances where such repatriation is genuinely unfeasible or unsuccessful.

The second contention is that the right and obligation are *non-derogable* in nature, that is that they may not be derogated from in any circumstances. In other words, no matter who the child is or what they may have done, and notwithstanding any arguments or concerns on the part of the state, the particular situation and normative understanding of children guarantees to all children this right and imposes on all states this obligation. Consequently, even children allegedly involved with or perpetrators of criminal or terrorist activity are subject holders of this right and object recipients of this obligation. Indeed, as underscored by (almost universally accepted) international rights, standards and normative understandings of children so in conflict with the law, the right and obligation in relation to such children not only continues to apply but is in fact even stronger, on account of the degree of violence to which such children have been exposed, the severity of the trauma to which such children have been resultingly subjected, and the extent of personalised service treatment which such children consequently require for their "physical and psychological recovery and social reintegration".<sup>4</sup>

This introduction forms Part I of this paper. Part II introduces the theoretical children's rights framework the central pillar of this paper. Important to this thesis are several fundamental principles and key distinctions within the children's rights framework, and an

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<sup>4</sup> CRC, art 39.



examination of these follows first a discussion of the conceptual normative understandings of children the platform on which the framework broadly rests.

Part III sets out the rights framework as applicable to children abroad in situations of violence. It highlights a number of children's rights which may be at risk of violation in such cases before exploring more deeply three areas of rights particularly relevant to children in such scenarios. This Part forms the international legal backdrop against which states' responses may be measured. Those responses clearly subscribe to a separate *negative* normative conception of the appropriate treatment of children abroad in situations of violence, a conception which this paper demonstrates fails to uphold fully children's guaranteed rights and protections, with detrimental consequences.

The response from states to the situation of children who are this day being detained in "squalid" conditions in contravention of their rights in camps in northern Syria displays most evidently this current normative conception of states of the rights of children stranded in overseas situations of violence as well as their corresponding obligations. Though thousands of foreign<sup>5</sup> children are and have been stranded in "inhuman" conditions — many for over a year, and with little or no hope of return otherwise — on the basis of alleged association with terrorist groups such as the Islamic State of Iraq and Syria (ISIS), the states of the children's origin have mainly been reluctant to repatriate their child nationals and have accordingly failed and refused to do so, typically on the ground of national security concerns. Part IV of this paper demonstrates in the indefensible inaction of states and resulting detrimental consequences to children the real inadequacy of states' current conception of the application of children's rights to situations of violence such as these.

This paper aims to make a real contribution to the understanding of states' obligations under the children's rights framework in relation to their child nationals who are stranded overseas in situations of violence. A child rights approach is "one which furthers the realization of the rights of all children as set out in the Convention by developing the

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<sup>5</sup> That is, not Syrian or Iraqi.

capacity of duty bearers to meet their obligations to respect, protect and fulfil rights”.<sup>6</sup> This paper, while unable itself to develop the *capacity* of states, in laying out more clearly the rights of children affected by violence aims to so further the realisation of their rights by presenting more clearly states’ more active and necessary obligations towards children in such situations. Specifically, therefore, the contribution this paper makes to the existing literature is the drawing together of rights and obligations within the children’s rights framework to articulate anew a *positive* and *non-derogable* right of children to be repatriated from overseas situations of violence and a *positive* and *non-derogable* corresponding obligation on states to take real efforts to do so. Part V presents this new conception of the right and obligation.

The right and obligation find immediate utility in the final substantive Part as a modelled appropriate response to the situation of the children detained in northern Syria in line with children’s rights and states’ obligations. The thesis of this paper, however, is necessarily more wide-ranging, and the right of children to be repatriated to their country of origin and the corresponding obligation on home states to take efforts to do so could potentially apply also to children abducted and conscripted for use in armed groups as child soldiers, children involved and associated with foreign gangs, children subject to and perpetrators of drug and human trafficking or slavery, and, more recently and equally urgently, children stranded as a result of COVID-19. In highlighting these, Part VI demonstrates the current and ongoing potential application and utility of the right and obligation articulated in this paper as meaningful contributions to the recognised existing children’s rights framework.

## *II Theoretical Framework*

This paper is premised upon the children’s rights framework. This Part first explores the foundational theoretical platform on which this framework rests, before establishing certain key elements of the formal rights framework that is its pillar.

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<sup>6</sup> UN Doc CRC/C/GC/13 at [59].

## A *Normative Understandings of Children*

Children universally are by reason of their age alone guaranteed rights and ensured protections additional to all other humans. This paper argues that there exists within the accepted children's rights framework an unarticulated right to be repatriated and a corresponding obligation on states to do so. It is thus helpful to consider in brief the fundamental and universal understandings of the special position, place and role of children in society which underpin and justify the provision to them of these additional rights and protections.

### 1 *Children as rights-holders, entitled to special care and protection*

First of these is that children are more than mere *objects* of protection but rather subjects of rights themselves.<sup>7</sup> Although in earlier times children were first viewed as less autonomous and important beings in themselves than property and capital of their parents, then subsequently treated as hapless and helpless victims requiring paternalistic protection for their welfare, modern thought understands children more properly as distinct and valuable entities in their own right, capable of exercising and worthy of possessing specific and tailored rights.<sup>8</sup> Children, as both “becomings” and “beings”,<sup>9</sup> are therefore more than just *objects* in need of assistance but rather “rights holders entitled to non-negotiable rights to protection.”<sup>10</sup>

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<sup>7</sup> Child Rights International Network (CRIN) *Realising Rights? The UN Convention on the Rights of the Child in Court* (2018) at 31.

<sup>8</sup> See generally John Eekelaar “The Emergence of Children’s Rights” (1986) 6 OJLS 161 at 162–164.

<sup>9</sup> See Noam Peleg “Time to Grow Up: The UN Committee on the Rights of the Child’s Jurisprudence of the Right to Development” in Michael Freeman (ed) *Law and Childhood Studies: Current Legal Issues Volume 14* (Oxford University Press, Oxford, 2012) at 375; and see generally Emma Uprichard “Children as ‘Being and Becomings’: Children, Childhood and Temporality” (2008) 22 *Children & Society* 303; Kate Adams “What is a child? Children’s perceptions, the Cambridge Primary Review and implications for education” (2014) 44 *Cambridge Journal of Education* 163; and Jens Qvortrup “Are Children Human Beings or Human Becomings? A Critical Assessment of Outcome Thinking” (2009) 117 *Rivista Internazionale di Scienze Sociali* 631.

<sup>10</sup> UN Doc CRC/C/GC/13 at [59].

A child rights approach, recognising a child's "equal human right to respect for their human dignity and physical integrity",<sup>11</sup> as well as their individual personality and distinct needs and interests, is accordingly "one which furthers the realization of the rights of all children ... by developing ... the capacity of rights holders to claim their rights".<sup>12</sup> Respect for all the rights of children, and in particular their rights to dignity, life, survival and development, well-being and health, and participation and protection from non-discrimination, must therefore be the "pre-eminent goal" of all states' policies concerning/relating to children.<sup>13</sup>

Notwithstanding their individual dignity, children are on account of their age nevertheless entitled to and in need of special and additional care, assistance and protection as they are often particularly vulnerable to violence and derogation of their rights.<sup>14</sup>

## 2 *Recognition of children involved in violence as victims*

As reported by the Special Representative, many of those who find themselves exposed to violence overseas are children in "actual or perceived conflict with the law".<sup>15</sup> This "duality or dilemma" has taken on renewed form in the more recent and extensive involvement of children in terrorist activity.<sup>16</sup> The "unconventional" position of children thus involved with terrorist groups, some of whom have committed criminal acts, has "blurred perceptions of culpability",<sup>17</sup> such children either "hardened terrorists who cannot

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<sup>11</sup> Pinheiro, above n 3, at XV.

<sup>12</sup> UN Doc CRC/C/GC/13 at [59].

<sup>13</sup> At [59].

<sup>14</sup> OSCE Office for Democratic Institutions and Human Rights "Repatriation of 'foreign terrorist fighters' and their families urgently needed to safeguard human rights and security, OSCE human rights head says" (11 February 2020) OSCE <[www.osce.org](http://www.osce.org)>.

<sup>15</sup> UN Doc CRC/C/GC/13 at [72(g)].

<sup>16</sup> Jacinta Carroll *The citizen as enemy combatant: dealing with foreign terrorist fighters* (No 12, 2019) at 3.

<sup>17</sup> At 3.

be trusted” or otherwise “simply victims of terrorist propaganda”.<sup>18</sup> The answer according to international law and scholarship, however, is unequivocal. All children associated with parties to conflict are to be regarded “not only as perpetrators” but rather “primarily as victims”<sup>19</sup> of “the most grievous human rights violations” and offences against international law.<sup>20</sup>

Regardless of whether they are directly involved in or merely witness to hostilities or criminal activity, children in conflict environments are exposed to extreme forms of violence which have a severe impact on their physical and mental well-being.<sup>21</sup> Exposure to multiple and ongoing trauma such as violence, abuse, hunger, malnutrition and neglect pose considerable risk to a child’s social, moral, emotional and cognitive development<sup>22</sup> and overall functioning,<sup>23</sup> with potentially lifelong implications.<sup>24</sup>

Moreover, it is too simplistic to suggest that children “voluntarily” engage in violence. Rather, the situation is far more nuanced and may often involve extreme manipulation,

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<sup>18</sup> Elena Pokalova “Child Returnees” in *Returning Islamist Foreign Fighters: Threats and Challenges to the West* (Springer International Publishing, Cham, 2020) 195 at 217.

<sup>19</sup> UN Children’s Fund (UNICEF) *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles)* (2007) [“Paris Principles”] at [3.6].

<sup>20</sup> Nina HB Jørgensen “Children associated with terrorist groups in the context of the legal framework for child soldiers” (2019) 60 QIL 5 at 18; *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [17]; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre *Children affected by the foreign-fighter phenomenon: Ensuring a child rights-based approach* (2019) at 12 and 74; see SC Res 2427 (2018).

<sup>21</sup> At [15]; United Nations Counter-Terrorism Committee Executive Directorate *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives* (2018) at 6; United Nations Office on Drugs and Crime (UNODC) *Preventing and Responding to Violence against Children Recruited and Exploited by Terrorist and Violent Extremist Groups*; United Nations Office on Drugs and Crime (UNODC) *UNODC Roadmap on the Treatment of Children Associated with Terrorist and Violent Extremist Groups* (2019) at 1; Jørgensen, above n 20, at 7; Radicalisation Awareness Network (RAN) *Child returnees from conflict zones* (2016).

<sup>22</sup> Radicalisation Awareness Network (RAN) *RAN Manual — Responses to returnees: Foreign terrorist fighters and their families* (2017) at 69.

<sup>23</sup> At 69.

<sup>24</sup> See Radicalisation Awareness Network (RAN), above n 21.

coercion and duress.<sup>25</sup> This is not to deny children’s evolving capacities and agency,<sup>26</sup> but rather to emphasise that underlying conditions, such as poverty, peer and family pressure, discrimination and denial of human rights generally increase children’s vulnerability to become involved in criminal activity, particularly terrorist-related.<sup>27</sup>

The recognition of children’s status as victims does not grant immunity for criminal acts committed, but it does necessitate ongoing consideration of this fact at every stage of states’ responses, which must then be tailored to be supportive and not punitive accordingly.<sup>28</sup>

### 3 *Reformative potential*

By virtue of their age and ongoing development, when a conducive environment is provided children have reformative potential and incredibly resilient coping strategies that can allow them to flourish as an individual in society despite suffering significant trauma.<sup>29</sup> Consequently, rehabilitation and reintegration of children who have suffered violence or

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<sup>25</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 74 and 77, citing *Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence* (International Criminal Court, 18 March 2008), in *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* (14 March 2012).

<sup>26</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 74.

<sup>27</sup> Jørgensen, above n 20, at 7; *Report of the independent expert for the United Nations study on violence against children* GA Res 60/282 (19 August 2005) at 20; Radicalisation Awareness Network (RAN), above n 22, at 1; Brian Michael Jenkins “Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria” (2019) 12(5) CTC Sentinel 11 at 12.

<sup>28</sup> 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) at 71–73; United Nations Office on Drugs and Crime (UNODC) *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (2017) at 75; *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [52].

<sup>29</sup> Global Counterterrorism Forum *Rehabilitating Juvenile Violent Extremist Offenders in Detention: Advancing a Juvenile Justice Approach* at 12.

trauma is always “the primary objective” of any consequent state measures over, for instance, any punitive responses.<sup>30</sup>

### *B The Children’s Rights Framework*

Presented here are several preliminary matters necessary for the purposes of this paper: the location of children’s rights; the nature of children’s rights as either positive or negative and either derogable or non-derogable; and the key principles underpinning application of the children’s rights framework.

#### *I Sources of children’s rights*

The children’s rights framework relating to children stranded overseas in situations of violence is sourced mainly in international human rights law (IHRL) but informed also by international humanitarian law (IHL), international criminal law and certain other areas of law such as refugee law, counter-terrorism law and the law relating to consular relations. This section introduces briefly the sources and certain major legal instruments important to the thesis of this essay.

Of chief importance, IHRL is established through treaties and customary international law.<sup>31</sup> The requirements stipulated in treaties — both positive and negative — are binding but only on states party to them, whereas customary international law, which is established through consistent state practice over time in the belief the practice is required by law,<sup>32</sup> is applicable to all states regardless of individual treaty ratification.<sup>33</sup> Central to the children’s

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<sup>30</sup> *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [17]; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 74; Global Counterterrorism Forum *Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context* (2016) at 2; United Nations Office on Drugs and Crime (UNODC), above n 28, at 74.

<sup>31</sup> United Nations Counter-Terrorism Implementation Task Force *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (2018) at 5.

<sup>32</sup> *Opinio juris*.

<sup>33</sup> United Nations Counter-Terrorism Implementation Task Force, above n 31, at 5.

rights framework is the CRC, the most widely ratified human rights convention,<sup>34</sup> to the obligations of which all 196 ratifying states (that is, *all* qualifying states bar the United States) are bound under international law.<sup>35</sup> The CRC dictates and prescribes the appropriate treatment of all children in all situations, necessarily including those in situations of violence. Other instruments of IHRL relevant here include the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) — the three of which together comprise the “International Bill of Rights” — as well as the Convention Against Torture (CAT).

IHL,<sup>36</sup> which by way of rules contained in the four Geneva Conventions and their Additional Protocols seeks for humanitarian reasons to limit the effects of armed warfare, contains additional provisions relevant to children as applicable in situations of both international and non-international armed conflict.<sup>37</sup> Even in such situations, however, IHRL nevertheless continues to operate, as IHL is “complementary [to], not mutually exclusive [with]” IHRL.<sup>38</sup> Indeed, the two bodies of law, while distinct, have been said to

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<sup>34</sup> Julia Sloth-Nielsen “Monitoring and Implementation of Children’s Rights” in Ursula Kilkelly and Ton Liefwaard (eds) *International Human Rights of Children* (Springer Singapore, Singapore, 2019) 31 at 34. All UN member states have ratified the Convention, with the exception of the United States, which signed the Convention in 2000 but has not introduced the necessary legislation to complete the process. See also Helen Duffy “‘Foreign Terrorist Fighters’: A Human Rights Approach?” (2018) 29 *Security and Human Rights* 120 at 167.

<sup>35</sup> Michael Freeman “Why It Remains Important to Take Children’s Rights Seriously” (2007) 15 *Int’l J Children’s Rts* 5 at 5; Radicalisation Awareness Network (RAN), above n 22, at 73.

<sup>36</sup> Also known as the law of armed conflict.

<sup>37</sup> United Nations Counter-Terrorism Implementation Task Force, above n 31, at 7.

<sup>38</sup> *Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168 (ICJ) 231; *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [11]; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 7–8.



share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity”.<sup>39 40</sup>

International criminal law, refugee law, counter-terrorism law and the law relating to consular relations are also relevant and included in this paper to the extent necessary.

## 2 *The nature of children’s rights*

### (a) Rights and obligations as positive or negative

Rights and obligations may be categorised as either positive or negative.<sup>41</sup> A *negative* right or obligation means the right-holder is protected from violation of that right, so that those with the negative obligation (being those from whom the right-holder is protected) must refrain from acting in such a way so as to violate that right. A *positive* right or obligation requires those with the corresponding obligation positively to *act* to take measures to uphold or ensure the right-holder is guaranteed that right.<sup>42</sup> For an example, A’s *negative* right to life against B means B has a *negative* obligation not to take the life of A; A’s *positive* right to life against B means B has a *positive* obligation to make efforts to ensure the life of A (which may necessitate B preventing C from taking the life of A).<sup>43</sup> Understandably, then, though the outcome may be the same in either case, the content of a positive right is stronger than that of a negative right, enjoying greater protection. Consistently, the requirements of a positive obligation are generally more arduous than those of a negative obligation, since whereas a negative obligation may simply require that

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<sup>39</sup> *Coard v United States* IACHR No 109/99, 29 September 1999 at [38], cited in Silvia Borelli “Casting light on the legal black hole: International law and detentions abroad in the ‘war on terror’” (2005) 87 Int Rev Red Cross 39 at 54.

<sup>40</sup> United Nations Counter-Terrorism Implementation Task Force, above n 31, at 7–8.

<sup>41</sup> UN Doc CCPR/C/21/REV1/ADD13 at [6].

<sup>42</sup> See for example at [8].

<sup>43</sup> See a similar example in Tatyana Eatwell *State responsibility for human rights violations committed in the state’s territory by armed non-state actors* (Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No 13, 2018) at 13.

one with the obligation refrain from doing something, a positive obligation will more often require the obligation-holder positively to act.

As a result, the existence of a positive obligation generally “is not taken for granted but rather is something that must be justified in a particular case.”<sup>44</sup> Nevertheless, states can and do have positive obligations to protect individuals from acts committed by private persons or entities, and the OHCHR has averred that all states have positive human rights obligations to protect human rights.<sup>45</sup> Similarly, although a state may comply with any obligation to “respect” human rights simply by not violating them, any duty to “protect” or “fulfil” human rights “imposes an affirmative duty on the state, and calls for specific activities by the state to enable individuals to enjoy the recognized rights.”<sup>46</sup>

The distinction between positive and negative rights and obligations is central to this paper. The thesis of this paper is that whereas children appear to have a clear *negative* right of return to their country of origin and states a *negative* obligation not to *prevent* their child nationals’ return, in fact examination of the children’s rights framework reveals a more powerful *positive* right of children to *be repatriated* to their country of origin, placing on those states a more active *positive* obligation to take real efforts to *repatriate* their child nationals. The real consequences of such a shift are significant: children as rights-holders will be rather than alone, passive and struggling individuals in difficult settings the beneficial recipients of states’ broader consular and practical assistance; and states which might previously have relied on a lack of clear culpability for failures to act are then

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<sup>44</sup> Laurens Lavrysen *Human Rights in a Positive State* (Intersentia, 2016) at 215.

<sup>45</sup> Bertrand G Ramcharan *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff Publishers, Leiden, 2011) at 17; “Office of the United Nations High Commissioner for Human Rights (OHCHR)” PreventionWeb <[www.preventionweb.net](http://www.preventionweb.net)>, cited in Isabel M Borges “Protection obligations of states under international human rights law and related instruments” in *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge, New York, 2018) at 45.

<sup>46</sup> Nihal Jayawickrama *The Judicial Application of Human Rights Law* (Cambridge University Press, Cambridge, 2002) at 46; Ramcharan, above n 45, at 123; OHCHR “International Human Rights Law” <[www.ohchr.org](http://www.ohchr.org)>.

precluded from pleading inaction but must instead uphold their international obligation to *act*.<sup>47</sup>

(b) Rights and obligations as derogable or non-derogable

Non-derogable rights are those that, at least in theory, cannot be taken away or compromised.<sup>48</sup> Although certain human rights treaties provide for states to limit specified rights when strict conditions are met, non-derogable rights are those that continue to apply always and allow no derogations, even in times of emergency.<sup>49</sup>

IHRL generally is applicable at all times to all persons, with only very limited derogations permitted.<sup>50</sup> For instance, and reinforcing their fundamental importance, rules of *jus cogens* (those norms recognised by the international community of states as a whole as protecting central values and interests, and modifiable only by a subsequent norm of the same character) by definition permit no derogation.<sup>51</sup> Any limitations on IHRL's application must be prescribed by law, necessary and proportionate to the pursuance of legitimate aims, and non-discriminatory, so that any limitations are not arbitrary or unreasonable but rather contain "adequate safeguards and effective remedies".<sup>52</sup>

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<sup>47</sup> See David Young "Duty to Repatriate: The Case of Foreign Combatants in Kurdish Prisons" [2019] *Denv J Int'l L & Pol'y*.

<sup>48</sup> "non-derogable right" UNTERM <[www.unterm.un.org](http://www.unterm.un.org)>.

<sup>49</sup> See generally Annika Tahvanainen "Hierarchy of Norms in International and Human Rights Law" (2006) 24 *Nordisk Tidsskrift for Menneskerettigheter* 191 at 199–201.

<sup>50</sup> *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [11]; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 7–8.

<sup>51</sup> Vienna Convention on the Law of Treaties (23 May 1969), art 53; see also Tahvanainen, above n 49, at 194.

<sup>52</sup> UNDOC CCPR/C/21/REV1/ADD13; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 5; *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN4/1985/4 (28 September 1984) at [16] and [18].

As noted above, children have special rights and protections that by reason of age alone apply to all persons under the age of 18.<sup>53</sup> The CRC contains no general derogation clause, and almost all of the rights themselves contain no derogation provision, so that most of the rights within the CRC are non-derogable and as such continue to apply “in all situations, irrespective of the children’s age, sex, or other status, including actual or perceived family or personal affiliation.”<sup>54</sup> Indeed, art 38 of the CRC itself clearly indicates that it remains applicable even in emergency situations.<sup>55</sup> Only three articles in the CRC allow derogation of the rights they contain: arts 10 (the right to leave any country), 13 (the right to freedom of expression) and 15 (the right to freedom of association and peaceful assembly). In each case, the permitted derogations are limited to those necessary for protection of national security, or of public order or of public health or morals, or the protection of the rights and freedoms of others.

Nevertheless, it is of note that the vast majority of children’s rights are non-derogable in nature. This may be contrasted with, for instance, rights under the ICCPR, which permits

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<sup>53</sup> United Nations Convention on the Rights of the Child, art 1; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 27–28; United Nations *Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups* (2019) at 5; see also Radicalisation Awareness Network (RAN), above n 22. Only arts 10, 13 and 15 are subject to exceptions on the basis of national security interest, United Nations Office on Drugs and Crime (UNODC), above n 28, at 71, n 96.

<sup>54</sup> *International Covenant on Civil and Political Rights General Comment No 29: States of Emergency (Article 4)* UN Doc CCPR/C/21/Rev1/Add11 (24 July 2001) at n 5; CRC, art 1; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 27–28; see also Radicalisation Awareness Network (RAN), above n 22. Only arts 10, 13 and 15 are subject to exceptions on the basis of national security interest; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71, n 96; United Nations Interregional Crime and Justice Research Institute (UNICRI) *Children and Counter-Terrorism* (2016); United Nations, above n 53, at 5.

<sup>55</sup> See UN DOC CCPR/C/21/REV1/ADD11 at n 5; and Pierre Thielborger “The ‘Essence’ of International Human Rights” (2019) 20 German LJ 924 at 929, n 32.

states to take measures derogating from their obligations in times of public emergency,<sup>56</sup> though such derogations must be of an exceptional and temporary nature and the situation has still to amount to a public emergency which threatens the life of the nation.<sup>57</sup>

### 3 *Key principles within the children's rights framework*

Consistently with but separately to the normative understandings of children described above, the children's rights framework operates by four key principles included in the CRC which must be applied at all times:<sup>58</sup> non-discrimination;<sup>59</sup> the best interests of the child;<sup>60</sup> the right to life, survival and development;<sup>61</sup> and the right to be heard.<sup>62</sup> States and any other actors must then ensure that any and all actions concerning children abide by these four principles.

#### (a) Non-discrimination

First, states must respect and uphold children's rights "without discrimination of any kind".<sup>63</sup> The unequivocal nature of this wording allows no margin of appreciation; indeed, the Committee on the Rights of the Child ("the Committee") has recommended that states must "address discrimination against vulnerable or marginalized groups of children ... and make proactive efforts to ensure that such children are assured their right to protection on

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<sup>56</sup> International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976), art 4(1); Thielborger, above n 55, at 928.

<sup>57</sup> UN Doc CCPR/C/21/REV1/ADD11 at 29, cited in United Nations Counter-Terrorism Implementation Task Force, above n 31, at 6.

<sup>58</sup> *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12]; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71.

<sup>59</sup> CRC, art 2.

<sup>60</sup> Article 3.

<sup>61</sup> Article 6.

<sup>62</sup> Article 12.

<sup>63</sup> Article 2.

an equal basis with all other children.”<sup>64</sup> Discrimination may arise in various ways, including prejudice based on conflict with the law or association with armed forces or groups, leaving such children particularly and discriminately vulnerable to violence and derogation of their rights.<sup>65</sup> In any matters relating to children, therefore, states must act non-discriminately, and where some children would be more and unduly affected by states’ inaction, discriminate action may be their *inaction*.

(b) Best interests a “primary consideration”

The “cardinal principle”<sup>66</sup> of the children’s rights framework is that “[i]n all actions concerning children ... the best interests of the child [are to] be a primary consideration.”<sup>67</sup> The principle underpins, applies to and guides application of all rights under the CRC and all policies, actions and decisions directly or indirectly concerning children.<sup>68</sup> The principle necessitates “active measures” from all state organisations,<sup>69</sup> requiring that “[e]very legislative, administrative and judicial body or institution ... systematically [consider] how children’s rights and interests are or will be affected by their decisions and actions”.<sup>70</sup> The best interests principle thus places children at the very centre of considerations in all and any decisions that do or may affect them.<sup>71</sup>

That the child’s best interests should be a “primary” consideration means that while they are not the *only* or *predominant* consideration, they must nevertheless be the “primary

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<sup>64</sup> *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [60].

<sup>65</sup> UN Children’s Fund (UNICEF), above n 19, at [3.1]; UN Doc CRC/C/GC/13 at [60]; *Report of the independent expert for the United Nations study on violence against children* UN Doc A/61/299 (29 August 2006) at [93(e)].

<sup>66</sup> Duffy, above n 34, at 167.

<sup>67</sup> CRC, art 3(1); Duffy, above n 34, at 167; United Nations, above n 53, at 6.

<sup>68</sup> Duffy, above n 34, at 167.

<sup>69</sup> *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12].

<sup>70</sup> At [12].

<sup>71</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20.

focus” and do carry “precedence” and “the most weight”.<sup>72</sup> For instance, though the best interests must be a primary consideration at all times, the Committee has asserted that this must be respected especially when children are victims of violence.<sup>73</sup> As such, its universal nature demands that states “fashion solutions to serve the child’s best interests on a case-by-case basis ... even when the child’s best interests may conflict with the State’s perceived security interests.”<sup>74</sup>

Though it is not a new concept,<sup>75</sup> and despite a General Comment devoted to it in 2013, the exact meaning of “best interests” remains “controversial and debated”.<sup>76</sup> According to the Committee’s guidance/advice, the principle aims to ensure not only the “full and effective enjoyment” of all the rights in the CRC and the child’s integrity and human dignity, but also the child’s “holistic development”, meaning “the child’s physical, mental, spiritual, moral, psychological and social development”.<sup>77</sup> In particular, “[a]n adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the [CRC].”<sup>78</sup>

### (c) Right to life, survival and development

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<sup>72</sup> Duffy, above n 34, at 167; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 30.

<sup>73</sup> *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [3(f)].

<sup>74</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 30.

<sup>75</sup> Having first appeared in the *Declaration of the Rights of the Child* GA Res 1386 (1959) at [2].

<sup>76</sup> *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* UN Doc CRC/C/GC/14 (29 May 2013); Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [3.01 and 3.05].

<sup>77</sup> UN Doc CRC/C/GC/14 at [4]–[5]; Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at n 2; and *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12]; see also Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [3.06].

<sup>78</sup> UN Doc CRC/C/GC/13 at [61].

Under this principle, states have a negative obligation to refrain from interference with a child's right to life, the only right in the CRC described as "inherent".<sup>79</sup> In relation to the child's survival and development, though, there is an "additional layer of protection" in the form of positive obligations on the state to protect the child "to the maximum extent possible" from violence and exploitation, which would otherwise jeopardise this right.<sup>80</sup>

"Development" is to be understood in its broadest sense, embracing as a holistic concept a child's physical, mental, spiritual, moral, psychological and social development,<sup>81</sup> and links with other related rights such as education, play and leisure activities, access to health care (including psychological care), safe drinking water and a clean environment.<sup>82</sup> The right is mainly understood as relating to the child's *future* development, as a result of which obligations on states have the aim of, in addition to achieving the child's "optimal development", taking care of the child's *future* well-being.<sup>83</sup>

The Committee has expressed particular concern in relation to children outside their country of origin, on the basis they are especially vulnerable to various risks to their life, survival and development, and in relation to whom in particular this principle therefore "necessitates vigilance".<sup>84</sup>

#### (d) Right to be heard

Children who are marginalized or discriminated against face particular barriers to participation.<sup>85</sup> For children in situations of violence, since:<sup>86</sup>

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<sup>79</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [6.08].

<sup>80</sup> CRC, art 6; Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [6.01].

<sup>81</sup> UN Doc CRC/GC/2003/5 at [12]; UN Doc CRC/C/GC/13 at [62].

<sup>82</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [6.03].

<sup>83</sup> Peleg, above n 9, at 381, cited in Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [6.15]; UN Doc CRC/C/GC/13 at [62].

<sup>84</sup> *General Comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin* UN Doc CRC/GC/2005/6 (3 June 2005) at [23].

<sup>85</sup> UN Doc CRC/C/GC/13 at [63].

<sup>86</sup> At [63].



... the experience of violence is inherently disempowering, sensitive measures are needed to ensure that child protection interventions do not further disempower children but rather contribute positively to their recovery and reintegration via carefully facilitated participation.

Since in the Committee’s estimation, “child participation promotes protection and child protection is key to participation”,<sup>87</sup> children thus have the right to express their views in all matters affecting them, which states are then obliged to uphold with “no leeway” for discretion.<sup>88</sup> In order to make a well-formed view, though, a child must be provided with all relevant information and engagement must occur by way of “consistent and ongoing arrangements”.<sup>89</sup> Upholding this right properly then “ensures respect for the child as an actor in [their] everyday life”.<sup>90</sup>

### *III Rights of Children in Overseas Situations of Violence*

The children’s rights framework applies at all times to all children. This section outlines those rights within the children’s rights framework particularly relevant and applicable to children in overseas situations of violence, that is children in any extraterritorial set of circumstances in which they are subject to “all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.<sup>91</sup>

#### *A Rights generally*

While art 19 “forms the core provision” relating to violence, children suffering in such situations are generally likely to be suffering from other violations of their rights as well.<sup>92</sup>

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<sup>87</sup> At [63].

<sup>88</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [12.05].

<sup>89</sup> UN Doc CRC/GC/2005/6 at [25].

<sup>90</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [12.01].

<sup>91</sup> CRC, art 19; see Pinheiro, above n 3, at 33; UN Doc CRC/C/GC/13 at [4].

<sup>92</sup> UN Doc CRC/C/GC/13 at [7(a)] and [7(b)] and [72(g)].

This section highlights in precis some of those rights that are particularly likely to be impinged upon as a factor in conjunction towards or result of suffering from violence more generally. While arguably almost every right in the CRC may be at risk of violation where children are suffering violence, the purpose of highlighting these is to demonstrate the extent of rights violations children to whom the positive right to be repatriated this paper presents applies often suffer.

The first rights to note are the key principles always applicable already described above, namely a child's rights to non-discrimination (art 2); to have their best interests a primary consideration (art 3); to life, survival and development (art 6); and to have their views heard (art 12).

As foreshadowed, several other areas of rights are particularly relevant to children in overseas situations of violence, and are devoted further attention detail below, namely a child's rights: to return, including their right to nationality and to be protected from statelessness (arts 7, 8 and 10); to be protected from violence, including recruitment and use in armed conflict (arts 19 and 38); and to appropriate youth justice measures and protections (arts 37 and 40).

Apart from these, violence in an overseas setting may also impinge upon, in particular, a child's right:

- (a) to a name and to know and be cared for by their parents (art 7);
- (b) to preserve their identity (art 8);
- (c) to be protected from separation from their parents against their will (art 9);
- (d) to freedom of expression (art 13);
- (e) to freedom of thought, conscience and religion (art 14);
- (f) to freedom of association and to freedom of peaceful assembly (art 15);
- (g) to privacy (art 16);
- (h) to access to information (art 17);
- (i) to enjoyment of the highest attainable standard of health and to health care treatment, to nutritious foods and clean drinking water, and to a healthy environment generally (art 24);

- (j) to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, including nutrition, clothing and safe housing (art 27);
- (k) to education (art 28);
- (l) to practise their own religion and to use their own language (art 30);
- (m) to rest and leisure, to play and recreation, and to culture and arts (art 31);
- (n) to be protected from economic exploitation and harmful work (art 32);
- (o) to be protected from the use and trafficking of drugs (art 33);
- (p) to be protected from sexual exploitation and abuse (art 34);
- (q) to be protected from abduction, sale and trafficking (art 35); and
- (r) to exploitation generally (art 36).

## *B Right of return*

The first specific right to raise in reference to the treatment of children in overseas situations of violence is the child's guaranteed right of return. This is the product of the child's right to acquire a nationality, as well as their protection against statelessness and right of return.

### *1 Right to a nationality*

Under art 7 of the CRC, every child has the right to acquire a nationality, which states must ensure their domestic law has safeguards to fulfil, especially where the child would otherwise be stateless.<sup>93</sup> The right to nationality is included in a number of treaties, and in conjunction with art 15 of the UDHR in particular, the state may not arbitrarily deprive a child of their nationality.<sup>94</sup> In fact, states must also respect the right of the child to preserve their identity (including their nationality) as recognised by law "without unlawful

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<sup>93</sup> United Nations, above n 53, at 4; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 28.

<sup>94</sup> United Nations, above n 53, at 4.

interference” and must provide “appropriate assistance and protection” to a child to re-establish speedily their identity where it has been illegally deprived.<sup>95</sup>

## 2 *Protection against statelessness*

Making nationals stateless is illegal under international law and states must have safeguards and processes that protect people from becoming stateless in place to ensure that nobody is made stateless.<sup>96</sup> Indeed, statelessness could hardly be in the best interests of a child,<sup>97</sup> given the profound impact this could have on their future and the protection of their rights, lacking any one primary duty-bearer.<sup>98</sup> The UN Convention on the Reduction of Statelessness prohibits states from unilaterally declaring that their refugee nationals living abroad are no longer their citizens unless that citizen has acquired citizenship of another country;<sup>99</sup> however, the convention makes no mention of “return” or “repatriation”.<sup>100</sup> Nevertheless, stateless children or those at risk of becoming stateless are in “especially vulnerable and exposed situations.”<sup>101</sup>

## 3 *Right of return*

The “International Bill of Rights” grants to all people a negatively framed right of return to their country.<sup>102</sup> Interestingly, this is one right which is located in human right

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<sup>95</sup> CRC, art 8; TL Lee “Refugees from Bhutan: Nationality, Statelessness and the Right to Return” (1998) 10 IJRL 118 at 144.

<sup>96</sup> United Nations, above n 53, at 4; OSCE Office for Democratic Institutions and Human Rights, above n 14.

<sup>97</sup> United Nations, above n 53, at 1.

<sup>98</sup> Duffy, above n 34, at 167.

<sup>99</sup> Vic Ullom “Voluntary Repatriation of Refugees and Customary International Law” (2001) 29 Denv J Int’l L & Pol’y 115 at 120.

<sup>100</sup> At 120.

<sup>101</sup> Pinheiro, above n 3, at 202.

<sup>102</sup> The “International Bill of Rights” comprises the *Universal Declaration of Human Rights* GA Res 217A (1948); the International Covenant on Civil and Political Rights; and the International

instruments applicable to all humans rather than directly and explicitly enhanced by the CRC. Nevertheless, art 13(2) of the UDHR, which grants everyone the right “to return to [their] country”, was later included in art 12(4) of the ICCPR, which provides that “[n]o one shall be arbitrarily deprived of the right to enter [their] own country”.<sup>103</sup> Although the terminology most frequently appears as an assured right to “enter”, “a growing number of international human rights scholars ... agree that the right to ‘enter’ ... amounts to a right to ‘return.’”<sup>104</sup> Individuals, therefore, “possess the ‘human right’ to return to the country from which they fled; a right to be guaranteed by their state.”<sup>105</sup>

The right of return under the UDHR, though, is subject to a general derogation clause so that its exercise may in fact be constrained.<sup>106</sup> Conversely, however, there is no such general limitation clause in the ICCPR,<sup>107</sup> and indeed art 12 itself contains a limitations clause which doesn’t apply to the right of return.<sup>108</sup> Under the ICCPR, therefore, the right to return to one’s own country may only be denied if the denial is not arbitrary.<sup>109</sup> This,

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Covenant on Economic, Social and Cultural Rights (signed 16 December 1966, entered into force 3 January 1976).

<sup>103</sup> GA RES 217A, art 13(2); Geoff Gilbert “The International Law of Voluntary Repatriation” at 1; Eric Rosand “The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?” (1998) 19 Mich J Int’l L 1091 at 1128; International Covenant on Civil and Political Rights, art 12(4).

<sup>104</sup> Ullom, above n 99, at 117.

<sup>105</sup> At 117.

<sup>106</sup> GA RES 217A, art 29(2).

<sup>107</sup> Rosand, above n 103, at n 167.

<sup>108</sup> Art 12(3) of the International Covenant on Civil and Political Rights provides that “[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” The reference to “above-mentioned rights” means that the limitation applies to the rights earlier contained in art 12, relating to (1) the right to liberty of movement and freedom to choose one’s residence and (2) the right to *leave*, but not to (4) the right of return, which is provided for immediately following the limitation.

<sup>109</sup> Rosand, above n 103, at n 167.

however, as with all and any limitations on rights, ought to be interpreted restrictively so as not to be “contrary to the general aim and purpose of the specific right and the instrument in which it is contained”,<sup>110</sup> which view the drafting of the ICCPR reinforces.<sup>111</sup> A similarly framed right of return exists also in the ICERD, which allows for no derogation from its provisions.<sup>112</sup>

Finally, it must be noted that the right of return must be entirely *voluntary*, as affirmed by the protection against refoulement,<sup>113</sup> which prevents the expulsion, return, extradition or other removal to a 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 treatment or punishment.”<sup>114</sup> Thus while a child abroad *may* return to their country of origin by their choice, at the same time they must not be forcibly returned where such a risk exists.

Thus a negative right of return exists for all people under international law, so that a state may not strip a person of their sole citizenship nor *deny* one’s freedom to return to their country of origin.

### *C Right to be protected from violence*

The case for the positive right and obligation this paper presents is rooted squarely in relation to children in situations of violence. This is on the basis that such children are really suffering and clearly deserving of some additional method of protection. The normative understandings of children are relevant here: that children subjected to violence

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<sup>110</sup> Christa Meindersma “Population Exchanges: International Law and State Practice - Part 2” (1997) 9 IJRL 613 at 642, cited in Rosand, above n 103, at n 167.

<sup>111</sup> The drafting makes clear that it was only included to accommodate countries which used exile as lawful penal sanction under their domestic criminal law “and were thus unwilling to accept an absolute obligation to accept returnees”: Rosand, above n 103, at n 167, citing Manfred Nowak *UN Covenant on Civil and Political Rights* (NP Engel, Kehl, 1993) at 219.

<sup>112</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), art 5(d)(ii); Rosand, above n 103, at n 167.

<sup>113</sup> Gilbert, above n 103, at 1.

<sup>114</sup> United Nations, above n 53, at 6.

are universally necessarily victims, that children are entitled to special protection and support, that violence can result in terrible harms and further and ongoing consequences to children's development, and that their dignity is necessarily violated as a result. As the Independent Expert for the UN Study on Violence Against Children (the Independent Expert) succinctly summarised: "no violence against children is justifiable and all forms of violence are preventable".<sup>115</sup>

### *1 Right to be protected from all forms of violence*

As violence is "the intentional use of physical force or power, threatened or actual, against a child, by an individual or group", it results in or has a high chance of resulting in actual or potential harm to the child's health, survival, development or dignity.<sup>116</sup> Children are particularly at risk, and underlying conditions such as "community attitudes to violence, discrimination, poverty, the unequal status of women and girls, lack of access to quality education and denial of human rights generally ... exacerbate children's vulnerability to violence".<sup>117</sup> Relatedly, and accordingly, the prevention of all forms of violence is "essential for promoting the full set of child rights in the [CRC]" on the basis that doing so "[s]ecur[es] and promot[es] children's fundamental rights to respect for their human dignity and physical and psychological integrity".<sup>118</sup>

A child's right to be protected from violence is guaranteed by art 19 of the CRC, under which states have an "immediate and unqualified obligation" to take "all appropriate legislative, administrative, social and educational measures".<sup>119</sup> In its General Comment on corporal punishment, the Committee stated that art 19 is an unequivocal prohibition,

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<sup>115</sup> Pinheiro, above n 3, at XIII; *Report of the independent expert for the United Nations study on violence against children* UN Doc A/61/299 (29 August 2006) at [1].

<sup>116</sup> Krug and others, above n 3, at 5; see also UN DOC A/61/299 at [8].

<sup>117</sup> *Report of the independent expert for the United Nations study on violence against children* GA Res 60/282 (19 August 2005) at [62].

<sup>118</sup> *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [13].

<sup>119</sup> At [65].

with “no ambiguity: [the wording] does not leave room for any level of legalized violence against children.”<sup>120</sup> Indeed, the protection from violence is comprehensive and encompasses not only the child’s life and survival but their development as well.<sup>121</sup> Accordingly, children who have survived harm have as part of this protection the right to receive measures necessary for and conducive to recovery and reintegration.<sup>122</sup>

## 2 *Right to be protected from recruitment and use in armed conflict*

As related above, the normative understanding of children recruited and used in armed conflict is that such children should be recognised primarily as victims, even where they are accused of having committed crimes. This understanding enjoys legal status, having been confirmed by the Security Council in a 2018 Resolution and under IHRL, IHL and international criminal law as well.<sup>123</sup>

First, the CRC unequivocally prohibits the recruitment of children under the age of 15 in armed conflict.<sup>124</sup> Article 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict provides further that armed groups “should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”, binding so under IHRL the 170 states party to the additional protocol.<sup>125</sup>

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<sup>120</sup> *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)* UN Doc CRC/C/GC/8 (2 March 2007) at [18], cited in Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [19.14].

<sup>121</sup> UN Doc CRC/C/GC/13 at [62].

<sup>122</sup> Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [39.05].

<sup>123</sup> SC Res 2427 (2018); United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 74; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 27–28.

<sup>124</sup> United Nations Interregional Crime and Justice Research Institute (UNICRI), above n 54, at 22; CRC, art 38; Additional Protocol I to the Geneva Conventions (adopted 8 June 1977, entered into force 7 December 1978), art 77; Additional Protocol II to the Geneva Conventions (adopted 8 June 1977, entered into force 7 December 1978), art 4(3)(c).

<sup>125</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, signed 25 May 2000, entered into force 12 February 2002),



The recruitment of children is also proscribed under IHL in Additional Protocols I and II to the Geneva Conventions as well as under customary IHL.<sup>126</sup> Furthermore, children recruited into an armed group or used in hostilities are victims of “war crimes” under international criminal law as set out in the Rome Statute.<sup>127</sup>

A state responsible for its nationals has as a result negative and positive obligations under international law to first refrain from recruiting children itself but also actively to take measures to prevent the recruitment of children by other actors and agents. This legal recognition demonstrates as well the “necessity of prosecuting the groups and not the children who are primarily victims of the recruitment process.”<sup>128</sup> The fact that children may have committed criminal acts subsequently does not deprive them of any later rights or guarantees, since they were “victims of violations of international law” in their illegal recruitment and use whom the state failed in its obligation to protect in the first place.

#### *D Rights in relation to justice*

The importance of treating children in conflict with the law in a separate justice system designed for the particular needs, circumstances and considerations relevant to children as above is well-established.<sup>129</sup> For the appropriate treatment of such children suspected of having committed criminal acts, the international legal framework provides “clear and

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art 4(1); United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 75.

<sup>126</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20.

<sup>127</sup> United Nations Office on Drugs and Crime (UNODC), above n 28, at 74–75; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20.

<sup>128</sup> “UNODC Roadmap on the Treatment of Children Associated with Terrorist and Extremist Groups highlighted at African Regional Conference” (19 July 2019) United Nations: Office on Drugs and Crime <[www.unodc.org](http://www.unodc.org)>.

<sup>129</sup> See generally Nessa Lynch *Youth Justice in New Zealand* (Thomson Reuters New Zealand, Wellington, 2019) at ch 2; Laurence Steinberg “Adolescent Development and Juvenile Justice” (2009) 5 *Annu Rev Clin Psychol* 47; and Kathryn Hollingsworth “Theorising Children’s Rights in Youth Justice: The Significance of Autonomy and Foundational Rights” (2013) 76 *MLR* 1046.

detailed guidance”.<sup>130</sup> There are a number of rights and obligations applicable specifically to children and to which such children are entitled, contained in four main international instruments known collectively as the UN Minimum Standards and Norms of Juvenile Justice.<sup>131</sup> Non-derogable, they continue fully to apply to all children in all situations: even in times of conflict or emergency and regardless of the type or seriousness of the offence.<sup>132</sup>

### *1 Minimum requirements for criminal responsibility*

The first restriction on the criminal liability of children is that those below a certain age cannot be held liable under the criminal law, either on the basis they are considered not to have the capacity to infringe the criminal law or otherwise that it would be wrong to hold them criminally responsible for their acts.<sup>133</sup> The CRC itself mandates the use of an MACR, though it does not specify any certain age;<sup>134</sup> yet it is to be at not “too low a level” and the Committee has recommended 14 years without exception, that is regardless of the offence.<sup>135</sup> Concerningly, however, certain countries have more recently introduced

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<sup>130</sup> United Nations Office on Drugs and Crime (UNODC), above n 28, at 71; United Nations, above n 53, at 5.

<sup>131</sup> United Nations Interregional Crime and Justice Research Institute (UNICRI), above n 54, at 18–19; *United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)* (1990) [“Riyadh Guidelines”]; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* (1985) [“Beijing Rules”]; United Nations *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)* (1990) [“Havana Rules”]; *Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)* (1997) [“Vienna Guidelines”].

<sup>132</sup> Only arts 10, 13 and 15 are subject to exceptions on the basis of national security interest: United Nations Office on Drugs and Crime (UNODC), above n 28 at 71, n 96; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 80; CRC, arts 37 and 40; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71.

<sup>133</sup> See Gerry Maher “Age and Criminal Responsibility” (2005) 2 Ohio St J Crim L 493 at 503–507; see also Lynch, above n 129, at 69.

<sup>134</sup> CRC, art 40(3)(a).

<sup>135</sup> *Beijing Rules*, above n 131, r 4.1; *General comment No 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at 6; see also United Nations Office on Drugs and Crime (UNODC), above n 28, at 71–72.

exceptions to the MACR for the commission of certain listed serious crimes, such as terrorist offences,<sup>136</sup> which the Committee has expressed concern over as offending against the non-derogability of the CRC rights.<sup>137</sup> Where children are detained or otherwise remain in states which have exceptions to the MACR for certain offences, therefore, or employ an unduly low MACR, those children are at heightened risk of being held criminally liable, and receiving subsequent penalties and criminal sanction, in direct contravention of international consensus and best practice.

Even where children are at or above the MACR, children continue to benefit from additional protections and presumptions, detailed further below. Where the alleged offence relates to terrorist activity or association, for instance, international protocol under the *Paris Principles* requires also that children have been *actively involved* in criminal activity.<sup>138</sup> Prosecution or punishment for association with or membership of a terrorist group alone is discouraged, and it has been suggested that travelling to join a terrorist group cannot by itself be considered criminal on the part of the child.<sup>139</sup> For as the UN Security Council has recognised, children may have been required to serve in a terrorist group in many different roles and not necessarily as direct participants in hostilities,<sup>140</sup> (though a similar argument could arguably be made for other individuals as well).

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<sup>136</sup> United Nations Office on Drugs and Crime (UNODC), above n 28, at 76; UN Doc CRC/C/GC/24 at [25]; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20; United Nations, above n 53, at 8.

<sup>137</sup> UN Doc CRC/C/GC/24 at [25].

<sup>138</sup> UN Children's Fund (UNICEF), above n 19, at [8.7].

<sup>139</sup> UN Children's Fund (UNICEF), above n 19, art 8.7; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 27–28. See also *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism* HRC Res 28/28 (19 December 2014) at [49].

<sup>140</sup> SC Res 2396 (2017); United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 68.

## 2 *Protections against detention/deprivation of liberty*

While Fiona de Londras has observed that “[n]o legal system could insist on an absolute right to liberty”,<sup>141</sup> IHRL protects the right not to be deprived of liberty *unlawfully or arbitrarily*.<sup>142</sup> What this means, in other terms, is that a person may not be deprived of their liberty unless it is on one of the limited and defined bases of detention and is challengeable.<sup>143</sup> The protections for children are even stronger: under applicable international safeguards, detention must be used only as a measure of last resort and for as short a period as possible.<sup>144</sup> In particular, preventive and administrative detention are only to be used in “the most serious cases” and regularly reviewed, with their duration limited by law.<sup>145</sup> Instead, decision-makers, who must — as ever — be guided by the best interests of the child, should give “particular attention” to alternatives to prosecution and impose detention only where *no other* less restrictive alternatives are available.<sup>146</sup>

There is of course sometimes a tension between the interests and rights of a child and those of others, such as members of the public,<sup>147</sup> which necessitates the use of detention in

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<sup>141</sup> Fiona de Londras “The right to be free from arbitrary detention” in *Detention in the “War on Terror”: Can Human Rights Fight Back?* (Cambridge University Press, Cambridge, 2011) 36 at 36.

<sup>142</sup> CRC, art 37(b); SC Res 2225 (2015) at [17]; SC Res 2427 at [18 (2018)]; Child Rights International Network (CRIN) *Caught in the crossfire? An international survey of anti-terrorism legislation and its impact on children* (2018) at 17.

<sup>143</sup> de Londras, above n 141, at 36–37.

<sup>144</sup> CRC, art 37(b).

<sup>145</sup> *General comment No 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at 14; United Nations Office on Drugs and Crime (UNODC), above n 28, at 87–88.

<sup>146</sup> UN Children’s Fund (UNICEF), above n 19, at [3.7], citing International Covenant on Civil and Political Rights; *Beijing Rules*, above n 131; and *Riyadh Guidelines*, above n 131; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 28; *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [17]. Such alternatives could include diversion, community service, probation and conditional or suspended sentences: United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20; *Beijing Rules*, above n 131, r 11.4.

<sup>147</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 30.

certain circumstances. However, fundamentally the importance placed on the child’s best interests as a “cardinal principle” means those interests should be at the “cent[re] of considerations”, even when the child is considered a potential security risk.<sup>148</sup> Indeed, deprivation of liberty has been said to be “almost never” in the best interests of the child, “[a]s a matter of principle”.<sup>149</sup> The Committee has commented:<sup>150</sup>

The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.

Importantly too, the Committee was convinced that could be done “in concert with attention to effective public safety.”<sup>151</sup> Since any use of detention for children “risks neglecting” the child’s best interests,<sup>152</sup> the Committee in its 2019 General Comment accordingly entreated states to “immediately embark on a process to reduce reliance on detention [of children] to a minimum.”<sup>153</sup>

### 3 *Rights to proper treatment, youth justice and additional procedural safeguards*

Every child “alleged as, accused of or recognized as having infringed the law, particularly those who are deprived of their liberty” has the right to be treated “in a manner consistent with his or her rights, dignity and needs, in accordance with applicable international

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<sup>148</sup> At 30; OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 69.

<sup>149</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 83.

<sup>150</sup> *General Comment no 10: Children’s rights in juvenile justice* UN Doc CRC/C/GC/10 (25 April 2007) at [10], cited in United Nations Office on Drugs and Crime (UNODC) *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners* (2015) at 15.

<sup>151</sup> UN Doc CRC/C/GC/10 at [10], cited in United Nations Office on Drugs and Crime (UNODC), above n 150, at 15.

<sup>152</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 69; United Nations Interregional Crime and Justice Research Institute (UNICRI), above n 54, at 77.

<sup>153</sup> *General comment No 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at 14.

law”.<sup>154</sup> This ensures that any prosecution or treatment of children in conflict with the law is conducted in a way that is child-specific and meeting minimum standards based on a child’s age, needs and specific vulnerabilities.<sup>155</sup>

Children are also, in addition to all the ordinary procedural standards applicable to justice proceedings, ensured additional guarantees which apply from the moment a child is arrested throughout the entire justice process, including emphasising, amongst other things:<sup>156</sup> the well-being of the child and proportional responses to offending; the presumption of innocence; contemplation of diversion at any point; the most limited restriction on personal liberty as possible; and the least possible use of institutionalisation.<sup>157</sup>

Many of these additional guarantees are satisfied by the use of a youth justice system.<sup>158</sup> Moreover, a youth justice system is appropriate for all children accused of crime, regardless of the seriousness of the criminal charge;<sup>159</sup> the idea that only the adult justice system is able to protect society from serious crime is a misconception — in fact the specific role of the youth justice system to protect and best provide for children in conflict with the law adheres to the interest in promoting the reintegration of such children into society.<sup>160</sup>

The above exegesis into the children’s rights framework detailed the major rights in play in relation to children in situations of violence overseas and as such the international legal backdrop against which states’ actual responses may then be compared.

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<sup>154</sup> *The United Nations Global Counter-Terrorism Strategy Review* GA Res 70/291 (19 July 2016); Child Rights International Network (CRIN), above n 142, at 17; CRC, art 40.

<sup>155</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20.

<sup>156</sup> See at 79–80.

<sup>157</sup> CRC, art 40(2); *Beijing Rules*, above n 131, rr 5(1), 7(1), 11(2), 17(1) and 19(1).

<sup>158</sup> Global Counterterrorism Forum, above n 30, Good Practices 1 and 5; Child Rights International Network (CRIN), above n 142, at 10.

<sup>159</sup> CRC, art 40; Child Rights International Network (CRIN), above n 142, at 17; United Nations Interregional Crime and Justice Research Institute (UNICRI), above n 54, at 79; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 80.

<sup>160</sup> United Nations Office on Drugs and Crime (UNODC), above n 28, at 77.

#### *IV Case Study: The Situation of Children Detained in Camps in Northern Syria*

Although the children’s rights framework sets out clearly rights of children in overseas situations of violence and a number of relevant corresponding obligations on states, the response from states in relation to the situation of children currently stranded and detained in camps in northern Syria suggests the present overall conception of the rights and obligations is that they do not translate to a positive right for the child to be repatriated nor a positive obligation on states to take real efforts to do so. This Part contextualises the application of the children’s rights framework to this situation before highlighting the real and evident failures of states’ current conception of the rights and obligations under that framework.

##### *A Contextual Background*

###### *1 The recruitment, exploitation, involvement and association of children in ISIS*

In a period of several years centred around the declaration of the Islamic caliphate in June 2014, over 40,000 foreigners<sup>161</sup> from around 110 states travelled to Iraq and Syria to join the Islamic State.<sup>162</sup> The UN has (perhaps controversially)<sup>163</sup> described the so-called foreign terrorist fighter (FTF) phenomenon as “one of the most serious threats to international peace and security”.<sup>164</sup> Although the concept of foreign fighters is not new, what was notable about the situation in Syria and Iraq compared to previous generations of foreign fighters was the use of a transnational recruitment strategy and the unprecedented sheer number of foreigners who joined, a scale made possible with the use of social and

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<sup>161</sup> That is, those not from Iraq or Syria.

<sup>162</sup> Duffy, above n 34, at 125–126; Richard Barrett *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (2017) at 7.

<sup>163</sup> Duffy, above n 34, at 127.

<sup>164</sup> At 127, citing SC Res 2178 (2014).

digital media.<sup>165</sup> The highest number came from Russia, but some also came from other former Soviet republics, Eastern Europe, Western Europe and the Maghreb.<sup>166</sup> ISIS was also distinctive in its active and targeted recruitment, indoctrination and utilisation of children to its cause.<sup>167</sup> ISIS was “adept” at radicalising young people through social media, so that a high proportion of FTFs were in fact children who had either travelled on their own or with their families.<sup>168</sup> Such children, who were then given military and ideological training and utilised in propaganda, have been termed “Cubs of the Caliphate” on the basis of their future as “lions”.<sup>169</sup> It is important to acknowledge, however, that while some served as suicide bombers, spies, snipers or soldiers on the front line, this was not universally the case and others performed merely support roles such as treating

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<sup>165</sup> Radicalisation Awareness Network (RAN), above n 22, at 15; Barrett, above n 162, at 10; Thomas Renard and Rik Coolsaet *Returnees: Who Are They, Why Are They (Not) Coming Back, and How Should We Deal with Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (2018) at 3 and 16; Secretary-General “Counter-terrorism and human rights: winning the fight while upholding our values” (SOAS, University of London, 16 November 2017).

<sup>166</sup> Barrett, above n 162, at 9–11.

<sup>167</sup> Radicalisation Awareness Network (RAN), above n 21; Radicalisation Awareness Network (RAN) “Discussion Paper” (paper presented to RAN High-Level Conference); *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [13]; Pokalova, above n 18, at 200 and 205; Francesca Capone “The children (and wives) of foreign ISIS fighters: Which obligations upon the States of nationality?” (2019) 60 QIL 69 at 76; Noman Benotman and Nikita Malik *The Children of Islamic State* (2016) at 25–27. See generally Kara Anderson “*Cubs of the Caliphate*”: *The Systematic Recruitment, Training, and Use of Children in the Islamic State* (2016); and John G Horgan and others “From Cubs to Lions: A Six Stage Model of Child Socialization into the Islamic State” (2017) 40 *Studies in Conflict & Terrorism* 645.

<sup>168</sup> Javed Ali and others *Open Letter from National Security Professionals to Western Governments: Unless We Act Now, the Islamic State Will Rise Again* (The Soufan Center, 2019); United Nations Counter-Terrorism Implementation Task Force, above n 31, at 27.

<sup>169</sup> Pokalova, above n 18, at 200 and 205; Capone, above n 167, at 76; Benotman and Malik, above n 167, at 25–27. See generally Anderson, above n 167; and Horgan and others, above n 167.



wounded persons or guarding strategic locations.<sup>170</sup> All such children, though, were exposed to or engaged in violence.<sup>171</sup>

## 2 *Detention of children in camps*

In 2019 there were said to be around 7,000–8,000 children of foreign nationality — an estimated 700–1400 of whom from European countries — left in prolonged detention in camps and “stranded in legal and administrative limbo”, with “meagre prospects” of leaving or returning to their home country.<sup>172</sup> Although by 2018, approximately 1,180 child FTFs — or 25 per cent of those child FTFs accounted for in Syria and Iraq — were believed to have returned home,<sup>173</sup> as the geographic area under ISIS control shrank over the course of 2018 and 2019.<sup>174</sup> Many of those who did not were arrested and dislocated, either forced to relocate or arrested and physically transported to makeshift detention camps or detention facilities under Syrian Democratic Forces (SDF) control, the largest Al-Hol.<sup>175</sup>

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<sup>170</sup> Radicalisation Awareness Network (RAN), above n 21; Radicalisation Awareness Network (RAN), above n 167, at 2; United Nations Office on Drugs and Crime (UNODC) *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia* at 26–27.

<sup>171</sup> Radicalisation Awareness Network (RAN), above n 22, at 70.

<sup>172</sup> “Syria: thousands of foreign children in Al Hol camp must be repatriated given coronavirus fears” (11 May 2020) Save the Children <[www.savethechildren.net](http://www.savethechildren.net)>; “Repatriate or reject: What countries are doing with IS group families” (11 June 2019) France 24 <[www.france24.com](http://www.france24.com)>; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 13; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* (28 January 2020) at [97]; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/45/31 (14 August 2020) at [71].

<sup>173</sup> Joana Cook and Gina Vale *From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State* (2018) at 50.

<sup>174</sup> The Islamic State was declared defeated by the Kurdish-led Syrian Democratic Forces (SDF) on 23 March 2019: Jenkins, above n 27, at 13.

<sup>175</sup> UN Doc A/HRC/45/31 at [60]. In particular, “Operation Peace Spring”, a Turkish offensive into northern Syria which started in October 2019, caused 175,000 people to be displaced, including approximately 80,000 children.

In addition to children who had actively travelled to Syria and Iraq, either independently or with members of their family, thousands of local and foreign children (those born in Syria and Iraq to FTFs) were also arrested and detained for their alleged association with ISIS members.<sup>176</sup> The detention of all these children was done seemingly on the basis of the children having assimilated a violent extremist ideology and posing a particular risk to society, and a perception that alternatives to detention are not possible in terrorism-related cases.<sup>177</sup>

Albeit politically and factually establishing the citizenship of children born to FTFs in Syria and Iraq is a major and important current debate in this area, this paper proceeds on the basis of what states are obligated by rights to do in relation to their established citizens.

### 3 *Conditions of detention and the current humanitarian crisis, heightened by COVID-19*

In living conditions that have been described as “squalid”,<sup>178</sup> “apocalyptic”<sup>179</sup> and “inhuman”,<sup>180</sup> children detained in the camps without recourse to the necessary legal safeguards have limited access to food, running water, sanitation facilities, due process and other fundamental and necessary rights and services such as education, medical care and trauma counselling.<sup>181</sup> In overcrowded conditions and absent adequate health services in

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<sup>176</sup> *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [18]; *Children and Armed Conflict – Report of the Secretary-General* UN Doc A/72/865–S/2018/465 (16 May 2018) at [16]; “*They have erased the dreams of my children*”: *children’s rights in the Syrian Arab Republic* UN Doc A/HRC/43/CRP6 (13 January 2020) at [57]; UN Doc A/HRC/45/31 at 15. See also Tim Meko “ISIS fighters returning home—Washington Post” (22 February 2018) <[www.washingtonpost.com](http://www.washingtonpost.com)>.

<sup>177</sup> United Nations Office on Drugs and Crime (UNODC), above n 28, at 97; Capone, above n 167, at 82.

<sup>178</sup> UN Doc A/HRC/45/31 at [71]; “More than 500 people, mainly children, died in Syria’s al-Hol camp in 2019: Medics” Middle East Eye <[www.middleeasteye.net](http://www.middleeasteye.net)> at 500.

<sup>179</sup> Ali and others, above n 168.

<sup>180</sup> UN Doc A/HRC/45/31 at [80].

<sup>181</sup> At 15; “First case of Coronavirus among residents in Al Hol camp confirmed—Save the Children” <[www.savethechildren.org.au](http://www.savethechildren.org.au)>; Orlaith Minogue and Amjad Yamin *A Children’s Crisis: Update*

place, malnutrition, disease and hypothermia are rife.<sup>182</sup> Those with physical or intellectual disabilities are particularly adversely affected, but the International Commission of Inquiry reported boys who were visibly ill and had untreated conflict-related injuries despite many having been in the camp for over a year.<sup>183</sup> In Al-Hol camp in 2019 more than 500 people — 371 of whom children — died; in August 2020 eight children died in the camp in less than a week.<sup>184</sup>

Conditions are only degrading on account of the novel coronavirus (COVID-19) pandemic, with medical services being stripped down to “skeletal levels”,<sup>185</sup> especially on account of restrictions on border crossings, which have reduced humanitarian assistance and the capacity of health facilities in the camp by 40 per cent.<sup>186</sup> The first case in Al-Hol was reported on 10 August 2020 and more recent infections of camp workers have paused the limited health and education services there were.<sup>187</sup>

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*on Al Hol camp and COVID-19 concerns* (Save the Children, 2020) at 4; Tania Sawaya and others “Coronavirus Disease (COVID-19) in the Middle East: A Call for a Unified Response” (2020) 8 *Frontiers in Public Health* at 1; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* (28 January 2020) at [96].

<sup>182</sup> “France taken to court for refusing to repatriate the children of jihadists” (7 May 2019) France 24 <[www.france24.com](http://www.france24.com)>; Ali and others, above n 168; *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [18]; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 13; Duffy, above n 34, at 126.

<sup>183</sup> At [64].

<sup>184</sup> Human Rights Watch “France: Urgently Repatriate Sick Child from Northeast Syria” (22 April 2020) Human Rights Watch <[www.hrw.org](http://www.hrw.org)>; “More than 500 people, mainly children, died in Syria’s al-Hol camp in 2019: Medics”, above n 178; “Eight children die in Al Hol camp, northeastern Syria in less than a week” <[www.unicef.org](http://www.unicef.org)>.

<sup>185</sup> UN Doc A/HRC/45/31 at [72].

<sup>186</sup> “Child deaths in Syria spike in camp for IS families, says UN” (15 August 2020) Egypt Independent <[www.egyptindependent.com](http://www.egyptindependent.com)>.

<sup>187</sup> “First case of Coronavirus appears among residents Syrian Al Hol camp” (10 August 2020) Save the Children International <[www.savethechildren.net](http://www.savethechildren.net)>; “Eight children die in Al Hol camp, northeastern Syria in less than a week”, above n 184.

With the infrastructure in the camp struggling to cope and the SDF lacking the capacity to look after the detainees in a lawful and sustainable way, Kurdish authorities have suggested they may transfer management of the camps to the Syrian regime, expel detainees to Turkey or send them for trial in Iraq.<sup>188</sup> Another option, for which Kurdish authorities have repeatedly pressed, is for foreign women and children in detention camps to be returned to their countries of origin.<sup>189</sup>

#### 4 Responses from states

So far, few countries have followed the Kurdish request to repatriate their citizens.<sup>190</sup> Those that have have done so slowly and with no overall strategy or plan, but rather on an ad hoc case-by-case basis.<sup>191</sup> France, for example, has repatriated a “handful” of children and left hundreds of others there.<sup>192</sup> Encouragingly, Belgium decided to allow children under 10 with proven ties to Belgium to return, with older children assessed on a case-by-case basis, though this is without active pursuit of repatriation and subject to remaining practical challenges such as the provision of consular services.<sup>193</sup> Certain other countries

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<sup>188</sup> European Council of Foreign Relations (ECFR) *Open letter: Call for a managed return of ISIS foreign fighters* (2019); Eric Schmitt, Alissa J Rubin and Thomas Gibbons-Neff “ISIS Is Regaining Strength in Iraq and Syria” *The New York Times* (19 August 2019) <[www.nytimes.com](http://www.nytimes.com)>; “Foreign Terrorist Fighters: Addressing Current Challenges” (11 February 2020) US Mission to the OSCE <[www.osce.usmission.gov](http://www.osce.usmission.gov)>; Young, above n 47.

<sup>189</sup> “Repatriate or reject: What countries are doing with IS group families”, above n 172; Young, above n 47.

<sup>190</sup> Young, above n 47.

<sup>191</sup> Jenkins, above n 27, at 12.

<sup>192</sup> Laurent Léger “Enfants français en Syrie: Le Drian visé par trois plaintes devant la Cour de justice” (16 September 2019) *LExpress.fr* <[www.lexpress.fr](http://www.lexpress.fr)>.

<sup>193</sup> Duffy, above n 34, at n 209; Thomas Renard and Rik Coolsaet *Children in the Levant: Insights from Belgium on the dilemmas of repatriation and the challenges of reintegration* (Egmont Institute, 2018) at 4–5, cited in Capone, above n 167, at n 35; Bulan Institute “Fionnuala Ni Aolain: ‘States are under a legal obligation from the UN Security Council to repatriate’ | Bulan Institute” (3 June 2020) <[www.bulaninstitute.org](http://www.bulaninstitute.org)>. In late 2018, a Belgian court ruled that the Belgian government should do everything in its powers to bring back six children and their mothers from the Al-Hol camp in Syria on the basis of the children’s best interests, but the decision was subsequently

have also been in favour of repatriation, including the United States, former Soviet states such as Kazakhstan, Uzbekistan and Tajikistan, and Indonesia.<sup>194 195</sup>

However, the overwhelming response from states has been reluctance to act.<sup>196</sup> States have largely avoided taking charge of the children’s repatriation, trial, detention and eventual reintegration, and generally seem to have an unclear position and no set approach.<sup>197</sup> The Canadian federal government, for example, has said it has “no positive obligation” to help at least 25 Canadian children stuck in the detention camp — despite the COVID-19 pandemic.<sup>198</sup> Some countries, such as the United Kingdom and Australia, both of which have previously revoked the citizenship of such nationals, have been described as trying “everything but repatriation.”<sup>199</sup>

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overturned on appeal: Capone, above n 167, at 88, citing Tanya Mehra and Dr Christophe Paulussen *The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking* (International Centre for Counter-Terrorism — The Hague (ICCT), 2019); see also Zico Saerens “Rechter verplicht ons land om kinderen van IS-vrouwen vanuit Syrisch vluchtelingenkamp naar België te halen” (26 December 2018) VRT NWS <[www.vrt.be](http://www.vrt.be)>; and “België moet IS-weduwes en kinderen dan toch niet terughalen” (27 February 2019) De Standaard <[www.standaard.be](http://www.standaard.be)>, cited in Mehra and Paulussen.

<sup>194</sup> Alejandro Sánchez Frías “Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions Against Terrorism” (2020) 53 *Israel L Rev* 71 at 73.

<sup>195</sup> “Repatriate or reject: What countries are doing with IS group families”, above n 172.

<sup>196</sup> Pokalova, above n 18, at 211; Dan E Stigall “Repatriating Foreign Fighters from Syria (Part 1)” (18 March 2020) *Just Security* <[www.justsecurity.org](http://www.justsecurity.org)>.

<sup>197</sup> “ISIS Foreign Fighters after the Fall of the Caliphate” (2020) 6 *Armed Conflict Survey* 23 at 25–26; Frías, above n 194, at 73.

<sup>198</sup> Alex Boutilier “Ottawa says it has no ‘obligation’ to help Canadian children trapped in Syrian detention camp” (5 June 2020) *The Star* <[www.thestar.com](http://www.thestar.com)>.

<sup>199</sup> Thomas Renard and Rik Coolsaet *New figures on European nationals detained in Syria and Iraq* (2019) at 2.

## *B Challenging the Current Conception of Children’s Rights and State Obligations*

A contentious political and diplomatic issue,<sup>200</sup> the situation of children detained in camps in northern Syria is a difficult legal problem largely without precedent and with no straightforward solution.<sup>201</sup> However, as Chair of the Commission of Inquiry, Paulo Pinheiro, lamenting the failure of states to heed calls of the last 10 years to protect their child nationals, has said: “There are no clean hands in this conflict but the status quo cannot endure”.<sup>202</sup> Whereas proper adherence to the children’s rights framework would necessitate states’ active repatriation of the children, as detailed later, this section demonstrates that states’ current understandings of children’s rights and their own obligations in relation to those rights is inadequate and really failing children.

### *1 State justifications, arguments and concerns*

States have refused to repatriate their child nationals on the basis that children have assimilated a violent extremist ideology and are a particular risk to society, in the process denying children rights of return, protection from violence, access to youth justice as well as a more active right to *be* repatriated as outlined in this paper.

#### (a) State arguments and concerns

It is the “almost unanimous” concern that returning FTFs are “unrepentant and represent a serious security threat” that has “informed all the decisions made so far by states of nationality.”<sup>203</sup> The concern is particularly strong in relation to children affiliated with ISIS on the basis of their “voluntary” association and subsequent radicalisation, indoctrination

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<sup>200</sup> “ISIS Foreign Fighters after the Fall of the Caliphate”, above n 197, at 26.

<sup>201</sup> Young, above n 47.

<sup>202</sup> “Syria: Bombshell report reveals ‘no clean hands’ as horrific rights violations continue” (15 September 2020) UN News <[www.news.un.org](http://www.news.un.org)>.

<sup>203</sup> Adam Hoffman and Marta Furlan *Challenges Posed by Returning Foreign Fighters* (2020) at 6; Thomas Renard and Rik Coolsaet “Losing Control Over Returnees?” (13 October 2019) Lawfare <[www.lawfareblog.com](http://www.lawfareblog.com)>; Andrew Gilmour “The Children of ISIS Don’t Belong in Cages, Either” *The New York Times* (9 December 2019) <[www.nytimes.com](http://www.nytimes.com)>; Young, above n 47; *Children and Armed Conflict – Report of the Secretary-General* UN Doc A/72/865–S/2018/465 (16 May 2018) at [16]; Capone, above n 167, at 76–77.

and deliberate utilisation as “cubs of the caliphate”.<sup>204</sup> The fear in Europe in particular is that children returning from Syria may become further radicalised, trained in the use of weapons and explosives and return to conduct terrorist attacks against citizens, if not directly, then in logistical, material or other support such as further recruitment or radicalisation.<sup>205</sup> The valid concern of states is that without clear evidence on how to prevent recidivism, retaliation or otherwise radicalism, repatriation is incompatible with their duty to protect citizens.<sup>206</sup>

(b) State arguments unfounded and concerns misplaced

However, this concern is misplaced. Avowedly, there will “inevitably” remain the risk that returnees *do* return to commit terrorist activities or will otherwise purposefully or otherwise inspire terrorist attacks or threats.<sup>207</sup> However, “[t]he potential for violence is unknown and most likely unknowable”,<sup>208</sup> and the extent to which they pose a threat to the national security of their country of origin, according to national governments, has not been borne out by subsequent events and should not be overly exaggerated.<sup>209</sup>

For it appears that initial state fears have not fully come to pass. Although FTF returnees have admittedly been responsible for or involved in several attacks in Europe upon their

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<sup>204</sup> Anderson, above n 167; Capone, above n 167, at 76; Benotman and Malik, above n 167, at 25–27.

<sup>205</sup> Daan Weggemans, Edwin Bakker and Peter Grol “Who Are They and Why Do They Go?” (2014) 8 *Perspectives on Terrorism* 100 at 100; United Nations Office on Drugs and Crime (UNODC), above n 21; and Hoffman and Furlan, above n 203, at 9–10.

<sup>206</sup> Office of the SRSG on Violence against Children *Solutions for Children Previously Affiliated With Extremist Groups: An Evidence Base to Inform Repatriation, Rehabilitation and Reintegration* (2020) at 6; United Nations Counter-Terrorism Implementation Task Force, above n 31, at 2.

<sup>207</sup> “ISIS Foreign Fighters after the Fall of the Caliphate”, above n 197, at 27.

<sup>208</sup> Radicalisation Awareness Network (RAN), above n 21.

<sup>209</sup> “ISIS Foreign Fighters after the Fall of the Caliphate”, above n 197, at 27; David Malet “ISIS Foreign Fighters: Keep Your Enemies Closer” Australian Institute of International Affairs <[www.internationalaffairs.org.au](http://www.internationalaffairs.org.au)>; Hoffman and Furlan, above n 203, at 8.

return from Syria,<sup>210</sup> the return of thousands of FTFs has not resulted in any largescale or widespread terrorism as feared and suggested.<sup>211</sup> It is important to acknowledge that only a very small number and a “very low” rate of FTFs have engaged in terrorism upon their return, and even fewer of those children.<sup>212</sup> Although governments widely cited a 2013 study which found that approximately 10 per cent of returnees will become domestic terrorists,<sup>213</sup> the same researcher found two years later the rate was in fact just 0.002 per cent — though, perhaps unsurprisingly, the updated figure failed to attract the same traction with governments and policymakers.<sup>214</sup> It becomes apt to repeat here one commentator’s view, that:<sup>215</sup>

... to subordinate [one’s individual rights] so easily to alleged national security concerns contravenes the objects and purposes of human rights instruments generally and renders superfluous most of the rights they were designed to protect.

## 2 *Rights and obligations in relation to children allegedly involved in terrorism*

### (a) Specific obligations in relation to children involved in terrorism

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<sup>210</sup> Including the attacks in Brussels in May 2014 and March 2016 and in Paris in November 2015. See Renard and Coolsaet, above n 199, at 2; Radicalisation Awareness Network (RAN), above n 22; and Jenkins, above n 27, at 14.

<sup>211</sup> David Malet “Is it more dangerous to let Islamic State foreign fighters from the West return or prevent them from coming back?” *The Conversation* <[www.theconversation.com](http://www.theconversation.com)>.

<sup>212</sup> Duffy, above n 34, at 126; *How to handle returning foreign fighters: policies and challenges: Hearing before the Special Committee on Terrorism, European Parliament 2* (2018); and Hoffman and Furlan, above n 203, at 8.

<sup>213</sup> Thomas Hegghammer “Should I Stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting” (2013) 107 *Am Pol Sc R* 1; Malet, above n 209; “ISIS Foreign Fighters after the Fall of the Caliphate”, above n 197, at 27; Malet, above n 211; Hoffman and Furlan, above n 203, at 7.

<sup>214</sup> Thomas Hegghammer and Petter Nesser “Assessing the Islamic State’s Commitment to Attacking the West” (2015) 9 *Perspectives on Terrorism*; Malet, above n 209; Malet, above n 211.

<sup>215</sup> Rosand, above n 103, at 1135.



The UN has called on states to combat and address terrorism, which it has called “one of the most serious threats to international peace and security”.<sup>216</sup> UN SC Resolutions 2178 and 2396, which were passed in response to ISIS, call upon states to assess and investigate those suspected of being FTFs and assess and investigate them and their accompanying family members, including children,<sup>217</sup> and require every country to bring to justice anyone suspected of participating or supporting terrorists, including developing appropriate prosecution, rehabilitation, and reintegration strategies for returning FTFs,<sup>218</sup> and prosecuting and penalising them.

(b) Standards applicable to children allegedly involved in terrorism

Certain commentators are worried these Resolutions represent for children involved with armed groups a potential “paradigm shift” from protection to securitisation, and a threat to the rule of law.<sup>219</sup> The Special Representative has, though, confirmed:<sup>220</sup>

Particularly in contexts where Governments are engaged in operations to counter violent extremism, it is more important than ever to ensure they are carried out in full compliance with [IHL], [IHRL] and refugee law.

Consistently, then, the UN has urged that in adopting responses to returning FTFs, states do so in compliance with obligations under IHRL,<sup>221</sup> even if out of a concern that a failure to do so could fuel the very conditions conducive to extremism.<sup>222</sup> Thus for children allegedly associated with an extremist group, and in concert with normative conceptions of

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<sup>216</sup> *The United Nations Global Counter-Terrorism Strategy* GA Res 60/288 (2006), preamble.

<sup>217</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 69.

<sup>218</sup> Malet, above n 209.

<sup>219</sup> See for example Sandra Krähenmann and Paulien Vandendriessche “From child soldier to child ‘terrorist’: safeguarding innocence from counter-terrorism” (20 November 2019) *Humanitarian Law & Policy* <[www.blogs.icrc.org](http://www.blogs.icrc.org)>; Fionnuala Ní Aoláin “The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law” *Just Security* <[www.justsecurity.org](http://www.justsecurity.org)>.

<sup>220</sup> *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [16].

<sup>221</sup> At [16].

<sup>222</sup> United Nations Counter-Terrorism Implementation Task Force, above n 31.

children who have suffered traumatic conditions and experiences, the same children's rights standards must nevertheless continue to apply.<sup>223</sup>

### 3 *Effect and conclusion*

#### (a) Failures to uphold obligations, including children's rights and best interests

In failing to repatriate, assess and investigate children allegedly associated with ISIS, states in their responses have failed to uphold their obligations under international counter-terrorism law as described above, such measures including rehabilitation and reintegration. More importantly for present purposes, however, in leaving children detained in camps overseas states have failed in their obligations to uphold children's rights, demonstrating the inadequacy of states' current understandings of children's rights and their own obligations in relation to those rights.

The detention of children is "the norm rather than the exception", with parties in Syria detaining children "without a scintilla of evidence or due process".<sup>224</sup> Indeed, the Commission found that the SDF's long-term detention of children in the detention camps amounted to unlawful deprivation of liberty.<sup>225</sup> Children's access to rights such as education and health have been affected, with insufficient services in the camps.<sup>226</sup> Whereas those detained in camps are already exposed to extreme vulnerability,<sup>227</sup> and

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<sup>223</sup> At [21]; OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 69–70.

<sup>224</sup> CRC, art 37(b); United Nations Office on Drugs and Crime (UNODC), above n 28, at 97; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 83; "Syria: Bombshell report reveals 'no clean hands' as horrific rights violations continue", above n 202.

<sup>225</sup> *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/45/31 (14 August 2020) at [80]; "Syria: Bombshell report reveals 'no clean hands' as horrific rights violations continue", above n 202.

<sup>226</sup> UN Doc A/HRC/45/31 at [13].

<sup>227</sup> Duffy, above n 34, at 168.

exposure to violence, the emotional and psychological distress for children is only greater in light of COVID-19.<sup>228</sup>

Such a shift towards viewing children as security risks and potential threats risks neglecting the best interests principle.<sup>229</sup> The International Commission has determined that contrary to their best interests, children have been “scarred by the brutality of the war” in Syria, “victimized in numerous ways” and “continuously denied the special respect and protection they are entitled to”.<sup>230</sup>

The CRC requires states to promote the physical and psychological recovery and reintegration as a result of any form of neglect, abuse, torture or armed conflict.<sup>231</sup> Instead, in failing to repatriate their child nationals states are in reality only allowing their child nationals to be further harmed.

#### *V A Positive Right and Obligation*

The preceding Part demonstrated in reality the inadequacy of the current normative conception of the children’s rights framework to provide real recourse for the situation of children in overseas situations of violence. Upon analysis, a synthesis of the relevant rights and obligations within the children’s rights framework reveals a more powerful right of children to be protected from situations of violence, offering children in such situations of violence a stronger *positive* right on which to rely. Such a right necessitates a corresponding obligation on duty-holders to take real efforts to uphold the right of such children to be protected; states, which are under international law responsible for their child nationals, have a corresponding positive obligation to take real efforts to protect their child nationals from such situations. States must then act to positively and effectively assist children to be

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<sup>228</sup> “First case of Coronavirus appears among residents Syrian Al Hol camp”, above n 187; “First case of coronavirus appears among residents of Syrian Al Hol camp” <[www.savethechildren.org.uk](http://www.savethechildren.org.uk)>.

<sup>229</sup> United Nations Interregional Crime and Justice Research Institute (UNICRI), above n 54, at 77; OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 69–70.

<sup>230</sup> *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* (28 January 2020) at [93].

<sup>231</sup> Mehra and Paulussen, above n 193.

protected from violence; indeed, if not for states' failures to protect their child nationals from such violence, the children would not be prevented from returning to their country of nationality. States therefore have an obligation to take real efforts to actively repatriate their child nationals from overseas situations of violence.

*A Child's Positive and Non-derogable Right to be Protected from Situations of Violence*

The violence children experience in an overseas setting may take the form of exploitation, physical harm, mental abuse or neglect or maltreatment. In whatever form it occurs, as a direct result of full adherence to children's rights as prescribed in the children's rights framework, children have a positive right to be protected from all situations of violence.

That children have such a positive and non-derogable right to be protected from situations of violence mainly follows from the discussion of their rights outlined above. Under the children's rights framework, children are entitled as rights-holders to have their guaranteed rights "respected", "protected" and "fulfilled". Although *respect* for a right may require only negative adherence, in the sense that a state actor may need only to *refrain* from doing some act, the *protection* and *fulfilment* of children's rights impose on consequent duty-holders, including states, *positive* obligations to act.

Certain of these guaranteed rights are vital: especially that the child's best interests are a primary consideration and the child has guaranteed rights to life, survival and development. Proper adherence to these necessarily ensures a child's protection from violence, while failure — including failure to act — may ensue violence itself. Beyond these cornerstone rights, children have specific and explicit rights, the vast majority of which, as noted, are non-derogable and thus continue to apply in all situations. Those rights include protection from violence specifically as well as other rights which if unfulfilled would cause the child right-holder harm. For instance, failure of a state agent to implement appropriate youth justice standards would be a rights-incursion in itself and also potentially lead to further and perhaps more consequential impacts, such as the deprivation of a child's liberty and

the manifest risks, disruptions to development and augmented physical and mental health concerns that could typically lead to.<sup>232</sup>

A reading of the children’s rights framework leads, then, to an inevitable positive and non-derogable right of children to be protected from violence.

*B The Positive and Non-derogable Obligation on States to Protect their Child Nationals from Overseas Situations of Violence*

*1 Obligations under international law generally*

States are required to perform and act in line with their obligations under international law, whether those arise from treaties to which they are a party or through custom.<sup>233</sup> This duty to act consistently with international law will thus necessitate positive action where the right imposes positive obligations. Under the foundational UN Charter, for instance, all member states are required to “fulfil in good faith the obligations assumed by them”, including “to take joint and separate action in cooperation with the [UN] ... to achieve universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>234</sup> The effect of this obligation to “fulfil”, in fact, is that states “must take *positive* action to facilitate the enjoyment of basic human rights.”<sup>235</sup>

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<sup>232</sup> United Nations Office on Drugs and Crime (UNODC), above n 150, at 16; Global Counterterrorism Forum, above n 30, at 8; “UN Global Study on Children Deprived of Liberty” <[www.humanrights.gov.au](http://www.humanrights.gov.au)>.

<sup>233</sup> See *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [2]–[4] in relation to states’ binding obligations under the ICCPR; Ramcharan, above n 45, at 17.

<sup>234</sup> Charter of the United Nations, United Nations (signed 1945, entered into force 1945), arts 2(2), 55 and 56.

<sup>235</sup> OHCHR, above n 46 (emphasis added); see also *General Comment No 19 (2016) on public budgeting for the realization of children’s rights (art 4)* UN Doc CRC/C/GC/19 (20 July 2016) at [27].

These fundamental human rights and freedoms were reiterated in the 1948 Universal Declaration of Human Rights,<sup>236</sup> which although not imposing any positive obligations on states itself “inspired a rich body of legally binding [IHRL] treaties”,<sup>237</sup> many of which do require positive requirements to action — such as the CRC itself. The Committee has confirmed that in ratifying the CRC, states “take upon themselves obligations not only to implement [the CRC] within their jurisdiction, but also to contribute, through international cooperation, to global implementation”.<sup>238</sup> Indeed, states have an obligation to cooperate with one another *to promote* universal respect for and observance of human rights, including children’s rights.<sup>239</sup>

It is worth remembering that a state is not relieved of its obligations under IHRL during an outbreak of violence or armed conflict,<sup>240</sup> since IHRL continues to apply, indeed perhaps with even stronger requirements by reason of a higher incidence of human rights violations.<sup>241</sup>

## 2 *Responsibility for nationals*

Part of states’ responsibilities under international law is their responsibility for citizens and obligation to respect and ensure the rights and freedoms of all individuals within their jurisdiction.<sup>242</sup> This obligation in fact refers to all individuals within its territory *and* all

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<sup>236</sup> *Universal Declaration of Human Rights* GA Res 217A (1948); Eatwell, above n 43, at 11.

<sup>237</sup> “The Foundation of International Human Rights Law” (7 October 2015) United Nations <[www.un.org](http://www.un.org)>.

<sup>238</sup> *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [7].

<sup>239</sup> UN Doc CRC/C/GC/19 at [35] (footnotes omitted); see also Declaration on Principles of International Law Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (entered into force 24 October 1970).

<sup>240</sup> Eatwell, above n 43, at 25.

<sup>241</sup> Borelli, above n 39, at n 65; Ramcharan, above n 45, at 17.

<sup>242</sup> Eatwell, above n 43, at 13 and 34; CRC, art 2(1); International Covenant on Civil and Political Rights, art 2(1); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art 6(1).

individuals subject to its jurisdiction, since in relation to IHRL, the notion of “jurisdiction” assumes a wider scope than normally attributed to it: for the purposes of IHRL, contracting states are “bound to secure the ... rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad”.<sup>243</sup> Indeed, the OSCE Office for Democratic Institutions and Human Rights has pointed to an “obligation to take all the steps necessary to protect their nationals from serious human rights violations abroad”,<sup>244</sup> and the Vienna Convention on Consular Relations provides that states should provide assistance to their nationals abroad, particularly looking to safeguard the interests of minors.<sup>245</sup>

Furthermore, the UN Office of Counter-Terrorism and UN Counter-Terrorism Centre have “encouraged” states to extend protective measures to a child in a vulnerable situation outside of its territory when its decision “impacts the child’s life in a foreseeable manner.”<sup>246</sup> While this is valid, in fact, the obligation is even stronger and not subject to such a limitation in application. As noted earlier, rights within the children’s rights framework are generally non-derogable. States have obligations to *ensure* children receive appropriate assistance in certain situations, as for instance where children have been involved in armed conflict outside their state of nationality,<sup>247</sup> and have in any case under IHRL positive obligations to protect all individuals within its jurisdiction from acts

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<sup>243</sup> Jayawickrama, above n 46, at 47; *Cyprus v Turkey* (1976) 4 EHRR 482 (ECHR), cited in Borelli, above n 39, at 56; *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [10]; Eatwell, above n 43, at 14; see also *Lilian Celiberti de Casariego v Uruguay* [1981] UN Doc CCPR/C/13/D/56/1979, 68 ILR 41 (ICJ); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports 136 (ICJ) at [109].

<sup>244</sup> OSCE Office for Democratic Institutions and Human Rights, above n 14.

<sup>245</sup> See especially Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 19 March 1967), art 5(e) and (h).

<sup>246</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 33.

<sup>247</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, arts 6 and 7.

committed by private persons or entities,<sup>248</sup> such individuals being “anyone within the power or effective control” of the state.<sup>249</sup>

### 3 *Obligations to ensure children’s rights*

As Tatyana Eatwell has stated, “[a] state is, *at all times*, under a positive obligation under IHRL to ensure the rights and freedoms of all individuals within its jurisdiction.”<sup>250</sup> The present section shows how states’ responsibility for their nationals results in a positive obligation on states to uphold children’s rights.

In a child rights approach, duty bearers must meet their tripartite obligations to *respect*, *protect* and *fulfil* children’s rights.<sup>251</sup> In signing the CRC, ratifying states become such duty bearers with all contingent responsibilities.

Article 4 of the CRC is critical in this respect, as it contains the general obligation on states.<sup>252</sup> Under this provision, states must explicitly “undertake all appropriate legislative, administrative, and other measures” to implement all the rights in the Convention.<sup>253</sup> That the state “shall undertake” these measures means “there is no policy space for states to decide whether or not they abide by this obligation”:<sup>254</sup> in other words, the requirement to take all such measures is non-derogable, qualified solely by an acceptance that certain measures may not be “appropriate”. Failure to take any or enough of the necessary

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<sup>248</sup> Ramcharan, above n 45, at 17.

<sup>249</sup> General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [10].

<sup>250</sup> Eatwell, above n 43, at 34.

<sup>251</sup> *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [59]; Aoife Nolan “Art.27 The Right to a Standard of Living Adequate for the Child’s Development” in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) 1021 at 1037; *General comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)* UN Doc CRC/C/GC/15 (17 April 2013) at [71].

<sup>252</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [4.01].

<sup>253</sup> UN Doc CRC/C/GC/13 at [65].

<sup>254</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [4.01].



measures cannot be justified on the basis of resource constraints;<sup>255</sup> indeed, where resource constraints are an issue states “are obliged to *seek* international cooperation and to demonstrate they have made every possible effort in this regard”<sup>256</sup> in order to “mobilize the maximum available resources for children’s rights.”<sup>257</sup>

Article 4 does not alone require state adherence — other articles also “demonstrate the need ... to ensure the protection of children in all situations of life and development”.<sup>258</sup> States undertake to ensure the implementation of each of the key principles of the CRC (art 3 inferentially) and undertakings from states appear extensively in relation to other rights throughout the CRC. As only some examples, but relevant presently, states undertake: “to ensure the child such protection and care as is necessary for his or her well-being”;<sup>259</sup> to “pursue full implementation” of the child’s right to “enjoyment of the highest attainable standard of health”;<sup>260</sup> to “take appropriate measures ... to implement” the child’s right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development;<sup>261</sup> to undertake measures to achieve the child’s right to education “progressively and on the basis of equal opportunity”;<sup>262</sup> and to “encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”<sup>263</sup> States have made similar undertakings to “take all feasible measures to

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<sup>255</sup> UN Doc CRC/C/GC/13 at [73].

<sup>256</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [4.10], citing *General Comment No 19 (2016) on public budgeting for the realization of children’s rights (art 4)* UN Doc CRC/C/GC/19 (20 July 2016) at [35]–[36] (footnotes omitted); see also Declaration on Principles of International Law Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

<sup>257</sup> UN Doc CRC/C/GC/19 at [37], cited in Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [4.10].

<sup>258</sup> UN Doc CRC/C/GC/13 at [67].

<sup>259</sup> Art 3(2).

<sup>260</sup> Art 24(2).

<sup>261</sup> Art 27(3).

<sup>262</sup> Art 28(1).

<sup>263</sup> Art 31(2).

protect” the rights described earlier as particularly relevant to children in overseas situations of violence.<sup>264</sup>

All of these undertakings contribute to a fuller requirement to act positively for children’s best interests, development and survival and to protect child nationals from situations of violence. Thus where children lack access to proper protection and care, health care services, an adequate standard of living, education resources or opportunities for cultural, recreational and leisure activities, states must act positively to redress these deficiencies in order to protect their child nationals.

### *C The Obligation on States to Repatriate their Child Nationals from Situations of Violence*

The preceding sections have shown that children have a positive right to be protected from situations of violence and that states have positive obligations to protect their child nationals from situations of violence. Although the return of nationals states are generally not legally obligated to facilitate,<sup>265</sup> the present section demonstrates that in relation to children stranded overseas in situations of violence full adherence to their obligations under international law places on states a positive and non-derogable obligation to take effective measures to actively repatriate their child nationals from such overseas situations.

#### *1 Upholding fully children’s right to return*

As noted above, the “vast majority” of states are party to instruments that “compel ‘a right to enter’ or ‘right to return’ obligation”.<sup>266</sup> However, these are mainly framed in the negative — so that a host state may not extradite to another state a person who is at risk of being harmed in the receiving state — and operate primarily in relation to hosting states, “placing remarkably few obligations” on the country of origin.<sup>267</sup> In particular, nothing in

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<sup>264</sup> CRC, art 38(2) and (4).

<sup>265</sup> Pokalova, above n 18, at 220; Young, above n 47.

<sup>266</sup> Ullom, above n 99, at 125.

<sup>267</sup> At 117; Stigall, above n 196.

the “International Bill of Rights” explicitly requires states to take back their citizens after hostilities.<sup>268</sup>

It is acknowledged that the right to return as it appears in IHRL is a negative right, preventing states from *denying* an individual’s freedom to return to their country of origin. It is submitted, however, that the corresponding obligation of a right to return properly acknowledged and adhered to must take the form in certain cases not of a proscription on states against refusing citizens entry but in fact as an extended *positive* obligation on states to assist citizens in their return. It is suggested that where it is by reason of a state’s failures to uphold its obligations in relation to a national’s rights that the national is prevented from exercising their right of return, the state must take real efforts to assist the return of that national, *on the basis that* to not do so would be to effectively deny their right to return, which is prohibited under IHRL. In other words, if it is clear that a national has very limited — if any — ability to exercise their right to return as a result of failures of the state to protect their rights in the first place, a state which neglects to assist their subsequent return effectively fails to uphold its negative obligations to allow that national’s return.

It should be noted that such an active practical obligation could not be said to inhere in relation to all citizens at all times, as this would be to apply a clearly negatively framed right into a prescriptive and arguably unreasonable requirement on states to repatriate nationals in instances where the state is in contravention of no rights. The obligation to repatriate presented here, in contrast, exists in relation to those whom the state has failed in its obligations towards and who are prevented from exercising their right to return by reason of those failures.

Children stranded overseas in situations of violence are one such — perhaps the clearest — group of individuals. As demonstrated throughout this paper, states have positive obligations to protect their child nationals from situations of violence. The suggestion here is that a state’s failure to uphold their positive obligations towards children to protect them may effectively translate to a failure of its negative obligations such as allowing the right

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<sup>268</sup> Ullom, above n 99, at 116.

of return as well, as the state will have effectively removed their national of their ability to exercise that right.

Indeed, the existence of a right is not fully meaningful without due ability for a right-holder to access and utilise it.<sup>269</sup> States cognisant of their obligations under international law to allow children's right of return ought reasonably to recognise that the fulfilment of that right will be almost impossible without due assistance on their part.<sup>270</sup> It is clear that children in situations of violence — and necessarily then subject to various other violations of their rights as well — such as those deprived of their liberty without appropriate youth justice safeguards will be unable to realise their guaranteed right to return.

## 2 *Protecting children from violence*

Even if not by the provisions relating to children's rights to return, states are nevertheless required to repatriate children in overseas situations of violence as part of their obligations to actively fulfil other rights. States, after all, have an “obligation to take all the steps necessary to protect their nationals from serious human rights violations abroad.”<sup>271</sup>

The first of these is that since the protection against all forms of violence is a civil right and freedom, its “[i]mplementation ... is therefore an immediate and unqualified obligation of States parties”, towards which they are required to undertake “all possible measures”.<sup>272</sup> As the Committee rightly points out, art 19 to this end “stresses that available resources must be utilized to the maximum extent.”<sup>273</sup>

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<sup>269</sup> See a similar point made in relation to access to health care in Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [24.02].

<sup>270</sup> See Ana Luquerna “The Children of ISIS: Statelessness and Eligibility for Asylum under International Law” (2020) 21 *Chicago Journal of International Law* 148 at 177.

<sup>271</sup> OSCE Office for Democratic Institutions and Human Rights, above n 14.

<sup>272</sup> Vandenhole, Erdem Türkelli and Lembrechts, above n 3, at [19.03], citing *General Comment No 13: The right of the child to freedom from all forms of violence* UN Doc CRC/C/GC/13 (18 April 2011) at [37] and [65].

<sup>273</sup> UN Doc CRC/C/GC/13 at [65].

The Special Representative for Children and Armed Conflict has reported that stateless children and children involved in armed conflict are particularly vulnerable,<sup>274</sup> as well as those who have already experienced violence.<sup>275</sup> States' obligations in this respect are "non-discretionary and strict" — and ongoing, so that states "must act now with urgency to fulfil their ... commitments to ensure protection from all forms of violence".<sup>276</sup>

In order to so fulfil their obligations, states must then react to address and mitigate or remove the source of violence itself or otherwise assist to relocate the child. It may be that alternative local arrangements sufficiently serve to discharge the state's obligations in this regard; however, as is perhaps more likely in overseas situations of violence, which may be for example settings of conflict or widespread criminal activity, it may be necessary to remove the child from the local situation entirely. Thus repatriation becomes and serves as a certain way to fulfil the state's obligations to protect the child from violence.

### 3 *Ensuring youth justice measures*

The second major set of rights the fulfilment of which may require a state to repatriate its child nationals abroad are those relating to youth justice procedures. Again, the right of access to youth justice is non-derogable for all children, meaning a child enjoys the protections of youth justice measures in all places at all times and in relation to all categories of offence.<sup>277</sup>

As reported by the recent *Global Study on Children Deprived of Liberty*, the arbitrary detention of children worldwide is widespread, with millions of children suffering in

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<sup>274</sup> *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [21].

<sup>275</sup> UN Doc CRC/C/GC/13 at [72(g)].

<sup>276</sup> Vandenhoe, Erdem Türkelli and Lembrechts, above n 3, at [19.03], citing UN Doc CRC/C/GC/13 at [37]; *Report of the independent expert for the United Nations study on violence against children* UN Doc A/61/299 (29 August 2006) at [91].

<sup>277</sup> Only arts 10, 13 and 15 are subject to exceptions on the basis of national security interest: United Nations Office on Drugs and Crime (UNODC), above n 28 at 71, n 96; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 80; CRC, arts 37 and 40; United Nations Office on Drugs and Crime (UNODC), above n 28, at 71.

detention being deprived of their childhood and their future.<sup>278</sup> Conditions of detention are often poor and overcrowded.<sup>279</sup> The use of administrative detention, in particular, poses serious concerns, with a general lack of oversight and monitoring.<sup>280</sup> As noted above, deprivation of liberty is “almost never” in the best interests of the child.<sup>281</sup> In any case, it does not seem to be being used as a last resort, nor are alternative measures such as diversion fully explored.<sup>282</sup>

In addition, certain countries still permit the death penalty for certain crimes, operate non-fair trials summarily and without children having access to lawyers and due process rights.<sup>283</sup>

Such overseas failures to administer appropriate youth justice measures therefore require in instances of children located overseas that children are repatriated to their country of nationality for judicial proceedings, in order to receive fair and appropriate youth justice.<sup>284</sup>

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<sup>278</sup> Manfred Nowak *The United Nations Global Study on Children Deprived of Liberty* (2019) at 13; Taghreed Jaber “A long road to detention being used as a last resort for children: a look at the UN Global Study on Children Deprived of Liberty” (22 November 2019) Penal Reform International <[www.penalreform.org](http://www.penalreform.org)>.

<sup>279</sup> United Nations Office on Drugs and Crime (UNODC), above n 28.

<sup>280</sup> United Nations Office on Drugs and Crime (UNODC), above n 28; United Nations Office on Drugs and Crime (UNODC), above n 150.

<sup>281</sup> United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 83.

<sup>282</sup> Global Counterterrorism Forum, above n 30; United Nations, above n 53, at 6; “*They have erased the dreams of my children*”: *children’s rights in the Syrian Arab Republic* UN Doc A/HRC/43/CRP6 (13 January 2020) at [96]; *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict* UN Doc A/HRC/31/19 (29 December 2015) at [65].

<sup>283</sup> “Iraq: ISIS Child Suspects Arbitrarily Arrested, Tortured” (6 March 2019) Human Rights Watch <[www.hrw.org](http://www.hrw.org)>; Jo Becker *Extreme Measures: Abuses against Children Detained as National Security Threats* (Human Rights Watch 2016) at 15.

<sup>284</sup> United Nations, above n 53, at 5; *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [65].

### *D Territorial Jurisdiction*

The thesis of this paper is that children have a right to be repatriated from overseas situations of violence, which states of nationality are bound to take real efforts to achieve. The application of this idea, however, has necessarily the potential corollary of impinging upon the territorial jurisdiction of other states, in whose territory and thus necessarily under whose jurisdiction such children will be, since foreign nationals are generally subject to the jurisdiction of the receiving state.<sup>285</sup> Accepting that under the UN Charter all states enjoy sovereign equality, and that member states of the UN commit to refrain from impinging upon the territorial integrity or political independence of any other state,<sup>286</sup> concerns about respecting the right of other states to administer matters within their territory raise serious hesitations as to the extent to which states could actually realise their human rights obligation to repatriate their child nationals as newly propounded herein.

First it must be duly acknowledged that “[i]n most instances, the exercise of jurisdiction beyond a state’s territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another state.”<sup>287</sup> As described by the Permanent Court of International Justice in 1927:<sup>288</sup>

Now the first and foremost restriction imposed by international law upon a State is that ... it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory ...

However, the Court admitted it would be otherwise if there exists “a permissive rule derived from international custom or from a convention” so allowing such interference, in the existence of which:<sup>289</sup>

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<sup>285</sup> Capone, above n 167, at 90.

<sup>286</sup> Charter of the United Nations, art 2(1) and (4).

<sup>287</sup> *Samuel Kaunda v The President of the Republic of South Africa* 4 South African L Reports 235 at [38] (CC).

<sup>288</sup> *The SS “Lotus” (France v Turkey)* (1927) PCIJ Series A, No 10 (ICJ) at 18–19.

<sup>289</sup> At 19.

... all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

The issue arises in that art 2(1) of the CRC explicitly requires states to “respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction”. As developed later, “jurisdiction” takes a more expansive meaning under IHRL, as a result of which states have obligations to “anyone within the power or effective control” of the state, even if not situated within their territory.<sup>290-291</sup> Hugh King has demonstrated how all nationals (necessarily including children) remain within the “jurisdiction” of their state when abroad under such an understanding of non-territorial jurisdiction,<sup>292</sup> with the result that states’ obligations towards their child nationals endure even following their departure overseas.<sup>293</sup>

However, the traditional importance of state sovereignty has diminished since 1927 and “has undoubtedly been eroded by the emergence of a body of international human rights law.”<sup>294</sup> In consideration of these points against the broad international children’s rights framework, therefore, the appropriate answer emerges clear. Although the extent to which states owe obligations abroad has been described as “uncertain”, the extraterritorial reach of human rights treaties is undisputed.<sup>295</sup> It should then be recalled that the “object and purpose” of human rights treaties “is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all

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<sup>290</sup> General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004) at [10].

<sup>291</sup> Capone, above n 167, at 92.

<sup>292</sup> Hugh King “The Extraterritorial Human Rights Obligations of States” (2009) 9 HRL Rev 521 at 549–550.

<sup>293</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/70/303 (7 August 2015) at [16].

<sup>294</sup> Jayawickrama, above n 46, at 25.

<sup>295</sup> Capone, above n 167, at 89; UN DOC A/70/303 at [16].



other contracting states.”<sup>296</sup> In entering into human rights treaties, such as the CRC, then:<sup>297</sup>

... the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction

In other words, the almost universally acknowledged<sup>298</sup> fundamental importance of the internationally recognised rights of children under the CRC means that a state’s action in respect of children must be first considered in light of commitments under the CRC. Considering too that most of the obligations within the CRC are non-derogable, the interests in territorial sovereignty of another state may not thus constitute a justification against real efforts to uphold the rights of child nationals suffering from violation of their rights.<sup>299</sup> It may be that subsequent attempts to act to preserve and uphold the rights of child nationals prove to be impossible, unfeasible or even unsuccessful; in any case, however, the presence of another state possessing territorial jurisdiction over a child national is no justifiable reason to neglect to take all reasonable necessary efforts to uphold the rights of that child national.

Indeed, the territorial jurisdiction of another state over a child national will not in reality generally prove to pose the major difficulty practically. In many cases where children are in situations of violence (even where that violence is the result of state detention), the host nation may prefer to have the home nation act to repatriate them, as in the case study herein. As with child refugees stranded after armed conflict, children stranded as a result of emergency situations such as COVID-19, or children previously associated with armed

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<sup>296</sup> Jayawickrama, above n 46, at 24, citing *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75) (Advisory Opinion)* OC-2/82 IACHR (Series A) No 2, 24 September 1982 at [29].

<sup>297</sup> Jayawickrama, above n 46, at 24, citing *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75) (Advisory Opinion)* at [29].

<sup>298</sup> Remembering to except the United States from this.

<sup>299</sup> It is the same with *jus cogens* norms of IHRL: UN DOC A/70/303 at [27].

groups, the repatriation of the children may serve to ease the burden and necessary responsibilities on the host nation.

As a final note, the risks to territorial sovereignty of placing such importance on children's rights should not be great. First, the children to whom this applies is a necessarily limited group, being those in relation to whom the home state bears responsibility. Second, although undoubtedly each territorial state enjoys the sovereign right to prosecute suspects for crimes committed on their territory,<sup>300</sup> this paper makes the case in relation only to children whose recognised rights under the children's rights framework — to be protected from violence, to appropriate justice standards, etc — are not being upheld. Thus the obligation to take measures to assist the repatriation of children will only arise where the host state is itself in contravention of duly upholding the children's rights under international law; as long as justice and other responses adhere to applicable international standards and no other rights are being infringed, the conflict will not arise.

*E Subject to Non-refoulement and the Child's Best Interests*

As a final note, it should be emphasised that repatriation is voluntary and any repatriation must be fully subject to and respectful of the protection against refoulement.<sup>301</sup> Thus, indisputably and unequivocally a state may not require that a child be removed to another where there are substantial grounds for believing there is a real risk of irreparable harm to the child, particularly if that repatriation is undertaken for reasons of accountability rather than reintegration.<sup>302</sup>

Any repatriation proposals must also consider what is in the child's best interests, particularly in relation to preserving family unity.<sup>303</sup> Where following a "Best Interests

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<sup>300</sup> Mehra and Paulussen, above n 193.

<sup>301</sup> Convention and Protocol Relating to the Status of Refugees, (entered into force 1951), art 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (entered into force 26 June 1987), art 3.

<sup>302</sup> *General Comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin* UN Doc CRC/GC/2005/6 (3 June 2005) at [27].

<sup>303</sup> United Nations, above n 53, at 6.

Assessment” of a child, it is suggested that it would be in the best interests of the child to remain in the overseas situation, the state should not attempt to unilaterally undermine that.<sup>304</sup> (The slightly absurd result of it being in the child’s best interests to remain in the overseas situation of violence suggests that other measures ought perhaps to be taken, such as the repatriation of the child’s family members as well).<sup>305</sup>

#### *F Theoretical Conclusion*

As demonstrated in the preceding sections, a synthesis of various rights and a careful examination of applicable obligations results in a positive right of children to be repatriated from overseas situations of violence and a corresponding obligation on states to take real efforts to do so.

### *VI Potential Application of the Positive Right and Obligation*

#### *A A Children’s Rights Response to the Situation of Children Detained in Camps in Northern Syria*

States should positively take effective measures to facilitate the return of all children holding their citizenship for the purposes of rehabilitation and reintegration, in compliance with international law, including the principle of non-refoulement, and in full adherence to the children’s right to be repatriated and the state’s obligation to do so. compliance with international law.<sup>306</sup> The de-radicalisation programme modelled in Aarhus, Denmark, which aims to create trust between authorities, returning individuals and families, and involves mentoring, psychological counselling, the provision of support for families and

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<sup>304</sup> At 6.

<sup>305</sup> “They have erased the dreams of my children”: children’s rights in the Syrian Arab Republic UN Doc A/HRC/43/CRP6 (13 January 2020) at [92(k)].

<sup>306</sup> *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (26 December 2018) at [20]; UN Doc A/HRC/43/CRP6 at [92(k)].

active contact with authorities,<sup>307</sup> is one approach which has enjoyed some success in managing individuals returning from Syria.<sup>308</sup>

### *1 Compliance with the children's rights framework*

A programme of repatriation and rehabilitative care and support best upholds the key understandings of and principles for dealing with children, including ensuring their best interests are upheld. Any rehabilitative and reintegrative efforts of children who have been involved with terrorist groups are necessarily contingent on avoiding further victimisation and harm following their involvement. Although wide-ranging societal change may be necessary to tackle the underlying causes of extremism such as discrimination, inequality and instability,<sup>309</sup> it is imperative that children in the instant case be included, empowered and cared for rather than isolated, stigmatised and punished.<sup>310</sup> As the Special Representative for Children and Armed Conflict has said, “[c]hildren who have been abducted, recruited, used and exposed to violence at an early age must not be doubly victimized.”<sup>311</sup> Rather, such children require trauma-informed support for their physical and psychological recovery. Where such trauma is untreated, there is a risk for further radicalisation or a return to ideologies that may lead to further harm.<sup>312</sup> As victims of violence, the children are in need of and should receive special protection and intervention in medical, psychological, mental and educational services and assistance.<sup>313</sup> Children are not currently receiving those services and support in the camps, instead continuing to suffer

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<sup>307</sup> Zubeda Limbada and Lynn Davies “Addressing the Foreign Terrorist Fighter Phenomenon from a Human Rights Perspective” (2016) 18 Int C L Rev 483 at 490.

<sup>308</sup> At 490.

<sup>309</sup> Barrett, above n 162; Renard and Coolsaet, above n 203.

<sup>310</sup> Gilmour, above n 203; Radicalisation Awareness Network (RAN), above n 22; United Nations Office on Drugs and Crime (UNODC), above n 28.

<sup>311</sup> At [17].

<sup>312</sup> European Council of Foreign Relations (ECFR), above n 188; “UN Global Study on Children Deprived of Liberty”, above n 232.

<sup>313</sup> United Nations, above n 53, at 3; Pokalova, above n 18, at 215; Radicalisation Awareness Network (RAN), above n 22.

in detention.<sup>314</sup> The repatriation of the children in line with the obligation presented in this paper is the necessary first step of that process of assistance.

Repatriation, moreover, fulfils states' human rights and counter-terrorism obligations. Whereas leaving children neglected in the camps in Syria reneges on the child's rights to appropriate justice measures, assessment, investigation, monitoring and even prosecution under domestic youth justice processes best ensures accountability in line with international law, including the requirements under the SC Resolutions to bring those associated with terrorist groups to justice.<sup>315</sup>

## 2 *Long-term effectiveness*

Implementing an active repatriation of the detained children in line with children's rights also serves as the most security-effective approach for states that are legitimately concerned about the safety and security of their citizens.<sup>316</sup>

Though there may remain legitimate concerns about the security risk returning child FTFs represent to members of society generally,<sup>317</sup> “[s]ecurity cannot be achieved at the expense of human rights”<sup>318</sup> and indeed, denial of human rights may only foster new grievances —<sup>319</sup> as the Independent Expert has stated, “violence thrives in the absence of ... respect for human rights”.<sup>320</sup> Rather, policies protecting children's rights do not only give effect to human rights obligations but also likely “converg[e] with broader, long-term security goals”, since children rehabilitated and reintegrated are less likely to be involved in

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<sup>314</sup> Minogue and Yamin, above n 181, at 14.

<sup>315</sup> “Statement by Ministers of the Global Coalition To Defeat ISIS/DAESH” (7 February 2019) US Embassy in Syria <[www.sy.usembassy.gov](http://www.sy.usembassy.gov)> at [8]; “*They have erased the dreams of my children*”: *children's rights in the Syrian Arab Republic* UN Doc A/HRC/43/CRP6 (13 January 2020) at [92(k)].

<sup>316</sup> See European Council of Foreign Relations (ECFR), above n 188.

<sup>317</sup> Capone, above n 167, at 76–77; Renard and Coolsaet, above n 203.

<sup>318</sup> Duffy, above n 34, at 171.

<sup>319</sup> Office of the SRSG on Violence against Children, above n 206, at 6.

<sup>320</sup> Pinheiro, above n 3, at XVIII.

violence in the future.<sup>321</sup> Although the challenges are “considerable”, investing in the rehabilitation and reintegration of children associated with terrorist groups is “a pre-requirement” to security, on the basis that “there is no dichotomy between preserving public safety and protecting children”.<sup>322</sup> Rather, they are “complementary and should be applied concomitantly.”<sup>323</sup>

This point is reinforced by the Secretary-General, who has observed that anti-terrorism strategies that violate human rights are likely to be unsuccessful and indeed are a risk factor for terrorism.<sup>324</sup> As he has stated:<sup>325</sup>

Terrorism is fundamentally the denial and destruction of human rights, and the fight against terrorism will never succeed by perpetuating the same denial and destruction.

Whereas inaction is not only unlawful but *also* counterproductive, from a security perspective controlled repatriation has been described as the “least bad option” to ensure long-term security.<sup>326</sup> While the rehabilitation of violent extremists has been described as

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<sup>321</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 71; Duffy, above n 34, at 171; United Nations Office of Counter-Terrorism and UN Counter-Terrorism Centre, above n 20, at 30.

<sup>322</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), above n 28, at 71; Alexandra Martins, quoted in United Nations Office on Drugs and Crime (UNODC) “Protecting children from terrorism: Indonesia launches the ‘Bali Call for Action for the implementation of the UNODC Roadmap’” (12 March 2020) United Nations Office on Drugs and Crime <[www.unodc.org](http://www.unodc.org)>; see also “UNODC Roadmap on the Treatment of Children Associated with Terrorist and Extremist Groups highlighted at African Regional Conference”, above n 128, in which the same was said by Dayan Farias Picon, UNODC Crime Prevention and Criminal Justice Officer.

<sup>323</sup> “UNODC Roadmap on the Treatment of Children Associated with Terrorist and Extremist Groups highlighted at African Regional Conference”, above n 128, quoting Dayan Farias Picon, UNODC Crime Prevention and Criminal Justice Officer.

<sup>324</sup> Secretary-General, above n 165; Child Rights International Network (CRIN), above n 142; Gilmour, above n 203.

<sup>325</sup> Secretary-General, above n 165.

<sup>326</sup> Letta Tayler “Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178” (2016) 18 Int C L Rev 455 at 481–482; Renard and Coolsaet, above n 199, at 2; Renard and Coolsaet, above n 203; Pokalova, above n 18, at 220.

“particularly difficult”, nevertheless such initiatives are “essential” for children’s reintegration into society, and evidence from child soldier scholarship shows that re-acceptance and prioritising reintegration is crucial for effective rehabilitation and non-recidivism so that children develop to be healthy, valued and contributing members of their communities.<sup>327</sup>

The Secretary-General has rightly stressed that in order to combat the threats of terrorism and violent extremism going forward we need to address the factors and conditions conducive to such behaviour, such as inequality and discrimination as well as exclusion and lack of opportunity and serious violations of human rights more generally.<sup>328</sup> Nevertheless, a reconception of children’s rights as evincing a child’s positive right to be repatriated and a corresponding positive obligation on states best upholds children’s rights, adheres most strongly to states’ international obligations and demonstrably would be more security-effective in the longer term than states’ current inaction.

### *B Other Potential Applications*

The right and obligation outlined in this paper have more wide-ranging and ongoing utility as well than the case study focused on, the potential application of which this section can only highlight.

For instance, the ability for children to be repatriated to their country of origin could have potentially great impact on children abducted and conscripted for use in armed groups as child soldiers, children involved and associated with foreign gangs, children subject to and perpetrators of drug and human trafficking or slavery, and children stranded as a result of COVID-19. In each of these cases the moral pull towards an active response is strong, as the children in each case will have been victimised and suffered in varying ways. However, where such victimisation has occurred the right is strong not only morally but legally as

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<sup>327</sup> Pokalova, above n 18, at 221–222; Office of the SRSG on Violence against Children, above n 206, at 6.

<sup>328</sup> “Counter-Terrorism Methods Must Not Compromise Rule of Law, Human Rights, Secretary-General Stresses, as High-Level Conference Concludes” (29 June 2018) United Nations <[www.un.org](http://www.un.org)>.

well, as this paper has demonstrated. Such children as above would all qualify as victims of violence to whom their country of origin has obligations to protect. The effective fulfilment of those obligations would consist of the active repatriation of those children where such is necessary to ensure the children's protection from violence and fulfilment of their other rights. While there would likely be significant challenges to repatriation in each case, states must nevertheless under international law take all feasible measures to fulfil their responsibilities, even if those were to prove ultimately unsuccessful.

## *VII Conclusion*

The situation of children stranded overseas in situations of violence is deserving of attention and positive meaningful and effective action. The children's rights framework contains a number of rights and obligations relevant to children who are in such overseas situations of violence. However, states' responses to such situations, as evidenced most clearly in relation to children detained in camps in northern Syria, demonstrate the inadequacy of the current normative conception of children's rights applicable in such circumstances and their own obligations in relation to those rights, with detrimental effects to the children affected.

A close synthesis of rights and obligations within the international children's rights framework reveals in relation to children in overseas situations of violence a more powerful right of children *to be repatriated* and a more active corresponding obligation on states to take real efforts *to repatriate* their child nationals from such situations. The right and obligation are *positive*, in the sense they necessitate action on the part of duty-holders to uphold, and *non-derogable*, in the sense that the right and obligation apply at all times in relation to all children, regardless of any criminal or other activity on their part.

The application of an articulated right of children to be repatriated to their country of origin and the corresponding obligation on states to take efforts to do so is necessarily wide-ranging, since the right and obligation apply to all children stranded in overseas situations of violence. The hope of this author is that these rights and obligations articulated anew have ongoing utility and real impact for children who continue to suffer from violence as a result of state inaction.



***Word Count***

The text of this paper (excluding the cover page, abstract and key words, table of acronyms and abbreviations, table of contents, footnotes and bibliography) comprises exactly 14,998 words.

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