



CHILD
IDENTITY
PROTECTION

Policy Brief 5

CHILDREN'S RIGHT TO IDENTITY

in the context of repatriation policies of foreign children stranded in Northeast Syria



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Child Identity Protection's Policy Briefs

These policy briefs are designed to explore specific issues through the protective lens of the child's right to identity as established in articles 7-8 of the Convention of the Rights of the Child (birth registration, name, nationality and family relations).

In their concise format, these policy briefs seek to complement the existing work of other stakeholders and where possible, reference is made to their work, with a view of facilitating a holistic approach to protecting children's rights.

As such, the policy briefs do not purport to provide a comprehensive analysis of all children's rights at stake such as non-discrimination, right to survival and development, health, education and other rights.



Acronyms and abbreviations

AANES

Autonomous Administration of North and East of Syria

CAT

Convention against Torture

CEDAW

Convention on the Elimination of All Forms of Discrimination Against Women

CHIP

Child Identity Protection

CRC

Committee United Nations Committee on the Rights of the Child

ECHR

European Convention on Human Rights

ECTHR

European Court of Human Rights

HRC

UN Human Rights Committee

ICCPR

International Covenant on Civil and Political Rights

ISIL / Daesh

Islamic State of Iraq and the Levant

SDF

Syrian Democratic Forces

Syria

Syrian Arab Republic

UDHR

Universal Declaration of Human Rights

UN Guidelines

Guidelines for the Alternative Care of Children

UNCRC

United Nations Convention on the Rights of the Child

Definitions

Islamic State of Iraq and the Levant:

a terrorist organization, currently led by Abu Bakr al-Baghdadi, whose stated goal is to solidify and expand its control of territory once ruled by early Muslim caliphs and to govern through implementation of its strict interpretation of sharia.

Extraterritorial Jurisdiction:

refers to the competence of a State to make, apply and enforce rules of conduct in respect of persons, property, or events beyond its territory.

Syrian Democratic Forces (SDF):

armed force of the Autonomous Administration of North and East of Syria (AANES). Established in 2015, approximately four years after an armed uprising against

Syrian President Bashar al-Assad, the SDF has received military and financial support from the United States to fight ISIL in northeast region of Syria. Comprising a diverse composition, the SDF includes Arab, Kurdish, and members of other minority groups among its ranks.

Treaty Bodies:

Treaty Bodies are committees of independent experts that monitor the implementation by States parties of their obligations under international human rights treaties. Treaty bodies usually receive and assess reports submitted periodically by State parties detailing how they are applying the treaty provisions nationally. Most treaty bodies may also consider complaints or communications from individuals alleging that their rights have been violated by a State Party.

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Introduction

The scope of jurisdiction, particularly the 'extraterritorial' reach of human rights treaties, has long been a contentious issue before human rights courts and treaty bodies. This debate has recently taken centre stage in discussions surrounding the repatriation of individuals stranded in detention facilities in Northeast Syria.

Following the defeat of the Islamic State of Iraq and the Levant (ISIL), thousands of alleged ISIL foreign fighters, sometimes with their children, have been captured and detained without trial in facilities administered by the Syrian Democratic Force (SDF), a non-State actor. The arbitrary and unlawful detention, along with the degrading conditions and treatment children endure, constitute a serious violation of international law. This raises the question of who, if anyone, is responsible for ending the violations of children's rights by removing them from the camps. It is evident that, if no State actor assumes (or is called to assume) this duty of protection, children will continue to exist in a legal vacuum, condemned to endure life in the camps.

The repatriation of children is one possible option to ensure their safety, put an end to their human rights violations, and neutralize further security threats. However, multiple barriers impede children's return to their country of origin. This policy brief delves into the obstacles related to their identity, particularly, nationality and family relations.

At the outset, it is acknowledged that there are significant national security and anti-terrorism considerations that must be taken into account. However, maintaining children in the conditions of SDF controlled camps and prisons has its own risks. Inaction toward them could be detrimental to the very objectives that States aim to achieve by denying their repatriation: security against future terrorist threats. The UN's counterterrorism chief, Vladimir Voronkov, has said that inaction on repatriation threatened to "bring about the very outcomes we intend to prevent," including "the radicalization and recruitment of a new generation of terrorists, and the strengthening of terrorist groups in the region and around the world".¹ Indeed, preventing their repatriation could "lead these children to develop a resentment [...] within a few years that could constitute fertile ground for a new recruitment by one of the jihadist groups who are still active in those territories."² Hence, while this policy brief will not delve into the national security implications, it is essential to underscore that safeguarding the rights of the child is, on the whole, aligned with the long-term interests of States in countering terrorism.

Legally, States argue they do not have effective control over the camps, nor do they exercise any control or authority through its agents over its nationals. In this context, regional courts and treaty bodies have provided divergent interpretations of extraterritorial jurisdiction. The United Nations Committee on the Rights of the Child (CRC Committee) has acknowledged that its State Parties have an obligation to repatriate their national children stranded in the camps. In contrast, the European Court of Human Rights has determined that its State Parties do not share this obligation.

Considering the high stakes for the detained children, this policy brief commends the flexible and child-rights-based approach to the jurisdictional conundrum, as adopted by the CRC Committee. It argues that a holistic approach to children's rights trigger extraterritorial jurisdiction beyond the mere spatial and personal models. Simultaneously, it urges caution against overly relying on nationality as an important factor triggering extraterritorial jurisdiction, considering the significant obstacles faced by children in the camps when it comes to having a legal identity as well as acquiring, proving, and maintaining a nationality.

In this respect, it argues that States should comply with the obligations arising from Articles 7 and 8 (right to identity) of the United Nations Convention on the Rights of the Child (UNCRC),³ which includes providing assistance and protection to children who lack essential elements to establish their identity. Furthermore, it presents the argument that, when

the nationality of children cannot be swiftly assessed and proven, their exit from the camps could still be based on another dimension of their identity, specifically respect for family relations (Article 10, UNCRC).

The first section provides the factual context, detailing the dire conditions children face in detention in Syria. It underscores how these conditions violate international law, constituting a breach of their human rights, particularly under the UNCRC.

The second section explores the question of responsibility for addressing these significant violations of children's rights. It outlines how regional courts and treaty monitoring bodies have grappled with the jurisdictional challenges concerning children stranded in the camps.

Section three delves further into the approach advocated by the CRC Committee. It welcomes the child-rights based approach adopted by the Committee while discussing the potential problematic implications of over-reliance on nationality to justify extraterritorial jurisdiction.

Section four provides a more in-depth explanation of the numerous obstacles that children in Northeast Syria encounter when attempting to acquire, prove, and restore their nationality, as well as maintain their family relations. It argues that a desirable policy for States, and a possible argument for the CRC Committee when nationality is uncertain, is to base the relocation of children on the 'family relations' dimension of their identity rather

than nationality. In other words, a possible approach to ensuring that children, particularly those experiencing obstacles in acquiring or proving nationality, have a way out of the camps is to shift the focus from nationality as a determining factor for jurisdiction to family relations. This would entail facilitating their departure through reunification with extended family members rather than repatriation, which typically refers to returning to a country of one's own nationality.

This policy brief does not aim to provide a comprehensive overview of all the issues arising from these highly legally and politically complex cases, which are covered in other publications.⁴ Instead, its intention is to advocate for States' obligations concerning children in detention, taking into comprehensive account children's right to identity, in accordance with Articles 7, 8 and 10 of the UNCRC. It also highlights areas where further guidance from the CRC Committee would be welcome and provides opportunities for State Parties to the UNCRC to advance their ongoing efforts.



SECTION 1

1. Factual context

In March 2019, the victory of the Syrian Democratic Forces (SDF),⁵ a non-State armed group, over the village of Baghouz marked the territorial defeat and collapse of ISIL/Daesh. Consequently, thousands of alleged ISIL fighters and supporters, including women with children, were captured, and arbitrarily detained in various types of detention facilities, such as high-security prisons and internment camps.

For instance, while approximately 1,000 detainees – apprehended as boys and representing up to 20 nationalities – are held in formal detention centres like Al-Sina'a and Alaya prisons,⁶ the majority of women and children are detained in the al-Hol and al-Roj camps, which function as open prisons.⁷

To this day, detainees – including children – are held without charge or trial and with no possibility of having the legality of their detention reviewed by a judicial authority.¹⁵ Moreover, there have been reports that they are subject to inhumane treatment contrary to Article 3 of the Geneva Conventions¹⁶ and other international and regional human rights standards (Article 7 of the International Covenant on Civil and Political Rights (ICCPR),¹⁷ Article 37 of the UNCRC, Article 3 of the European Convention on Human Rights (ECHR)).¹⁸

FIGURES – AL-HOL AND AL-ROJ INTERNMENT CAMPS

Until October 2023, it has been estimated that **58,000** individuals have been detained in the camps, **37,000** of whom are children, mostly under the age of 12, and nearly **17,000** are women.⁸ Between 2019 and 2020, **517 children died in the camps**,⁹ including as a result of preventable death causes.¹⁰ While almost the majority of children detained are of Iraqi nationality, approximately **8,000** children¹¹ are from more than **55 other nationalities**¹² (e.g. Australia, Belgium, Bosnia and Herzegovina, France, Germany, Kazakhstan, The Netherlands, Sweden and the United Kingdom).¹³ In 2018, it was reported that half of the Dutch and French children in internment camps were younger than five years old.¹⁴

Reports indicate that their detention conditions include extreme deprivation of basic services and goods (i.e. food, water, electricity and health services), as well as exposure to physical and psychological violence.¹⁹ The circumstances of their detention can also potentially satisfy

the threshold for classification as torture, due to the cumulative effects of indefinite detention, systematic disappearances of male children, the pervasive atmosphere of physical violence and severe deprivation of basic needs.²⁰

PRACTICE OF BOYS' DISAPPEARANCES:

A particular risk for children in the camps is the forced removal of young boys as they grow older. The SDF routinely disappears boys from 12 years of age, taking them to unknown locations and holding them without contact with their mothers. Typically, these removals take place in the middle of the night and involve multiple children at once. Reports corroborating these removals came from mothers themselves who had lost their sons and from neighbors who witnessed the removals. There have been several waves of removals: in August/September 2019, when 15 boys from 14 years and older were taken from the al-Hol camp; in October 2019 in the Roj camp; and in January 2020 from the al-Hol Annex, when approximately 30 teenaged boys from various nationalities were forcibly abducted.²¹

In this context, the SDF repeatedly stated that they lack the resources to keep detaining foreign persons and have appealed to countries to bring their nationals home. UN Special Rapporteurs,²² the Council of Europe's Commissioner on Human Rights²³ and other stakeholders have consistently called upon States to repatriate all their nationals. Nevertheless, countries of origin, including those from Europe, have displayed reluctance to repatriate adults, and in many cases, even children.

As of June 2023, more than 1,800 detained children from over 30 countries have been repatriated²⁴ while thousands of children still remain arbitrarily detained in dire conditions. States have implemented repatriation policies that allow for case-by-case decision-making regarding children with confirmed nationality, although the specific criteria used for these determinations are not publicly disclosed.²⁵ An even more complex and seemingly hopeless situation pertains to detained children, who are unable to prove their identity.

SECTION 2

2. The jurisdictional conundrum: Any duty-bearer?

The arbitrary and unlawful detention of children in internment camps and prisons on Syrian territory, as well as the conditions and treatment they are subjected to, contravene international law constituting a breach of Articles 7, 9, 10, 14, and 24 of the ICCPR and Articles 2 and 16 of the Convention against Torture (CAT).²⁶ Under the UNCRC, numerous children's rights, including the right to life, survival, and development (Art. 6), freedom from torture, inhuman and degrading treatment (Art. 37(a)), and protection from unlawful or arbitrary deprivation of liberty (Art. 37(b)), are at stake, among others.

Importantly, and for the purpose of this policy brief, it is crucial to recognise that children's rights to identity, including birth registration, nationality, name, and family relations – as outlined in Articles 7 and 8 of the UNCRC – as well as their right to (seek) family reunification – as stipulated in Article 10 of the UNCRC – are also at stake. **For children's human rights not to be merely 'theoretical and illusory' but rather 'practical and effective',²⁷ there must be a duty-bearer responsible for putting an end to the violations they are subjected to.** To answer the question of who, then, is the duty-bearer, jurisdiction must be established (Article 2

UNCRC). In fact, human rights obligations hinge upon a State's jurisdiction. In other words, the exercise of jurisdiction serves as a crucial prerequisite for holding States accountable for their actions or omissions when these actions or omissions infringe upon rights outlined in a ratified human rights convention. Furthermore, there is an opportunity for private entities to intervene in these situations, both from the profit and non-profit sectors.²⁸ Jurisdiction can be defined as 'no less and no more than "authority over" and "control of"'.²⁹ Ordinarily, jurisdiction is territorial, which means that States are generally obligated to respect the human rights of those within their territorial boundaries.³⁰ However, there are circumstances in which human rights *can* and *should* apply outside those boundaries, referred to as extraterritorial jurisdiction. Extraterritorial jurisdiction refers to the legal conditions under which a State may be held responsible for acts performed or producing effects outside its boundaries.³¹

2.1. Territorial jurisdiction: The Syrian Arab Republic

The Rojava region in which the camps are located falls *de jure* under the territory of the Syrian Arab Republic (Syria). As such, Syria has *territorial* jurisdiction over children stuck in the camps and, consequently, positive obligations arising from the UNCRC to put an end to their human rights violations.

However, the *de facto* situation is quite different. Indeed, the Syrian Government does not exercise control over Rojava. This region has declared its autonomy and is under the armed defence force of the SDF, a non-State actor, which effectively governs this territory, including prisons

and internment camps located therein.³² Furthermore, even if Syria were to regain control over Rojava, the numerous allegations of human rights violations attributed to the Syrian Government and its stated intention to prosecute *all* suspected ISIL affiliates raise serious doubts about its capacity to safeguard the rights of children with *alleged* ties to ISIL who are stranded in the camps.³³ Given the circumstances outlined, it is evident that Syria has a record of not respecting rights, and therefore it is unlikely that it would be willing to comply with its obligations under the UNCRC to protect children stranded in North-East Syria.

2.2. Extraterritorial jurisdiction

After establishing that, even though obliged to do so under international law, Syria is not a reliable duty-bearer, it is necessary to assess whether other State actors – without delving into the complexities surrounding non-State actors' obligations in armed conflict³⁴ – have extraterritorial jurisdiction and positive substantive obligations to end the human rights violations affecting children. In other words, are there States Parties to human rights treaties, who hold the duty of repatriation to those children?

Generally, extraterritorial jurisdiction can be exercised under two established models.³⁵

- The *spatial model*, conceived as a State's *actual* control over territory.³⁶ For instance, if the Rojava region were under the effective control of a State actor rather than the SDF, that State actor would have extraterritorial jurisdiction over individuals in the region.
- The *personal model*, conceived as authority or control over an individual outside the State's own territory.³⁷ For example, if individuals in the detention camps and prisons were under the custody of a State actor other than the Syrian Arab Republic and not the SDF, that State actor would have extraterritorial jurisdiction over them.

In more recent times, a third approach has emerged for establishing extraterritorial jurisdiction, known as the *functional model*.³⁸ This model is based on a State's capacity to safeguard individuals from 'immediate and foreseeable' threats.³⁹ The functional approach to extraterritoriality posits that the critical question in interpreting the concept of extraterritorial jurisdiction in human rights treaties is not solely about a State's effective control over the person or the territory where the person is located. Instead, it centres on a State's effective control over the individual's ability to exercise their human rights. In essence, this

approach implies that a State has an obligation concerning all individuals over whom it exercises power or effective control over (some of) their rights.

Several treaty monitoring bodies and regional courts have been recently tasked with addressing the complex issue of the extraterritorial scope of human rights. Some of them have done so specifically in cases involving detainees in Northeast Syria under the SDF, while others have examined different but similarly challenging contexts (e.g. life incidents in international waters).

2.2.1. A procedural approach: The European Court of Human Rights in *H.F and others v. France*

The most restrictive approach to the jurisdictional conundrum of individuals stranded in the camps seems to be the one taken by the European Court of Human Rights (ECtHR).⁴⁰ In *HF and others v France*⁴¹ – a case concerning the repatriation of three children and their mothers - the Grand Chamber found that France had no substantive obligation to repatriate its nationals.⁴²

Firstly, the ECtHR found that France did not exercise effective control or authority over the area (*spatial model*), as the camps were not under French control, nor did it have control over the individuals (*personal model*), as the children and their guardians were in SDF custody. Secondly, the ECtHR moved beyond the classical personal and spatial models of jurisdiction, confirming that they do not cover all the situations in which States exercise extraterritorial jurisdiction. However, the Chamber

rejected the functional approach to jurisdiction, which it had earlier seemed to adopt in *Carter v Russia*⁴³ and proceeded differently. More specifically, it examined whether there were connecting ties with France that could trigger its extraterritorial jurisdiction under Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) and Article 3(2) of Protocol 4 (right to enter one's own territory).

Concerning Article 3, the ECtHR dismissed the applicants' arguments based on France's operational capability to repatriate them (*functional model*), their French nationality, and the immediate threat to their lives, deeming them insufficient to establish extraterritorial jurisdiction. In other words, according to the ECtHR, the decision of the French authorities not to repatriate children and their mothers did not

have in its view the effect of subjecting them to France's jurisdiction as regards the inhuman treatment they are subjected to in Rojava.⁴⁴ Under Article 3(2) of Protocol 4, the ECtHR found that, factors such as official repatriation requests submitted to France, the immediate threat to the lives of the children and their mothers, and the willingness of the SDF to transfer them did, on the other hand, trigger France's extraterritorial jurisdiction, adding a degree of complexity and confusion to the analysis. Regarding the merits of Article 3(2), it held that the French authorities' handling of repatriation requests lacked appropriate safeguards against arbitrary decisions on repatriation leading to a violation of the procedural obligations arising from Article 3(2) of Protocol 4.⁴⁵ Hence, the right to enter one's own country is violated by France, but not on a substantive basis; rather, it is due to procedural flaws in the decision-making process for repatriation.⁴⁶

2.2.2. Comprehensive approaches: Other regional courts and treaty monitoring bodies

In contrast to the ECtHR, other regional courts, and UN treaty monitoring bodies, such as the UN Human Rights Committee (HRC),⁴⁹ the African Commission on Human and Peoples' Rights,⁵⁰ or the Inter-American Court of Human Rights⁵¹ endorse the functional model, arguing that jurisdiction can also arise in certain circumstances from the effective control over the *rights* of individuals abroad.

In summary, the ECtHR did not accept France's jurisdiction concerning the protection of its citizens in the camps of Northeast Syria under article 3 of the ECHR. However, it did assume a jurisdictional link with France under Article 3 (2) of the Protocol 4. In doing so, the judgment rejected the functional model and failed to provide a way out for detainees in the camps. **If States' obligations towards individuals trapped in Northeast Syria, including children, are limited to procedural safeguards related to repatriation requests, their rights risk becoming 'theoretical and illusory'.**⁴⁷ **It is evident that while France cannot be held responsible for the initial creation of detention conditions, its failure to facilitate the repatriation of children is undeniably prolonging the suffering of children in the camps and the violations of their rights therein. Other countries, with whom detainees have nationality links, also face similar challenges.**⁴⁸

The UN Human Rights Committee's approach in *A.S. et al. v Italy*

*A.S. et al. v Italy*⁵² is an emblematic case in this regard. The HRC concluded that Italy's failure to rescue a sinking ship in the Mediterranean Sea, located just outside its national waters, directly contributed to the loss of life in that incident. Due to what the HRC termed a 'special relationship of dependency', the individuals, who tragically lost their lives, were considered to fall under Italian jurisdiction.

In its decision, the HRC raised critical questions to establish jurisdiction, such as whether the migrants' right to life fell under the power or effective control of Italy.⁵³ The majority of the HRC found that Italy had jurisdiction based on the fact that a unique relationship of *dependency* had been established between the individuals on the distressed vessel and Italy.⁵⁴ The HRC based its decision on a combination of factual elements, including distress calls for help and interactions between the sinking vessel and Italian rescue teams, as well as legal considerations, such as the duty outlined in international maritime law to respond to distress calls. In essence, by relying on the effective control over rights approach (functional model), the HRC concluded that Italy had the obligation to protect the lives of the migrants who drowned in the Mediterranean, because their enjoyment of the right to life depended on Italy.⁵⁵

As noted below, there are similarities between the HRC case, and the ones brought before the CRC Committee on children stranded in Northeast Syria.

CRC Committee's approach in *L.H. et al. v. France, F.B. and Others v. France* and *P.N. et al. v. Finland*

Several cases concerning the repatriation of children trapped in detention camps in Syria have been brought before the CRC Committee: *L.H. et al. v. France*;⁵⁶ *F.B. and Others v. France*⁵⁷ and *P.N. et al. v. Finland*.⁵⁸ Differently from the ECtHR, the CRC Committee found that State Parties had extra-territorial jurisdiction, triggering a substantive obligation of repatriation. While the CRC Committee's findings

are significant given the legal vacuum faced by detained children in Northeast Syria, it remains somewhat unclear which jurisdictional models it employed to arrive at this conclusion. Some have argued that the Committee could have benefited from a more robust legal justification for its conclusions.⁵⁹

Addressing the legal impasse of jurisdiction in a few paragraphs, the CRC Committee argued that in the context of migration, States bear extraterritorial responsibility for the protection of their nationals, particularly through child-sensitive and rights-based consular protection.⁶⁰ Furthermore, it identified extraterritorial jurisdiction considering context-specific circumstances of the victims, such as their extreme vulnerability, and the deplorable conditions of their detention, which posed an imminent risk of irreparable harm to their lives, physical and mental well-being. The CRC Committee also evaluated the 'capability and power' of the State of the children's *nationality* to protect them. The terminology employed, including 'capability', 'control', and 'capacity', suggests that, in finding States Parties' jurisdiction, the Committee relied at least partially on the functional model.⁶¹ However, it did not clarify its interpretation of the concept of 'effective control'. Furthermore, unlike other regional courts and treaty monitoring bodies, the CRC Committee did not assertively rely on the functional model and refrained from explicitly referencing the work of other sister bodies that have embraced it more robustly.⁶²

Most likely, the CRC Committee avoided theoretical elaboration of the functional model and what is deemed to be its threshold test in favour of a '*flexible and child-rights focused approach (...) that responds to increasingly complex contexts, both legal and factual, and acknowledges the high stakes involved for the children in question*'. A position adopted and advocated for by a group of 31 international law academics who intervened as third parties in *L.H et al. V France* case.⁶³

Interestingly, there are resemblances between repatriation cases brought before the CRC Committee and the HRC ruling in *A.S. et al. v Italy*. In both instances, there was a distress call made, and the involved States had the capability to provide assistance but chose not to do so.⁶⁴ Consequently,

2.3. Preliminary conclusions on jurisdiction

The question of extraterritorial application of human rights remains complex and open to varying interpretations among regional courts and treaty monitoring bodies. This highlights the pressing need for greater clarity and consistency when addressing cases involving individuals in situations similar to those in Northeast Syria. Indeed, divergent interpretations of similar norms among human rights treaty bodies raise important questions about the coherence of international human rights law.⁶⁷

the breaches can be seen as directly and predictably linked to the decisions not to offer support.⁶⁵

In the CRC Committee's decisions, such as the HRC's ruling, the issue of jurisdiction and the extent of extraterritorial obligations has been addressed with careful consideration of acute humanitarian needs, the unique circumstances of extreme vulnerability, and the failure of States with the capacity to respond to urgent appeals. The exceptional nature of the circumstances unmistakably formed the foundation of the Committees' approach in both instances. It is reasonable to assume that a sense of moral indignation played a significant role in shaping their *sui generis* approach to jurisdiction.⁶⁶ Inizio modulo

To varying degrees, both the CRC Committee and the HRC cases demonstrate a departure from strict formalistic approaches to jurisdiction, favouring a functional approach grounded in the power of States and the impact of their acts and omissions. **These cases suggest a willingness among human rights bodies to adopt flexible approaches when sufficient normative links exist and the State in question exercised sufficient effective control over the rights of individuals and their fate. These cases also implicitly reflect the recognition, seen across human rights practice, of the need to prevent protection vacuums for individuals beyond the 'effective control' of States (personal and spatial model of extra-territorial jurisdiction).**⁶⁸

SECTION 3

3. Anchoring the obligation of repatriation, among others, to nationality

This short section elaborates on the potential challenges in emphasizing the nationality of children as one factual determinant for triggering extraterritorial jurisdiction and thus positive substantive obligations on the States of nationality.

The CRC Committee identified extraterritorial jurisdiction based on a range of context-specific factors, with nationality being one of the most important, albeit not the sole factor.⁶⁹ **While maintaining a flexible approach in such cases is desirable and commendable, relying on nationality as a determinant for triggering extraterritorial jurisdiction may give rise to several issues.**

First, it can result in arbitrary distinctions that may not align with the broader principles of human rights protection, including the obligation to avoid discrimination on the grounds of nationality, as outlined in Article 2(1) of the UNCRC.⁷⁰ Additionally, reliance on nationality to establish extraterritorial jurisdiction could set a precedent that might be potentially invoked by States in forthcoming cases where the identification of children is uncertain, arguing that they do not have extraterritorial jurisdiction.

Finally, it encourages States to strip children and their parents of their nationality on grounds of terrorism affiliation as exemplarily happened in the case of Shamima Begum.⁷¹ This possibility has already been suggested by the then largest Dutch political party, expressing its intention to do so to avoid granting them access to Dutch territory.⁷²

Professor Ann Skelton, current chairperson of the CRC Committee, provided further insights during an online symposium co-organised by Child Identity Protection and the Institute on Statelessness and Inclusion on Child's rights to identity in emergency settings in November 2022.⁷³ She explained that, while nationality was indeed a factor to consider in determining extraterritorial jurisdiction, it was not the sole determining factor.

In a different scenario – she acknowledged – one might argue for the need to provide assistance to children irrespective of their citizenship. However, she emphasised that in the cases brought before the Committee, nationality served as a crucial link between State Parties and the children. When considered alongside several other factors, it justified their ability to act on behalf of the children.

In summary, while nationality does offer certain protections to children, who can ascertain their identities, it also presents some critical challenges. The following section delves deeper into one of these challenges, focusing on the considerable number of children in Northeast Syria who encounter obstacles in acquiring,

maintaining, or confirming their nationality and maintaining their family relations. Such difficulties can, in turn, jeopardise their prospects of repatriation. **Without the safeguard of a nationality link, many children in Northeast Syria, lacking proper proof of identity or having untraceable fathers or nationalities, face the risk of remaining trapped in arbitrary detention in degrading conditions and, additionally, of becoming stateless.** This situation constitutes a violation of international law, including Article 15 of the Universal Declaration of Human Rights (UDHR), Article 24 of the ICCPR, Article 9(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Articles 4 and 6 of the European Convention on Nationality.



4. A potential way out for children deprived of elements of their identity?

This section details the challenges experienced by detained children in acquiring, retaining, and proving their nationality. Furthermore, it presents a potential alternative to ensure children's exit from the camps when difficulties persist in establishing their nationality. This alternative involves shifting the focus from nationality to family relations as the basis for reuniting children with extended family members.

4.1. Challenges faced by children deprived of elements of their identity: Nationality

Acquisition of nationality

Children detained in Northeast Syria, especially those who were born there, encounter multiple obstacles in acquiring nationality. For instance, among European States that follow *jus sanguinis* tradition, only a minority allow a child born abroad to a national parent to automatically acquire nationality through operation of law without the need for any formal process.⁷⁴ Furthermore, some of these States have enacted laws that create exceptions regarding children born in conflict areas to parents allegedly affiliated with ISIL.⁷⁵ As a result, if a child in the al-Hol and al-Roj camps had a parent, who is national of one of these States applying exceptions, they

would be denied access to automatic acquisition of nationality based on their blood relation.⁷⁶

Additionally, the common practice among most States following the *jus sanguinis* tradition is not to grant automatic nationality at birth. To enable children born abroad to acquire nationality, the following steps are typically required:

a) a decision must be made by the relevant authorities;

(b) there must be proof of registration or declaration of the birth;

(c) additional conditions can be required.⁷⁷

In sum, even though children have a right to acquire their parents' nationality, they are often not recognised as nationals until the necessary official procedures are completed, which cannot be undertaken in these cases as detainees have no access to consular services. Moreover, even when the law allows for the automatic acquisition of nationality, challenges arise due to exceptions in place on the ground of their parents' terrorism affiliation.

Removal of nationality

Another distressing situation faced by children in detention camps on Syrian territory is the erosion of their identity, often through the removal of their nationality.⁷⁸ In certain jurisdictions, this impact is direct when children themselves are singled out for nationality revocation due to alleged affiliations with ISIL. At other times, children are indirectly affected by revocation of nationality when their

parents or other family members lose their nationality.⁷⁹ These practices carry the inherent risk of arbitrariness contrary to the negative obligation arising from Article 8(1) of the UNCRC as well as Article 2(2) of the UNCRC, which aims to protect the child against discrimination 'on the basis of the status, activities, *expressed opinions or beliefs of the child's parents*'.

Proof of nationality

Children in makeshift facilities in Northeast Syria face significant challenges in obtaining and proving their nationality. Many lack official identity documents, like passports and birth certificates, and the absence of access to consular services makes obtaining documentation impossible. States Parties to the UNCRC concerned have positive obligations resulting from Article 8(2) of the UNCRC in swiftly re-establishing the missing elements of their identity.

Article 7 of the UNCRC

1. The child shall be registered immediately after birth and shall have the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national laws and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 of the UNCRC

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

4.2. Family relations in children's repatriation and identity preservation

4.2.1. Family Relations when Nationality is Uncertain

Given the numerous challenges outlined above, when difficulties persist in establishing the nationality of children in the camps, a potential solution for facilitating their release from arbitrary detention is to shift the focus from nationality to their extended family relations.

Article 8 of the UNCRC recognises that a child's identity comprises dimensions beyond nationality, including their name and family relations. Therefore, when children encounter obstacles in acquiring or proving their nationality,

and if extended family members (e.g. grandparents, uncles and aunts, older siblings) including in third countries are willing and able to care for them, their departure from the camps could be based on reunification with those family members rather than repatriation to their home country. These extended family members should be duly assessed, prepared and supervised, to ensure that that all interests are respected, and they should receive appropriate specialised counselling and supervision.⁸⁰

Article 9 of the UNCRC

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child. (...)

4.2.2. Family Relations when Children are Granted Repatriation without their Primary Caregiver

In other instances, States refuse to repatriate children together with their parents stranded in the camps citing national security concerns.⁸¹ In these situations, while some mothers consent to their children's individual repatriation to spare them from the

camp conditions, others refuse to relinquish their custody rights, thereby hindering the children's repatriation.⁸² These situations raise complex questions relevant to the preservation of family relations, first and foremost, with their primary caregivers.

While States generally have an obligation to preserve the family unit of children,⁸³ the issue of separating children from their primary caregivers for the purpose of repatriation is highly sensitive and requires a best interest assessment as stipulated in Article 9 of the UNCRC. In addition, Article 20(1) UNCRC states that children whose own best interests cannot be allowed to remain in their family environment, shall be entitled to special protection and assistance provided by the State. Further guidance is provided in the UN Guidelines for the Alternative Care of Children (UN Guidelines).⁸⁴

If separation is deemed to be in the best interests of the child, children might be repatriated alone, without their primary caregivers. In these situations, States should consider broader 'family relations' as a protective measure, through 'international kinship care' placements in a third country where a relative is in a position to care for the child. Such arrangements are outlined in the UN Guidelines,⁸⁵ with specific reference to the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, which provides a helpful framework for bilateral decisions.⁸⁶

International kinship care arrangements not only serve to preserve the child's family relations, including their identity, but also contribute to maintaining 'the child's ethnic, religious, cultural, and linguistic background' (Art. 20(3) of the

UNCRC). Children who were not born in the camps have been deprived of their identities associated with their original habitual place of residence and extended families. For those born in the camps, there is an opportunity to restore their identities and family relations.

Repatriation may require extended families to approach the relevant authorities in their country regarding their potential willingness to care for these children. It would then be incumbent upon these authorities to contact the SDF, obtain relevant information about the children, and undertake the best interests of the child procedure. Regarding support services for kinship carers, the recently-published guidance on kinship care, provides examples to help children build relationships with their carers while preserving language and culture.⁸⁷ The Guidance notes that 'supporting safe cross-border placements may require work with social service workers in each context. Effective cross-border case management, including the documentation of cases and sharing of case notes, is vital here'.

Such an approach is also consistent with the 2022 Human Rights Council resolution promoting family reunification with a specific focus on emergency situations.⁸⁸ In practice, research conducted in 2022 by Human Rights Watch reveals that many repatriated children who are now living with extended families have integrated well into their respective countries⁸⁹

4.3. Conclusions related to identity protection

When children lack the essential elements or proof of their identity, particularly in the context of nationality, it is incumbent upon States to adhere to the positive and negative obligations arising from Article 8 of the UNCRC. Specifically, States should refrain from arbitrarily interfering with children's right to identity, as exemplified by cases involving the revocation of nationality, while also taking affirmative measures to provide assistance and protection to children who lack essential elements of their identity. This includes facilitating the acquisition and verification of nationality.

However, where complexities persist regarding the establishment and acquisition of nationality, due consideration should be given to the 'family relations' dimension of a child's identity. Consequently, the removal of children from detention camps should not solely rely on their nationality but should extend to encompass their right to reunification with family members through

kinship care. This approach remains desirable also when children are repatriated alone while their parents are left in the camps. In such cases, prioritising reunification of the child with extended family members in third countries willing to provide care is recommended.

This approach, which requires to pay due consideration to the two dimensions of children's identity, namely not only nationality but also preservation of family relations, serves to provide a way out for all those children who actually face obstacles in proving or acquiring nationality. Further, reunification with (extended) family members contribute to the continuity of their upbringing, respecting their ethnic, religious, cultural, and linguistic background. By adopting this approach, States and treaty monitoring bodies can establish a robust framework for protecting the rights and welfare of children, regardless of the intricate challenges posed by their nationality.

SECTION 5

5. Final remarks

CHIP greatly appreciates the work of the UN CRC Committee on the Rights of the Child and encourages:

- Providing insights on its understanding of States' duties of protection towards stateless children trapped in the camps, as well as those who lack proof of their identity in accordance with Article 8 of the UNCRC;
- Providing clearer guidance on the basis upon which States can be deemed to possess extraterritorial jurisdiction;
- Articulating in the case law its precise interpretation of the 'effective control' concept and delineate the criteria and tests it employs to establish such control;
- Referencing developments related to the 'control over rights' approach (functional model), such as the Joint Statement of UN Special Rapporteurs on extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic (Para. 11)⁹⁰ or the HRC's General Comment No. 36 (Para. 63).⁹¹

Finally, CHIP encourages **States, including competent authorities, courts and administrative bodies** to focus their ongoing efforts on:

- Simplifying and expediting the process of acquiring nationality for children born in conflict zones, ensuring that they can automatically acquire nationality through operation of law without undue bureaucratic hurdles;
- Facilitating the verification of nationality by establishing mechanisms to provide consular services to children in makeshift facilities, including the issuance of official identity documents;
- Ceasing the practice of revoking children's nationality, whether directly or indirectly, based on allegations related to their parents' affiliations;
- Not refusing to repatriate children with their primary caregivers tout court but conducting best interests assessments in all cases;
- Taking a holistic approach to identity, considering extended family relations together with nationality as an important potential factor in triggering extraterritorial jurisdiction when nationality is uncertain;
- Considering international kinship care arrangements when appropriate and deemed in the best interests of the child, subject to a comprehensive assessment of the potential caregivers;
- Establishing rehabilitation and reintegration frameworks,⁹² recognizing that child returnees may have been exposed to violence, participated in it, or witnessed violent acts, and may also have been subjected to indoctrination and radicalisation. Based on these considerations, States should develop and implement a holistic, long-term policy for the management, rehabilitation, and reintegration of child returnees with a focus on their well-being, restoration of their identity and family relations as well as future prospects.⁹³

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requires more than merely failing to act when the opportunity – or perhaps even moral responsibility – arises. This highlight concerns that are expected to be central to ongoing discussions regarding these rulings – specifically, what, if any, are the implications for the enforcement of human rights treaties in cases where States possess the authority to prevent violations, a circumstance that frequently arises, but still choose not to do so. See dissent by Shany, Heyns and Pazartzis. HRC. *Supra* 45. Para. 2; and Duffy, H. (2021). *Supra* 35.

66 Duffy, H. (2021). *Supra* 35.

67 Pijnenburg, A. (2022). *Supra* 48.

68 Duffy, H. (2021). *Supra* 35.

69 *Id.*

70 *Id.*

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