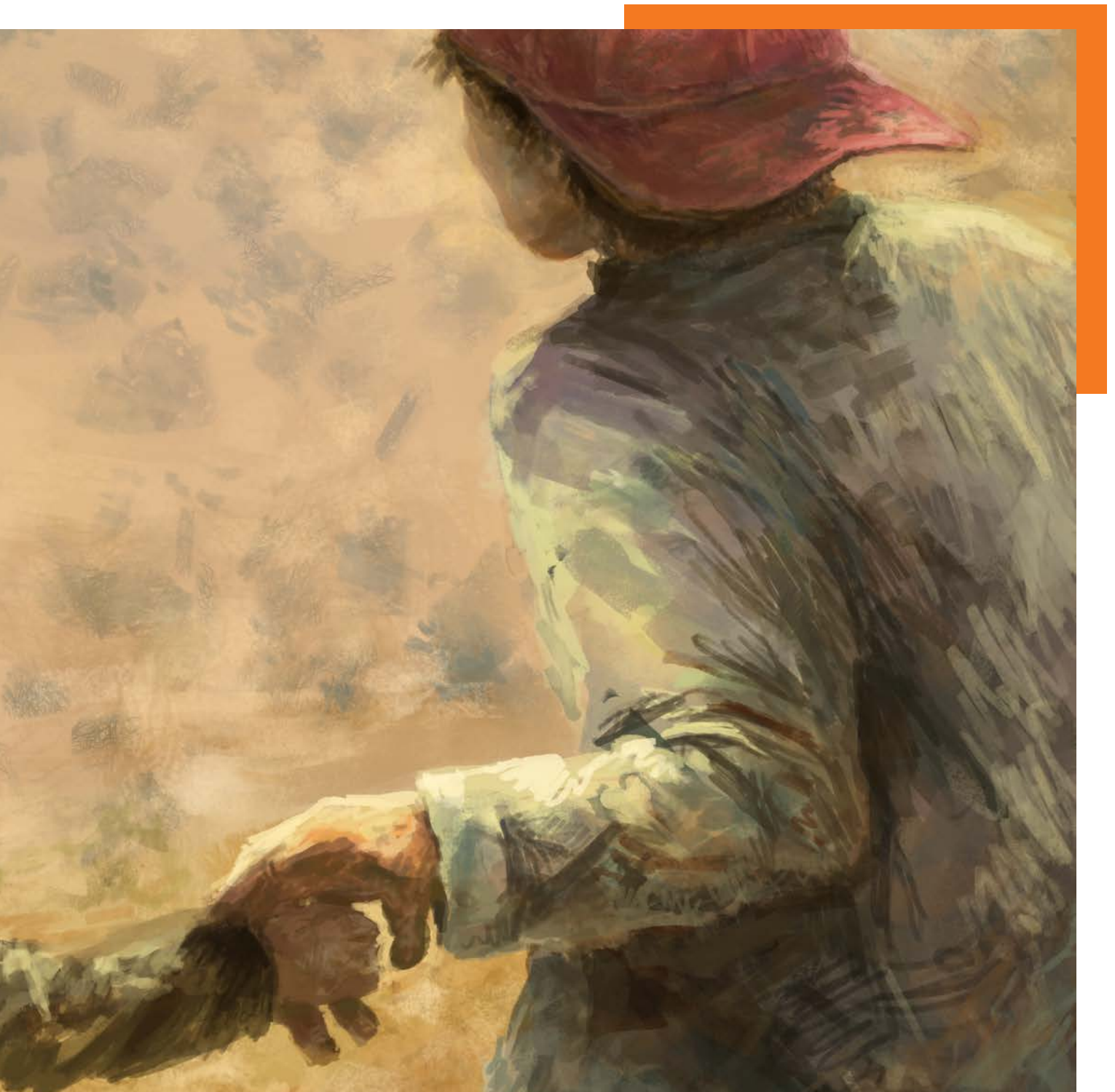




UNITED NATIONS
OFFICE OF COUNTER-TERRORISM
UN Counter-Terrorism Centre (UNCCT)



**CHILDREN AFFECTED BY
THE FOREIGN-FIGHTER PHENOMENON:
ENSURING A CHILD RIGHTS-BASED APPROACH**

Handbook

Children affected by

the foreign-fighter phenomenon:

Ensuring a child rights-based approach



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Foreword

by the Under-Secretary-General of UNOCT
and Executive Director of UNCCT

The critical phenomenon of individuals who travel abroad for the purpose of perpetrating, planning, preparing for or participating in terrorist acts – so-called foreign fighters – has been high on the agenda of the international community. Following the territorial collapse of the Islamic State in Iraq and the Levant (ISIL) in particular, increased attention has been focused on such individuals and their families, many of whom are detained in camps, returning to their countries of origin or travelling to a third country. Thousands of children are among them.

Some of the children accompanied their parents to conflict zones, and an unknown number were born to parents who are foreign fighters. Others were recruited across borders and travelled by themselves to join terrorist groups. Although some did not travel across borders, there are concerns that the children may face consequences because of their family ties to individuals suspected of being foreign fighters.

Acknowledging the challenges posed by the foreign fighter phenomenon and the urgent need to address the needs and protect the rights of children affected by it, some Member States have requested practical guidance on how to take appropriate measures towards such children while also fulfilling their obligations under

international human rights, humanitarian and refugee law.

As the Secretary-General has emphasized, respect for and the protection of human rights are of extraordinary importance to addressing the conditions conducive to terrorism. Upholding the rights of children affected by the foreign fighter phenomenon will be critical to ensuring their full reintegration into society and will protect them from marginalization and discrimination, which may lead to future radicalization. In particular, all policies and actions related to children should be firmly based on the principle of the best interests of the child, and children should be treated, first and foremost, as victims.

The Security Council has also taken note of the plight of such children. In its resolution 2396 (2017), adopted in December 2017, the Council called upon Member States to assess and investigate individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters and their accompanying family members, including children; to develop and implement comprehensive risk assessments for those individuals; and to take appropriate action, including by considering appropriate prosecution, rehabilitation and reintegration measures.

Significantly, the Security Council acknowledged that children may be especially vulnerable and in need of particular psychosocial support, such as post-trauma counselling, and stressed that children need to be treated in a manner that respects their rights and protects their dignity in accordance with applicable international law.

Against this background, the Office of Counter-Terrorism worked closely with partners, including legal scholars, civil society organizations, think tanks, international organizations and Member States, to develop this handbook to support Member States by providing practical guidance.

In addition, at the instruction of the Secretary-General, my Office has coordinated the inter-agency development of key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations-listed terrorist groups, which lay out key human rights, humanitarian and operational principles to guide United Nations action in these areas. The handbook complements the key principles as a crucial part of my Office's work on these issues.

As laid out in the handbook, under international law there are already rich frameworks and standards to guide Member States in upholding the rights of children, including those affected by armed conflict and/or recruited by armed groups. The handbook highlights the standards applicable to issues pertinent to children affected by the foreign fighter phenomenon.

The development of the handbook was possible thanks to the support of partners who provided critical expertise and guidance

throughout the process. I would like to thank, in addition to United Nations partners, Saudi Arabia and Belgium, whose generous contributions made this handbook possible.

I hope that this handbook will lead to increased awareness and better protection of the rights of children, provided for under the Convention on the Rights of the Child, among other international instruments, in larger counter-terrorism efforts. Through this handbook, United Nations entities and their partners will also be better suited to offer practical support to Member States in tackling the difficult task of protecting the rights of the child in the context of countering and preventing terrorism.



Vladimir Voronkov,
Under-Secretary-General for Counter-Terrorism

INTRODUCTION

Challenges

1. Acts of terrorism impact children in multiple ways, with severe consequences. During armed conflict, children are often victims of violence and abuses by armed groups, including those designated by the United Nations as terrorist groups. Some Member State actions in response have further violated children's rights. According to international law, children—all persons under the age of 18—are considered vulnerable and in need of special protections based only on their age. Consequently, States must treat children, including children related to or associated with designated terrorist groups, primarily as victims¹ when devising responses, including counter-terrorism responses. With that challenge in mind, the present Handbook is aimed at supporting Member States to respect and protect the rights of children even while addressing security threats that arise at the hand of designated terrorist groups, including in relation to children associated with these groups, and to ensure children's rehabilitation and reintegration into societies, minimizing any possible security threats that they themselves may pose if not provided with the adequate support and resources needed.

2. Children's rights should be a primary concern of Member States seeking to counter terrorism and support children's development in a peaceful environment. Yet children are often

among the casualties of acts of terrorism. Too many children are also killed in military and non-military counter-terrorism operations, and are often seriously injured. As a result, they suffer from long-term consequences, including but not limited to physical disabilities and severe trauma. Designated terrorist groups are also known to recruit children and even send them to frontlines to participate in hostilities.² Children have been used as carriers of personnel-borne improvised explosive devices.³ They are victims of exploitation, abduction, trafficking, and sexual and gender-based violence by designated terrorist groups. Children have also become victims of such violations by State armed and associated forces in countering terrorism. Acts of terrorism and their impact on society also seriously affects children's access to health care and education. They also disrupt family life, including through the loss of parents and other family members, and in some cases, through displacement.

3. The cross-border nature of terrorist activities, highlighted by the latest wave of individuals who travelled abroad to join designated terrorist groups, adds another dimension to the impact on children. The Security Council has called upon Member States to assess and investigate individuals whom they have reasonable grounds to believe are "terrorists", including suspected "foreign terror-

¹ See United Nations Office on Drugs and Crime (UNODC), *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (Vienna, 2017), chap. 2.

² A/HRC/30/67, para. 44; A/HRC/36/55, para. 51; A/HRC/40/70, para. 62; A/HRC/31/47, para. 59; A/72/865, para. 185.

³ A/72/865, para. 226.

ist fighters”.⁴ The Council recognized that such individuals may “be travelling with family members they brought with them, with families they have formed or family members who were born while in conflict zones.”⁵ Noting that children are among such family members, the Council further notes that children may be especially vulnerable and in need of specialized support, such as post-trauma counselling, stressing that they need to be treated in a manner that respects their rights and dignity, in accordance with applicable international law.⁶

4. The Security Council recognizes that such children are victims of the most grievous human rights violations by armed groups, including designated terrorist groups.⁷ Designated terrorist groups, including ISIL and Boko Haram, recruit and use children across national borders.⁸ In Syria for example, 76 children verified to be recruited by armed groups were of 17 nationalities.⁹ Some children may also be kidnapped and transferred across borders by designated terrorist

groups or brought to the territory by their families.¹⁰ Furthermore, some children may simply be living under the control of those groups with no direct contact with them. Many children were born into those areas that were previously under the control of designated terrorist groups to foreign mothers or fathers and face similar challenges as the children who traveled to those locations due to their perceived association with, or family links to, individuals suspected of being foreign fighters.

5. As with all other victims of terrorism, children affected by the foreign fighter phenomenon face layers of challenges. Those recruited across borders are often stranded in hostile territories. They are left particularly vulnerable as they are in environments with limited to no support structures.¹¹ The States most impacted by armed conflict and terrorism are often characterized by poor security and humanitarian conditions and overwhelmed criminal justice, child protection and welfare services. Because of these multiple challenges, many children are also systematically arrested, detained, prosecuted and even convicted for their alleged association with armed groups, including designated terrorist groups.¹² Many infants and younger children are detained along with their primary caregivers because of their caregivers’ suspected association with designated terrorist groups.¹³ In many of these cases, detention conditions do not meet minimum standards,

⁴ The United Nations Security Council resolution 2178 (2014) defines “foreign terrorist fighters” as those “who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”(para. 6(a)). Various concerns have been raised with the term, including from human rights and humanitarian law perspectives. See section on terminology.

⁵ Security Council resolution 2396 (2017); By June 2018, for example, at least 1,175 children and 435 women were deprived of liberty in three sites across the north-eastern part of the Syrian Arab Republic on the basis of suspected family ties with Islamic State of Iraq and the Levant fighters, among them 43 nationals. S/2018/969, para. 24.

⁶ Security Council resolution 2396 (2017), preamble.

⁷ Security Council resolution 2427 (2018).

⁸ A/72/865, para. 16.

⁹ S/2018/969, para. 15.

¹⁰ S/2018/969, para. 24.

¹¹ A/73/278, paras. 10–11.

¹² A/HRC/40/49, para. 18; In Iraq, an estimated 1,200 children of different nationalities have reportedly been detained by the Government, including on terrorism-related charges. In the Syrian Arab Republic, more than 1,300 children are reportedly being held by Kurdish actors in different sites across the north-east of the country, often because of their alleged association with foreign fighters. A/73/278, para. 9.

¹³ A/72/865, para. 224.

especially for children who have special rights and needs in this regard.¹⁴ They lack access to adequate food, sanitation, and basic services, such as health care and education.¹⁵ Critically, many children with possible links to individuals suspected of being foreign fighters may face the risk of statelessness¹⁶ and many lack official documentation or birth certificates. In Iraq, for example, up to 13,000 children younger than 12 years old reportedly lack birth certificates or other documentation to establish their nationalities. Some may be of Iraqi parentage, while others may have one or two foreign parents.¹⁷

6. International human rights law provides the right for everyone to enter his or her own country.¹⁸ Still, some countries of origin bar their citizens - including both adults suspected of being associated with designated terrorist groups and their children, from returning.¹⁹ Consequently, such children are left in prolonged detention or stranded in foreign countries in legal and administrative limbo.²⁰ Some of the countries are willing to repatriate children from conflict zones, but not their parents or guardians, leading

to a risk of family separation. Some States have implemented a policy whereby only orphans are repatriated. Others have repatriated only children younger than a certain age, in contravention of international law, which confers special protections to everyone under the age of 18. Allowing only some children to return inevitably results in family separation, both from primary caregivers as well as from older siblings, another violation of children's basic rights. Separation may also be caused by measures intended to prevent children from accompanying a caregiver to a territory where the child risks forced recruitment.²¹

7. There are concerns that children of suspected foreign fighters may pose a threat in the future, especially without effective individualized assessments, protection measures and rehabilitation and reintegration assistance.²² Such children must be recognized as victims of human rights violations, involuntarily associated with groups that commit these grievous violations against their rights. However, there exists a wariness to assisting these children, including those who want to return to their own or their parents' countries of origin. Handling such cases effectively generally requires a whole-of-government and all-of-society approach. However, local communities, Governments, and the media have been reluctant to provide services and assistance to child victims, often due to the negative perceptions and stigma associated with such children.

¹⁴ A/HRC/40/70, para. 10.

¹⁵ A/HRC/40/70, para. 45; World Health Organization (WHO) reported of deaths of at least 29 children between December 2018 and January 2019 in in Al-Hol camp in Al-Hasakeh governorate, Syria, where the authorities are reportedly overwhelmed with the number of people coming into the camp. WHO is concerned over critical health situation in Al-Hol camp, Al-Hasakeh (Damascus, 2019). Available at www.emro.who.int/syr/syria-news/who-concerned-over-critical-health-situation-in-al-hol-camp-al-hasakeh.html

¹⁶ S/2019/50, para. 93; A/2019/103, paras. 62, 63; S/2019/103, para. 21; A/HRC/40/70, para. 10.

¹⁷ S/2019/103, para. 21; S/2019/50, para 93.

¹⁸ S/2019/103, para. 21; International Covenant on Civil and Political Rights (1966), art. 12(4).

¹⁹ S/2019/103, para. 21.

²⁰ A/HRC/40/70, para. 10.

Policy Background of the Handbook

8. The United Nations has repeatedly reaffirmed that all counter-terrorism measures must comply with international law, particularly human rights, humanitarian and refugee law, placing

²¹ A/HRC/40/28, para. 34.

²² S/2019/50, para. 92; S/2019/103, para. 10.

counter-terrorism architecture within a larger international legal framework. Both the Security Council and the General Assembly have reaffirmed this in relevant counter-terrorism resolutions.²³ Further, Pillar IV of the Global Counter-Terrorism Strategy adopted by the General Assembly in 2006 stressed that all measures to prevent counter terrorism must be based on human rights and the rule of law, and that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but are rather complementary and mutually reinforcing.²⁴

9. In resolution 2396 (2017), the Security Council called upon Member States “to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters and their accompanying family members, including spouses and children, entering those Member States’ territories; to develop and implement comprehensive risk assessments for those individuals; and to take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures” and emphasizes that Member States should ensure that they take all such action in compliance with domestic and international law.²⁵ Similarly, the General Assembly, in its sixth review resolution of the Global Counter-Terrorism Strategy, called upon Member States to develop and implement “prosecution, rehabilitation and reintegration strategies, taking into account gender and age dimensions” of returning

“foreign terrorist fighters” and their families.²⁶

10. Significantly, both the Security Council and the General Assembly noted that children may be especially vulnerable and in need of psychosocial support, such as post-trauma counselling. Both bodies stressed that children need to be treated in a manner that respects their rights and protects their dignity in accordance with applicable international law.²⁷ This echoes the Security Council resolution on children and armed conflict, which stresses the need to pay particular attention to the treatment of children associated or allegedly associated with armed groups who commit terrorist acts.²⁸

11. The United Nations Counter-Terrorism Centre developed this *Handbook* as part of its work under the Global Counter-Terrorism Strategy, Pillar IV on human rights and the rule of law.²⁹ Given that the erosion of the rule of law and violation of human rights could be drivers of terrorism, the *Handbook* also contributes to Pillar I of the Global Counter-Terrorism Strategy which address conditions conducive to terrorism. Ensuring the rights of concerned children and supporting families to rehabilitate and reintegrate, rather than stigmatize them and leaving them to become greater security threats in the long term, would contribute to addressing conditions conducive to terrorism.

²³ That is a point repeatedly made by the Security Council in its resolutions concerning counter-terrorism. For example, see preamble, paragraphs 4, 7, 13 and 34 of Security Council resolution 2396 (2017).

²⁴ General Assembly resolution 26/288, Global Counter-Terrorism Strategy (2006).

²⁵ Security Council resolution 2396 (2017), para. 29.

²⁶ General Assembly resolution 72/284 (2018), para. 39.

²⁷ Security Council resolution 2396 (2017), pp.18; General Assembly resolution 72/284 (2018), para. 39.

²⁸ Security Council resolution 2427 (2018), para. 19.

²⁹ General Assembly resolution 26/288 (2006).

Paris Commitments and Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups (2007)

The Paris Commitments to protect children from unlawful recruitment, use by armed forces or armed groups and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007) (the Paris Principles) were adopted at the international conference “Free children from war” in Paris, February 2007. Together, they consolidate global humanitarian knowledge and experience in working to prevent recruitment, protect children, support their release from armed forces or armed groups and reintegrate them into civilian life. Available at www.unicef.org/emerg/files/ParisPrinciples310107English.pdf

The Security Council Counter-Terrorism Committee Madrid Guiding Principles on stemming the flow of foreign terrorist fighters (S/2015/939) and the 2018 Addendum to the 2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177)

The Madrid Guiding Principles and its Addendum provide guidance on protecting and promoting the rights of the child in several contexts, including legal frameworks and procedures, investigations, watch lists and databases, biometric identification and prosecution, rehabilitation and reintegration approaches.

Aim of the *Handbook*

12. The *Handbook* aims to assist States in taking a human rights-based approach, with a special focus on child rights, to several issues concerning children affected by the foreign fighter phenomenon. In particular, the *Handbook* aims to assist practitioners in finding more effective and sustainable solutions to the challenges such children face by ensuring respect for international normative standards. The *Handbook* aims to do so by summarizing applicable international human rights law, especially child rights standards, and humanitarian law and explaining how applying such law practically also supports Member States to improve security and long-term recovery of children. The *Handbook* further includes recommendations for approaches that represent good practice, while introducing some national practices and other relevant publications and materials.

13. The *Handbook* seeks to contextualize States' counter-terrorism obligations under the United Nations Security Council resolutions within the broader international human rights and humanitarian normative frameworks, particularly those concerning child rights and children and armed conflict. With respect to the relevant Security Council resolutions, the present *Handbook* seeks to further build on the existing guidance provided by the Security Council Counter-Terrorism Committee, established pursuant to resolution 1373 (2001) concerning counter-terrorism for implementing relevant resolutions in a manner that ensures full protection and promotion of the rights of the child, including its Madrid Guiding Principles on stemming the flow of foreign terrorist fighters³⁰ and the 2018 Addendum to the 2015 Madrid Guiding Principles on foreign terrorist fighters, without purporting to create any new obligations for Member States.³¹

Target Audience and Focus of the *Handbook*

14. The target audience of the *Handbook* is primarily legal professionals, policymakers, security experts and practitioners who may benefit from further specific guidance on ensuring full protection and promotion of the rights of the child in the context of their work. Over the past few years, strategies, tools and technologies for countering terrorism have advanced at a rapid pace. Thus far, the adoption of legislation and policies to ensure that counter-terrorism measures are used in compliance with international human rights law, particularly concerning the rights of the child, has in many

cases failed to keep pace with these developments.

15. While the *Handbook* primarily addresses issues concerning children affected by the foreign fighter phenomenon, the applicable international legal standards identified in the *Handbook* apply to all children, including those recruited and used by armed forces and armed groups, regardless of their age and parents' nationalities. The goal of the *Handbook* is to ensure that all children's rights are protected and that all children are assisted, while attempting to address security concerns that States face in relation to the foreign fighter phenomenon.

16. There is a wealth of materials on children affected by armed conflict developed by United Nations agencies, international and regional organizations, Governments, civil society organizations and think tanks. While avoiding duplication to the extent possible, the *Handbook* aims to consolidate and highlight how existing law and standards on children, especially those concerning children affected by armed conflict, apply to children affected by the foreign fighter phenomenon. Some relevant instruments and publications are also introduced throughout the *Handbook*.

17. Further, the *Handbook* focuses on eight issues that children affected by the foreign fighter phenomenon may face: (1) key human rights principles to protect children's rights while addressing States' security concerns, (2) ensuring the right to nationality, (3) preserving family unity, (4) repatriation, (5) rehabilitation and integration, (6) juvenile justice, (7) deprivation of liberty and (8) data collection and exchange.

³⁰ S/2015/939.

³¹ S/2018/1177, annex to the letter dated 28 December 2018 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council (2018 Addendum to the 2015 Madrid Guiding Principles).

18. The following chapters summarize international human rights law, especially child rights law, humanitarian law and other international standards applicable to these eight issues. Summarizing these standards is intended to clarify for States how to ensure that measures to address these issues are based on child rights and that “the best interests of the child as well as the specific needs and vulnerabilities of girls and boys are duly considered.”³²

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

The UNODC handbook aims at providing guidance to legal professionals and policymakers, as well as practitioners on the treatment of children targeted by terrorist and violent extremist groups. The publication focuses on the prevention of child recruitment, justice for children, and rehabilitation and reintegration. To complement and build upon the *Handbook*, in 2019, UNODC has developed three training manuals to support practitioners and policymakers in designing and implementing effective interventions: (i) *Prevention of Child Recruitment by Terrorist and Violent Extremist Groups*; (ii) *Justice for Children in the Context of Counter-Terrorism*; and (iii) *Rehabilitation and Reintegration of Child Victims of Recruitment and Exploitation by Terrorist and Violent Extremist Groups*.

Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters (2018)

Published by the Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism, the document provides concrete guidance to States on how to implement Security Council resolutions 2178 and 2396 in compliance with international law, including human rights, humanitarian and refugee law. It covers a range of issues, including the right to liberty and freedom of movement, deprivation of nationality, information exchange/data collection and analysis and criminal justice measures. The document also has a section on children affected by or involved in foreign fighter activities.

Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the United Nations High Commissioner for Human Rights (A/HRC/40/28) (2019)

The report analyses human rights issues concerning children affected by terrorism, including child victims and witnesses of terrorist acts, children at perceived risk of recruitment and children associated or suspected of association with designated terrorist groups. It highlights the duty of protection and children’s right to, inter alia, rehabilitation and privacy.

³² Security Council resolution 2427 (2018), preamble.

Methodology

19. The overall focus of and main issues to be addressed by the *Handbook* were formulated after desk research and consultations with relevant United Nations entities, agencies and stakeholders. Subsequently, an expert meeting was held in New York in April 2018. Legal scholars, child rights practitioners, civil society organizations, United Nations agencies and think tanks participated in the meeting. They identified key international legal frameworks concerning the issues of focus. The experts were also consulted throughout the development of the *Handbook*, providing comments to the drafts.

20. The outcome of the April 2018 expert meeting was shared and discussed at consultative meetings with government officials at the regional level. For this purpose, the United Nations Counter-Terrorism Centre organized three consultative meetings in South-East Asia (July 2018), Europe (September 2018) and the Middle-East and North Africa (January 2019). The participants at the regional consultative meetings shared national practices and legislative frameworks. Some of the good practices and challenges shared in these meetings are included in the *Handbook*. In April 2019, another expert meeting was held in New York to review the draft *Handbook* and develop key recommendations.

Terminology

A child

21. The *Handbook* follows the definition of “a child” under the Convention on the Rights of the Child as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”.³³ The Convention on the Rights of the Child has near universal status. Many of

its provisions are now also part of “customary international law” that binds all States, even if they have not ratified the Convention. Under the Convention, all persons under the age of 18 are entitled to special protection.³⁴ Of particular significance to children affected by the foreign fighter phenomenon is that the Optional Protocol to the Convention on the involvement of children in armed conflict prohibits armed groups from recruiting anybody under 18.³⁵

Foreign terrorist fighters/foreign fighters

22. The Security Council has defined “foreign terrorist fighters” as those “who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”.³⁶

23. Concerns have been raised over the labelling of individuals, as well as their families, by association, as foreign terrorist fighters, difficulties related to the criminal regulation of individuals’ intentions, and the blurring of lines between terrorism and armed conflict, with consequences for human rights protection and the protection regime under international humanitarian law. There are

³⁴ Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention, para. 1. The Committee emphasizes that “adolescents up to 18 years old are holders of all the rights enshrined in the Convention; they are entitled to special protection measures, and, according to their evolving capacities, they can progressively exercise their rights (art. 5)”.

³⁵ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 4(1); Use of children under the age of 15 in hostilities is also a war crime. Rome Statute of the International Criminal Court (1998), art. 8(2)(b)(xxvi).

³⁶ Security Council resolution 2178 (2014), para. 6(a).

³³ Convention on the Rights of the Child (1989), art. 1.

concerns that the term may also lead to stigmatization and dehumanization, especially for children. The *Handbook* uses the term “foreign terrorist fighters” when referring to the use of the term as reflected in relevant Security Council resolutions.³⁷

Children affected by the foreign fighter phenomenon

24. The *Handbook* uses the broad term “children affected by the foreign fighter phenomenon” to recognize the diverse ways in which the phenomenon impacts children. This affirms the principle that international standards for child rights should apply to all children, regardless of their situation or age. The diverse groups³⁸ of children may include, but are not limited to, children who fall into one or more of the following categories: children accompanying family members who crossed borders to join designated terrorist groups; children who travelled to areas of conflict to join such groups; children who were taken by such groups across borders; children who directly participated in hostilities; children who were born in conflict zones or areas impacted by the foreign fighter phenomenon and children who were identified by authorities to be linked with such groups by virtue of familial relationship even when they

³⁷ See also United Nations Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, guidance to States on human rights-compliant responses to the threat posed by foreign fighters (New York, 2018), available at www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf.

³⁸ Security Council resolution 2396 (2017) uses the term “children associated with foreign terrorist fighters”. It was raised during expert meetings held while developing this Handbook that the use of the term “association” could be problematic as national legal frameworks that define “association” frequently do not require international acts. Children should not be criminally responsible for his or her presence in a country if she or he travelled with family or was born there. Notably, the Paris Principles (2007) define children associated with armed groups as primarily those recruited or used by an armed force or armed group. See para. 2.1.

had never travelled abroad. Some of these cases may involve parental abduction, criminal kidnapping, human trafficking, recruitment, use, and exploitation for the worst forms of child labour.

25. Such children include newborns up to the age of 18. Both girls and boys, including children with disabilities, are impacted by the phenomenon. While mindful of the need for age and gender-sensitive programmes for such children, the *Handbook* reiterates that international human rights law, including child rights law, affords special protections to all those under 18 years of age. Any accountability measures shall consider the child’s age at the time of the commission of a crime and the conditions under which the child may have been living or acting, including coercive, manipulative, or violent conditions. They should simultaneously support the child’s rehabilitation and reintegration.³⁹

International Human Rights Law, International Humanitarian Law, and International Refugee Law

International human rights law

26. International human rights law is established through treaties and customary international law. When States become parties to international human rights treaties, they are obligated to act in accordance with and uphold all of the requirements imposed by the treaty. When a State ratifies a treaty, it can make a **reservation**, which excludes or modifies the legal obligations under certain provisions of the treaty in their application

³⁹ Convention on the Rights of the Child (1989), art. 37; Committee on the Rights of the Child, general comment No. 24 (2009) on children’s rights in juvenile justice.

to that State.⁴⁰ Further, certain human right treaties also allow States to temporarily derogate, when strict conditions are met.⁴¹ Derogation suspends the legal effects of specific provisions in the State. Even under such treaties, some rights, for example the right to freedom from torture and the right to freedom of thought, conscience and religion, can never be derogated. Finally, some treaties allow certain rights, to be restricted, when specific requirements (a legitimate aim, legality, necessity, proportionality, and non-discrimination) are met.

27. Another source of human rights law is customary international law established through State practice that is undertaken by States in the belief that such practice is required by law (*opinio juris*). Customary law is applicable to all States.

28. The Convention on the Rights of the Child, a human rights treaty enumerating the rights of every person under 18 years of age and corresponding state obligations, has been ratified by all Member States, except one. Many of its provisions are now also part of “customary international law” that binds all States, even if they have not ratified the Convention.

29. Human rights obligations of a State party to a treaty are binding on all State organs and agents. All branches of government (executive, legislative and judicial) and other public or government authorities at national, regional or local

levels are obligated to fulfill the requirements.⁴²

30. The **principle of non-refoulement** prohibits States from removing individuals, regardless of migration, nationality, asylum or other status, from their jurisdiction when they would be at risk of irreparable harm upon return to the country of origin. This type of harm includes persecution, torture, inhuman or degrading treatment or punishment, arbitrary deprivation of life, including as a result of a death sentence pronounced without the fundamental guarantees of fair trial, and other gross violations of human rights, such as underage recruitment and participation in hostilities.⁴³ To that end, States must establish mechanisms for the purposes of hearing and assessing, on an individual basis, any fears expressed by the child, or their family, regarding the risks associated with repatriation. The principle is well founded under international human rights treaties⁴⁴ and is also considered as customary international law binding on all States.⁴⁵

⁴⁰ Vienna Convention on the Law of Treaties (1969), art. 2(1)(d).

⁴¹ International Covenant on Civil and Political Rights (1969), art. 4; Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights), art. 15; and American Convention on Human Rights (1969), art. 27.

⁴² Human Rights Committee, general comment No. 31 (2004) on nature of the general legal obligation imposed on States parties to the Covenant, para. 4.

⁴³ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/ No. 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 45; International Committee of the Red Cross (ICRC), “The updated Commentary on the First Geneva Convention” (2016), pg. 1218.

⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985), art. 3; International Covenant on Civil and Political Rights (1966), art. 6.

⁴⁵ UNHCR, “Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol” (2007), available at www.unhcr.org/4d9486929.pdf, paras. 21-22.

International humanitarian law

31. In addition to international human rights law, if an armed conflict exists, international humanitarian law applies. While international humanitarian law pertains to situations of armed conflict, international human rights law is applicable at all times and to all persons. Therefore, in situations that meet the threshold definition of non-international or international armed conflict, international human rights law and international humanitarian law apply concurrently and their various protections are complementary, not mutually exclusive.

32. Common Article 1 to the Geneva Conventions of 12 August 1949 provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”, which has become part of customary international law and applies to international humanitarian law in general. Military necessity cannot be invoked as a justification for acts that are contrary to international humanitarian law,⁴⁶ unless the rule in question specifically provides for exceptions based on military necessity.

33. Critical to some children affected by the foreign fighter phenomenon is the obligation to treat all children affected by armed conflict with special respect and protection under international humanitarian law.⁴⁷ Other related rules are the hu-

⁴⁶ ICRC, *The updated Commentary on the First Geneva Convention* (2016), para. 190.

⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) (Additional Protocol I to the Geneva Conventions), arts. 77, 78; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (Additional Protocol II to the Geneva Conventions), art. 4(3); ICRC, Customary International Humanitarian Law database, rule 135 on children, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

mane treatment for detained persons, including detained children,⁴⁸ the respect for family life as much as possible,⁴⁹ and the right of detained persons to correspond with their families.⁵⁰

International refugee law

34. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, along with regional refugee instruments,⁵¹ are the core legal instruments of the international refugee regime, complemented by customary international law and international human rights law. These instruments define the term “refugee”⁵² and establish an international framework for the protection of refugees, setting out the obligations of States towards refugees on their territory or otherwise under their jurisdiction, and the basic minimum standards of treatment for individuals defined as refugees. The **principle of non-refoulement** is the cornerstone of international refugee protection. Enshrined in article 33 (1) of the 1951 Convention, the principle provides that a refugee may not be expelled or

⁴⁸ Geneva Conventions of 12 August 1949, common art. 3; Additional Protocol II to the Geneva Conventions, art. 5; ICRC, Customary International Humanitarian Law database, rule 87 on humane treatment, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule87.

⁴⁹ See, among other things, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), art. 27; ICRC, Customary International Humanitarian Law database, rule 105 on respect for family life, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105.

⁵⁰ See, among other things, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), arts. 106 and 107; Additional Protocol II to the Geneva Conventions (1977), art. 5 (2) (b); Convention on the Rights of the Child (1989), art. 37 (c); ICRC, Customary International Humanitarian Law database, rule 125 on correspondence of persons deprived of their liberty, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule125.

⁵¹ African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); Cartagena Declaration on Refugees (1984).

⁵² Convention relating to the Status of Refugees (1951), art. 1A.

otherwise forcibly returned to a country where his or her life or freedom would be threatened based on race, religion, nationality, membership in a particular social group or political opinion.

35. The 1951 Convention provides for the exclusion from refugee status of persons with regard to whom there are serious reasons for believing they have committed certain serious crimes or heinous acts.⁵³ International refugee law also permits exceptions to the principle of *non-refoulement* when an individual has been determined to pose a danger to the security of the country or to its community in certain specific circumstances.⁵⁴ However, given the potentially serious consequences of denying refugee status or protection from *refoulement* to a person who otherwise may face harm upon return to his or her country of origin, these provisions should be interpreted in a restrictive manner.⁵⁵ In view of the particular circumstances and vulnerabilities of children, the application of these provisions to children always need to be exercised with great caution. A thorough and individualized analysis of all circumstances in each case should be undertaken, considering the rules and principles that address the special status, rights and protection afforded to children under international and national law. In particular, these principles related to the best interests of the child, the mental capacity of children and their ability to understand and

consent to acts that they are requested or ordered to undertake need to be considered.⁵⁶

⁵³ Ibid., art. 1F.

⁵⁴ Ibid., art. 33(2).

⁵⁵ UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003), available at www.refworld.org/docid/3f5857684.html, para. 2; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003), available at www.refworld.org/docid/3f5857d24.html, para. 4; UNHCR, Guidance Note on Extradition and International Refugee Protection (2008), available at www.refworld.org/docid/481ec7d92.html, paras. 13–16.

36. The 2006 Global Counter-Terrorism Strat-

⁵⁶ UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009), available at www.refworld.org/docid/4b2f4f6d2.html.

SECTION 1: Key Principles to Protect the Rights of the Child While Addressing a State's Security Concerns

egy adopted by the General Assembly in 2006 recognizes that effective counter-terrorism measures and protection of human rights are not conflicting goals, but rather are complementary and mutually reinforcing. For example, a national criminal justice system based on respect for human rights and the rule of law is considered one of the best means for effectively countering terrorism.⁵⁷ At the same time, conditions under which human rights are violated are recognized as being conducive to violent extremism.⁵⁸ As the Secretary-General António Guterres has also stressed, “Without a firm basis in human rights, counter-terrorism policies can be misused and abused. They can actually make us less safe, by undermining good governance and the rule of law... [T]errorism is fundamentally the denial and destruction of human rights, and the fight against terrorism will never succeed by perpetuating the same denial and destruction.”⁵⁹

37. In light of the above, the present section seeks to identify overarching international human rights and humanitarian law requirements that apply when States are developing and implementing measures relevant to children affected by the foreign fighter phenomenon. The section identifies how States must comply with the relevant international legal principles, including those affirmed under Security Council resolutions on children and armed

⁵⁷ General Assembly resolution 72/284 (2017), preamble.

⁵⁸ General Assembly resolution 70/674 (2015), Plan of Action to Prevent Violent Extremism (United Nations Plan of Action to Prevent Violent Extremism).

⁵⁹ Secretary-General's speech at SOAS, University of London, on “Counter-terrorism and human rights: winning the fight while upholding our values”, 16 November 2017, available at www.un.org/sg/en/content/sg/statement/2017-11-16/secretary-general's-speech-soas-university-london-“counter-terrorism.”

conflict.⁶⁰ These principles are discussed in the context of the relevant Security Council resolutions on counter-terrorism, which repeatedly highlight that all counter-terrorism measures should be in compliance with international law, particularly human rights and humanitarian law.

1.1 Rights of Children Under International Law and Corresponding State Obligations

38. As stated above, the Convention on the Rights of the Child has been ratified by nearly all Member States. Many of its provisions are now also part of customary international law that binds all States, even if they have not ratified the Convention. All States parties to the Convention have an obligation to apply the rights and provisions under it to each child within their jurisdiction. All rights under the Convention always apply to all children, including during periods of armed conflicts and are non-derogable. States parties should make every effort to ensure that the rights and provisions under the Convention are implemented at all times, including during times of armed conflict.

1.1.1 States' Obligations Towards a Child in Its Territory and Towards a Child Outside of Its Territory

39. The Convention on the Rights of the Child provides that States parties must ensure, without discrimination, the rights of all children within

⁶⁰ There are 12 progressively stronger resolutions on children and armed that form the basis of child protection in conflict settings, including extremist contexts. The Security Council adopted the resolution 2427 in July 2018, the latest in that regard.

their jurisdiction.⁶¹ Each State's party to the present Covenant undertakes to respect and ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind. "Subject to their jurisdiction" has been interpreted to mean within the State's power or effective control, even if that individual is not in the State's territory.⁶²

40. States have the duty to respect, protect and fulfill the rights of all children who are present "in their territory or subject to their jurisdiction".⁶³ The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory. States are obligated to respect and ensure their rights regardless of whether the child is a citizen of that State and irrespective of their nationality, immigration status or statelessness.⁶⁴ States have a responsibility to ensure each child's protection from violence, especially in relation to those in situations of vulnerability, including children in armed conflict and state-

less children,⁶⁵ regardless of the child's status under the law, including if the child is known or suspected of association with designated terrorist groups. Furthermore, these obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not part of or only partly under the jurisdiction of the State.⁶⁶

41. States may also have obligations towards children of its nationals outside of their territories in certain situations. Under the International Covenant on Civil and Political Rights, States parties are to respect and ensure the right to life of those who are both located outside of its territory and whose right to life is impacted by the State's activities in a direct and reasonably foreseeable manner.⁶⁷ Further, the Covenant entitles every child "to such measures of protection as are required by his status as a minor on the part of his family, society and the State".⁶⁸ This article requires adoption of special measures designed to protect the life of every child.⁶⁹ To fulfill these obligations, the State of a child's nationality arguably would have to extend protective measures even if the child is outside of its territory or jurisdiction. Simi-

61 Convention on the Rights of the Child (1989), art. 2(1); International Covenant on Civil and Political Rights (1966), art. 2(1).

62 Human Rights Committee, general comment No. 31 (2004), para 10; Human Rights Committee, general comment No. 36 (2018) on article 6 (right to life), para. 22.

63 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, para 39; see also Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) (Hague Convention), art. 6.

64 Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, para. 12; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child on general principles in the context of international migration, para. 11.

65 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, para 39.

66 That includes international waters or other transit zones where States put in place migration control mechanisms (Committee on the Rights of the Child, general comment No. 6 (2005), para. 23), as well as on board ships or aircrafts registered in the State (Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 10).

67 Human Rights Committee, general comment No. 36 (2018), para. 63

68 International Covenant on Civil and Political Rights (1966), art. 24(1).

69 Human Rights Committee, general comment No. 36 (2018), para. 60.

larly, States parties to the Optional Protocol to the Convention of the Rights of the Child on children in armed conflict must provide assistance to children who were recruited by designated terrorist groups in their jurisdiction. This can include ensuring support for their physical and psychological recovery, social reintegration and safeguarding their right to develop in an environment free from violence.⁷⁰

42. The International Covenant on Civil and Political Rights provides the right to enter one's own country.⁷¹ Further, under the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, States parties are to develop and implement effective consular protection policies. Such policies include specific measures directed to protecting children's rights, encompassing promotion of protocols on consular protection services.⁷² Correspondingly, host States also have obligations under the Vienna Convention on Consular Relations to ensure individuals' rights to communicate with and be visited by consular officers of their country of nationality.⁷³ This has significant implications for those children affected by the foreign fighter phenomenon who remain outside of their home countries or their countries of residence and who have not been afforded adequate protection in their host state.

43. When a child is in the territory of a State, it is the responsibility of that State to ensure that the children's best interests are respected. At the same time, when concerned States are parties to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, if the authority of a State party having jurisdiction considers that the authority of another State party would be better placed to assess the best interests of the child, it may request that another authority assumes jurisdiction. The State assuming jurisdiction must be one in which the child is a national or has a substantial connection, or where the child's property is located.⁷⁴ Additionally, if a child has been wrongfully removed or detained in a State, the State in which the child was previously a habitual resident should retain jurisdiction over the child. The State from which the child has been removed may exercise jurisdiction only to the extent it is necessary to protect the child.⁷⁵ Those provisions may be applicable to children affected by the foreign fighter phenomenon, depending on whether or not the concerned States are parties to the Convention.

⁷⁰ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 6(3).

⁷¹ International Covenant on Civil and Political Rights (1966), art. 12 (4).

⁷² Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, para. 19.

⁷³ Vienna Convention on Consular Service (1963), art. 36.

⁷⁴ The Hague Convention (1996), art. 8.

⁷⁵ *Ibid.*, art. 7.

1.1.2 States' Obligations in Time of Armed Conflict

44. International human rights law, including the Convention on the Rights of the Child, should be respected, even in times of armed conflict. An armed conflict exists whenever there is resort to armed force between States (international armed conflict) or when there is protracted armed violence between government authorities and organized armed groups or between such groups within a State (non-international armed conflict).

45. Different sets of rules apply to international armed conflict and non-international armed conflict. The core international humanitarian treaties that are applicable to international armed conflict are the four Geneva Conventions of 1949 and Additional Protocol I of 1977. As far as children are concerned, Protocol I sets out a general rule that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault” and that “[t]he Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason”.⁷⁶ As far as non-international armed conflict is concerned, common article 3 to the Geneva Conventions and Additional Protocol II of 1977 are the core applicable rules. In relation to children, Protocol II provides that “[c]hildren shall be provided with the care and aid they require” and then sets out specific measures to be taken, including the obligation to take all appropriate steps to facilitate the reunion of families temporarily separated.⁷⁷

46. Moreover, customary rules of interna-

⁷⁶ Additional Protocol I to the Geneva Conventions (1977), art. 77 (1).

⁷⁷ Additional Protocol II to the Geneva Conventions (1977), art. 4 (3).

tional humanitarian law apply in situations of armed conflict. Many of these customary rules apply to both international and non-international armed conflict and therefore apply to any armed conflict regardless of its type. Parties to an armed conflict, including non-state armed groups deemed “terrorist organizations”, are required to apply these rules.⁷⁸ Recruitment of children under the age of 15 years is prohibited by international humanitarian law and the recruitment of children under the age of 18 years is prohibited under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. An important feature of the Optional Protocol is the raising of age from 15 to 18 years regarding recruitment of children or their involvement in conflict. Conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities is a war crime in international and non-international armed conflict under the Rome Statute of the International Criminal Court.⁷⁹

47. The protections under international humanitarian law also apply to children who may find themselves under the jurisdiction within the power of a party to the conflict, including when they have been apprehended or detained.⁸⁰ International humanitarian law principles on direct participation in hostilities also provide helpful guidance on the application of international humanitarian law and principles concerning actual affiliation with armed forces or armed groups.

⁷⁸ ICRC, “The updated Commentary on the First Geneva Convention” (2016), para. 458.

⁷⁹ Rome Statute for the International Criminal Court (1998), art. 8

⁸⁰ Geneva Conventions of 12 August 1949, common art. 3(1). Further detail on detention in non-international armed conflict available at ICRC, “The updated Commentary on the First Geneva Convention” (2016), paras. 717-728.

1.2 General Principles under the Convention on the Rights of the Child

48. To paraphrase UNICEF, all children have one thing in common—their rights.⁸¹ The Convention on the Rights of the Child has been ratified by nearly all Member States, and many of its provisions have also attained the status of customary law. Its Optional Protocol on the Involvement of Children in Armed Conflict has been ratified by 168 States as of March 2019. The Optional Protocol serves as a standard by which international actors measure the protection of children in conflict zones, including contexts involving designated terrorist groups.

49. The Convention on the Rights of the Child obligates States parties to protect the rights of every individual under 18 years within their jurisdiction. Children are entitled to special protection as they are often dependent on others, not afforded an opportunity to express their views and are unable to participate in decisions about themselves or make a strong case advocating for their own interests.⁸² They face vulnerabilities and are not necessarily fully capable of appreciating the implications of their decisions, actions or the danger they may face.⁸³ As a result, regardless of their circumstances, States must treat all children affected by the foreign fighter phenomenon primarily as victims entitled to special protection. Consequently, measures concerning such children should aim for their rehabilitation and reintegration, although investigation and prosecution in line with international juvenile justice standards of a child above the minimum age of

criminal responsibility are not precluded where there is a credible evidence of commission of a crime.

In the **2018 Addendum to the 2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177)**, the Security Council Counter-Terrorism Committee repeatedly stresses the need to ensure the full protection and promotion of the rights of the child and to take into account the rights of the child as a primary consideration.⁸⁴

50. Under the Convention, there are four general guiding principles: (a) the non-discriminatory treatment of children (art. 2), (b) the best interests of the child as a primary consideration (art. 3), (c) the child's inherent right to life, survival and development (art. 6), and (d) respect for the views of the child (art. 12). These principles are critical when developing and implementing national laws, policies and programmes concerning children affected by the foreign fighter phenomenon, particularly in light of state obligations to protect and support rehabilitation and reintegration of children affected by armed conflicts under the Convention as well as Security Council resolution 2396.⁸⁵

1.2.1 The Right to be Free from Discrimination

51. Children have a right to be free from discrimination. This is a key principle that must be recognized and respected as the basis for all actions by States parties. States must respect and ensure the rights of each child within their jurisdiction without discrimination of any kind, including discrimination based on nationality,

⁸¹ UNICEF, "What is the Convention on the Rights of the Child?"; available at www.unicef.org/crc/index_73547.html

⁸² Committee on the Rights of the Child, 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, para.37).

⁸³ Committee on the Rights of the Child, general comment No. 6 (2005), para. 55.

⁸⁴ Addendum to the 2015 Madrid Guiding Principles (2018), principles 37, 38, 42, 43 and 47.

⁸⁵ Convention on the Rights of the Child (1989), arts. 38, 39, 40; Security Council resolution 2396 (2017), paras. 30, 31.

immigration status or statelessness.⁸⁶ This means that States cannot apply laws in a discriminatory way or treat any child differently based on his or her nationality, legal or other status, or alleged affiliation to foreign nationals who are suspected of being or who are fighting with armed groups on their territory. The principle equally applies to those children suspected of being foreign fighters.⁸⁷ The principle of treatment without any adverse distinction founded on race, colour, religion or faith, sex, birth, wealth or any similar criteria is also contained in international humanitarian law and applies to persons who are being detained.⁸⁸

Discrimination based on parents' status

52. Significantly, the principle of non-discrimination means that States must protect children from discrimination and punishment based on the “status, activities, expressed opinions, or beliefs” of their “parents, legal guardians, or family members.”⁸⁹ This has significant implications for children affected by the foreign fighter phenomenon. Children cannot be discriminated against, by law or by practice, even when their parents or primary caregivers are suspected or convicted of being foreign fighters. Such discrimination would constitute collective punishment. Children must not be discriminated

⁸⁶ Committee on the Rights of the Child, general comment No. 6 (2005), para. 12.

⁸⁷ Ibid.; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para. 21.

⁸⁸ Geneva Conventions of 12 August 1949, common art. 3(1).

⁸⁹ Convention on the Rights of the Child (1989), art. 2(2); see also, Human Rights Committee, *M.M.M. et al. v. Australia*, communication No. 2136/2012 (2013), para. 10.4 (The Human Rights Committee found the detention of a minor child whose parent was deemed a security risk to be “arbitrary and contrary to article 9, paragraph 1 of the Covenant”).

against or punished because of their parents’ or family members’ alleged or proven involvement in armed groups, including designated terrorist groups. That also means that children born to foreign fighters should not have that status reflected in any way on their birth certificates.

Discrimination against children used by designated terrorist groups

53. Children recruited and used in hostilities by designated terrorist groups have a right to equal access to services that can assist in their reintegration. Reintegration measures should avoid stigmatization and be free from negative distinctions between children who were recruited and used by designated terrorist groups and those who were not.⁹⁰ While individualized assessments are needed to ascertain each child’s rehabilitation and reintegration needs, all children who have been involved in conflict are vulnerable and should be treated primarily as victims and survivors of human rights violations.⁹¹ At the same time, when properly understood, the non-discrimination principle does not prevent, and in fact calls for, differentiation based on different protection needs. Such different protection needs may derive from age, gender, disability and other factors, as well as the nature of linkage with designated terrorist groups and the specific experiences of individual children and/or groups of children.⁹²

⁹⁰ The Paris Principles (2007), principle 3.3.

⁹¹ Security Council resolution 2396 (2017); Security Council resolution 2427 (2018).

⁹² Committee on the Rights of the Child, general comment No. 6 (2005), para. 18.

1.2.2 The Best Interests of the Child as a Primary Consideration

54. Article 3(1) of the Convention on the Rights of the Child provides the child's right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private spheres.⁹³ The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, lack of his or her own voice. Children have fewer opportunities than adults to advocate for their own interests, and those involved in decisions affecting themselves must be aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.⁹⁴

55. The primary consideration of the child's best interests must be applied with respect to all actions concerning children, including by courts of law, administrative authorities and legislative bodies.⁹⁵ The principle applies not only when a decision is being made concerning an individual child, but also when it concerns a group of identified or unidentified children.⁹⁶ Consequently, the principle applies when policy decisions are made regarding a particular group of children affected by the foreign fighter phenomenon. It also applies when any decisions are made concerning individual children. Indeed, the Security Council has also stressed that the best interests

of the child, along with the specific needs and vulnerabilities of girls and boys, should be duly considered in planning and undertaking actions concerning children in situations of armed conflict.⁹⁷

56. The child's best interests are a three-fold concept as follows: (1) a substantive right for the child to have his or her best interests taken into account as a primary consideration, (2) an interpretative legal principle to require interpretation of legal measures in such a way that most effectively serves the child's best interests, and (3) a rule of procedure to require thorough review of the possible impact (positive or negative) of a decision on the child or children concerned.⁹⁸

57. The principle of the best interests of the child guides all actions concerning children by both public and private actors and in legislative, judicial and administrative decisions.⁹⁹ Those standards cannot be lowered even if there are allegations of crimes against or administrative decisions affecting the child.¹⁰⁰ The principle of the best interests of the child also applies to all situations in which a child is deprived of liberty.

⁹³ Committee on the Rights of the Child, general comment No. 14 (2013), para. 1.

⁹⁴ *Ibid.*, para. 37.

⁹⁵ Convention on the Rights of the Child (1989), art. 3(1).

⁹⁶ Committee on the Rights of the Child, general comment No. 14 (2013), para. 6.

⁹⁷ Security Council resolution 2427 (2018), para. 10; Security Council resolution 2225(2015), preamble.

⁹⁸ Committee on the Rights of the Child, general comment No. 14 (2013), para. 6.

⁹⁹ Convention on the Rights of the Child (1989), art. 3(1); Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para 30.

¹⁰⁰ Convention on the Rights of the Child (1989) art. 40(2) (b)(iii); Committee on the Rights of the Child, general comment No. 14 (2013), para. 21—"21. The term "children" refers to all persons under the age of 18 within the jurisdiction of a State party, without discrimination of any kind, in line with articles 1 and 2 of the Convention" (emphasis added). Security Council resolution 2427 (2018), para 20.

The best interests as a primary consideration and States' security considerations

58. Children affected by the foreign fighter phenomenon should be viewed primarily as victims, especially when they were recruited and used by armed groups, including designated terrorist groups.¹⁰¹ (See section 1.3.1 on treatment of children primarily as victims.) Particularly in relation to children deprived of liberty due to association with armed groups, the Security Council has urged Member States to comply with applicable obligations under the Convention on the Rights of the Child.¹⁰²

59. The Convention on the Rights of the Child provides that the child's best interests should be a "primary consideration".¹⁰³ That means that the child's best interests should take precedence and should not be treated just as one of several considerations. In reality, there may be situations in which there are conflicts between the best interests of a child and the interests or rights of others, such as those of their parents, other children and the public. In such a case, potential conflicts must be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. However, the most weight should be given to that which best serves the child.¹⁰⁴

60. The Security Council Counter-Terrorism Committee has also recognized that, in cases involving children, the best interests of the child should be treated as a primary consideration and that special safeguards and legal protec-

tions should be put in place to ensure that all appropriate actions are taken in cases involving children, in full compliance with their obligations under international law.¹⁰⁵

61. A State may consider or determine that a child affected by the foreign fighter phenomenon is a security threat because of his or her past experiences with a designated terrorist group; however, the best interests of the child principle requires States to fashion solutions to serve the child's best interests on a case-by-case basis and pursuant to due process, even when the child's interests may conflict with the State's perceived security interests.¹⁰⁶ In this regard, the Security Council has noted that States should ensure that the competent authorities assess each child individually and without prejudice and take his or her rights and needs into account, while also considering the circumstances relating to the case and proceeding with any further criminal or security-related actions.¹⁰⁷

62. In short, States should place the child at the center of considerations and help ensure their rights even when the child is considered a potential security risk. They should also aim to assist the child in achieving his or her fullest potential and prepare the child for a responsible life in society.¹⁰⁸ In the long term, this is also likely to align with States' security interests by preventing the child's further involvement in violence in the future. As the United Nations Plan of Action to Prevent Violent Extremism recognizes, the lack

101 Security Council resolution 2427 (2018), para 20.

102 Ibid.

103 Convention on the Rights of the Child (1989), art. 3(1).

104 Committee on the Rights of the Child, general comment No. 14 (2013), para. 39.

105 S/2018/77, para. 42.

106 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para 33.

107 S/2018/1177, principle 42.

108 Convention on the Rights of the Child (1989), art. 29.

of adequate State efforts towards the realization of rights, exacerbated by discrimination, could provide opportunities for exploitation by violent extremists. Consequently, ensuring human rights-compliant reintegration strategies and programmes for children affected by the foreign fighter phenomenon would contribute to public security.¹⁰⁹

Parents in conflict with the law

63. States are to give special considerations to children who have been affected by their parents' conflict with the law.¹¹⁰ Such considerations apply to children whose parents are accused or convicted of being foreign fighters. States are to ensure that these children are treated as victims and do not have their rights infringed upon because of their parents' status as criminals or otherwise.¹¹¹ Detaining children or otherwise penalizing children based on allegations against their parents is discriminatory and is specifically forbidden under the Convention on the Rights of the Child.¹¹² The actions or choices of parents should not be attributed to their children.

64. At the same time, preserving family unity is an important component of the best interests of the child assessment. Given the gravity of the impact on the child of separation from his or her parents or other family members, the best interests assessment should consider that separation should not take place if less intrusive measures could protect the child (see chapter 3 on

preserving family unity).¹¹³

Unaccompanied or separated children

65. When a child is unaccompanied or separated from her or his guardians, States should provide additional safeguards in determining the child's best interests. Unaccompanied and separated children are extremely vulnerable to violence, exploitation, abuse and other violations of their rights. States should appoint a competent legal guardian for unaccompanied children to ensure respect for their best interests. When administrative or judicial proceedings are involved, unaccompanied or separated children should be provided with a legal representative in addition to a guardian (see chapter 3 on preserving family unity).¹¹⁴

The best interests of the child assessment and determination

66. People who make decisions concerning children on a daily basis, such as parents, guardians, and teachers, must also respect and reflect the child's best interests. Parents or legal guardians and where applicable, the members of the extended family or community as provided for by local custom, have primary responsibility for the care and development of children, and children's best interests should be their primary concern.¹¹⁵ Authorities are responsible for supporting parents or legal guardians to undertake that responsibility.

67. When authorities are making a decision relating to an individual child, they must establish formal processes, with strict procedural

109 United Nations Plan of Action to Prevent Violent Extremism (2015), para. 29.

110 Committee on the Rights of the Child, general comment No. 14 (2013), para. 28

111 Ibid.

112 Convention on the Rights of the Child (1989), art. 2(2).

113 Committee on the Rights of the Child, general comment No. 14 (2013), paras 60-61.

114 Committee on the Rights of the Child, general comment No. 6 (2005), paras 20-21.

115 Convention on the Rights of the Child (1989), art. 5.

safeguards to assess and determine the child's best interests.¹¹⁶ Best-interests assessments are generally required for individual children in situations in which they may be at risk of violence, abuse or exploitation and/or when they are separated from their parents or legal guardians. A child's best interests should be assessed and determined in a manner that ensures their holistic development and free exercise of their rights, including the rights to family life, freedom from violence and a nationality, among others, and to promote their human dignity.¹¹⁷ Assessing the child's best interests should be done considering the specific circumstances of each child, including the social and cultural context. Various factors should be considered, including the child's age, sex, level of maturity, familial situation and whether the child belongs to a minority group.¹¹⁸

68. Qualified persons, usually a social service professional and/or judicial official specialized in child rights and development, should conduct such an assessment. A multidisciplinary assessment and determination is also important, including meaningful participation by child protection and welfare authorities.¹¹⁹ In addition, actors independent of any authorities who have vested interest should undertake the assessment. For example, security or intelligence officers should not be involved in the best-interests assessments and determinations of children suspected of

involvement with armed groups or designated terrorist groups.

UNHCR Guidelines on Assessing and Determining the Best Interests of the Child: 2018 Provisional Release (2018)

This publication updates UNHCR's Guidelines on Assessing and Determining the Best Interests of the Child. The Guidelines combine a conceptual framework of the best interests of the child with operational guidance to provide one consolidated, practical framework of reference for practitioners. Available at www.refworld.org/pdfid/5c18d7254.pdf.

Example from Council of Europe. The best interests of the child—A dialogue between theory and practice (2016)

The publication is based on a conference organized by the Government of Belgium and the Council of Europe in 2014 as a venue for actors involved in decisions that have an impact on children's lives to share knowledge and enhance the understanding of the concept of the best interests of the child. The publication, consisting of contributions from 21 experts, covers four areas (a) general reflections of the concept, (b) assessing, determining and monitoring the best interests, (c) using the concept in different environments and (d) understanding the concept in family affairs. Available at <https://rm.coe.int/1680657e56>.

116 Ibid., art. 3.

117 Committee on the Rights of the Child, general comment No. 14 (2013), para. 5.

118 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para. 31.

119 Ibid., para. 32(c).

1.2.3 Inherent Right to Life, Survival and Development

69. Another critical principle under the Convention on the Rights of the Child is a child's inherent right to life and to maximum survival and development.¹²⁰ The term "development" should be interpreted in its broadest sense, encompassing the child's physical, mental, spiritual, moral, psychological and social development.¹²¹ States should adopt special measures designed to protect the life of every boy and girl, in addition to the general measures required for protecting the lives of all individuals under its jurisdiction.¹²² Ensuring survival and full development in a peaceful environment of children affected by the foreign fighter phenomenon and is also likely to be critical in preventing them from becoming threats in the future.

70. Ensuring a child's development is closely linked with ensuring freedom from all types of violence, including armed conflict, psychological mistreatment, neglect and sexual violence. States are to provide legislative and regulatory frameworks and protocols aimed at contributing positively to the child's rehabilitation and reintegration when she or he has been subjected to violence.¹²³ This is especially relevant for children who have been recruited and used by designated terrorist groups.

71. Ensuring a child's right to survival and development is particularly important in situations in which children are released from an armed group outside their State of nationality.¹²⁴ They are particularly vulnerable to further violations of their rights, including possible re-recruitment and use in hostilities, trafficking and other forms of exploitation.¹²⁵ The child's country of nationality and the host country both have obligations to ensure the child's exit from the group and appropriate assistance.¹²⁶ A punitive approach without consideration of the child's rights can result in lasting consequences for their development and negatively impact their opportunities for social integration (see chapter 5 on rehabilitation and reintegration). A State should not circumvent its responsibility to provide such assistance by arbitrarily denying or delaying the recognition of the child's nationality (see chapter 2 on ensuring the right to nationality).

72. As discussed in the introduction, the State of a child's nationality is encouraged to extend protective measures to a child in a vulnerable situation outside of its territory when the State's decision impacts the child's life in a foreseeable manner. Such States are encouraged to repatriate their nationals and fulfill their rights upon return. On the other hand, a critical obligation of the host State is to refrain from returning a child to any country when there is a risk of irreparable harm.¹²⁷ Such harm may encompass torture and ill-treatment in the process of prosecution for alleged

120 Convention on the Rights of the Child (1989), art. 6.

121 Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para.12.

122 International Covenant on Civil and Political Rights (1966), arts. 6 and 24; Human Rights Committee, general comment No. 36 (2018), para.23.

123 Convention on the Rights of the Child (1989), art. 39, Committee on the Rights of the Child, general comment No. 13 on the right of the child to freedom from all forms of violence (2011).

124 The Paris Principles (2007), para. 7.22.

125 A/73/278, paras. 10-11.

126 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), arts. 6 and 7.

127 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para 45.

association with designated terrorist groups. It may also include violence, recruitment or exploitation by terrorist organizations.¹²⁸ When there is such a risk, there should be an individual assessment of determination on whether a child's return would serve their best interests (see chapter 4 on repatriation).¹²⁹

1.2.4 Respect for the Child's Views

73. Taking the views of the child into consideration in decisions affecting them, including for their rehabilitation and reintegration, is likely to render such decisions more acceptable to the child and thus more effective. Allowing every child the right to express his or her views, commensurate with age and capacity, and having them taken into account by decision-makers is another principle under the Convention.¹³⁰ In accordance with their age and maturity, children should be provided with the opportunity to express their views in any judicial or administrative proceeding affecting them.¹³¹ When assessing a child's best interests, the child must also be given an opportunity to freely express his or her views and due weight must be given to such views.¹³² Young children should be included in decision-making processes in a manner consistent with their evolving capacities.

74. States should be particularly attentive to the views of children affected by armed conflict and terrorism, including by the foreign fighter phenomenon, as they may have been subjected to situations of violence. Such situations may have led to fewer opportunities for their voices to be heard or for them to develop capacities to articulate their voices.¹³³ Children outside of their country of origin or children without documents to prove their nationality face vulnerabilities that further limit their opportunities or abilities to have their voices heard.¹³⁴ It is critical that during all stages of assessment, including the securing of their release and reintegration, such children be given the opportunity to actively participate.¹³⁵ The Security Council has also called upon Member States, United Nations entities and other parties to ensure that the views of children are considered in programming activities throughout the conflict cycle.¹³⁶ Concretely, this means using age and gender-sensitive interview techniques to assess children's views and then ensuring that those views are given due weight in decisions affecting them. It also means ensuring that children are provided with age-appropriate information on alternatives and their consequences to ensure their views are informed and freely given.

128 Committee on the Rights of the Child, general comment No. 6 (2005), paras.26-28.

129 Ibid.

130 Committee on the Rights of the Child, general comment No. 12 (2009) on the right of the child to be heard, para. 2.

131 Convention on the Rights of the Child (1989), art. 12; General Assembly resolution 40/33 (1985), Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

132 Committee on the Rights of the Child, general comment No. 14 (2013), para. 43. See also the Paris Principles (2007), para. 3.14.

133 Committee on the Rights of the Child, general comment No. 12 (2009), para. 118.

134 Ibid., para. 123.

135 The Paris Principles (2007), 3.14.

136 Security Council resolution 2427 (2018), para. 23.

Example from Belgium—The right to express and be heard

The Belgian Constitution art. 22bis provides that “Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity.” In addition, in relation to civil matters, the judicial code provides that any child over 12 years of age has not only the right to be heard, but also to refuse to be heard, in the procedures relating to parental authority. In other words, there is a requirement to summon the child, but the child does not have to appear nor to express himself or herself. If the child is under 12 years of age, the judge may hear the child upon his or her request, or that of his or her parents, the public prosecutor’s office or on his or her own initiative. The judge may refuse, by a reasoned decision, to grant that request, unless it comes from the child him or herself or from the public prosecutor’s office.

1.3 Child Rights–based Approach to States’ Security Concerns

75. In implementing a human and child rights–based approach, the four principles summarized above under the Convention on the Rights of the Child and other international instruments provide the key framework. In addition, the following considerations should guide the treatment of children affected by the foreign fighter phenomenon, including in situations in which such children are considered security risks.

1.3.1. Treatment of Children Primarily as Victims

76. International law requires that States adopt a human and child rights–based approach that views those children first and foremost as victims, while considering security concerns. In fact, protecting and fulfilling the rights of children as victims is also critical for States’ security interests because it prevents exploitation of any resentment and grievances towards the State by designated terrorist groups.¹³⁷

77. Children affected by the foreign fighter phenomenon are often victims at multiple levels. They may be victims of a hostile environment in which their rights are denied, including the right to development and education. Children may have been victims of recruitment and use by designated terrorist groups. Children may be victims of arbitrary detention, mistreatment and abuse for alleged association with groups designated as terrorist groups or the alleged association of family members. Children may suffer from stigma and discrimination in the long term, including from their own communities, in ways that manifest differently for boys and girls.

78. Children who have participated in the activities of terrorist groups should be viewed primarily as victims, while taking into account the individual circumstances and issues related to the case, though investigation and prosecution in line with international juvenile standards of a child above the minimum age of criminal responsibility are not precluded. In this regard, the Security Council has expressed grave con-

¹³⁷ Plan of Action to Prevent Violent Extremism (2015), para. 27; see also the Convention on the Rights of the Child (1989), arts. 38, 39 and 40 on protecting children who are victims of armed conflict.

cern at the use of detained children for information-gathering purposes, and emphasizes that children who have been recruited in violation of applicable international law by armed forces and armed groups and are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law.¹³⁸ According to the Paris Principles on Children Associated with Armed Forces or Armed Groups, such children should be considered victims of violations of their rights, and of offences under international law, as well as their environment, in which they were coerced in some form.¹³⁹ Consequently, States should ensure that such children can claim their rights and seek protection in a non-hostile environment.¹⁴⁰ States should prioritize provision of psychosocial rehabilitation and social reintegration services for these children.¹⁴¹ Those who exploit, recruit, train and use children should be held criminally responsible.¹⁴²

138 Security Council resolution 2427 (2018), preambular para. 11, para. 20.

139 The Paris Principles Groups (2007), para. 3.6. “Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.”

140 Committee on the Rights of the Child, general comment No. 13 (2011), para. 52.

141 Convention on the Rights of the Child, arts. 39, 40(1), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 6(3). See also Security Council resolution 2427, which urges Member States to consider non-judicial measures that focus on rehabilitation and reintegration (para. 21), and encourages Member States to focus on long-term and sustainable reintegration and rehabilitation opportunities for children affected by armed conflict (para. 26).

142 Security Council resolution 2427 (2018), para. 30.

1.3.2 The Need for Individualized Assessments

79. The conclusion about what may be in a particular child’s best interests necessarily varies. Therefore, it is critical that each child be assessed individually according to his or her situation, rights and needs in a multidisciplinary manner.¹⁴³ This is also be critical to devising effective measures for each child, including for rehabilitation and reintegration, while ascertaining any security concerns a child may pose.

80. Addressing the needs of children affected by the foreign fighter phenomenon, including their reintegration into a community, should always be preceded by an individualized best-interests assessment. The assessment should be done in a friendly and safe atmosphere. Professionals trained in relevant human and social development fields, such as child psychology, child development, should undertake the assessment in a multidisciplinary manner.¹⁴⁴ The assessment should include an examination of the child’s health, potential impacts of gender-based violence and her or his family and community environments and attachments, among other things.¹⁴⁵ Such assessments should be undertaken in a cultural, gender and age-sensitive manner. It is also important to pay special attention to the atrocities that children may have witnessed and remain rooted in the child’s best interests, regardless of national considerations or priorities.¹⁴⁶

81. Children affected by the foreign fighter phenomenon may have been forced to participate in military training or may have been married at a very young age. They may have experienced,

143 Committee on the Rights of the Child, general comment No. 14 (2013), para. 76.

144 *Ibid.*, para. 94.

145 The Paris Principles (2007), paras. 6.35.2, 7.69.0, 7.72.

146 *Ibid.*, para. 7.31.

witnessed or been forced to take part in serious human rights violations and atrocities. There should be a proper evidence-based assessment of the impact that these experiences have had on each child, including on their personal and educational development, physical and mental health and ability to trust and feel safe.¹⁴⁷ In cases in which it is suspected that the child has participated in serious crimes, including crimes related to terrorism and atrocities, such assessments should also consider the age of the child, the availability of evidence and the circumstances of the case, while treating the best interests of the child as a primary consideration, in accordance with domestic and international law.

82. In cases in which it is considered that a child may pose an actual, proven security threat, authorities must still use the least restrictive response possible and adhere to the principles of justice for children. Assessments must still take into consideration what is required in rehabilitation in a manner that is respectful of the child's rights, as well as what is restorative and addresses their needs. It is important that any rehabilitative actions do not stigmatize a child or put them at risk of being ostracized or neglected by their families or communities.¹⁴⁸ Particular care should be taken in situations in which children need to be integrated into ethnic groups, communities or cultural environments dissimilar from their own.¹⁴⁹

¹⁴⁷ Convention on the Rights of the Child (1989), art. 39; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 6(3).

¹⁴⁸ The Paris Principles (2007), para. 7.42.

¹⁴⁹ Ibid., para. 7.42.

1.4 Key Recommendations

83. The following are key recommendations:
- a. Treat all persons under the age of 18 as “children” entitled to special protections. Children have special rights and protections that apply in all situations, irrespective of age, sex or other status, including actual or perceived family or personal affiliation with any armed group. Take steps to fulfill state obligations with respect to those children.
 - b. Treat all individuals under the age of 18 affected by the foreign fighter phenomenon first and foremost as victims of abuses and violations of their human rights. Individuals who were recruited or used by armed groups when they were children should also be treated as victims in light of, among others, legal prohibition of recruitment or use of children by armed groups. This does not preclude investigation and prosecution of a child above the age of criminal responsibility, in line with international juvenile justice and fair trial standards, in situations in which there is credible evidence of crimes committed by the child.
 - c. Provide all care and support to children affected by the foreign fighter phenomenon without discrimination or stigmatization. States are responsible for children who are their nationals and have an obligation to readmit them to their territory.
 - d. The best interests of the child must be a primary consideration in all actions or measures concerning children by both public and private actors and in legislative, judicial, and administrative decisions. All assessments of the best interests of the child must be conducted on an individual basis with proce-

dural safeguards in place. Such assessments should be multidisciplinary and include various experts, such as social workers and child psychologists. It should be done in an age and gender-sensitive manner with the entire situation of the child being considered.

- e. Provide the opportunity to children to express their views, and have them taken seriously, according to their capacity to make decisions concerning themselves.
- f. Never use potential links of children or their parents to the foreign fighter phenomenon as grounds for denying the protection afforded to the child under international human rights, humanitarian and refugee law.
- g. Train judges, law enforcement and other stakeholders working with children affected by the foreign fighter phenomenon on their obligations under international law, including the Convention on the Rights of the Child and relevant national child rights law and standards, with the support of the United Nations.
- h. Implement the recommendations from the Committee on the Rights of the Child before the next national review with a view to making concrete improvements in the status of the rights of the child holistically at the national level.

SECTION 2: Ensuring the Right to Nationality

84. The right to nationality is a fundamental right provided for in a number of international human rights instruments. Ensuring nationality is critical in protecting the rights of children. Nationality could particularly be determinative for children affected by the foreign fighter phenomenon as it relates to jurisdiction and responsibility of a State beyond its territory. Nationality is also closely linked to a State's duty to admit a child and its responsibility for repatriation, rehabilitation and reintegration. A child's nationality strongly influences social identity and thus her or his development. This in turn may also have security implications, as children without nationality risk being marginalized and exploited by designated terrorist groups in the long run.

85. Despite the right to nationality being provided for under international law, including in the Convention on the Rights of the Child, children affected by the foreign fighter phenomenon may face a significant risk of becoming stateless. The risk arises broadly in two scenarios. First, a child may be denied recognition as a national because the situation links him or her to the foreign fighter phenomenon. A lack of documentation, such as passports or birth certificates, may make it difficult to establish nationality through her or his parents (*jus sanguinis*). Some children have only birth certificates issued by non-State actors, including in some cases designated terrorist groups, which are unrecognized by all Member States. Denial of the rights of women and girls to confer their nationality upon their children or nationality laws that are discriminatory on other grounds

may present additional hurdles.¹⁵⁰ Currently, most Governments do not offer repatriation assistance to citizens in the conflict zones of Iraq and the Syrian Arab Republic, including men and women who are suspected of being “foreign terrorist fighters” and their children.¹⁵¹ Some States also lack representation in those areas and are unable to provide effective consular services. For legal, practical and political reasons, some countries offer such assistance only when their nationals manage to appear at their embassies or consulates and their nationalities are established, including through DNA testing. This situation raises questions as to how these States are implementing their obligations to children who, under the law, are entitled to nationality by descent.

86. Second, a child may be affected by the deprivation of nationality as a counter-terrorism measure. Some States have adopted legislation enabling authorities to revoke citizenship under specific circumstances, such as when the return of a citizen is considered to present a threat to national security or the vital interests of the State. In many States, this measure may only be taken only when individuals possess dual or multiple nationalities. Some domestic legislation, however, does not provide protection against statelessness. Any measures that affect the nationality of a

¹⁵⁰ S/2016/361, para. 16.

¹⁵¹ Breanda Stoter, “Born in the wrong place: Europe’s Islamic State offspring”, *Al-Monitor*, 10 January 2018, available at www.al-monitor.com/pulse/originals/2018/01/islamic-state-iraq-syria-children-mothers-europe-return.html; Abigail R. Esman, “Young But Dangerous: Still No Answer to Handling Europe’s Children of ISIS”, *The Investigative Project on Terrorism*, 22 January 2018, available at www.investigativeproject.org/7285/young-but-dangerous-still-no-answer-to-handling.

parent may directly impact a child's citizenship, his or her ability to repatriate and ability to enjoy his or her rights. As summarized below, international law prohibits arbitrary deprivation of nationality regardless of whether it leaves the concerned person stateless or not. In addition, States parties to the 1961 Convention on the Reduction of Statelessness may generally not deprive persons of citizenship when it would leave them stateless, except under certain narrow exceptions.¹⁵² Further, in reality, the denial or deprivation of nationality has not been shown to be an effective counter-terrorism measure. Rather, it is increasingly understood to be potentially counterproductive to security aims for a number of reasons.¹⁵³ Such measures can prevent return, rehabilitation and reintegration of individuals who may want to leave a terrorist organization and who do not, or no longer, constitute a threat, while conferring the risk of threat to host countries and local populations.¹⁵⁴

87. Given the significance of nationality and its importance to the enjoyment of other rights, as well as States' responsibilities, the present section examines the overarching principles concerning the right to nationality, prohibition of arbitrary deprivation and denial of nationality, and prevention of statelessness

¹⁵² Parties must have filed an appropriate declaration at the time of ratification or accession. See Convention on the Reduction of Statelessness (1961), art. 8.

¹⁵³ Council of Europe Parliamentary Assembly resolution 2263 (2019), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25430&lang=en>.

¹⁵⁴ United Nations Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance to States on human rights-compliant responses to the threat posed by foreign fighters (2018), 22-23; Council of Europe Parliamentary Assembly resolution 2263 (2019), para. 8.

among all children, including those affected by the foreign fighter phenomenon. The section also briefly examines human rights concerns in relation to discriminatory nationality laws and the use of DNA tests to establish a child's nationality.

2.1 International Law and Standards

2.1.1 The Right to Nationality

88. The right to a nationality is a fundamental human right. A number of international conventions and the Universal Declaration of Human Rights provide for this right.¹⁵⁵ Under the Convention on the Rights of the Child, all children should be registered immediately after birth and are entitled to a name and a nationality.¹⁵⁶ In addition, States that are party to the 1961 Convention on the Reduction of Statelessness must provide nationality to children born on their territory who would otherwise be stateless.¹⁵⁷

¹⁵⁵ International Covenant on Civil and Political Rights (1966), art. 24(3); Convention on the Rights of the Child (1989), art. 7(1); Universal Declaration of Human Rights (1948), art. 15(1); Convention on the Rights of Persons with Disabilities (2006), art. 18; International Convention for the Protection of All Persons from Enforced Disappearance (2007), art. 25(4); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), art. 29; Convention on the Elimination of All Forms of Discrimination Against Women (1979), art. 9; International Convention on the Elimination of All Forms of Racial Discrimination (1960), art. 5(d)(iii); Convention on the Nationality of Married Women (1957), arts. 1, 2, 3; African Charter on the Rights and Welfare of the Child (1990), art. 6; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), art. 6(g); Covenant on the Rights of the Child in Islam (2005), art. 7; American Declaration of the Rights and Duties of Man (1948), art. xix; American Convention on Human Rights (1969), art. 20; Arab Charter on Human Rights (2004), art. 29; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), art. 24; Resolution of the Asian African Legal Consultative Organization (2006) on legal identity and statelessness, arts. 3, 4, 5.

¹⁵⁶ Convention on the Rights of the Child (1989), art. 7(1).

¹⁵⁷ Convention on the Reduction of Statelessness (1961), art. 1,

89. Establishing, registering and documenting a child's nationality and birth is critical because it provides grounds for the child to secure other rights, such as health care, education, freedom of movement and protection in the labour market. A lack of documented nationality could also result in prolonged detention in immigration facilities, among others, which should be avoided, as it is never in the best interests of the child.¹⁵⁸ Documented and registered age also determines treatment by the justice system by establishing that a child is below the minimum age of criminal responsibility or under 18 and therefore subject to lower penalties and treatment according to juvenile justice standards.¹⁵⁹ Consequently, denying a child the right to birth registration or nationality renders him or her vulnerable to a multiplicity of human rights violations. Indeed, the Committee on the Rights of the Child has found that the failure to provide a child with birth registration or other identification documents constitutes neglect of the child, exposing them to potentially vulnerable situations.¹⁶⁰

90. In relation to recognition of nationality of children affected by the foreign-fighter phenomenon, States should refrain from applying their own nationality rules in an arbitrary or discriminatory fashion. Denying a child nationality because of the association with a parent who is deemed to be a foreign fighter would be contrary to the non-discrimination principle under the Convention on the Rights of the Child (article 2) and the best interests of the child (article 3) (see chapter 1 on the principles). When a child is

denied nationality because the link to the parent who is a national is not recognized, States should adopt a flexible approach to the acceptance of evidence of that link, taking into account the specific context, including by facilitating the provision of documents and consular services to assist nationals with the registration of their child born abroad and with recognition of their nationality. The fact that birth registration, which establishes the place of birth and parents of a child, has been conducted by a non-State actor that is not recognized as legitimate should not stand in the way of the recognition of the parent-child relationship for which the registration is evidence. States should take actions to speedily establish or not unduly delay the recognition of nationality, because of the impact that such a delay can have on the child's enjoyment of other rights and on their sense of identity.¹⁶¹

158 Committee on the Elimination of All Forms of Discrimination against Women, general recommendation No. 32 (2014), on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 57.

159 Committee on the Rights of the Child, general comment No. 24 (2019), para 39.

160 Committee on the Rights of the Child, general comment No. 13 (2011), para 72(g).

161 European Court of Human Rights, *Mennesson v. France* (65192/11), judgment of 26 June 2014, para. 97 in which the court says that children whose legal relationship with their parent is not established “face a worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code ... That uncertainty is liable to have negative repercussions on the definition of their personal identity” (emphasis added).

Coalition on Every Child's Right to a Nationality

UNCHR and UNICEF are jointly leading a global coalition on the child's right to a nationality. The Coalition aims to develop, expand and strengthen international cooperation to raise awareness of and combat the hidden problem of child statelessness. It also aims to promote the right of every child to acquire a nationality. Information is available at www.unhcr.org/ibelong/minority-children-statelessness/

2.1.2 The Prohibition of Arbitrary Deprivation and Denial of Nationality

91. States should never deprive a child of his or her nationality. This remains the same for children affected by the foreign fighter phenomenon who are often victims of violations of international law by multiple groups. (See section 1.3.1 on treatment of children primarily as victims.) Children should not have their nationality status affected based on the status of their parents or any alleged affiliation or association resulting from coercion or manipulation. Deprivation or denial of nationality is never in the best interests of the child, as this is likely to result in economic, emotional, social and immigration consequences.¹⁶² From a security perspective, deprivation of nationality of a child contributes to creating greater insecurity by leaving children with no support to recover or reintegrate and increases marginalization, which may lead to turning to violent extremism in the future.

¹⁶² Interregional Crime and Justice Research Institute, Report on Children and Counter-Terrorism (2016), 42.

92. Arbitrary deprivation of nationality is prohibited under international law. While the deprivation of nationality is permissible under international law in certain situations, it must not be arbitrary or unreasonable under the particular circumstance.¹⁶³ It thus must be carried out in accordance with due process protections and other procedural safeguards to ensure that it serves a legitimate purpose and that it is the least intrusive instrument to achieve the desired result, as well as be proportional to the aim it is seeking to accomplish.¹⁶⁴ Circumstances that authorize the deprivation of nationality have been noted to include situations in which an individual has acted in a way that is seriously prejudicial to the vital interests of the State.¹⁶⁵ Decisions relating to nationality should be issued in writing and open to effective administrative or judicial review, including on substantive issues.¹⁶⁶

93. Deprivation of nationality poses significant risks for human rights violations not only for the individuals stripped of nationality, but also for any children associated with them, especially when their nationality or immigration

¹⁶³ "Arbitrariness" has been interpreted to mean that every interference must be reasonable in the particular circumstances. See A/HRC/13/34, para. 24.

¹⁶⁴ A/HRC/13/34, para. 25.

¹⁶⁵ Convention on the Reduction of Statelessness (1961), art. 8(3)(a)(ii).

¹⁶⁶ Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance to States on human rights-compliant responses to the threat posed by foreign fighters (2018), 21-23.

status is dependent on that of their parents'.¹⁶⁷ Deprivation of nationality of a parent could impact a child through derivative loss whereby the child's nationality lapses as a direct consequence of the withdrawal of nationality from the parent or when the child is born after the parent is deprived of nationality. Again, such a negative impact on a child's status is likely to be contrary to the non-discrimination principle in penalizing the child based on the status, activities, expressed opinions, or beliefs of the child's parents and is likely to impact the enjoyment of other rights, including the right to family life.¹⁶⁸

94. Another way deprivation of nationality may impact a child affected by the foreign fighter phenomenon is when a person targeted for deprivation of nationality is still a child. As recruitment and use of children by armed groups is a violation of their rights and other provisions of international law, children who have been recruited or used should be considered primarily as victims. (See section 1.3.1 on the treatment of children primarily as victims.) Therefore, simply serving in an armed group should not be grounds for deprivation of nationality. In addition, in making any determination that children have committed crimes that are seriously prejudicial to the vital interests of the State, principles of juvenile justice must be applied, including a careful assessment of children's mental capacity to commit the crime, maturity and capacity to understand the nature and the consequences of his or her acts. In short, stripping of a child of nationality goes against the best interests of the

167 Committee on the Rights of the Child, concluding observations: Australia (1997) (CRC/C/15/Add.79), paras. 14 and 30, expressing concern that in some instances children can be deprived of their citizenship in situations in which one of their parents loses his or her citizenship; United Nations Interregional Crime and Justice Research Institute, Report on Children and Counter-Terrorism (2016), 42.

168 Convention on the Rights of the Child (1989), art. 2(2).

child and is most likely to be contrary to any proportionality requirement.¹⁶⁹

Example from Tunisia—Constitutional prohibition of deprivation of nationality

The 2014 Tunisian Constitution does not allow the Government to deprive a person of his or her nationality (article 25). Therefore, the Government cannot stop anybody from returning to the country under the Constitution.

2.1.3 Prevention of Statelessness

95. A number of international instruments contain obligations relevant to preventing statelessness of a child.¹⁷⁰ The Convention on the Rights of the Child, for example, emphasizes prevention of statelessness by requiring States parties to ensure the implementation of a child's rights to be registered, to a name and to acquire a nationality.¹⁷¹ Under international human rights law, States are not required to confer nationality on every child born in their territory; however, they should take appropriate measures to ensure that every child born in their territory has a nationality, including through the adoption of relevant internal policies and co-

169 Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, Guidance to States on human rights-compliant responses to the threat posed by foreign fighters (2018), 21.

170 Including Convention on the Rights of the Child (1989), Universal Declaration of Human Rights (1948) and Convention relating to the Status of Stateless Persons (1954) and Convention on the Reduction of Statelessness (1961).

171 Convention on the Rights of the Child (1989), art. 7(2); the same rights are enshrined in article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

operation with other States.¹⁷² The States that are parties to the 1961 Convention on the Reduction of Statelessness are required to provide a nationality to children born in their territories if they otherwise would be stateless.¹⁷³ Significantly, the 1961 Convention on the Reduction of Statelessness, and also the Committee on the Rights of the Child in its recommendations, also refer to the obligation of the state of nationality of the parents to confer nationality on a child born

abroad if he/she would otherwise be stateless.¹⁷⁴

96. In seeking to prevent statelessness, States must carefully consider any circumstances that might present a challenge to a child's ability to procure birth registration. A child born to a foreign national prisoner or detainee may require particular attention, as the mother may not have knowledge of or access to the procedures required to register the child.¹⁷⁵ When a child's identity documents have been acquired in a non-traditional or unlawful manner, States should consider the best interests of the child as a guiding principle and adopt flexible measures to ensure that legitimate documents are procured for each child.¹⁷⁶ For example, flexible measures are required concerning many of the approximately 30,000 children who were born in the areas controlled by ISIL in Iraq and Syria. They may be at risk of statelessness because they possess only ISIL-issued birth certificates unrecognized by any State's Government. Such certificates may be used to establish the date of birth and the parent-child relationship. Notably, the Security Council has also stressed the significance of ensuring universal birth registration, including late birth registration, which should remain an exception.¹⁷⁷

Example from the Philippines— Action plan to end statelessness

The Government of the Philippines launched the National Action Plan to End Statelessness on 24 November 2017 with the following action points: (1) resolve existing cases of statelessness, (2) ensure that no child is born stateless, (3) remove gender discrimination from nationality laws, (3) grant protection status and facilitate the naturalization of refugees and stateless persons, (4) ensure birth registration for the prevention of statelessness, (5) accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness and (6) improve quantitative and qualitative data on stateless populations. The Action Plan was developed to implement the Global Action Plan to End Statelessness 2014-2024, spearheaded by UNHCR. Available at www.unhcr.org/ibelong/global-action-plan-2014-2024/

¹⁷² Human Rights Committee, general comment No. 17 (1989) on the rights of the child (article 24), para. 8.

¹⁷³ Convention on the Reduction of Statelessness (1961), art. 1; see also joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, para. 26.

¹⁷⁴ The 1961 Convention on the Reduction of Statelessness, art. 4; Committee on the Rights of the Child, concluding observations: Haiti (2016) (CRC/C/HTI/CO/2-3), para. 26; Committee on the Rights of the Child, concluding observations: Canada (2012)(CRC/C/CAN/CO/3-4), para. 40; Committee on the Rights of the Child, concluding observations: Cuba (2011)(CRC/C/CUB/CO/2), para. 30-31.

¹⁷⁵ A/HRC/25/28, para. 28.

¹⁷⁶ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, para. 22.

¹⁷⁷ Security Council resolution 2427 (2018) para. 25.

Example from Tunisia—Judicial procedure to establish nationality

The Government of Tunisia allows any child to return to Tunisia as long as the mother is established as a Tunisian and the accompanying child is hers. If the child does not have any documentation to prove his or her birth, the mother or the public prosecutor on behalf of the child files a civil case to establish nationality and civil status through the civil registration. DNA testing may be used to establish the child's nationality; however, it has to be done under the supervision of the judiciary to ensure the best interests of the child.

2.1.4 Human Rights Considerations Corresponding to National Laws That Are Discriminatory in Granting Nationality

97. The Convention on the Elimination of All Forms of Discrimination Against Women obligates States parties to ensure that women have equal rights with men to confer nationality on their children.¹⁷⁸ Nationality laws that discriminate against mothers in the conferral of nationality may result in a child being stateless in situations when the father is either stateless, unable to confer citizenship because the child was born abroad, unknown or not married to the mother at the time of the child's birth.¹⁷⁹ A father's inability to fulfil the administrative steps need-

¹⁷⁸ Convention on the Elimination of All Forms of Discrimination Against Women (1979), art. 9(2). Many States Parties maintain a reservation to article 9(2); Committee on the Elimination of All Forms of Discrimination against Women, general recommendation No. 32 (2014), para. 61.

¹⁷⁹ Committee on the Elimination of All Forms of Discrimination against Women, general recommendation No. 32 (2014), para. 61.

ed to confer his nationality or acquire proof of nationality for his child also leaves the child without nationality unless the mother can confer nationality.¹⁸⁰ Such risks are particularly high when the child's father is affiliated with a terrorist organization, as many men were killed in combat or captured and forcibly separated from their family.¹⁸¹ Nationality laws that are discriminatory and increase the risk of statelessness in those circumstances should be revised to ensure the right of children to obtain nationality without discrimination, regardless of the status or activities of their parents.¹⁸²

98. If the identification of the father is required or if the parents must be married to register a child's birth and confer nationality, women may be reluctant or unable to obtain a child's birth certificate for various reasons, leaving the child stateless. If a woman cannot present proof that she is married to the child's father, or alternatively, if the marriage certificate is not acceptable because it was issued by a terrorist organization, a child may be rendered stateless.¹⁸³ Some women fear the stigmatization of having married or being forced to marry a member of a terrorist organization, and thus they do not feel secure enough to come forward. Many women whose children were born of rape do not seek to register their children for fear of stigmatization. This is especially so

¹⁸⁰ UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness (2019), available at www.refworld.org/docid/5c8120847.html.

¹⁸¹ Ibid.

¹⁸² Office of the High Commissioner for Human Rights (OHCHR), Background Note for expert workshop on best practices to promote women's equal nationality rights in law and in practice (2017), available at www.ohchr.org/EN/Issues/Women/WRGS/Pages/ExpertWorkshopNationality-RightsLawinPractice.aspx, para. 2.1(1).

¹⁸³ Ibid.

when the child's purported father is involved in terrorist activities. States must ensure procedural safeguards that ensure every child's birth registration, possibly without requiring the father's information or marriage status. Conferral of nationality to children should always take place without stigmatization or discrimination on any grounds.

2.1.5 Human Rights Considerations Relating to the Practice of Performing DNA Testing on Children to Confirm Nationality

99. Some countries use DNA testing to determine parentage, and thereby eligibility for nationality of children born to individuals suspected of being foreign fighters. DNA testing should be used only to establish eligibility for nationality on an exceptional basis, because of the invasiveness of the measure. Logistical challenges, including access to DNA testing in areas affected by conflict, are likely to make it difficult for many children to be reunited with their families or to be repatriated to their country of nationality if DNA testing is required. States utilizing this measure should perform a careful analysis of each child's respective situation, ensuring that all necessary information regarding their personal circumstances and background is solicited. In addition, given that the long-term implications of using biometric data on the enjoyment of various human rights are not fully understood, the use of such a method should be limited and should not be undertaken in a way that undermines the best interests of the child or a group of children.

The right to family life

100. The Convention on the Rights of the Child describes the family as "the fundamental group of society and the natural environment for the

growth and well-being of all its members and particularly children."¹⁸⁴ The use of DNA testing to confirm a child's link to his or her possible country of nationality may pose a risk to the child's right to association with his or her family. DNA testing will not confirm a genetic link if a child was adopted or in situations in which the individual thought to be the child's father was not in fact the biological father.¹⁸⁵ A narrow definition of family (i.e., direct DNA linkage) may not always serve to best identify those in the position to care for and nurture the child.¹⁸⁶ Indeed, "the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition."¹⁸⁷ The focus on biological families per se may also lead to separation of a child from the primary caregiver where the child is raised by non-biological parents. Instead, States are encouraged to consider a child's "family" as not only their direct relatives (biological parents, brothers, sisters, uncles, aunts, etc.), but also less closely related relatives and individuals with a shared life or emotional ties even without a DNA

¹⁸⁴ Convention on the Rights of the Child (1989), preamble.

¹⁸⁵ J. Taitz, J. E. M. Weekers and D. T. Mosca, "The Last Resort: Exploring the Use of DNA Testing for Family Reunification", *Health and Human Rights*, vol. 6, no. 1 (2002), available at www.jstor.org/stable/4065312, 20-32.

¹⁸⁶ See Human Rights Committee, general comment No. 16 (1988) on article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), para. 5, noting that the term "family" should be given a broad interpretation to include those understood as family in the society of the State concerned; see also Committee on the Rights of the Child, concluding observations: Nepal (2005) (CRC/C/15/Add.261), paras. 51 and 52, noting that adequate alternative care for a child includes placement with their extended family; UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007), 124.

¹⁸⁷ Human Rights Committee, general comment No. 19 (1990) on protection of the family, the right to marriage and equality of the spouses (article 23), para. 2.

connection, including through family tracing.¹⁸⁸

101. In deciding whether to grant a child citizenship or the right to re-enter a country, States should thus consider their obligations to respect the rights of the extended family or community as provided for by local custom, and to care for and foster the development of a child.¹⁸⁹ Likewise, States considering a solution for a child who has been permanently deprived of his or her family environment must give due regard to continuing a child's upbringing in their ethnic, religious, cultural and linguistic background, an evaluation which may call for returning a child to the environment in which he or she was born or partially raised.¹⁹⁰ This is a consideration that must be made in situations when the child's parents are detained abroad and a DNA test does not serve to establish a genetic link to a suspected country of nationality. As in all decisions concerning a child, the best interests of the child must be the primary consideration.¹⁹¹

The right to privacy

102. DNA testing potentially places a child's right to privacy at risk.¹⁹² The collection of bio-

metric data¹⁹³ for a specific purpose may be justified if it is in the child's best interests; however, it is an activity that must be approached with caution, as there is a general lack of safeguards concerning the future uses of DNA once it has been collected and stored.¹⁹⁴

103. States collecting DNA for the purpose of confirming a child's connection to their suspected home country should not retain the child's genetic record for any other use, including the development of biometric databases.¹⁹⁵ Instead, a child's biometric data should be used only in measures to protect the child and be destroyed once the child's identity is established. States should implement strict rules on the collection, use, retention of and access to biometric data, including DNA data.¹⁹⁶ Failure to protect a child's personal data in this regard constitutes a violation of the right to privacy set

188 ICRC, Commentary on the Additional Protocols to the Geneva Conventions of 1949 (Geneva, 1987), art. 32, para. 1215.

189 Convention on the Rights of the Child (1989), art. 5.

190 Ibid., art. 20(3).

191 Ibid., art. 2.

192 Ibid., art. 16(1) stipulates that no child should be subjected to arbitrary or unlawful interference with his or her privacy or family.

193 Biometric data is defined as "unique markers that identify or verify the identity of people using intrinsic physical or behavioral characteristics", and has been noted to include DNA. Jennifer Lynch, *From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond* (Immigration Policy Center and Electronic Frontier Foundation, 2012), available at www.eff.org/document/fingerprints-dna-biometric-data-collection-us-immigrant-communities-and-beyond, 4.

194 Committee on Assessing Genetic Risks, *Assessing Genetic Risks: Implications for Health and Social Policy* (National Academy of Science, Washington DC, 1984), available at www.ncbi.nlm.nih.gov/books/NBK236044/.

195 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para 17.

196 Ibid.; United Nations Office of Counter-Terrorism and Counter-Terrorism Executive Directorate, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter Terrorism* (2018), available at www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-biometrics-final-version-LAT-EST_18_JUNE_2018_optimized.pdf, 31-32.

forth in the Convention on the Rights of the Child.¹⁹⁷ The use of firewalls may be such a measure to ensure protection of the rights of the child. Firewalls are measures to separate States' immigration enforcement activities from other activities, such as criminal justice processes. Such measures ensure that immigration authorities do not have to share information concerning the immigration status of each child with other institutions.¹⁹⁸ (See chapter 8 on data collection and exchange.

The Security Council Counter-Terrorism Committee notes in its **2018 Addendum to the 2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177)** that States should consider specific issues that may arise with respect to protecting and promoting the rights of the child in the context of biometrics, including when children's biometric data is collected for child-protection purposes, and further considers putting in place specific, appropriate legal frameworks and safeguards.¹⁹⁹

2.2 Key Recommendations

104. The following are key recommendations:

Protecting the right to nationality

- a. Respect, protect and fulfill the right of every child to acquire a nationality, as set out in the Convention on the Rights of the Child, especially when he or she would otherwise be stateless.
- b. Reform nationality laws that are discriminatory, including to remove discrimination based on gender and/or marital status of the parents. National legislation should grant women the right to bestow their own nationality onto their children.
- c. Apply nationality law without discrimination and be guided by the best interests of the child as a primary consideration. Potential links of children or their parents to the foreign fighter phenomenon should never be grounds to deny nationality.
- d. Accept nationals and their children, respect the right of nationals to return to their own countries of origin and assist them, as necessary, to facilitate repatriation.
- e. Take actions to prevent children from becoming stateless. Establish effective safeguards and processes that protect any child from becoming stateless.
- f. In the absence of evidence to the contrary, there should be favorable consideration of parenthood when an individual presents him

¹⁹⁷ Ibid.

¹⁹⁸ OHCHR and Global Migration Group Working Group on Migration, *Human Rights and Gender, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, available at www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf, p.12.

¹⁹⁹ Addendum to the 2015 Madrid Guiding Principles (2018), principle 38 (i).

or herself as the parent of a child, including for the purposes of the operation of the nationality law.

- g. Consider the full array of available evidence in helping to establish the parent–child relationship to ensure the recognition of nationality, and do not discount evidence but rather recognize the facts established by documentation that is issued by non-State entities. Allow non-documentary forms of evidence in the absence of birth registration.
- h. Given its invasiveness, use DNA testing only as a last resort for establishing the parent–child relationship. If DNA testing is required, make it accessible, removing barriers to access, both physical and practical. DNA test results, once they have served the purpose of establishing a biological connection between the child and his or her parent or parents, should be destroyed.
- i. Never deprive a child of his or her nationality.
- j. Ensure that denial or deprivation of nationality of a parent does not result in derivative loss for the child or otherwise undermine the rights of the child, including the right to family life. Children cannot be discriminated against based on the actions of a parent or family member.
- k. Prevent statelessness in all cases.

Birth registration

- i. Ensure all children born on State territory have access to immediate birth registration. Birth registration is essential to protect a child and determine his or her identity and nationality. Children should also be provided with a birth certificate.

Deprivation of nationality

- j. Avoid the use of deprivation of nationality as a counter-terrorism measure. This is increasingly understood to be counterproductive to security aims and is likely to be considered arbitrary under international law.
- k. In the event of the use of deprivation of nationality in the narrow cir-

cumstance that is found to be seriously prejudicial to the vital interests of the State or engagement in the military service of a foreign State, that measure should be imposed only following a careful assessment of necessity and proportionality, and with full respect for procedural safeguards to guarantee due process, including transparency and an effective appeals mechanism.

SECTION 3: Preserving Family Unity

105. The right to family unity is a key basis of action taken within child protection systems. Family-based care is always preferred if it is in the best interests of the child. Preservation of and support for family unity goes beyond the parent-child relationship, extending to sibling groups and extended family. Maintaining family unity, especially in relation to children affected by the foreign fighter phenomenon can also improve security outcomes. Children who are unaccompanied and without family-based care are more likely to have their rights violated, including being at risk for recruitment into armed groups. In relation to those families in the areas previously under the control of armed groups, including designated terrorist groups, taking some family members and leaving others behind is likely to fuel resentment towards such a state policy. Those left behind are likely to be more vulnerable, while remaining under the influence or control of armed groups and at a higher risk of continuing rights violations.

106. In reality, many children affected by the foreignfighter phenomenon face the possibility of separation from their parents or primary caretakers. Recruitment and use of children can also cause family separation. Children may be separated from their parents or primary caregivers as a result of conflict, displacement, as well as the death or detention of one or both parents. Children who become separated may join armed groups to try to protect themselves and access basic services. In addition, individuals suspected of being foreign fighters are often placed in detention and/or criminal proceedings. Children may be separated from their detained parents. Security screening processes and requirements for documentation for readmis-

sion to countries may also result in separation of children from their parents when some family members do not have the required documentation. Some countries of nationality take a position to accept only children returning from conflict zones, not their parents. With such a policy, the repatriation process itself can lead to separation. Differential treatment based on age can also result in separation of siblings, with children above the minimum age of criminal responsibility being separated from their younger siblings.

107. The present chapter highlights family unity as a primary rule under international human rights and humanitarian law. The chapter further summarizes human rights considerations in avoiding family separation and facilitating family reunification. The chapter concludes by summarizing international standards in ensuring the child's rights when he or she is separated from his or her parent(s).

3.1 International Human Rights Law and Standards

3.1.1 The Principle of Family Unity

108. International human rights law recognizes “the family” as a natural and fundamental unit and entitled to protection by States.²⁰⁰ The

²⁰⁰ Universal Declaration of Human Rights (1948), art. 16(3); International Covenant on Civil and Political Rights (1966), art. 23; International Covenant on Economic, Social and Cultural Rights (1966), art. 10(1); American Convention on Human Rights (1969), art. 17(1); Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (1988), art. 15(1); African Charter on Human Rights and Peoples' Rights (1981), art. 18.

Convention on the Rights of the Child describes the family as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”²⁰¹ International law prohibits arbitrary or unlawful interference with one’s family,²⁰² even in circumstances involving individuals with serious criminal convictions.²⁰³ Children have the right to preserve family relations as part of their identity without unlawful interference.²⁰⁴ Children must not be separated from their parents against their will, unless a competent authority with judicial review determines it to be in their best interests.²⁰⁵

109. International humanitarian law also requires the maintenance of the family life as far as possible.²⁰⁶ In cases of displacement, parties to conflict must take all possible measures to ensure that members of the same family are not separated.²⁰⁷ Under humanitarian law, children who are deprived of their liberty must be held in

quarters separate from those of adults, except when families are accommodated as family units.²⁰⁸

Example from France—Unity of siblings as the priority

As per the 23 February 2018 Prime Minister instruction, the Government of France prioritizes the unity of siblings concerning children returning from conflict areas. Children over 18 months are placed with a foster family with siblings. Usually a juvenile judge convenes a hearing to review a foster order and to order a long-term solution to prevent leaving the child in the foster family’s care.

3.1.2 Preventing Family Separation and Facilitating Family Reunification

Preventing family separation

110. Preventing family separation and preserving family unity, including maintenance of sibling relationships, are considered to be important components of the child protection system.²⁰⁹ The Convention on the Rights of the Child stipulates that a child cannot be separated from his or her parents

201 Convention on the Rights of the Child (1989), pre-ambule.

202 International Covenant on Civil and Political Rights (1966), art. 17(1).

203 European Court of Human Rights, *Beldjoudi and Beldjoudi née Teychene v France*, Judgment, Merits and Just Satisfaction, App No 12083/86, Case No 55/1990/246/317, 26 February 1992, para 79. Also, *Moustaquim v Belgium*, Merits and Just Satisfaction, App. No 12313/86, A/193, 18 February 1991.

204 Convention on the Rights of the Child (1989), art. 8(1).

205 *Ibid.*, art. 9(1).

206 See, among other things, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), art. 27(1); ICRC, Customary International Humanitarian Law database, rule 105 on respect for the family life, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105#Fn_2751A971_00008.

207 See, among other things, 1949 Fourth Geneva Convention, art. 49; ICRC, Customary International Humanitarian Law database, rule 131 on treatment of displaced persons, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule131.

208 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), art. 82; Additional Protocol I (1977) to the Geneva Conventions, art. 77 (4); ICRC, Customary International Humanitarian Law database, rule 120 on accommodation for children deprived of their liberty, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule120, “Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units”.

209 Committee on the Rights of the Child, general comment No. 14 (2013), para. 60

against her or his will unless “competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.²¹⁰ Separation should be avoided not only from biological parents, but also any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.²¹¹

111. Separation from parents or primary caregivers has potentially serious implications on children, including on their right to development.²¹² It is especially so for young children, who are especially vulnerable to adverse consequences because of their physical dependence on and emotional attachment to such individuals. Young children’s limited ability to comprehend the circumstances of any separation also increases their vulnerability.²¹³

112. Given the gravity of the impact on the child of separation from his or her parents, such separation should occur only as a last resort, when there are no less intrusive measures to protect the child.²¹⁴

Supporting parental role

113. The Convention on the Rights of the Child reaffirms that parents or legal guardians have the primary responsibility for promoting their child’s development and well-being, with the child’s best interests as their

basic concern.²¹⁵ States are encouraged to respect the primary responsibility of parents, mothers and fathers. States are urged to take all necessary steps to ensure that parents are capable of taking such primary responsibility for their children.²¹⁶ Overall goals should include minimizing the number of children who require institutional or other forms of long-term care, and to those limited situations in which it is judged to be in the child’s best interests.²¹⁷

114. Before resorting to separation as the last measure when there are no less intrusive measures to protect a child, States must provide support to the parents so that they can reassume their parental responsibilities and restore or enhance the family’s capacity to take care of the child.²¹⁸

When separation is considered to be in the best interests of the child

115. Separation of a child from her or his parents should be considered only when there are reasonable grounds to believe that a child is, or is likely to be, exposed to severe abuse or neglect by parents.²¹⁹ The abuse or neglect of a child that may require separation has been interpreted to entail “mental violence”, a form of abuse that includes scaring or threatening a child.²²⁰ When there are such grounds, the situation of the child and his or her family has to be assessed, where possible, by a multidisciplinary team of well-trained child-protection professionals with appropriate

210 Convention on the Rights of the Child (1989), art. 9(1).

211 Committee on the Rights of the Child, general comment No. 14 (2013), para. 60

212 Committee on the Rights of the Child, general comment No. 7 (2005) on implementing child rights in early childhood, para. 36.

213 Ibid., para. 18.

214 Committee on the Rights of the Child, general comment No. 14 (2013), para. 61.

215 Committee on the Rights of the Child, general comment No. 7 (2005), para. 18, citing the Convention on the Rights of the Child (1989), arts. 18.1 and 27.2.

216 Ibid., para. 18.

217 Ibid.

218 Committee on the Rights of the Child, general comment No. 14 (2013), para. 61.

219 Convention on the Rights of the Child (1989), art. 9(1).

220 Committee on the Rights of the Child, general comment No. 13 (2011), paras. 21(a)-(b)

judicial involvement, ensuring that no other option can fulfil the child's best interests.²²¹ In the best-interests assessment, how to preserve the family environment and maintain family relations is a key element that must be considered.²²² Any intervention should be combined with efforts to support the family. Of relevance for States that may wish to repatriate children affected by the foreign-fighter phenomenon, children should generally be repatriated with their parents or legal guardians, and certainly with siblings. If repatriation together is not possible, for example owing to differing nationalities, with parental consent, repatriation may proceed without a best-interests determination. However, a best-interests determination is necessary if a child is unaccompanied, if the child is at risk of imminent harm from the parent, or in a custody dispute. When such a procedure cannot be undertaken in the country where the child is currently residing, the child should be repatriated with the parent and the best-interests determination undertaken in the country of origin with proper safeguards in place, so that the wishes of the child and the parents can be considered. (See chapter 4 on repatriation.)

116. Children of individuals suspected of being foreign fighters may be particularly at risk of forcible recruitment by a designated terrorist group.²²³ Children are perceived by armed groups as being more ideologically malleable than adults and are seen as easy targets for indoctrination and recruitment to participate in violence.²²⁴ Further, children are often the most susceptible to recruitment or exploitation by those they love or by those on whom they are

completely dependent: members of their own family.²²⁵ Consequently, parents and other family members have been noted to play a critical role within terrorist organizations in the recruitment of children, as well as preventing child recruitment into such groups. When a child is in danger of experiencing imminent harm from parental action, temporary removal may be warranted.²²⁶ Again, any such decision must be made based by a competent authority subject to judicial review, on the basis of actual risk to the child's well-being and should be in accordance with the Guidelines for Alternative Care of Children (see the following box).²²⁷ Even in these cases, the best interests of the child have to be a primary consideration, and separation should not take place unless there are no less intrusive measures to protect the child.²²⁸ As discussed earlier, States are to provide support to the parents in assuming their parental responsibilities before resorting to separation.²²⁹

221 Committee on the Rights of the Child, general comment No. 14 (2013), para. 64.

222 *Ibid.*, paras 52, 58–70; Committee on the Rights of the Child, general comment No. 6 (2005), para. 34.

223 A/HRC/40/28, para. 34.

224 United Nations University, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (2018), 113.

225 *Ibid.*

226 Committee on the Rights of the Child, general comment No. 14 (2013), section V, para A(1)(c); A/HRC/40/28, para. 34.

227 A/HRC/40/28, para. 34.

228 Committee on the Rights of the Child, general comment No. 14 (2013), section V, para. A(1)(c).

229 *Ibid.*

The Guidelines for Alternative Care of Children

—Adopted by the United Nations General Assembly in 2010, the Guidelines aim to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments concerning the protection and well-being of children who are deprived of parental care or who are at risk of being so. The Guidelines seeks to ensure that children do not find themselves in out-of-home care unnecessarily. The Guidelines further seek that the type and quality of out-of-home care provided is appropriate to the rights and specific needs of the child concerned. Available at www.unicef.org/protection/alternative_care_Guidelines-English.pdf.

Encouraging family unification

117. Even when separation is determined to be in the best interests of the child, it should not necessarily be permanent or indefinite. When separation is necessary, it should be for the shortest possible time. Services should be provided to support families to address the causes of separation, and there should be a process for regular review of the situation for eventual family unification when it is deemed to be in the best interests of the child. Given that international law provides special protection to the family, States should ensure such periodic review of separation with the aim of reuniting the child with his or her family whenever it is in the

child's best interests.²³⁰ In situations in which a child is in a country different from his or her parent or parents, article 9 of the Convention on the Rights of the Child requires that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification should be dealt with by States parties in a positive, humane and expeditious manner.²³¹ If it has been determined that it is in a child's best interests to be repatriated without his or her parents or other family members, he or she should be readmitted to his or her country of origin as soon as possible to facilitate family reunification.

3.1.3 Human Rights Considerations When Separation Occurs

118. Even when separation is decided to be in the best interests of the child, international human rights standards provide several considerations to be made by the States to ensure that the child's rights are respected and protected. When a child has to be separated from the parent or the primary caregiver, the State has a responsibility to provide alternative care. Family-based care should be prioritized rather than an institutional environment. Institutions should be used only as a last resort and for the shortest time possible.²³² States should ensure that guardianship of a separated child is never granted to an individual or organization that is involved in a conflict.²³³

230 Universal Declaration of Human Rights (1948), art. 16(3); International Covenant on Civil and Political Rights (1966), art. 23; International Covenant on Economic, Social and Cultural Rights (1966), art. 10(1); American Convention on Human Rights (1969), art. 17(1); Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (1988), art. 15(1); African Charter on Human Rights and Peoples' Rights (1981), art. 18.

231 Convention on the Rights of the Child (1989), art. 10(1).

232 A/HRC/40/28, para. 11.

233 *Ibid.*, para. 55.

Right to maintain contact with family

119. The assessment of a child's best interests applies also to whether a child is permitted to maintain personal relations and direct contact with their parents, as far as possible. When separation is judged to be in the best interests of the child and necessary, the child has the right to maintain linkages and relations with their parents and family, including siblings, relatives and persons with whom the child has strong personal relationships, unless it is not in the child's best interests.²³⁴ States should assess the quality of each child's relationship with their parents in decisions concerning the frequency or length of visits if it is determined to be in the child's best interest to continue their family relationship.²³⁵

Right to information concerning the parents

120. Even when separation is deemed to be in the best interests of a child, the child has the right to information concerning the parents. Thus, the child should be informed, to the extent possible, of the whereabouts of the absent parent "unless the provision of the information would be detrimental to the well-being of the child".²³⁶ Such information should be provided in a language that can be fully understood by the child.²³⁷ As summarized earlier, a child, whose separation

is determined to be in his or her best interests, still has the right, to the extent possible, to maintain personal relations and direct contact with both parents on a regular basis, except if such contact is contrary to the child's best interests.²³⁸

Considerations for children separated because of parents' detention or incarceration

121. Children separated from their parents due to their parents' detention or incarceration may require additional protection, including from stigmatization.²³⁹ To begin with, in cases in which the parents or other primary caregivers are accused of a crime, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of possible impacts of different sentences on the best interests of the concerned child.²⁴⁰ When detention or imprisonment of a parent cannot be avoided, States should provide support to children to prevent the risk of violence that they may be exposed to owing to the parent's situation, acknowledging the complementary roles of the criminal justice system, child protection agencies, health, education and social service sectors.²⁴¹ That may also require States to address the responsibility of the media and to enforce legislation to protect the right to privacy of those children and prevent their stigmatization.²⁴²

²³⁴ Convention on the Rights of the Child (1989), art. 9(3); Committee on the Rights of the Child, general comment No. 14 (2013), section V, para. A(1)(c).

²³⁵ Committee on the Rights of the Child, general comment No. 14 (2013), section V, para A(1)(c).

²³⁶ Convention on the Rights of the Child (1989), art. 9(4).

²³⁷ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), available at www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf, para. 44.

²³⁸ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 33.

²³⁹ *Ibid.*, para. 35, citing Convention on the Rights of the Child (1989), art. 9(3).

²⁴⁰ Committee on the Rights of the Child, general comment No. 14 (2013), para. 69.

²⁴¹ A/RES/69/194, para. 23(h).

²⁴² Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 36.

122. In relation to the incarcerated parent, children have the right to regularly visit their parent(s), as long as it is in their best interests.²⁴³ To ensure that the child can exercise the right to visit his or her parent, it is recommended that the parent be detained in a facility close to the child.²⁴⁴ Again, in a case in which repatriation is involved, it is strongly encouraged that the parent and the child be repatriated together so that, even if the parent is detained, maintenance of family links remains likely. Wherever possible, visits to the incarcerated parent should be undertaken in a child-friendly environment. This includes visiting times that minimize the interference with the child's life, such as non-school hours, and visit durations conducive to building or maintaining strong relationships.²⁴⁵ There should also be the possibility of visits outside the detention facility to facilitate parent-child bonding in a child-friendly environment.²⁴⁶ In cases in which the parent is detained far from the child's location, there should be measures to address disadvantages caused by such a distance.²⁴⁷ That may include allowing alternative means of communicating, including through telephone, video-conference and other means of communication.

243 Ibid., paras 38–39.

244 Ibid., para. 40.

245 UNODC, Commentary to the Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)(2011), available at www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf (the Bangkok Rules Commentary), commentary on rule 26.1; Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents” (2011), para. 39.

246 Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents” (2011), para. 39.

247 General Assembly, resolution 65/229 (2010), Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), rule 26.

Example from the Netherlands— Maintaining family relations

In the Netherlands, the Child Protection Board considers it important for children who are cared for outside prison to be allowed to maintain their relationships with their detained parent(s). To realize this, one possible measure is recording a mother reading a bed-time story and sending it to her child. The Dutch system allows a child to visit his or her parent in prison every week, accompanied by a family member or a guardian.

Example from Tunisia—Preparation for separating a child from the mother in prison

In Tunisia, in cases in which a child is to be received by his or her parent's family, officers undertake several visits to the family members who are to receive the child before the child is removed from the mother in detention in order to ease the transition of the child from the prison to the outside world. In cases in which the child is to be received by a national institution, psychologists monitor the child's psychological status.

3.2 Key Recommendations

123. The following are key recommendations:

Family unity

- a. All children have the right to family unity. Do not separate children from their parents and family, unless separation is determined to be in their best interests by a competent authority subject to judicial review. If separation is necessary, it should be for the shortest period consistent with the child's best interests.
- b. Do not separate a child from her or his family whenever possible, as separation has significant impact on the child's development, except if it is in the child's best interests. A child must not be separated from the parent if less intrusive measures could protect the child. Separation should be a last resort in cases that present a clear risk of harm to the child and other less intrusive measures cannot be taken to protect the child.
- c. Ensure to the extent possible that siblings with existing bonds are not separated and remain together, when that is determined to be in the child's best interests.
- d. Promote family unity through prevention of family separation, identification and care of separated children, and family tracing and reunification.

In determining separation

- e. Make any decision that might lead to family separation, including for repatriation, using processes that have procedural safeguards, with a child-centered approach and based

on the best interests of the child, and subject to international legal requirements for family separation. When the best-interests determination cannot be undertaken in compliance with the requirement under Article 9 of the Convention on the Rights of the Child, children will accordingly need to be repatriated with their mothers.

- f. Ensure that the best interests of the child assessment and when necessary, best-interests determinations are done promptly, by a competent authority or qualified professional(s). If such actions cannot be taken in the country where the child is residing, they should be repatriated with the parent and such determinations should be made in the country of origin.
- g. For any decisions regarding a child, institute safeguards to ensure participation of the child, based on the child's evolving capacities, in making the assessment and determination based on his or her own best interests. The parents or primary caregivers of the child must also be given an opportunity to participate and make their views known, to the extent possible.
- h. Review separation periodically or in fixed intervals to determine whether it remains necessary.

Protection required if separation is necessary

- i. When a child is being separated from the parent, provide information and notice to the parent and child so that they can say goodbye and minimize the trauma of separation for both. Particularly for cases of separation due to repatriation, sufficient advance notice (at least several days) should be provided for both child and parent with specific informa-

tion about where each individual will be and the specific care available to the child. The parents should have a say in identifying the child's caregiver, when it is in the child's best interest.

- j. Provide special protection measures for any child who has been separated from his or her parents or primary caregivers, including when the separation is due to the detention of the parent or caregivers, as such separation significantly increases children's vulnerability.
- k. Ensure appropriate alternative care for separated or unaccompanied children. Preference should be given to kinship and family-based care options rather than institutional care.
- l. Consult the parents and the child in deciding the child's caregiver, as far as possible, when it is in the child's best interest. Family-based care should be preferred and institutional care should be used as a last resort and for the shortest possible time. Adhere to the Guidelines for Alternative Care of Children.
- m. Take measures to ensure that the child can, as far as possible, maintain contact with the family following separation, unless such contact is determined not to be in the best interests of the child.
- n. Keep the child informed about the parent and the parent about the child, unless such information sharing is determined not to be in the best interests of the child.
- o. Properly train caregivers of children to care for children with psycho-social distress.
- p. Prepare the family and community to receive any child separated from the parent,

including to prevent stigmatization of the child and ensure the privacy of the child.

SECTION 4: Repatriation

124. The repatriation of children affected by the foreign fighter phenomenon and their families who are outside of the country of origin or parents' nationality has been a contentious issue in recent years. Such children may include those who were recruited across borders by designated terrorist groups and have traveled independently, those who were brought by family members who crossed borders to join designated terrorist groups, and those who were born to individuals who crossed borders to join designated terrorist groups.

125. Currently, some countries of origin refuse to receive adults suspected of being associated with armed groups, including designated terrorist groups, and their children.²⁴⁸ Consequently, children are left in prolonged detention or situations of deprivation of liberty in restricted camps while in legal and administrative limbo.²⁴⁹ Other countries have expressed willingness to repatriate only children from conflict zones and not their parents, inevitably leading to the risk of family separation. Additionally, some States have also implemented a policy whereby only orphans are repatriated. Yet others have adopted policies to take only children younger than a certain age, in contravention of international law, which provides special protection to all children, regardless of age. If implemented, these policies will inevitably result in family separation—from both primary caregivers as well as older siblings.

126. Refusal to repatriate children with their

parents or the repatriation of children only or children under a certain age can contribute to insecurity in the long term. Leaving children and their parents in prolonged detention and administrative limbo delays or prevents them from accessing basic services, such as health care and education, as well as participating in the rehabilitation and reintegration process, possibly leading to perpetual marginalization. Separation of a child from his or her parent or primary caregivers is likely to cause emotional distress, anxiety, fear, anger and possibly resentment, all of which may hinder full reintegration into society. When it is in the best interests of the child, repatriation together with parents or primary caregivers and other siblings provides the best option to support the child and the parent to rehabilitate and reintegrate with family support. Even when the parent is facing criminal proceedings and held in detention or imprisoned upon repatriation, being in physical proximity to the child allows maintaining the family relationship more easily than if they were separated in different countries.

127. As summarized in previous chapters, the right to nationality and the right to family life are fundamental rights guaranteed for every child under international law. The present chapter summarizes key international human rights and humanitarian provisions, provided that they are applicable to States of origin, that obligate them to facilitate the repatriation of children who are their nationals or who claim their nationality while they are in conflict-affected areas because of the foreign fighter phenomenon. Fundamentally, the process of repatriating a child to his or her country of origin or nationality must comply with both the best interests of the child principle

²⁴⁸ S/2019/103, para. 21.

²⁴⁹ A/HRC/40/70, para. 10.

(see section 1.2.2 above on the best interests of the child principle) and the *non-refoulement* principle under international law.

4.1 International Law and Standards

4.1.1 Human Rights Considerations Calling for Repatriation

128. In February 2019, the Committee on the Rights of the Child, in its concluding observations to Belgium on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, recommended that “taking into consideration paragraph 26 of Security Council resolution 2427 (2018), [to] promptly facilitate the repatriation of all Belgian children, and whenever possible, their families, regardless of age or the degree of suspected involvement in the armed conflict and in compliance with article 9 of the Convention”.²⁵⁰ In April 2019, the United Nations Secretary-General endorsed the “key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups,” which calls upon Member States to ensure that their nationals who are family members of suspected foreign fighters and do not face serious charges are repatriated for the purposes of prosecution, rehabilitation and/or reintegration.²⁵¹ A number of international human rights law provisions support these calls.

²⁵⁰ Committee on the Rights of the Child, concluding observations: Belgium (2019)(CRC/C/BEL/CO/5-6), para. 50 (b).

²⁵¹ 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).

The right to life

129. States’ obligations towards children’s right to life, maximum survival and development may call for them to repatriate a child when he or she is in a situation in which his or her life is in danger.²⁵² Under the International Covenant on Civil and Political Rights, every child is entitled “to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”.²⁵³ This provision requires States parties to adopt special measures designed to protect the life of every child. Similarly, the Convention on the Rights of the Child requires States parties to take all appropriate measures to protect the child from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation”.²⁵⁴ This article applies to children without a primary or proxy caregiver, children of migrant parents or unaccompanied children outside their countries of origin.²⁵⁵ States must take responsibility as the “de facto” caregiver or the one “who has the care of the child”, even if such children are not within the context of physical care settings.²⁵⁶ The Convention also obligates States parties “to ensure the child such protection and care as is necessary for his or her well-being”.²⁵⁷ These provisions may call for repatriation when the child’s life would be better protected in the country of origin and it is deemed to be in the best interests of the child,

²⁵² Human Rights Committee, general comment No. 36 (2018), para. 63.

²⁵³ International Covenant on Civil and Political Rights (1966), art. 24(1).

²⁵⁴ Convention on the Rights of the Child (1989), art. 19(1).

²⁵⁵ Committee on the Rights of the Child, general comment No. 13 (2011), para. 35.

²⁵⁶ *Ibid.*

²⁵⁷ Convention on the Rights of the Child (1989), art. 3(2).

provided that the International Covenant on Civil and Political Rights is applicable to States of origin.

The right to enter one's own country

130. International human rights law prohibits arbitrary deprivation of the right to enter one's own country.²⁵⁸ The right of a person to enter his or her own country is considered to be multi-faceted. "It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country."²⁵⁹

131. Significantly, the International Covenant on Civil and Political Rights provides the right to enter one's "own country" which is considered to be broader than the concept "country of his nationality".²⁶⁰ It is not limited to a national in the formal sense, but also encompasses "an individual, because of his or her special ties or claims in relation to a given country, [who] cannot be considered to be a mere alien".²⁶¹ Such individuals include nationals of a country who have been stripped of their nationality in violation of international law.²⁶² Prohibition of

arbitrary deprivation of the right to enter his or her own country guarantees that even interference provided for by law should be "reasonable in the particular circumstance".²⁶³ The Human Rights Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country can be considered reasonable.²⁶⁴

132. Significantly, the Convention on the Rights of the Child, to ensure the right to family unity, also provides for the right of the child and his or her parents to leave any country and to enter his or her own country.²⁶⁵ Application by a child or his or her parents to enter a State party to the Convention for the purposes of family unification should be dealt with by the States parties involved "in a positive, humane and expeditious manner."²⁶⁶

The right to nationality

133. As summarized in chapter 2, the right to nationality is provided for in a number of international human rights treaties. Under the International Covenant on Civil and Political Rights, States are required to adopt appropriate measures to ensure that every child has a nationality when he or she is born, including through cooperation with other States.²⁶⁷ Repatriation to the country of origin or potential nationality is likely to be one such measure.

258 International Covenant on Civil and Political Rights (1966), art. 12(4); African Charter on Human and Peoples' Rights (1981), art. 12; Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No.11 (1963), art. 3(2).

259 Human Rights Committee, general comment No. 27 (1999) on freedom of movement, para. 19.

260 Human Rights Committee, general comment No. 21 (1992) on humane treatment of persons deprived their liberty, para. 20.

261 Ibid.

262 Ibid.

263 Ibid.

264 Ibid.

265 Convention on the Rights of the Child (1989), art. 10(2).

266 Ibid, art. 10(1).

267 Human Rights Committee, General Comment No. 17 (1989), para. 8.

The right to family life

134. Preventing a person's (including a child's) return to the country where his or her family live may also amount to interference with family life. States may not subject an individual to arbitrary or unlawful interference with his or her family.²⁶⁸ The mere fact that members of the family reside in the territory of one country does not necessarily guarantee the right to enter the territory of that country. However, while States have the discretion to deny an individual the right to re-entry in pursuit of a legitimate aim, such discretion may not be exercised arbitrarily.²⁶⁹ When restrictions to re-enter a country are based on assertions that the person is a threat to national security, such assertions should be carefully substantiated; otherwise the restrictions could be considered to be arbitrary interference with family life.²⁷⁰

The right to rehabilitation and reintegration

135. As summarized in chapter 5, under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, States parties have the obligation to ensure the rehabilitation and reintegration of children affected by armed conflict, including the foreign fighter phenomenon.

136. States are required to aid children who were recruited by armed groups in their jurisdiction by ensuring support for their

physical and psychological recovery and social reintegration with the goal of safeguarding their right to develop in an environment that is free from violence.²⁷¹ Therefore, States should provide support to children who were recruited in their jurisdiction and then crossed borders. The Security Council also recognizes "the importance of timely and appropriate reintegration and rehabilitation assistance to children associated with foreign fighters returning or relocating from conflict zones".²⁷² The Council has emphasized that children may be especially in need of particular psychosocial support, such as post-trauma counseling, stressing that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law.²⁷³ For effective and timely rehabilitation and reintegration of children in conflict-affected areas, repatriation to countries of nationality may be critical and in the best interests of the child. In this regard, the Special Representative of the Secretary-General for Children and Armed Conflict has called upon States to facilitate the return of all children holding citizenship for the purposes of rehabilitation and reintegration.²⁷⁴

Access to consular services

137. The Convention on the Rights of the Child, provided it is applicable, obligates States parties to develop and implement effective consular protection policies, including specific measures directed at protecting children's rights and encompassing promotion of protocols

268 International Covenant on Civil and Political Rights (1966), arts. 17 and 23; Convention on the Rights of the Child (1989), art. 16(1); African Charter on Human Rights and Peoples' Rights (1981), art. 18(1); European Convention on Human Rights (1950), art. 8.

269 *Ilyasov v. Kazakhstan* (CCPR/C/111/D/2009/2010), para. 7.2.

270 *Ibid.*, paras. 7.3 and 7.5.

271 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, art. 6(3).

272 Security Council resolution 2396 (2017), para. 36.

273 *Ibid.*, preamble.

274 A/HRC/40/49, para. 20.

on consular protection services.²⁷⁵ Correspondingly, host States also have obligations under the Vienna Convention on Consular Relations to ensure individuals the right to communicate with, and be visited by, consular officers of their countries of nationality.²⁷⁶ When lack of access to consular services is a child's primary obstacle to returning to his or her home country, the obligation to provide consular services, together with the aforementioned obligation to provide protection, strongly encourages facilitation of repatriation to the country of nationality, when it is deemed in the best interests of the child.

4.1.2 Human Rights Considerations in Repatriating a Child

Preserving family unity

138. Any family separation occasioned by the repatriation of a child to his or her country of origin must comply with article 9 of the Convention on the Rights of the Child which requires the best-interests determination by a competent authority with judicial review. Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as measure of a last resort measure, and separation should not take place if less intrusive measures could protect the child. (See chapter 3 on preserving family unity.) This means that siblings should, as far as possible, be repatriated together regardless of age, and children should be repatriated with their parents, unless the parents give their free and informed consent for the separation, or

a competent authority subject to judicial review determines that it is in the best interests of the child to be separated from his or her family. States should therefore seek the free and informed consent of parents before separating children for repatriation. When possible, the consent of both parents should be sought, unless it is not in the child's best interests to do so. When one parent is unreachable or his or her location or identity is unknown, the consent of the available parent or legal guardian is sufficient to repatriate a child. When it is not possible to obtain such consent, including when the parent is in detention, at least there should at minimum, to the extent possible, meaningful consultation with the parent concerned in a non-coercive setting. It should be noted that, when States have opted to repatriate children with their parents, the best-interests determination for separation by a competent authority is not required.

Child separated from a parent suspected of being a foreign fighter

139. When a child is separated from a suspected foreign fighter who is detained outside of his or her home country (following a best-interests determination by a competent authority subject to judicial review), the child should be repatriated when it is in his or her best interests.²⁷⁷ This should be done, to the extent possible, by an individual assessment of the best interests of the child if the parent consents, the child agrees and a suitable family is willing to receive the child in the country of origin. The parent concerned should be consulted and be able to give free and informed consent, unless this is not in the child's best interests. The principle of *non-refoulement* must also be ensured.

²⁷⁵ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families / No. 23 (2017) of the Committee on the Rights of the Child, para. 19.

²⁷⁶ Vienna Convention on Consular Relations (1963), art. 36.

²⁷⁷ The Bangkok Rules (2010), rule 53(2).

140. Such repatriation may be most appropriate, when it is recognized that the child of a non-resident foreign person may not have an appropriate caretaker in the country in which the parent is detained.²⁷⁸ The parent should be able and encouraged to contact consular officials in the country of origin where the child's reunification with family members is to take place.²⁷⁹

141. Following the application or informed consent of the parent concerned, the transfer of the parent to his or her home country should also be considered as early as possible, when relevant bilateral or multi-lateral agreements are in place.²⁸⁰ Such a transfer is particularly important if the child is already in his or her home country. Transferring adult prisoners who are parents to serve their sentences in their own countries, if they so wish, should be explored as soon as possible after sentencing in the host country.²⁸¹

4.2 Key Recommendations

142. The following actions are recommended:

Consular assistance

- a. Provide consular assistance when and where possible, including, if necessary, through a third party, when there is good reason to indicate the presence of child citizens in need of protection.
- b. Establish a best-interests process for children, including best-interests assessments, as soon as a child citizen's presence is confirmed. Such processes can be undertaken through a qualified third party when best-interests procedures are not available in the place where the child is residing. However, lack of timely best-interests procedures should not delay repatriation; in such situations, children and parents should be repatriated together and procedures undertaken as soon as possible after repatriation with their full participation.
- c. Host and home countries should cooperate, when possible, to expedite the process taking into consideration the best interests of the child.
- d. In case of a parent's denationalization, the child's repatriation to the country of origin or the decision for him or her to remain with the parent in the host country must be determined as expeditiously as possible with the consent of the parent, based on an individualized best-interests assessment and decision.

278 UNODC, Commentary to the Bangkok Rules (2011), commentary on rule 53(1).

279 Ibid.

280 The Bangkok Rules (2010), rule 53(1).

281 UNODC, Commentary on the Bangkok Rules (2011), rule 53(1).

Preparation for repatriation

- e. When repatriation is in the best interests of the child, the process should be initiated as swiftly as possible.

Repatriation with or without parents

- f. Ensure that nationals who are family members of suspected foreign terrorist fighters and who do not face serious charges are repatriated for the purposes of prosecution, rehabilitation and/or reintegration, as appropriate.
- g. In determining a child's repatriation, ensure that the parent(s) and the child are consulted so as to hear and consider their views.
- h. Ensure that the parent's free and informed consent is obtained when the child is repatriated without the parent. Repatriation of a child without the parent should occur when parental consent is obtained, or when a child's repatriation is based on the best-interest assessment. If the consent is to be obtained, it should be in writing and be limited to the repatriation. It should not be used to prevent future reunification or as evidence in future proceedings with respect to termination of parental rights.
- i. When a child is repatriated without his or her parents, swift repatriation of the parents should be considered. When there are allegations of crimes against the parents, possible prosecution in the parents' countries of origin should be explored. When the parents have already been sentenced, the possibility of serving the sentence in their home country to enable physical proximity to the child should be considered.

SECTION 5: Rehabilitation and reintegration

143. Rehabilitation and reintegration support from States is critical to ensuring the enjoyment of human rights by children affected by the foreign fighter phenomenon. In reality, such children face many challenges, including persistent discrimination from state authorities and/or communities to which they may return. The existence of comprehensive support systems from States and other actors, including community-based groups and civil society organizations, may help children to better reintegrate and develop. Such support for full integration is likely to serve States' long-term security goals by preventing further marginalization, which could push children to return to armed groups, including designated terrorist groups.

144. Many children affected by the foreign fighter phenomenon are likely to require long-term support. This may include some level of continuing psychosocial or more specialist medical support once integrated into a community. Some may have been injured or acquired disabilities and others may suffer chronic health consequences from having lived in conditions without adequate basic services. Stigma and discrimination upon return to their countries of nationality, or relocation to a third country may also increase the challenges that such children face, as may lack of or interrupted education services. This can contribute to challenges to psychosocial and psychological wellbeing if not supported properly. Rehabilitation and reintegration should aim to support children so that they are able to enjoy their rights, including the right to physical, social, psychological and cognitive development, without discrimination and stigmatization.

145. In relation to the rehabilitation and reintegration of children affected by armed conflict, including those recruited, used and exploited by armed groups, there is a wealth of materials available to support States to implement relevant programming. Consequently, the focus of the present chapter is limited to a brief summary of international human rights and humanitarian provisions, which are intended to remind States of relevant international standards that call for rehabilitation and reintegration of children affected by conflict.

5.1 International Law and Standards

5.1.1 States' Obligations for Rehabilitation and Reintegration

Children affected by violence, including armed conflict

146. The Convention on the Rights of the Child establishes States parties' obligations to promote the rehabilitation and social integration of children affected by armed conflict, including the foreign fighter phenomenon. The Convention obligates States parties to take all appropriate measures to protect children from all forms of physical or mental violence, injury, abuse, mistreatment or exploitation.²⁸² This obligation exists not only at the national level, but also at the provincial and municipal levels.²⁸³ It specifies that States shall take protective measures even when a child is in the care of his or her parent or legal guardian. Such protective mea-

²⁸² Convention on the Rights of the Child (1989), art. 19(1).

²⁸³ Committee on the Rights of the Child, general comment No. 13 (2011), para. 5

sures shall extend to “treatment and follow-up of instances of child maltreatment... and, as appropriate, for judicial involvement”.²⁸⁴ States shall “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts”.²⁸⁵

147. The Security Council has also reflected on these obligations, especially in its resolutions on children and armed conflict. The Council has stressed the primary role of Governments in providing protection and relief to all children affected by armed conflict.²⁸⁶ States are encouraged “to focus on long-term and sustainable reintegration and rehabilitation for children affected by armed conflict”.²⁸⁷ In this regard, the Council has urged all parties concerned, including Member States, United Nations entities and financial institutions to support national institutions and local civil society networks “for advocacy, protection and rehabilitation of children affected by armed conflict to ensure the sustainability of local child-protection initiatives”.²⁸⁸

284 Convention on the Rights of the Child (1989), art. 19(2); The article is considered as directly relevant to the Optional Protocol on the involvement of children in armed conflict. See Committee on the Rights of the Child, general comment No. 13 (2011), para. 7(a).

285 Convention on the Rights of the Child (1989), art. 39.

286 Security Council resolution 2427 (2018), seventh preambular para.; Security Council resolution 2225(2015), seventh preambular para.

287 Security Council resolution 2427 (2018), para. 26.

288 Security Council resolution 1612 (2005), para. 17; Security Council resolution 2427 (2018), para. 37.

148. Furthermore, in its resolution 2396 (2017), the Security Council recognized the particular importance of providing timely and appropriate reintegration and rehabilitation assistance to “children associated with foreign terrorist fighters returning or relocating from conflict zones, including through access to health care, psychosocial support and education programmes that contribute to the well-being of children.”²⁸⁹ Critically, the resolution encourages States to develop appropriate legal safeguards to ensure that prosecution, rehabilitation and reintegration strategies concerning children are in compliance with international law obligations, and tailored to their needs.²⁹⁰

Children recruited and used by armed groups

149. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits the recruitment and use of anyone under 18 years of age by armed groups (and armed forces).²⁹¹ The Optional Protocol requires States parties to prevent the recruitment or use in hostilities of children within their jurisdiction and support reintegration by providing such children with “all appropriate assistance for their physical and psychological recovery and their social integration”.²⁹² In relation to children affected by the foreign fighter phenomenon, especially those who were recruited

289 Security Council resolution 2396 (2017), para. 36.

290 *Ibid.*, para. 37.

291 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 4.

292 *Ibid.*, art. 6 (3).

in their countries of origin and travelled abroad to join a designated terrorist group, the Optional Protocol requires the country of origin to assist in their recovery and reintegration. In addition, the Optional Protocol requires international cooperation on the rehabilitation and social integration of children recruited and used in hostilities, including through technical cooperation and financial assistance.²⁹³

150. Social reintegration involves the right of all children who have been recruited and used by armed groups, regardless of the group to which they may have been affiliated.²⁹⁴ Initiatives should be holistic and avoid stigmatizing or discriminating against individuals or groups of children and should include family and community members.²⁹⁵ Member States should proactively engage with children associated with armed groups living outside the country when developing rehabilitation and reintegration strategies.

151. In its resolution 2396 (2017) the Security Council emphasized that “children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies”.²⁹⁶ The Council also stressed the importance of assisting “children associated with foreign terrorist fighters who may be victims of

terrorism, and to do so taking into account gender and age sensitivities”.²⁹⁷ The Council recognized the particular importance of providing, through a whole-of-government approach, timely and appropriate reintegration and rehabilitation assistance to “children associated with foreign terrorist fighters returning or relocating from conflict zones”, including through access to health care, psychosocial support and education programs that contribute to the well-being of children and to sustainable peace and security.²⁹⁸ The Council further encouraged Member States to develop appropriate legal safeguards to ensure that prosecution, rehabilitation and reintegration strategies are in full compliance with their international law obligations, including in cases involving children.²⁹⁹

²⁹³ Ibid., art. 7.

²⁹⁴ Convention on the Rights of the Child (1989), art. 39.

²⁹⁵ See, for example, United Nations, *5.30 Children and DDR: Integrated Disarmament, Demobilization and Reintegration Standards (2006)*. Available at <http://unddr.org/uploads/documents/IDDRS%205.30%20Children%20and%20DDR.pdf>; Security Council resolution 1261 (1999) on children and armed conflict.

²⁹⁶ Security Council resolution 2396 (2017), para. 31.

²⁹⁷ Ibid.

²⁹⁸ Ibid., para. 36

²⁹⁹ Ibid., para. 37.

The Security Council Counter-Terrorism Committee noted in the 2018 Addendum to the **2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177)** that, in cases involving children, States should ensure that rehabilitation and reintegration strategies: (a) Make the best interests of the child a primary consideration; (b) Are implemented in compliance with criminal legislation, taking into account the gravity of any crime that may have been committed, while considering the age of the child and recognizing that such a child may also be a victim of terrorism; (c) Include access to health care, psychosocial support and education programmes that contribute to the well-being of children, and grant access to regular education whenever possible; (d) Are age and gender-sensitive; and (e) Enable the involvement of child-protection actors and the social sector, as well as their effective coordination with the justice sector.³⁰⁰

5.1.2 Human Rights Considerations in Rehabilitation and Reintegration of Children

Child rights-based approach

152. Under the Convention on the Rights of the Child, recovery and integration of a child shall take place “in an environment which fosters the health, self-respect and dignity of the child”.³⁰¹ A child rights-based approach to such measures requires a paradigm shift from treating children as “objects in need of assistance” to treating them as “rights holders entitled to non-negotiable rights to protection”.³⁰²

³⁰⁰ S/2018/1177, annex (2018), guiding principle 47.

³⁰¹ Convention on the Rights of the Child (1989), art. 39.

³⁰² Committee on the Rights of the Child, general comment No. 13 (2011), para. 59.

Individualized support within a community

153. A child rights-based approach requires that rehabilitation and reintegration be carried out in an individualized manner. Consideration should be given to: (a) the child’s views; (b) the child’s safety; and (c) any predictable impact of potential intervention on the child’s long-term well-being, health and development.³⁰³ Depending on the child’s needs, medical, mental health, social and legal services may be required with long-term follow-up services.³⁰⁴ States should start planning early for the reintegration of children returning from conflict areas and engage all relevant ministries. Given that the majority of children affected by the foreign fighter phenomenon and returning from conflict-affected areas are likely to be suffering from psychosocial distress, provision of these services in the long-term is likely to be critical to ensuring each child’s well-being. A child should also be able to maintain contact with both parents, unless it is found to be contrary to the best interests of the child.³⁰⁵ (See chapter 3 on preserving family unity.)

154. Reintegration is a process whereby a child enters or re-enters a family or community and develops the identity, skills, and competencies that allow him or her to thrive and participate in community life. Given the stigma and sensitivities around children affected by the foreign fighter phenomenon, the individualized approach described above should be complemented by, and situated within, a community-based approach that seeks to support all extremely vulnerable children. Children should not be isolated or provided with special programmes. Rather, services should

³⁰³ Ibid., paras. 50-52.

³⁰⁴ Ibid.

³⁰⁵ Ibid., para. 53; Convention on the Rights of the Child (1989), art. 9(3).

be embedded within existing social service systems and adapted or strengthened according to their needs. The community-based approach reduces the likelihood of stigmatization or resentment against returning children by, for example, providing them with services or benefits that are not widely available to other children and which promote their effective reintegration. At the same time, the individualized assessment should also consider the possibility of ‘peer pressure’ within the given community which may prevent effective rehabilitation.

Example from the Netherlands— Individualized return plans

In the Netherlands, before a child returns from a conflict-affected area, the Child Protection Board develops a return plan for him or her. The plan identifies who will take care of the child after his or her return (because the mother is most likely in detention); what kind of professional care the child should receive; which school is best positioned to receive the child; and which safety measures, if any, should be taken to ensure both the safety of the child and his or her environment. The best interests of the child are always the primary consideration that guides the process. During the process, the Child Protection Board may request advice from an expert pool, which contains experts in the fields of trauma and ideology, who have been convened to contribute to the planning process. As it takes time to repatriate such children, an officer assigned to each case contacts the child’s family members in the Netherlands to request updated information on the situation of the child, on a monthly basis. The municipalities become the owners of the return plans. They organize round tables to discuss the situation with the concerned municipalities; and they are responsible for ensuring that the implementation conditions of the return plans are met. The Child Protection Board participates in the round tables, along with the police, public prosecutor, the intelligence service, a mental health organization, and the probation service, among others.

Gender sensitivity

155. In taking an individualized approach to rehabilitation and reintegration, the gender dimension of violence must also be taken into consideration. States must ensure that the measures take into account the different risks facing girls and boys in relation to violations or abuses.³⁰⁶ The Security Council has underlined the importance of considering the special needs and particular vulnerabilities of girls affected by armed conflict, including those who have been orphaned, sexually exploited and used in hostilities.³⁰⁷ The specific needs of girls and boys, as well as children with disabilities, need to be addressed, including in relation to their access to health care, psychosocial support and educational programmes.³⁰⁸ Educational measures must be prioritized and be designed to improve children's pro-social attitudes, competencies and behaviours.³⁰⁹

Whole-of-government approach

156. The Security Council highlighted the importance of a “whole-of-government approach” in providing timely and appropriate reintegration and rehabilitation assistance to children affected by the foreign fighter phenomenon.³¹⁰ This approach also reflects appropriate protective measures required under the Convention on the Rights of the Child, which should cut across “all sectors of Government” within an “integrated, cohesive,

interdisciplinary and coordinated system”.³¹¹ These measures should clarify: “(a) who has responsibility for the child and family from reporting and referral all the way through to follow-up; (b) the aims of any course of action taken—which must be fully discussed with the child and other relevant stakeholders; (c) the details, deadlines for implementation and proposed duration of any interventions; and (d) mechanisms and dates for the review, monitoring and evaluation of actions”.³¹² Due process must be respected at all times and in all cases with the best interests of the child being the primary consideration.³¹³ It should be noted that the role of different elements of a multi-disciplinary approach may change during reintegration depending on the needs and situation of the individual child which may continue into early adulthood.

157. Notably, the Security Council has recognized the role that civil society organizations can play in contributing to rehabilitation and reintegration due to their relevant knowledge of, access to and engagement with local communities. States are encouraged to engage with these organizations proactively to develop rehabilitation and reintegration strategies.³¹⁴ Families, including extended families, and communities also play critical roles as individuals cannot integrate into communities alone. The Council has further recognized the important role of local and religious leaders and civil society networks in combating stigmatization of children, especially girls, including those born as a result of sexual violence during conflict.³¹⁵

306 Committee on the Rights of the Child, general comment No. 13 (2011), para. 72.

307 Security Council resolution 1314 (2000), para. 13.

308 Security Council resolutions 2225 (2015), para. 18; and 2427 (2018), para. 14.

309 Committee on the Rights of the Child, general comment No. 13 (2011), para. 52.

310 Security Council resolution 2396 (2017), para. 36.

311 Committee on the Rights of the Child, general comment No. 13 (2011), para. 39.

312 *Ibid.*, para. 53.

313 *Ibid.*, para. 54.

314 Security Council resolution 2396 (2017), para. 32.

315 Security Council resolutions 2225 (2015), para. 9; and 2427 (2018), paras. 9 and 28.

Finally, given the cross-border nature of violence and abuses faced by children affected by the foreign fighter phenomenon, specific legislation, policies, programmes, and partnerships between concerned States may be required.³¹⁶

Example from Indonesia— A memorandum of understanding for a whole-of-government approach

The Government of Indonesia has emphasized a “whole-of-government approach”. Multiple agencies work closely in relation to families returning from conflict-affected areas. Agencies involved include the National Agency for Counter Terrorism, the Ministry of Home Affairs, the Ministry of Social Affairs, the Indonesian National Police and the Commission for the Protection of Children. A memorandum of understanding was signed by these departments for the rehabilitation and reintegration of returnees, including children. The role of civil society organizations has also been very important. They play a critical role in supporting social workers working with returnees and advising local governments to ensure protection of the rights of returnees.

5.2 Key Recommendations

158. The following are recommended:

- a. Ensure that the primary goals of all measures concerning children affected by the foreign fighter phenomenon are protection, rehabilitation and reintegration. This does not preclude investigation and prosecution of a child above the minimum age of criminal responsibility, according to international juvenile justice principles and fair trial standards, when credible evidence of commission of a crime exists. However, alternatives to prosecution should always be considered.
- b. Design and implement strategies and programmes to facilitate children’s repatriation, in cases in which they are outside of the country of nationality, rehabilitation and reintegration into their families and societies, without stigmatization or discrimination.
- c. Upon repatriation, engage children in standard child protection systems without isolating them, and ensure they receive rehabilitation and reintegration services, including, when needed, support in relation to their mental health, psychosocial well-being and gender-based violence.
- d. Ensure that design and delivery of rehabilitation and reintegration programmes are:
 - *Based on the best interests of the child principle;*
 - *Reflecting the views of the child;*
 - *Provided through a multi- and inter-sectoral approach;*
 - *Age, gender and disability sensitive;*

³¹⁶ Committee on the Rights of the Child, general comment No. 13 (2011), para. 76.

- *Localized;*
 - *Respectful of children's religious and cultural identities;*
 - *Non-stigmatizing; and*
 - *Built on the strengths and services existing in the community, including extended families.*
- e. Take an individualized approach to each child, family and community concerned, taking the unique context, needs, resource availability and limitations into consideration.
- f. Prepare and sensitize families and communities that will receive children affected by the foreign fighter phenomenon, especially children returning from conflict-affected areas, while respecting the right to privacy and avoiding stigmatization. Address any factor in the community that may render rehabilitation challenging, including the existence of peer-pressure.
- g. Ensure periodic evaluation of rehabilitation and reintegration programmes, including their effectiveness. Conduct risk assessments of any adverse human rights impacts.

SECTION 6: Juvenile Justice

159. The Security Council has emphasized that children who were recruited in violation of international law by armed groups and have been accused of committing crimes during armed conflicts should be treated primarily as victims of violations of international law.³¹⁷ The Council has specifically urged Member States to consider non-judicial measures as alternatives to prosecution and detention that focus on the rehabilitation and reintegration of children formerly associated with armed groups.³¹⁸ Guiding principle 31 of the Security Council Counter-Terrorism Committee's guiding principles on foreign terrorist fighters recommends that Member States "consider appropriate administrative measures and/or rehabilitation and reintegration programmes as alternatives to prosecution in appropriate cases. Such measures should be used in a manner compliant with applicable international human rights law and national legislation and should be subject to effective review".³¹⁹ The Committee's principles reflect the Principles and Guidelines on Children Associated with Armed Forces and Armed Groups (the Paris Principles) which prioritize reintegration and rehabilitation of children primarily as victims of violations of international law. The preference of seeking alternatives to prosecution is based on the status of children as victims of violations of international law regarding child recruitment and the use of children in hostilities and is supported by an approach that aims to minimize revictimization. In reality, a significant number of children—especially teenage boys—

have been systematically arrested and detained for their alleged association with designated terrorist groups.³²⁰ They are exposed to harsh detention conditions, charged under anti-terrorism laws and even sentenced to capital punishment.

160. Although children have agency, whether children ever truly voluntarily associate with armed groups is contested, as those who join armed groups often do so under extreme manipulation, coercion and duress.³²¹ Nonetheless, children who have reached the age of criminal responsibility may be criminally liable for certain actions, but only with due consideration to their right to child-specific due process and minimum standards based on their age, needs and specific vulnerabilities, and with respect for internationally recognized juvenile justice and fair trial standards. During the course of judicial proceedings, including investigation and trial, consideration should be

³¹⁷ Security Council resolution 2427 (2018), para. 20.

³¹⁸ *Ibid.*, para. 21; see also Security Council resolution 2225 (2015), para. 9.

³¹⁹ S/2015/939, annex II, (2018), guiding principle 31.

³²⁰ A/HRC/40/49, para. 18; A/72/865, paras. 76, 186 and 224; A/73/278, para. 9.

³²¹ International Criminal Court, 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 in the case *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-1229-AnxA), 18 March 2008, paras. 10, 14, 18, 21 and 23, (arguing that: "(1)The distinction between voluntary enlistment and forced recruitment is a distinction without meaning in the context of armed conflict because even the most voluntary of acts can be a desperate attempt to survive by children with a limited number of options in the context of war; and (2) Using children to participate actively should be interpreted broadly since children are required to play multiple support roles including as spies, messengers, porters, scouts, and cooks, that place them in danger."); see also International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01//06, judgement of 14 March 2012; United Nations University, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (2018).

given to the coercive environment under which the child was living or forced to act. The best interests of the child should be the primary consideration when applying counter-terrorism laws and policies to children.³²² The justice process should have as the primary goal the ultimate rehabilitation and reintegration of the child concerned.

161. On the topic of children recruited by armed groups that are designated terrorist groups, the United Nations Office of Drugs and Crime (UNODC) has developed a Handbook on children recruited and exploited by terrorist and violent extremist groups.³²³ The Handbook provides guidance for developing a comprehensive approach to the treatment of children recruited and exploited by terrorist and violent extremist groups, from prevention to reintegration intervention. Such guidance is anchored in the analysis of the international legal framework and in the identification of relevant promising practices across different regions of the world. The Handbook, as well as the law and standards summarized in the following section, offers a useful starting point for how to support children who may be in contact with the law.

³²² A/HRC/40/28, para. 60.

³²³ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (2017). The Handbook is available in Arabic, English, French, in printed and electronic versions.

6.1 International Law and Standards

6.1.1 Promoting Alternatives to Prosecution

Children as victims of international law violations

162. The Security Council has emphasized that children who have been recruited by armed groups in violation of international law and are accused of having committed crimes during armed conflict should be treated primarily as victims of violations of international law.³²⁴ Security Council resolution 2396 (2017) stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, taking into account gender and age sensitivities.³²⁵

163. Children who are used by designated terrorist groups are victims of violations of broader international laws against recruitment and use of a child.³²⁶ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits recruitment and use in hostilities of anybody under 18 years of age by armed groups.³²⁷ International humanitarian law – under the Additional Protocols to the Geneva Conventions of 1949 and customary humanitarian law – also prohibits recruitment and

³²⁴ Security Council resolution 2427 (2018), para. 20.

³²⁵ Security Council resolution 2396 (2017).

³²⁶ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups* (2017), 40–46.

³²⁷ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), art. 4.

use of anybody under 15 years old in hostilities.³²⁸ Conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities constitutes a war crime in international and non-international armed conflicts under the Rome Statute of the International Criminal Court.³²⁹ Finally, the International Labour Organization (ILO) Convention No. 182 on the worst forms of child labour also requires States to prohibit and eliminate “forced or compulsory recruitment of children for use in armed conflict” as a matter of urgency.³³⁰

164. The Security Council has recognized that children may have been required to serve in designated terrorist groups in many different roles, including as supporters and facilitators.³³¹ The use of children by designated terrorist groups should be interpreted broadly, as children may have been used as “fighters, cooks, porters, messengers, spies or for sexual purposes”. Use should not be limited to direct participation in hostilities.³³²

165. Children affected by the foreign fighter phenomenon may also be victims of abduction, sexual violence and trafficking. The

Security Council recognizes that there is a link between abduction, recruitment and trafficking of children. Children in situations of armed conflict can be particularly vulnerable to trafficking,³³³ while some children are victims of trafficking and exploitation by designated terrorist groups. Victims of trafficking and abduction should not be punished for crimes committed as a result of their being trafficked.³³⁴

Example from Morocco— Rehabilitation prioritized

In Morocco, rehabilitation is prioritized over criminal prosecution, taking into consideration the fact that prosecution itself may further traumatize children returning from conflict-affected areas. The Government has devised a rehabilitation programme with the aim of eventually releasing the children to their families. The programme also contains reconciliation aspects developed in consultation with religious scholars.

328 Additional Protocol I (1977) to the Geneva Conventions, art. 77(2); Additional Protocol II (1977) to the Geneva Conventions, art. 4(3)(c); ICRC, Customary International Humanitarian Law database, rule 136 recruitment of child soldiers, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136; ICRC, Customary International Humanitarian Law database, rule 137 on participation of child soldiers in hostilities, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule137.

329 Rome Statute for the International Criminal Court (1998), art. 8; Security Council resolution 1261(1999), para. 2; Security Council resolution 1460 (2003), para. 8; Security Council resolution 2143 (2014), para. 5.

330 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), art. 3(a).

331 Security Council resolution 2396 (2017), para. 31.

332 The Paris Principles on Children Associated with Armed Forces or Armed Groups (2007), para. 2.1.

Voluntariness of association and coercive environment

166. Although children are recognized as agents in their own right, whether they can ever be considered to have intentionally associated with armed groups is disputed. Given that the recruitment that appears to be most voluntary could be an attempt to survive in the context of war with limited options, distinction between voluntary and forced recruitment may be artificial. Children

333 Security Council resolution 2427 (2018), para. 39.

334 See, for example, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

who join armed groups often do so under extreme manipulation, coercion, and duress. Children may be unable to avoid association with armed groups, including designated terrorist groups, that are in control of a territory, and whose tactics, methods and milieu are inherently coercive. Most children associated with designated terrorist groups experience some form of coercion or constraint.³³⁵ Even when children exhibit some degree of agency in joining armed groups, they often join to meet basic needs.³³⁶ Children living in territory that is controlled by armed groups often have no choice but to become affiliated in some capacity, even if their affiliation is limited to non-combative roles, such as forced marriage or participating in training or the education system.³³⁷ Therefore, prosecution and criminalization of children formerly under the control of designated terrorist groups should not be undertaken, particularly when the association is only alleged.

167. Assessment of the child's criminal responsibility should be made on a case-by-case basis, and should include any mitigating factors. States should seek to provide clear criteria for competent authorities in this regard. During any contact with the law, consideration should be given to the coercive environment under which children were living or forced to act. Factors that must be considered include the child's age when he or she became involved in the armed group; reasons for joining; consequences of refusal to join and consequences of attempting to leave; length of time as a member; forced use of drugs, alcohol and medication; level of education and understanding; trauma, abuse or ill-treatment

335 A/HRC/40/28, para. 36.

336 Ibid., para. 37.

337 United Nations University, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (2018), 240.

suffered; and absence of positive role models.

168. At the same time, under national laws, association or affiliation with armed forces or groups often includes girls and boys who serve in support roles, and in some legislation, includes preparatory or ancillary actions, material support, or even posts on social media due to broad counter-terrorism legislation.³³⁸ Such laws, as applied to children, violate international law. Children, as victims of recruitment and use, should not face criminal charges for acts of association with a group deemed a designated terrorist group by the United Nations. Rather, States should investigate and prosecute adults who recruit children or who manipulate, coerce or order them to commit terrorist acts. Likewise, expressions of support for particular groups, acts, or ideologies that do not rise to the level of incitement to discrimination, hostility, or violence, or to committing terrorist acts, should not constitute criminal offenses.³³⁹

6.1.2 International Justice Standards for Children

169. Many children affected by the foreign fighter phenomenon are under the minimum age of criminal responsibility (Committee on the Rights of the Child recommends 14 years), and/or are merely living under the control of armed groups. For these children, there is no legitimate reason for prosecution. Children should not be prosecuted for membership in an armed group nor affiliation based on family ties or other association, as recruitment and use of children by

338 Ibid., 42, 220.

339 International Covenant on Civil and Political Rights (1966), arts. 19 and 20; General Assembly resolution 26/288, Global Counter-Terrorism Strategy (2006) and Security Council resolution 1624 (2005).

armed groups is a violation of their rights.

170. For any child over the minimum age of criminal responsibility who may have been actively involved in conflict, States are encouraged to use community-based alternatives to prosecution and detention, in accordance with international standards applicable to all children who are in contact with the law. These alternatives include pretrial diversion, community service, probation and conditional or suspended sentences.³⁴⁰ Such standards apply equally to children associated with armed groups, including designated terrorist groups.

171. Even used as a last resort, any prosecution must adhere to child-specific due process, and minimum standards based on a child's age, needs, and specific vulnerabilities. Member States' actions must be consistent with international human rights law, as related to domestic law enforcement and counterterrorism.³⁴¹ Due process guarantees must be consistent with all international human rights law.³⁴² Juvenile justice systems should always be used for children, rather than military or special courts, including in the case of terrorism or national security offenses.³⁴³ States should provide services for rehabilitation and preparation for reintegration with families and communities as early as possible, including during times when children are in detention or serving custodial sentences.

³⁴⁰ The Beijing Rules (1985), rule 11.4.

³⁴¹ Security Council resolution 2396 (2017), para. 7.

³⁴² General Assembly resolution 72/180 (2018) on protection of human rights and fundamental freedoms while countering terrorism, para. 5(s).

³⁴³ A/HRC/40/28, para. 52.

Minimum Age of Criminal Responsibility

172. The Committee on the Rights of the Child—a body monitoring the implementation of the Convention on the Rights of the Child by States parties—recommends that all children under age 18 be tried as children.³⁴⁴ In addition, the Committee now recommends a minimum age of criminal responsibility to be set between the ages of 14 and 16.³⁴⁵ The Committee recommends that all children under age 18 be tried as children if they have reached the minimum age of criminal responsibility. Therefore, at a minimum, no child under 14 should be prosecuted. Instead, social services, including case management, and reintegration services, should be provided to address the root causes of their conduct and the consequences of their experiences.³⁴⁶

173. Criminal accountability measures shall consider the child's age at the time of the commission of a crime, and simultaneously support the

³⁴⁴ Committee on the Rights of the Child, general comment No. 10 (2007), para. 38; see also Human Rights Committee, Concluding Observations: Belgium, CCPR/C/BEL/CO/5 (2010), para. 23 (“The State party should review its legislation with a view to preventing minors between the ages of 16 and 18 from being tried as adults.”); Committee against Torture, Concluding Observations: Ethiopia, CAT/C/ETH/CO/1 (2011), para. 27 (recommending that the state “classify persons above 15 and under 18 years of age as “young persons” who are subject to the lighter penalties in articles 157-168 of the Criminal Code and may not be kept in custody with adult criminals”); Committee against Torture, *Concluding Observations: Luxembourg*, CAT/C/LUX/CO/5 (2007), para. 10 (calling on state to “do everything possible to ensure that minors are never tried as adults”); A/HRC/13/30/Add.2, para. 31 (expressing concern at “the exclusion of children between 16 and 18 years of age from the juvenile justice system”).

³⁴⁵ Committee on the Rights of the Child, general comment No. 10 (2007), para. 35; see also Inter-American Commission on Human Rights Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas* (2011), available at www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf, paras. 39-47.

³⁴⁶ Committee on the Rights of the Child, general comment No. 24 (2019), para. 38.

child's rehabilitation.³⁴⁷ With respect to any child who may be prosecuted for crimes committed while part of an armed group, during the course of any trial, consideration should be given to the coercive environment under which the child was living or forced to act. Individuals must never be subject to the death penalty or life imprisonment without parole for acts they may have committed while a child.³⁴⁸ Juvenile justice systems should prevent further exposure to violence.

174. Being charged with terrorism-related offences or offences against national security shall not constitute cause to rebut the conclusive presumption that a child below the minimum age of criminal responsibility, as defined by domestic legal systems, cannot commit a criminal offence. Equally, it shall not constitute cause to prosecute and try a child—or a person who was below 18 at the time of the alleged offence—as an adult. Domestic legislation shall not define different (lower) ages of criminal responsibility solely for terrorism related offences or for offences against national security.

Procedural safeguards

175. If children over the minimum age of criminality are tried, hearings and trials must be before independent and impartial judicial bodies. They must be afforded all due process guarantees under international standards, including non-retroactive juvenile justice, presumption of innocence, right to counsel, right to be heard, right to effective participation in the proceeding, includ-

ing through interpreters, and prompt and direct information of the charges.³⁴⁹

176. Regardless of the type of alleged crime committed by a child, States should also apply the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), which provide basic procedural safeguards for children, many of which are restated in the Convention on the Rights of the Child.³⁵⁰ The Beijing Rules state that the juvenile justice system shall emphasize:

- the well-being of the child, and ensure proportional responses to offenders³⁵¹;
- the presumption of innocence as well as rights to notification charges, to counsel and representation, to presence of guardian/parent, to confront witnesses, and to appeal³⁵²;
- judgement without delay, with contemplation of release from detention³⁵³;
- contemplation of diversion at any decision-making point³⁵⁴ with community-based diversion recommended³⁵⁵;
- detention for as short a time period as is possible, as a last resort, and placement to alternatives to detention when

347 Convention on the Rights of the Child (1989), arts. 37, 40; Committee on the Rights of the Child, general comment No. 24 (2019), para. 75.

348 International Covenant on Civil and Political Rights (1966), art. 6, para. 5; Convention on the Rights of the Child (1989), art. 37, para (a); Committee on the Rights of the Child, general comment No. 24 (2019), para. 75.

349 International Covenant on Civil and Political Rights (1966), art. 14; Convention on the Rights of the Child (1989), art. 40.

350 The Beijing Rules (1985). Standards for children in contact with the law also are enshrined in the Convention of the Rights of the Child (1989), International Covenant on Civil and Political Rights (1966), and General Assembly resolution 70/175 (2015), the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

351 The Beijing Rules (1985), rule 5(1).

352 *Ibid.*, rule 7(1); 15(1).

353 *Ibid.*, rule 10(2).

354 *Ibid.*, rule 11(2).

355 *Ibid.*, rule 11(3).

possible³⁵⁶;

- prohibition of capital punishment³⁵⁷;
- most limited restriction on personal liberty as is possible³⁵⁸;
- least possible use of institutionalization³⁵⁹;
- provision of education, vocational, or other rehabilitative services³⁶⁰ and attention to special needs of females.³⁶¹

177. The Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context³⁶² provides specific guidance with respect to terrorist contexts. The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)³⁶³ and United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)³⁶⁴ are additional standards on justice for children. They include the right to an identity and a nationality, the right to grow up in a family environment and the right to special protection when deprived of that family environment, as well as the right to legal counsel, to be held separately from adults unless in their

356 Ibid., rules 13(1), 13(2).

357 Ibid., rule 17(2).

358 Ibid., rule 17(1).

359 Ibid., rule 19(1)

360 Ibid., rule 24(1).

361 Ibid., rule 26(4).

362 Global Counterterrorism Forum, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context, available at www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Neuchâtel-Memorandum-on-Juvenile-Justice.pdf

363 General Assembly resolution 45/112 (1990), United Nations Guidelines for the Prevention of Juvenile Delinquency, available at www.un.org/documents/ga/res/45/a45r112.htm (the Riyadh Guidelines).

364 General Assembly resolution 45/113 (1990), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, available at www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx.

best interests and to receive services while in detention.

178. Importantly, to ensure effective implementation of these rights, it is critical that personnel involved in the administration of juvenile justice are competent and have proper training. They should also be informed about each child's individual circumstances, as well as the needs of the most vulnerable children.³⁶⁵

Example from France—Educating professionals working with children

The Government of France has a small group of trainers who provide training for all professionals, such as judges, who work with children affected by the foreign fighter phenomenon. The trainers include judges and psychologists. Training covers information about the trauma suffered by children and the reality of life in conflict zones. This training was found to be helpful as it enables children to establish better relationships with these professionals if the latter is aware of what each child has gone through.

Detention as a last resort

179. Children should be detained only as a last resort, for the shortest possible period of time. They should not be deprived of liberty for protective purposes. Regardless of the nature of the charges against them, children should not be detained for administrative purposes. Children formerly associated with armed groups

365 Committee on the Rights of the Child, general comment No. 24 (2019), para. 40.

should not be detained or prosecuted solely for their association or membership in the group (see chapter 7 on deprivation of liberty).

In the 2018 Addendum to the 2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177),

the Security Council Counter-Terrorism Committee specifies that in cases involving children, States should ensure that competent authorities:

- are provided with appropriate scope for discretion at all stages of proceedings;
- have at their disposal a variety of alternatives to judicial proceedings and sentencing, including, if appropriate, age-sensitive child-protection measures;
- are provided with clear guidelines with respect to whether, or under what conditions, they should keep a child in detention and in which cases diversion is possible, subject to regulation and review, in accordance with international law and national standards, and bearing in mind that, in cases involving children, detention should be used as measure of last resort; and
- act in accordance with the guidelines regulating pretrial detention and the utilization of other measures of restraint, as provided for in their national criminal legislation and defined in compliance with international law.³⁶⁶

6.2 Key Recommendations

180. The following are recommended:

Decision to investigate and prosecute

- a. Children over the age of criminal responsibility —14, as recommended by the Committee on the Rights of the Child—may be liable for certain actions, when credible evidence exists, but only under internationally recognized justice and fair trial standards, including juvenile justice standards that consider a child's age at the time of the alleged criminal act.
- b. Do not investigate or prosecute a child solely for the child's association with or membership in any group. Children, as victims of recruitment and use, should not face criminal charges for acts of association with a designated terrorist group. Rather, investigate and prosecute adults who recruit children or who manipulate, coerce or order them to commit terrorist acts.
- c. Do not investigate or prosecute anyone for crimes committed by family members.

Procedural safeguards

- d. Treat all children accused of crimes, including terrorism related crimes, in a manner consistent with international juvenile justice and fair trial standards.
- e. During the course of justice proceedings, including trial, consider the coercive environment under which the child was living or forced to act.

Detention and sentencing

- f. Use detention only as the last possible resort for the shortest possible time. Seek alternatives to detention, including community-based/non-custodial/care facilities.
- g. When there is any form of detention or sentencing for children, its aim should be rehabilitation and reintegration.³⁶⁶
- h. Never impose capital punishment or life imprisonment without the possibility of release on an individual who committed a crime as a child.

³⁶⁶ Committee on the Rights of the Child, general comment No. 24 (2019).

SECTION 7: Deprivation of Liberty

181. Under international human rights law, “deprivation of liberty” is defined as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”³⁶⁷ Such action may include arrests, pre-trial detention, “preventive” detention or “administrative detention”.³⁶⁸

182. As a matter of principle, deprivation of liberty is almost never in the best interest of the child. Use of deprivation of liberty of a child should be a last resort when no other less restrictive alternatives are available and for as short a period as possible. When detention is used, it poses other serious challenges that can be harmful to children. Deprivation of liberty of children affected by the foreign fighter phenomenon, including incarceration and detention, is also likely to be counter-productive from a security perspective. Such measures can make recidivism more likely, create legitimate grievances in certain communities and reduce the likelihood of successful reintegration efforts.³⁶⁹

183. Some children affected by the foreign fighter phenomenon are deprived of liberty for their or their parents’ alleged association with

367 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002), art. 4(2).

368 CTITF Working Group on protecting human rights while countering terrorism, *Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism* (2014), para. 5.

369 United Nations University, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (2018), 224; UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups* (2017), 98.

designated terrorist groups.³⁷⁰ Security Council resolutions 2178 (2014) and 2396 (2017) oblige Member States to establish serious criminal offenses and to investigate and prosecute those suspected of being foreign terrorist fighters. Most individuals who are suspected of being foreign fighters face detention and prosecution in the country of conflict or upon return to their home countries. Children of foreign women are detained along with their parents or caregivers. As previously noted, many children, particularly teenage boys, have been systematically arrested and detained for their presumed affiliation with designated terrorist groups.³⁷¹ Older boys are also frequently detained along with their fathers during investigations. They are exposed to harsh detention conditions, charged under anti-terrorism laws and even sentenced to capital punishment. In addition, there is an overreliance on administrative detention for children.³⁷² There are also situations in which a large number of women associated with designated terrorist groups, along with their children, are held in detention or camps for long period of time.³⁷³

184. Given the prevalence of deprivation of liberty as a response to children affected by the foreign fighter phenomenon, the present chapter briefly summarizes relevant human rights and humanitarian principles applicable to all children deprived of liberty. The chapter also touches upon

370 A/72/865, para. 224.

371 A/HRC/40/49, para. 18; A/72/865, paras 76, 186, 224; A/73/278, para. 9.

372 UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups* (2017), 97.

373 A/HRC/40/70, para. 45.

considerations to be made when a child is being detained together with his or her parent, as well as detention of a child as part of the juvenile justice process. Because detention of children for reasons related to the migration status of them or their parents is prohibited under international law.³⁷⁴

7.1 International Law and Standards

7.1.1 Key Principles and Standards Concerning Deprivation of Liberty of Children

Right to personal liberty

185. Under international law, every person has the right to liberty.³⁷⁵ In relation to children who are in contact with law, the Convention on the Rights of the Child requires that children be detained only as a last resort and for the shortest amount of time.³⁷⁶ As noted earlier, the Security Council has also urged Member States to consider non-judicial measures as alternatives to prosecution and detention for children formerly associated with armed groups.³⁷⁷

Prohibition of arbitrary detention of children

186. International human rights law and standards set out minimum requirements to ensure that individuals are not deprived arbitrarily or unlawfully of their liberty and that rights of

detainees are not violated. The Convention on the Rights of the Child prohibits the arbitrary or unlawful deprivation of liberty of a child.³⁷⁸ The Security Council has echoed the principle that no child should be deprived of his or her liberty unlawfully or arbitrarily and has called on all parties to conflict to cease unlawful or arbitrary detention.³⁷⁹

187. “Arbitrariness” should be interpreted broadly “to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.³⁸⁰ Any decision to deprive a child of his or her liberty must take into account his or her best interests as a primary consideration, including with regard to the duration and conditions of detention.³⁸¹ Detention must be based on grounds previously established by law. These grounds for detention cannot be assumed, particularly on blanket assumptions relating to the age of the child and must be determined on a case-by-case basis.

³⁷⁴ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 23 (2017) of the Committee on the Rights of the Child, paras. 5-13.

³⁷⁵ International Covenant on Civil and Political Rights (1966), art. 9; Convention on the Rights of Persons with Disabilities (2006), art. 14, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), art. 16.

³⁷⁶ Convention on the Rights of the Child (1989), art. 37.

³⁷⁷ Security Council resolution 2427 (2018), para. 21.

³⁷⁸ Convention on the Rights of the Child (1989), art 37(b).

³⁷⁹ Security Council resolution 2225 (2015), para. 17; Security Council resolution 2427 (2018), para. 13.

³⁸⁰ Human Rights Committee, general comment No. 35 (2014) on article 9 (liberty and security of person), para. 13.

³⁸¹ *Ibid.*, para. 18.

Detention conditions

188. In a case in which a child is deprived of liberty, international norms require that the detention conditions meet certain standards. States have a heightened duty of care towards individuals deprived of their liberty and to take any necessary measures to care for their life and bodily integrity.³⁸² Children must be treated with special respect and protection, including when they are deprived of their liberty.³⁸³ Fundamentally, children of detainees or prisoners should not be treated as detainees or prisoners themselves.³⁸⁴ To prevent any physical or psychological harm to such children, the environment where they live should be as close as possible to a normal environment outside of detention. The detention facility should be flexible enough to meet the needs of detainees with children.

189. Some of the practical aspects provided for under relevant international instruments include the following:

- Prohibition against torture and other inhuman treatment: The prohibition against torture and other forms of ill-treatment is considered as a *jus cogens* norm of customary international law, applicable to all States in all circumstances. Some human rights treaties, including the Convention on the Rights of the Child, also codify this requirement. The Convention provides that no child shall be subjected to torture or other cruel, inhuman

or degrading treatment or punishment.³⁸⁵ The Convention also requires States parties to treat every child deprived of liberty with humanity and respect for the inherent dignity of the human person.³⁸⁶

Under international humanitarian law, the obligation of humane treatment under Common Article 3 of the Geneva Conventions entails a requirement of humane treatment for children. The determination of whether the treatment of a person deprived of his or her liberty, or the conditions of detention, constitutes cruel or inhuman treatment should be considered not only by the objective elements relating to the severity of the harm, but also the subjective elements relating to the condition of the victim. Significantly, the physical, mental and moral effects of an act or omission on a child depend on the child's age and, as a consequence, so do the degrees and kinds of suffering that would amount to a violation of Common Article 3.

- Safety and security: Detention conditions themselves can be conducive to various forms of violence against children. To address that, States are urged to provide appropriate care and protection and to promote good practices to strengthen the protection and safety of children, including for those living in custody with a parent, such as the provision of special mother-and-child units.³⁸⁷ States are encouraged to allow civilian child protection actors access to children deprived of liberty, including children detained or imprisoned

³⁸² Human Rights Committee, general comment No. 36 (2018), para.25.

³⁸³ ICRC, Customary International Humanitarian Law database, rule 135 on children, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

³⁸⁴ The Bangkok Rules (2010), rule 49.

³⁸⁵ Convention on the Rights of the Child (1989), art. 37(a). Also see Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987) art. 2, and International Covenant on Civil and Political Rights (1966), art. 7.

³⁸⁶ Convention on the Rights of the Child (1989), art. 37(c).

³⁸⁷ A/RES/69/194, paras. 38(d), (g).

for association with armed groups,³⁸⁸ as well as independent human rights monitors.

- Family unity and separation of adults and children: Generally, except for cases in which families are accommodated as family units, children must be held in quarters separate from those of adults.³⁸⁹ While international humanitarian law does not exclude the detention of children, it emphasizes that they must be lodged together with their parents if they were interned during an international armed conflict in accordance with the Fourth Geneva Convention.³⁹⁰ Customary international humanitarian law also requires that family life be respected as far as possible (see chapter 3 on preserving family unity).³⁹¹ If not with parents, children should be kept in a juvenile facility separate from adults. When a child is detained, States shall notify the parents and family of any detained child about the child's whereabouts and provide information to the child about the whereabouts of his or her family members and facilitate family contact. Establishment of family links is critical not only to supporting family unity and to the rehabilitation and reintegration of the child, but also to

reducing fear and anxiety related to missing family members.

- Registration: At the time of admission, the number and personal details of children being admitted should be recorded, including names and ages.³⁹² All information relating to a child should be kept confidential and used only in a manner consistent with the best interests of the child.³⁹³

Examples from Morocco and Thailand—Birth registration

In Morocco, children born in prison are registered. Information about the address of the prison or the fact that the child was born in prison is not included in the registration documents. Similarly, in Thailand, even if a child is born in a prison, it is prohibited to record the prison as the birth location.

- Adequate standard of living: Adequate and timely meals, a healthy environment and regular exercise opportunities should be provided.³⁹⁴ There should be a regular supply of water available for the personal care of children and mothers.³⁹⁵
- Health care: Each child should undergo health screening, preferably by a child health specialist. Suitable health care equivalent to that available in the community should be

388 Security Council resolution 2427 (2018), para. 20.

389 ICRC, Customary International Humanitarian Law database, rule 120 on accommodation for children deprived of their liberty, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule120.

390 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), art. 82; ICRC, Customary International Humanitarian Law database, rule 120 on accommodation for children deprived of their liberty, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule120.

391 ICRC, Customary International Humanitarian Law database, rule 105 on respect for family life, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105.

392 The Bangkok Rules (2010), rule 3(1).

393 Ibid., rule 3(2).

394 Ibid., rule 48(1).

395 Ibid., rule 5.

provided, including regular vaccination.³⁹⁶ Specialists should monitor the development of children in detention in collaboration with community health services.³⁹⁷ Pregnant women and breastfeeding mothers should receive appropriate health advice and diets.³⁹⁸ The staff of detention facilities should also receive basic training on the health care of children so that they can respond appropriately in times of need and emergencies.³⁹⁹

- **Education and recreation:** Children should receive adequate, age-appropriate education.⁴⁰⁰ Children should also be able to participate in recreational activities appropriate to their age and in cultural life and the arts.⁴⁰¹
- **Facilities:** There should be child care facilities or arrangements to enable detained parents to participate in activities. At the same time, parents should be allowed to have maximum possible opportunities to spend time with their children.⁴⁰² It is also recommended that there be sufficient social services of an adequate quality, including health and educational facilities.⁴⁰³ Children should be allowed to move freely in open spaces and playgrounds, as they would if they were in the community.

396 Ibid., rule 9; UNODC, the Bangkok Rules Commentary (2011), rules 9 and 49-52.

397 The Bangkok Rules (2010), rule 51(1).

398 Ibid., rule 48(1).

399 Ibid., rule 33.

400 Convention on the Rights of the Child (1989), art. 28.

401 Ibid., art. 31.

402 The Bangkok Rules (2010), rules 42 and 50.

403 Committee on the Rights of the Child, Report and recommendations of the day of general discussion on “Children of incarcerated parents” (2011), para. 34.

Example from Belgium— Infrastructure for children

In Belgium, infrastructure appropriate for children are provided to those accompanying mothers in detention. Such infrastructure often includes a separate room next to and open to the mother’s cell. In all cases, the child has a separate bed. The room has all the necessary equipment for the stay of an infant or a very young child. The cells are open as often as possible (open during the day, closed for the nights). In principle, the child can move around freely. He or she also has access to the courtyard with games adapted to small children. The child has also toys in the prison cell. Relatives come to the prison regularly to play with the child. Children are also able to leave the prison regularly, including to have contact with his or her other parent (or other relatives). In order to avoid the child’s isolation from society, there are many support and assistance services that are responsible for maintaining the child’s relationships with the outside world. This includes ensuring maximum contact with the rest of the family, especially the father and grandparents. In addition, the child also regularly leaves prison accompanied by an adult, either to spend the day in the nursery or simply to enjoy the fresh air.

7.1.2 Deprivation of Liberty as Part of Juvenile Justice Process

190. The Convention on the Rights of the Child and international humanitarian law require that every child in detention be treated with humanity and respect for his or her inherent dignity, in

a manner that meets the needs of the child, depending on his or her age.⁴⁰⁴ Deprivation of liberty must not place a detained child outside the protection of the law.⁴⁰⁵ All provisions under the Convention on the Rights of the Child are applicable to children deprived of liberty, including the rights to privacy and to the highest attainable standards of health and to education. In addition, States must also adhere to protections under the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) and other international standards.

191. Protections afforded under international human rights law to children deprived of liberty as part of the juvenile justice process includes the judicial review of detention and other fundamental due process and judicial guarantees.⁴⁰⁶ For example, as soon as a child is detained on a criminal charge, he or she should be brought before a judge or other officer authorized by law to exercise judicial power to review the detention.⁴⁰⁷ The child should also be able to challenge the lawfulness of detention at any time.⁴⁰⁸ Whenever possible, detention pending trial should be replaced by alternative measures⁴⁰⁹ and conditional release must be used to the greatest extent

and as early as possible.⁴¹⁰ Children should not be held longer than what is permitted for the crimes for which they are being charged.

192. As summarized in the previous section, children should be held separately from adults unless it is not in their best interest, and in facilities that are age and gender-appropriate.⁴¹¹ Care, protection and all necessary individual assistance, including social, educational, vocational, psychological, medical and physical support, should be provided in view of the child's age, sex and personality.⁴¹² Children have a right to legal counsel and to receive services while they are in detention, so that they will be able to recover and reintegrate with their families and communities upon release.

193. Some national legislation allows for administrative detention on security grounds, preventive detention on grounds of terrorism or national security related risks, police custody without charges beyond the ordinary police custody delays, or any other analogous exception to the ordinary grounds and delays for detention. Such exceptional detention regimes shall not, under any circumstances be applicable in the case of children allegedly associated with armed groups, including those designated as terrorist groups by the United Nations, or other groups that use terrorist tactics, even in cases in which such exceptional detention regimes might be lawfully applicable to adults.

404 Convention on the Rights of the Child (1989), art. 37(c); Geneva Conventions of 12 August 1949, common art. 3.

405 General Assembly resolution 72/180 (2017), Protection on human rights and fundamental freedoms while countering terrorism, para. 5(c).

406 Security Council resolution 2427 (2018), para. 21; General Assembly resolution 72/180 (2017), Protection on human rights and fundamental freedoms while countering terrorism, para. 5(c).

407 International Covenant on Civil and Political Rights (1966), art. 9(3).

408 *Ibid.*, art. 9(4).

409 The Beijing Rules (1985), rule 13.2.

410 *Ibid.*, rule 28.1.

411 Convention on the Rights of the Child (1989), art. 37(c); The Beijing Rules (1985), rule 13.4.

412 The Beijing Rules (1985), rule 13.5.

On further discussion of deprivation of liberty of children for alleged association with designated terrorist groups, see the UNODC *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (2017), in particular chapter 3(D) on children deprived of their liberty.

Example from Tunisia—A probation system with focus on reintegration.

In Tunisia, a probation system provided under the Child Protection Code since 1995 has been used for reintegration of children charged with terrorism-related offences. Judges appoint social workers as probationary officers. The system allows guarded freedom for a duration of one to three years. It can be extended until the child turns 20 years old. The system aims to facilitate the social reintegration process. During the guarded freedom period, a child is encouraged to participate in various activities, such as education, sports activities and vocational training. The programme is implemented jointly by many institutions and civil society organizations.

7.1.3 Keeping a Child With the Primary Caregiver in Detention

The best interests of the child as a primary consideration in relation to detention

194. In relation to babies and infants whose parents are detained or incarcerated, national laws differ concerning the maximum age at which children are allowed to stay with their parents in prison.⁴¹³ Nevertheless, under the Convention on the Rights of the Child, such a decision must be based on the best interests of the child.⁴¹⁴ The assessment of the best interests of the child is also critical, because whether or not to allow such a stay would also have implications on separating children from a parent or primary caregiver.⁴¹⁵

195. Decisions on whether the best interests of the child are better served if the child lives with the parent in detention or outside should always be assessed on a case-by-case basis, with the best interests of the child as a primary

⁴¹³ UNODC, the Bangkok Rules Commentary (2011), rules 49-52.

⁴¹⁴ The Bangkok Rules (2010), rule 49; UNODC, the Bangkok Rules Commentary (2011), rules 49-52. While the Bangkok Rules primarily concerns female prisoners/detainees, the Rules also recognize that “As the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of children. Accordingly, some of these rules would apply equally to make prisoners and offenders who are fathers”, A/RES/65/229, Annex I, para.12.

⁴¹⁵ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para 32(e).

consideration.⁴¹⁶ The assessment should consider the implications on the child's right to development and their right to family life, among others. Deprivation of family care or long-term disruptions to relations or separations may have serious implications on the child's right to development, as well as his or her actual development.⁴¹⁷ At the same time, children suffer irreparable psychological harm when in detention or situations of restricted liberty. They are more vulnerable during detention, and girls in particular are at risk of violence.⁴¹⁸

196. States should give due consideration to circumstances in which the best interests of the child may be better fulfilled by living with the parent in detention. Such due consideration should encompass the overall conditions of detention, including services available to the child while in detention, availability and willingness of family members to care for the child and the quality of care outside of detention, as well as the particular need for parent-child contact in early childhood.⁴¹⁹ At the same time, the decision to detain a child with his or her parent should be regularly reviewed by judicial authorities, particularly when the investigation or sentence is lengthy. Should it be decided that the best interests of the child are better fulfilled

by removing the child from detention, it is of utmost importance that the separation from the parent be explained carefully in age-appropriate language that children understand, and that they are prepared and handled with extreme care. (See chapter 3 on preserving family unity.)

Example from Belgium—The best interests of the child

Under Belgian law, detained mothers may keep their children with them up to the age of 3 years. This rule applies both to children whose mothers are arrested, convicted and imprisoned and children born in prison. The request must always come from the mother herself. In principle, the decision on whether to allow the mother to do so rests with the prison director. According to the regulations, the prison director may not refuse to allow a woman to be accompanied by a child who is dependent on the mother's care. The best interests of the child are the main criteria in making this determination. If issues arise, the case can be referred to a judge who specializes in juvenile affairs who will make a final decision on the placement in the best interests of the child. Several prisons (Bruges, Berkendael and Lantin) have specific facilities for the care of infants. Theoretically, the rule also applies to fathers, but given the lack of specific infrastructure in male institutions, in practice, a child cannot accompany his or her father.

⁴¹⁶ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 33; UNODC, the Bangkok Rules Commentary (2011), rules 49-52.

⁴¹⁷ Committee on the Rights of the Child, general comment No. 7 (2005), para. 36(b).

⁴¹⁸ UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups* (2017), 98.

⁴¹⁹ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 37; UNODC, the Bangkok Rules Commentary (2011), rules 49-52.

Alternatives to detention

197. Generally, alternatives to detention and imprisonment should be available and applied when parents or primary caregivers are accused of committing an offense. This should be done in consideration of the possible impact of different custodial and non-custodial measures on the best interests of the affected child.⁴²⁰ The preference for non-custodial measures should be applied not only in terms of sentencing, but also in the pre-trial and trial phases.⁴²¹ Non-custodial measures may include house detention, mother-child houses, community service, probation and suspended sentences. Such measures would save affected children from enduring adverse implications from their parents' detention, including their own possible detention.⁴²²

198. Non-custodial sentences are especially preferred for pregnant women and women with dependent children.⁴²³ States should make efforts to keep such women out of detention, with due consideration to the seriousness of the offence at issue and the risk to the public.⁴²⁴ The preference for non-custodial measures for pregnant women and mothers with young children also exists at the regional level. For example, the African Charter on the Rights and Welfare of the Child (1999) provides that a non-custodial sentence should always be considered first and alternative

⁴²⁰ Committee on the Rights of the Child, general comment No. 14 (2013), para. 69.

⁴²¹ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 30.

⁴²² UNODC, the Bangkok Rules Commentary (2011), rules 57-58.

⁴²³ The Bangkok Rules (2010), rule 64.

⁴²⁴ *Ibid.*; Human Rights Council resolution 10/2 (2009), human rights in the administration of justice, in particular juvenile justice, para. 13.

measures to institutional confinement should be established and promoted for such mothers.⁴²⁵ The Council of Europe has also recommended avoiding custodial sentences for pregnant women and developing and using community-based sentences for mothers of young children.⁴²⁶

Example from Morocco—The right to leave detention

In Morocco, article 46 of the Penitentiary Centre Law provides the right to leave the penitentiary centre not only for children, but also for mothers once they serve more than half of their sentences. They can leave the centre and stay with their families for 10 days to maintain family relations. This visit system can also be used for other purposes, such as cultural events and education.

7.2 Key Recommendations

199. The following are recommended:

Avoiding deprivation of liberty

- a. Deprivation of liberty is generally not in the best interests of the child. If used, it should only be used as a last resort because other measures were tried and failed or there are no other less restrictive alternatives. It should be for the shortest period possible and in the least restrictive setting.
- b. Adhere to prohibition of arbitrary detention under international law. All detention must

⁴²⁵ The African Charter on the Rights and Welfare of the Child (1999), art. 30.

⁴²⁶ The Council of Europe, Parliamentary Assembly Recommendation 1469 (2000), on mothers and babies in prison.

- be based on grounds recognized as previously established by law.
- c. In case in which a child is prosecuted and convicted, ensure procedural safeguards to guarantee regular review and consideration of less restrictive alternatives.
- d. Even in situations in which a child is interned in an armed conflict, as provided for under international humanitarian law, for imperative reasons of security rather than on the basis of criminal charges, ensure that such internment is conducted in accordance with international humanitarian and human rights law. Ensure the periodic review of the decision to intern the child and release the child as soon as the reason for the internment ceases to exist.
- e. Never detain anyone based on alleged crimes of family members, except in cases of infants and toddlers whose primary caregivers are detained and remaining with the caregiver is judged to be in the best interests of the child.
- f. Military authorities should never detain any child. If a child is detained by military authorities, hand over the child to civilian authorities as soon as possible.
- i. At all stage of detention, including pre-trial detention, ensure access to essential goods and services, including food, water, hygiene, health-care, mental care, education, psycho-social support, exercise and legal aid. Services provided should be age, gender and disability-specific.
- j. Ensure that children are detained in quarters separated from the adults, unless they are members of the same family, when it is in the best interests of the child.
- k. Adhere to the absolute prohibition of disappearances; ensure record-keeping of each child, including his or her identity and whereabouts and family contact.
- l. Ensure data of each child in detention remains confidential and is accessed only by an authorized officer for purposes authorized under the law. Such data must be destroyed after a period specified by law/regulations.
- m. Ensure that any child in detention can maintain contact with his or her family, including siblings, through correspondence and visits, except in exceptional circumstances.
- n. Any child detained with an imprisoned parent should not be viewed or treated as a prisoner, but rather should be provided facilities and services similar to that in the community.
- o. Ensure access and monitoring by an independent civilian oversight body to any place of deprivation of liberty.

Treatment in detention

- g. Never resort to torture and other cruel, inhuman or degrading treatment or punishment prohibited under international law. Even allegations of terrorist-related offences never justify use of torture.
- h. Ensure humane treatment and conditions in detention that respect the dignity of the child in a manner that considers the specific needs arising from the age and sex of the child.

SECTION 8: Data Collection and Exchange

200. The collection and exchange of data on children by States can serve important protective purposes, particularly to identify missing children and/or children who may have been kidnapped, abducted, trafficked or otherwise exploited. There may also be circumstances when the collection and exchange of data on children may be necessary for security purposes when a child is considered to be a serious risk to him or herself or society. Such measures must be carefully regulated and implemented in accordance with relevant international human rights law, including the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as in compliance with any national and/or regional legislation concerning data protection.

201. In resolution 2396 (2017), the Security Council decided that Member States should develop watch lists or databases of known and suspected terrorists, including foreign terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travelers and conduct risk assessments and investigations, in compliance with domestic and international law, including human rights law. Resolution 2396 does not explicitly require the placement of children on these watch lists or databases.

202. Among the various types of data, watch lists and databases are national and regional alert systems that provide advance warnings and check procedures to assist in the recognition and identification of suspected criminals, terrorists, and suspicious goods or materials at border crossings and in the early detection of suspected or previously unknown criminals and

terrorists. Watch lists and databases provide an important tool for detecting those suspected of terrorism-related offences during routine border, immigration and police checks. Watch lists and databases also facilitate international information sharing. There is no internationally agreed upon definition or distinction between watch lists and databases, though databases are often regarded as more permanent and regulated.

203. The potential misuse or abuse of watch lists and databases can present significant human rights and rule-of-law challenges, especially in cases involving children. In the absence of common international standards for developing and maintaining watch lists and databases, they are generally developed at the national level without clear, internationally recognized legal frameworks. Some of resulting human rights concerns are outlined in the present chapter. In particular, in relation to children, failure to ensure an effective regulatory framework and oversight of collection and exchange of data is contrary to the principle of best interests of the child. Such a failure can lead to community grievances, further exacerbating conflict or negatively affecting social cohesion or conflict resolution initiatives.

204. As with all other actions concerning children, collection and exchange of the information concerning children must be guided by the best interests of the child and non-discrimination principles, as well as the rights of the child, as enshrined in the Convention on the Rights of the Child. The information of children should never be collected and exchanged solely because of their affiliation with their parents, unless information exchange is strictly limited for the purpose of protecting the child and the child's

best interests.⁴²⁷ In addition, children should never be placed on lists that result in the de facto deprivation of certain rights, such as no-fly lists, which have clear implications on the right to freedom of movement as discussed below.

205. The present section outlines key human rights considerations related to collection and exchange of information on children for protective and security purposes. Significantly, human rights implications of data collection and exchange may be different, depending on the purpose for which such measures are undertaken. In this regard, the chapter briefly reviews key human rights that may be impacted by data collection and exchange. The chapter further analyses human rights implications stemming from different aims of collection and exchange of the information of a child, particularly in light of the best interests of the child and non-discrimination principles. The chapter concludes by briefly reviewing the procedural safeguards in collecting and exchanging data of children.

⁴²⁷ United Nations Secretary-General, Key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups (2019), p. 6, providing “Member States should prevent the further stigmatization of children with links to United Nations listed terrorist group where possible. In the absence of criminal evidence, Children should not be placed on watch lists or in other databases based on family affiliation or alleged affiliation with an armed group.”

8.1 International Law and Standards

8.1.1 Rights Affected by Collection, Use and Exchange of a Child’s Information

206. Collection and exchange of a child’s information potentially impacts the enjoyment of various human rights, depending on how it is done, for what purposes and what safeguards are in place to ensure data is not misused. As all human rights are interrelated and indivisible, impacts on one right have implications on the enjoyment of other rights.

The right to privacy

207. The right to privacy⁴²⁸ is regarded as a foundational aspect of democratic societies. The violation of this right has an impact on numerous other human rights, including the right to life, liberty, security of person, health, work and social security, among others.⁴²⁹ One of the greatest risks of collection, use and exchange of personal data is the potential infringement of the right to privacy, which is provided under a number of international instruments, including the Convention on the Rights of the Child.⁴³⁰ The Convention requires States parties to protect every child from arbitrary or unlawful interference of his or her privacy in the home, family and through correspon-

⁴²⁸ “Privacy” has been defined as “the presumption that individuals should have an area of autonomous development, interaction and liberty without interaction with others, free from State intervention...” A/HRC/23/40, para. 22; A/HRC/13/37, para 11, both citing Lord Lester and D. Pannick (eds.), Human Rights Law and Practice (London, Butterworth, 2004), para. 4.82.

⁴²⁹ A/HRC/40/52, para. 23.

⁴³⁰ Convention on the Rights of the Child (1989), art. 16; International Covenant on Civil and Political Rights (1966), art. 17; Universal Declaration of Human Rights (1948), art. 17.

dence.⁴³¹ Additionally, no child should be subjected to unlawful⁴³² attacks on his or her honour or reputation. Every child also has the right to the protection of the law from such interference.⁴³³ In relation to children above the minimum age of criminal responsibility, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) elaborates on the right to privacy and makes it clear that Member States should ensure that the child's right to privacy "shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling".⁴³⁴

208. The provision for a child's right to privacy in the Convention on the Rights of the Child does not have any specific limitations attached to it. The Convention stipulates that no child shall be subjected to "arbitrary or unlawful interference with his or her privacy".⁴³⁵ With regard to the provision on the right to privacy under the International Covenant on Civil and Political Rights, the prohibition of an "arbitrary interference" is considered to require that any interference with the right to privacy must be reasonable and necessary in the particular circumstances, as well as proportional to the end sought.⁴³⁶

431 Convention on the Rights of the Child (1989), art. 16(1).

432 The term "unlawful" has been interpreted to mean that "no interference can take place except in cases envisaged by the law", of which the legislation itself must comply with international human rights law. Human Rights Committee, general comment No. 16 (1988), para. 3.

433 Convention on the Rights of the Child (1989), art.16(1)-(2).

434 The Beijing Rules (1985), rule 8.

435 Convention on the Rights of the Child (1989), art. 16(1)

436 A/HRC/27/37, para. 21.

209. It is well recognized that any interference with the right to privacy must comply with the principles of legality, necessity and proportionality.⁴³⁷ In other words, any such interference to the right to privacy must be (a) provided by law, and the law must be sufficiently accessible, clear and precise; (b) necessary for reaching a legitimate aim; and (c) proportionate to the aim and the least intrusive option available.⁴³⁸ These restrictions must be applied along with other key principles, including those of non-discrimination and the best interests of the child.⁴³⁹

The right to freedom of movement and its implications

210. Another right that may be impacted by collection of data of children, and especially by the exchange of such information, is the right to freedom of movement. When a child's information is shared internationally, depending on the purpose of such an exchange, there is a risk of negative impact on immigration and asylum decisions.⁴⁴⁰ A child's freedom of movement could thus be substantially affected.⁴⁴¹ Being placed on a no-fly list also seriously impairs freedom of movement. Indeed, a child should not be placed on a no-fly list, given the lifelong implications of such an administrative determination and in light of the principle of the best interests of the child.

437 See UNOCT and CTED, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter Terrorism* (2018).

438 A/HRC/13/37, para.19; A/HRC/27/37, para. 23; A/HRC/34/61, para. 36.

439 A/HRC/37/52, para. 8.

440 International Commission of Jurists, *Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009), available at www.refworld.org/docid/499e76822.html.

441 A/HRC/13/37, para. 37.

211. The restriction of freedom of movement potentially affects the child's family life when they have family members living in countries other than countries of their citizenship or residence. (See chapter 3 on preserving family unity and chapter 4 on repatriation). This could further restrict the child's opportunities for education or employment in the future. Such a restriction can also have a catastrophic effect on a child's development if she or he is forced to remain in a State or region where she or he will be exposed to violence or further human rights abuses. States must ensure that the inclusion of a child in such a database does not violate the principle of *non-refoulement*.

8.1.2 Human Rights Implications of Different Purposes for Collection, Use and Exchange of a Child's Information

212. As previously noted, international human rights law permits restricting certain rights, including the right to privacy, when certain requirements are met. One such requirement is that the aim of interference must be legitimate. Generally, a "legitimate aim" is considered as something to "protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others".⁴⁴² The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedom while countering terrorism has argued that "the prevention, suppression and investigation of acts of terrorism clearly amount to a legitimate aim" in relation to restriction of the right to privacy.⁴⁴³ Under the International Covenant on Civil and Political Rights, States parties have a positive obligation to protect citizens and others

within their jurisdictions against acts of terrorism to protect their right to life. Consequently, the Rapporteur argued that that duty could be discharged through the gathering and analysis of relevant information.⁴⁴⁴ Similarly, the United Nations High Commissioner for Human Rights has also expressed the view that surveillance on the grounds of national security or for the prevention of terrorism or other crime may be a legitimate aim. The degree of interference must, however, be assessed against the necessity of the measure to achieve the aim and the actual benefit it yields towards such a purpose.⁴⁴⁵ In light of the above, the present section briefly discusses various possible aims for which a child's data may be collected, used and/or exchanged and possible implications for human rights that those aims may pose.

To protect the child

213. Some States may collect information on children who are missing or suspected of being abducted and exchange such information between various agencies or even internationally. For example, children travelling with known or suspected foreign fighters may be victims of parental abductions, criminal kidnappings and human trafficking. Information concerning children who may be travelling with known or suspected foreign fighters can be placed on lists or databases of missing persons. This information can be shared in a timely and effective manner between States, for example, through dissemination of INTERPOL yellow notices. Some States also note on their watch lists or databases of known or suspected terrorists, including foreign terrorist fighters, that a suspect was travelling with a child, without naming that child.

⁴⁴² Human Rights Committee, general comment No. 27 (1999), para. 11.

⁴⁴³ A/69/397, para. 33.

⁴⁴⁴ Ibid.

⁴⁴⁵ A/HRC/27/37, para. 24.

214. Timely and effective sharing of information regarding children who may be missing and/or who may have been kidnapped, abducted, trafficked and exploited, can ensure that authorities take effective and appropriate actions when they come into contact with such children, including during routine border controls before travel is undertaken, upon arrival in another State's territory or upon the child's return.

215. As discussed in chapter 1, the Convention on the Rights of the Child, among other instruments, require States parties to protect the right to life of children. Hence, data collection and exchange for the sake of protecting the child is likely to be a legitimate aim. However, the purpose of data collection and exchange must be clearly stated in relevant legislation in accordance with the principle of legality. In addition, the information collected for the purposes of protection should not be used or shared for any other purpose.⁴⁴⁶ Instead, a child's data should be used only in measures to protect the child. The use of firewalls may be such a measure to ensure protection of the rights of the child. Firewalls are measures to separate States' immigration enforcement activities from other activities, such as criminal justice processes. Such measures ensure that immigration authorities do not have to share information concerning the immigration status of each child with other institutions.⁴⁴⁷

To monitor a child, as a potential suspect, because the parent is suspected of terrorist crimes

216. The Convention on the Rights of the Child requires States parties to respect and ensure children's rights without discrimination, including discrimination on the basis of the status, activities, expressed opinions or beliefs of the child's parents.⁴⁴⁸ Children whose parents have been labelled or suspected of terrorist activity must also be protected from all forms of discrimination and stigmatization.⁴⁴⁹ Hence, the information of children should not be collected and shared for monitoring or surveillance only on the basis of the parents actual or alleged terrorist activity.

217. Collecting and exchange of information of a child purely for his or her association with a family member suspected of a terrorist offense may also violate the child's due process and right to receive individual examination, including for immigration purposes. This may in turn also lead to violation of the prohibition on collective expulsions under

⁴⁴⁶ Ibid., para. 24.

⁴⁴⁷ OHCHR and Global Migration Group Working Group on *Migration, Human Rights and Gender, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, available at www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf, 12.

⁴⁴⁸ Convention on the Rights of the Child (1989), art. 2(2).

⁴⁴⁹ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), para. 33.

international human rights law.⁴⁵⁰ Significantly, in migration contexts, children's personal data, in particular biometric data, should be used only for the purposes of identifying and protecting the child and ensuring the child's best interests.⁴⁵¹ As discussed earlier, the right to freedom of movement, in turn, also impacts the enjoyment of other rights.

218. Monitoring of the child because of an allegation against the parents may be argued to be necessary for the legitimate aim of protecting public security. However, given the significant implications on the best interests of the child and non-discrimination principle, among others, it is clear that such measures on the basis of the allegation against the parents alone

450 The prohibition is on the basis that such mass expulsions deny individual migrants with the reasonable and objective examination of and decision on each person's individual case, rendering collective expulsions as inherently arbitrary and therefore prohibited. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), art. 22(1); Committee on Migrant Workers, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 51; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para.47; Human Rights Committee, General Comment No. 15 (1986) on the position of aliens under the Covenant, para.10; Committee on the Elimination of Racial Discrimination, general recommendation no. 30 (2003) on discrimination against non-citizens, para. 26; A/HRC/36/39/Add.2, paras. 33, 60; A/72/335, para. 93; A/HRC/37/50, para.4. Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para. 17; see also UNOCT and CTED, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter Terrorism* (2018), 31-32.

451 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para. 17; see also UNOCT and CTED, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter Terrorism* (2018), 31-32.

would not be considered proportionate to the aim or the least intrusive option.

To monitor the child on security grounds

219. The principle of the best interests of the child must govern a State's decision to collect, use and share information about a child, including what data is collected, how it is used, and the length of time the data is retained. The principle also applies when security services are concerned that a child may pose security threat. As discussed in section 1.2.2 on the best interests of the child principle above, there may be situations in which the best interests of the child and those of others, including the public, may be potentially in conflict. States may determine a child to be a security threat, including due to past actions taken while with a terrorist designated group, although children should not be deemed a security threat on the basis of association with such a group alone.

220. In general, the association of any individual with a watch list or database of known or suspected terrorists will likely have a very negative impact on his or her life, with legal, social and reputational consequences for the individual and his or her family, particularly in the case of potential data leakage.⁴⁵² Placing a child on a watch list or database of suspected terrorists may carry additional serious ramifications for a child's future and could be especially damaging if effective independent oversight of the entire watch list or database is not provided, with particular attention paid to data-management functions and the purposes for which the data will be used and to avoid any unauthorized extension of scope or access.

452 A/HRC/14/46, para. 37; International Commission of Jurists, *Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009), available at www.refworld.org/docid/499e76822.html.

Children are particularly susceptible to stigmatization, and research on labelling processes has shown that there are detrimental effects from identifying young persons as being in conflict with the law.⁴⁵³ This is so even in cases in which they are ultimately acquitted of the alleged offence, where the finding of guilt is not held in any record, the sentence becomes “spent” or when the law provides that the finding of guilt is not to disqualify the child in the future from any job or post.⁴⁵⁴ These implications may be heightened when children are believed to be associated with terrorist groups. Children who have been stigmatized or associated with criminal activity in the past have been found to experience extreme hardship later on in securing education, housing, employment and other undertakings necessary to their development.⁴⁵⁵

221. As stressed in the Security Council resolution 2427 (2018), children associated with armed groups, including children who have committed crimes, must be treated primarily as victims (see section 1.3.1 on treatment of children primarily as victims). As discussed in chapter 3, States have an obligation to rehabilitate and reintegrate children recruited and used by terrorist groups. Collecting and exchanging the information of a child who may be a potential security risk and the stigma associated with it could be a barrier to reintegration and normalization for children who have been victims of human rights violations. They may have been victimized by a terrorist group and then further stigmatized upon release. States must not collect and exchange the information of

453 The Beijing Rules (1985), rule 8 on protection of privacy.

454 Ibid.

455 Jamaal Abdul-Alim, “Juvenile Records Often Have Lifelong Consequences, Experts Say”, *Juvenile Justice Information Exchange* (2015), available at <https://jjie.org/2015/06/29/juvenile-records-often-have-lifelong-consequences-experts-say/>.

children formerly associated with armed groups for heightened surveillance or monitoring on the basis of prior association alone, particularly when the data may be used for law enforcement and counter-terrorism practices such as travel ban lists.

222. The right to non-discrimination is also crucial for children affected by the foreign fighter phenomenon who travelled across borders, because children in foreign countries may face higher risks of discriminatory treatment.⁴⁵⁶ States must ensure that all counter-terrorism measures do not subject the child to racial or ethnic profiling, stereotyping or any other form of discrimination.⁴⁵⁷ Additionally, States must address and take action against any tendencies that target, stigmatize, stereotype or profile on a discriminatory basis, giving special consideration to populations who have been targeted by politicians, officials, the media and other electronic communication networks.⁴⁵⁸ Because the issue of the potential threat posed by children affected by the foreign fighter phenomenon is politically charged and a widely debated, any actions taken that target or profile these children must be closely monitored to ensure the absence of political bias or pressure from the media as well as the inclusion of respect for the child’s rights.

223. When States find that the threshold is met for the placement of a child on a watch list or database, the state must take steps to ensure that the child’s inclusion on the list or database does not result in the discriminatory treatment of that child, including through depriving or

456 Committee on the Elimination of Racial Discrimination, general recommendation no. 30 (2003), para.8.

457 Ibid., para. 10.

458 Ibid., para. 12.

diminishing the child's access to services or education, freedom of movement, or enjoyment of other rights. States are advised to collect and exchange the information of a child as a potential suspect of terrorist crimes, only if:

- (i) the child is above a minimum age of criminal responsibility consistent with international juvenile justice standards;
- (ii) there is reasonable suspicion to believe that the child has committed terrorist crimes or is at risk of committing terrorist crimes and no less restrictive measures can limit that risk;
- (iii) the placement of a child on such a list is evaluated by authorities on a case-by-case basis, based on clear criteria for the inclusion of individuals' names on watch lists and in databases and comprehensive safeguards are in place (see section 8.1.3 below) throughout the duration of the child's placement on the list; and
- (iv) effective oversight and redress mechanisms are developed to ensure the protection of children's rights, particularly given the potential lifelong implications on affected children.

8.1.3 Procedural Safeguards to Ensure Protection of the Rights of the Child in Collecting and Exchanging Data

Regulatory framework

224. Under the International Covenant on Civil and Political Rights, private information about an individual may be stored only if it is essential to the

interests of society,⁴⁵⁹ a standard that requires close and careful consideration when the private information of a child is at risk. These measures should also include strict enforcement of appropriate rules on the collection, use, retention and access to the information.⁴⁶⁰ There should also be a sunset clause to ensure that the information in the database is expunged after a certain period of time.⁴⁶¹

Transparency

225. States should ensure every child's right to know who is in possession of her or his personal data, so that a child may request the rectification of information or the elimination of her or his data when it is held or distributed in contravention of law.⁴⁶² States should ensure each child's right to ascertain any personal information stored about them, such as their name being included in a database, as well as her or his right to know the purposes for which it is being stored.⁴⁶³ Inclusion of the information of those above an internationally recognized minimum age of criminal

⁴⁵⁹ Human Rights Committee, general comment No. 16 (1988), para 7.

⁴⁶⁰ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families No. 22 (2017) of the Committee on the Rights of the Child, para. 17; UNOCT and CTED, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter Terrorism* (2018), 36; S/2018/1177, principle 2.

⁴⁶¹ United Nations University, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (2018), 230; see also CRC General Comment 10 para 67, recommending the automatic removal from any criminal records of a child's name once they reach 18, or under conditions such as not having committed an offense within a stipulated time period

⁴⁶² Human Rights Committee, general comment No. 16 (1988), para. 10.

⁴⁶³ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007), 209.

responsibility should be based on reasonable and reliable evidence and according to the juvenile justice standards. (See the recommendation above, as well as chapter 6 on juvenile justice).

Protective measures for international exchange of information

226. The transnational sharing of personal information poses a great risk of violating one's rights and privacy owing to the variations in legal frameworks and proper safeguards for information-sharing when managing private data at national and regional levels. States must exercise due diligence before sharing a child's data with other States to ensure that the receiving State has adequate safeguards in place to protect the child's data and that the receiving State will not use that information beyond the agreed purpose. It is critical that when a child is removed from a State's watch list or database that an effective mechanism be in place to ensure that the child's name is removed from all other entities and States with which that data was shared. In affecting this, robust cooperation and prompt action between States is required.

Judicial remedies and legal aids

227. Every child has the right to challenge his or her inclusion in a database, and thus States must provide a judicial remedy for children to dispute the infringement of their privacy if he or she believes the listing is incorrect or that his or her personal data was collected in a way that was unlawful.⁴⁶⁴ Effective independent oversight

bodies should be established to review data collection, storage, retention and sharing to ensure doing so is strictly necessary and proportionate and is occurring in a fair, non-discriminatory manner.

228. Generally, children have limited access to the legal services necessary to understand the consequences of inclusion in a list and to challenge it. This is likely to be even more challenging for children who are non-citizens, as they might face obstacles in claiming their rights and accessing judicial remedies in countries other than their own. This is particularly so in the case of stateless children.⁴⁶⁵ States need to take measures to facilitate their access to necessary legal services and should consider appointing dedicated advocates for affected children.

On data collection in relation to the foreign fighter phenomenon, see further the Counter-Terrorism Implementation Task Force, "Guidance to States on human rights-compliant responses to the threat posed by foreign fighters" (2018), especially Chapter VII on information exchange, data collection and analysis. Available at www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf

⁴⁶⁴ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007), 209.

⁴⁶⁵ A/HRC/13/37, para. 31.

Example from Thailand—Information of a child on database.

In Thailand, the Juvenile and Family Court Procedure Act (2010) governs information concerning children who have violated laws. The Royal Thai Police keep records of such information. Once the child completes a rehabilitation programme, a notification is sent to the police and the child's information is transferred to an inaccessible archive.

8.2 Key Recommendations

229. The following are recommended:

Regulatory framework

- a. Develop specific regulatory frameworks, legal safeguards and procedures for collecting, using and sharing children's personal data, including in situations in which children are placed on lists and databases for child-protection purposes.
- b. Develop clear and appropriate standards, criteria and procedures for the inclusion of children's names in lists and databases, for the management and sharing of such databases and for the removal of names, considering the fundamental importance of the presumption of innocence and the age of the child.
- c. Collect and exchange the information of a child as a potential suspect of terrorist crimes only if:
 - i. *the child is above a minimum age of criminal responsibility consistent with international juvenile justice standards;*

- ii. *there is reasonable suspicion to believe that the child has committed terrorist crimes or is at risk of committing terrorist crimes and no less restrictive measures can limit that risk;*
- iii. *the placement of a child on such a list is evaluated by authorities on a case-by-case basis based on clear criteria for the inclusion of individuals' names in watch lists and databases and comprehensive safeguards are in place; and*
- iv. *effective oversight and redress mechanisms are developed to ensure the protection of child rights particularly given the potential lifelong implications on affected children.*

- d. Ensure that due diligence processes are in place to review other States' frameworks and data protection policies and procedures before sharing information about specific children with those States and ensure that agreements are in place to guarantee the removal of children's data from those States' databases.

Purpose

- e. In the context of migration, children's personal data, in particular biometric data, should be collected only for the purposes of identifying and protecting the child and ensuring the child's best interests, with strict enforcement of appropriate rules on collection access, use and retention of data.
- f. Noting in a watch list or database that a known or suspected terrorist, including a foreign terrorist fighter, was travelling with a child, without naming that child, can enable relevant

authorities to respond in an appropriate and timely manner. However, clearly define the purpose of including a child in the list or database in relevant legislation in accordance with the principle of legality.

- g. Prohibit the sharing and use of children's personal data for security purposes that was collected for the purposes of protection, remedy, civil registration, and access to services for the purposes of immigration enforcement.

Restricted access

- h. Strictly limit access to information including by clearly delineating mandates and powers based on publicly available laws, including on the protection of children.
- i. Ensure that the actions and responses of all relevant law enforcement agencies and border authorities, based on a match received from a watch list or database, follow domestic and international law including human rights law.
- j. Provide training for responsible authorities on relevant provisions for international human rights and children's rights, including the Convention on the Rights of the Child, with emphasis on the right to privacy, and the right to be protected from any form of violence, including the harm connected to stigmatization.

Oversight

- k. The collection, procurement, use, sharing and retention of children's personal data should be secured by effective oversight and control mechanisms. When a child is involved, oversight bodies should also include the agency that is specifically responsible for the care and protection of the rights of children. These oversight bodies must be independent of the political executive.

Remedial mechanism

- l. If a child believes his or her rights have been infringed, she or she should be able to bring the concern to a judicial body to be effectively remedied or redressed. Such a child should have access to a legal advocate to support the child in advocating for his or her rights.
- m. In cases involving children, relevant law enforcement agencies and border authorities should coordinate with child protection services at the earliest possible stage.

