

**ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS**  
**Abstract for Master's Thesis**

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
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Title of the Thesis: Positive obligations for states in light of international human rights laws to assist nationals abroad to return home from situations where their rights are at risk: an analysis of the situation at Al Hol camp and the strategies states have used to ensure the protection of human rights	
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<p>Considering states' international human rights obligations in light of international human rights instruments and norms, to what extent are they required to assist their nationals to return to their home country when they are trapped abroad in a situation where their human rights are being violated.</p> <p>The armed conflict in the Syria has been ongoing for over a decade now and was used as a case example. The Syrian conflict has received a lot of international attention due to the atrocities and the vast number of foreign people who have joined the conflict. Many of the foreigners are currently held in camps around Syria, unable to leave the war-torn country on their own which is why the question of repatriation has been widely associated with the conflict.</p> <p>The people should be entitled to protection guaranteed by international human rights treaties and that since the Syrian government is unable to protect these rights, the rights should be protected by their home countries. As many of the foreign nationals in Syria are European, the research analyses examples of how Finland and the Netherlands have addressed the human rights violations at the camps and whether they have repatriated their nationals considering their international human rights law obligations. Different international actors have made pleas for states to repatriate their nationals from these camps, however, states have been slow in the repatriation process referring to various reasons for their inaction.</p> <p>International human rights bodies have made it clear that further threat to life and health is probable at the camps and that states are aware or should be aware of the risk to their nationals. States should put pressure on each other to act regarding their nationals at the camps, but this has not happened yet.</p> <p>There are at least four lawful methods that other states can use to improve the human rights situation in Syria and promote a peaceful solution to the conflict. The best and most peaceful solution is a repatriation process which fulfils the states' international human rights obligations, guarantees protection for their nationals, and would relieve the pressure in Syria.</p>	
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MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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## Abbreviations

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women 1979

CERD - Convention on the Elimination of Racial Discrimination 1965

CJEU - Court of Justice of the European Union

CoE - Council of Europe

CRC - Convention of the Rights of the Child 1989

ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms  
1950

ECtHR - European Court of Human Rights

EU - European Union

ICC - International Criminal Court

ICJ - International Court of Justice

ICCPR - International Covenant on Civil and Political Rights 1966

ICESCR - International Covenant on Economic, Social and Cultural Rights 1966

ISIS - Islamic State in Iraq and Syria

Syria - Syrian Arab Republic

The Charter - The Charter of Fundamental Rights of the European Union

UDHR - United Nations Universal Declaration on Human Rights 1948

UN - United Nations

UNCAT - Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment  
or Punishment 1984

UNICEF - United Nations Children's Fund

## 1 Introduction

### 1.1 Introductory remark

The armed conflict in the Syrian Arab Republic (Syria) has been ongoing for over a decade now. What first started as a political protest against the local regime quickly escalated into a full-scale armed conflict. The involvement and influence of several states and non-state actors have resulted in the deaths of hundreds of thousands and the displacement of at least 11 million people who have spread out mainly across Syria and its neighbouring countries.<sup>1</sup> In 2013, a movement called Islamic State in Iraq and Syria (ISIS) started seizing control over several parts of Syria. ISIS has been internationally labelled as a terrorist organisation that has been accused of several acts of terror around the world. ISIS is primarily based in Syria but has supporters and affiliated groups in several other states.<sup>2</sup> Since, other armed groups and government forces in Syria have taken back control of areas formerly ruled by ISIS, but the conflict between the different groups is ongoing and the peace process is advancing slowly. With ISIS losing control in the region, the demand for accountability for their acts of terror is on the rise.<sup>3</sup> However, the parties in the conflict have breached international law by targeting civilians, subjecting some to torture and depriving humanitarian assistance.<sup>4</sup> This difficult situation creates a dilemma as to who is responsible for upholding human rights in Syria now and who can hold the parties responsible for their actions and omissions. With continuing human rights violations, lives remain at risk.

The Syrian conflict has received plenty of international attention due to the atrocities and the vast number of refugees, but also the numerous individuals from other countries who have travelled there to participate in the conflict or followed their families doing so, e.g., several thousand European nationals have also joined the conflict. Some of those who travelled to Syria to participate in the fighting, others went because of family bonds or religious reasons. Many Muslims immigrated to Syria in the hopes of living in an Islamic state.<sup>5</sup> It has been estimated

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<sup>1</sup> United Nations General Assembly, Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to the Syrian Arab Republic (5 April 2016) 4 para 10; Amnesty International, Report 2018 (Amnesty International) <<https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE0194332019ENGLISH.pdf>> accessed 2 February 2022, 60.

<sup>2</sup> Terry D. Gill, 'Classifying the Conflict in Syria' (2016) 92 Int'l L. Stud. Ser. US Naval War Col. 353.

<sup>3</sup> USA Council on Foreign Relations, 'Civil war in Syria' (2021) *Global Conflict Tracker* Available at <<https://www.cfr.org/global-conflict-tracker/conflict/civil-war-syria>> Accessed 2 February 2022.

<sup>4</sup> Amnesty International (n 1).

<sup>5</sup> Omer Faruk Topal, 'Foreign Fighters Involvement in Syria and Its Regional Impacts' (2013) 6 USAK Y.B. Pol. & Int'l Rel. 286 – 288.

that in just the first year of the conflict nearly 2000 Europeans travelled to Syria to join the conflict; since then, there have been many more.<sup>6</sup> Those who specifically went to Syria to participate in the armed conflict are called foreign fighters. While the concept of foreign fighters is not new, never before has it occurred to such an extent. This has given rise to new issues in international humanitarian and human rights laws that are yet to be settled such as issues of accountability and the right to assistance from their home country.<sup>7</sup> This thesis will discuss the foreign nationals in Syria and states' positive human rights obligations to repatriate them considering international human rights laws while recognising that other international legal instruments guarantee them different rights and protections. All foreign nationals will be discussed because of the universal nature of human rights.

No rules prevent travelling to war zones of their free will and joining armed forces or groups. If they are not lawfully detained, they are also free to leave any country where their human rights are at risk or being violated.<sup>8</sup> The question of whether a person is entitled to active state assistance when their human rights might be endangered abroad is not addressed directly in international human rights law and other sources of law and interpretations must be considered. Many of the foreigners are currently held in camps around Syria, unable to leave the war-torn country on their own which is why the question of repatriation has been widely associated with the Syrian conflict. There are existing practices in international humanitarian law when it comes to the treatment of foreign fighters and prisoners of war.<sup>9</sup> However, humanitarian law does not provide a clear answer to how the families of foreign fighters should be treated or others who have voluntarily travelled to a conflict area. According to international human rights law, everyone has equal rights, but practice suggests that those affiliated with terrorism have limited rights even though this is against the fundamental purpose of human rights. Different groups are guaranteed special protections, especially in armed conflicts.<sup>10</sup> The coexisting rights and obligations and their hierarchy must be determined to materialise state obligations.

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<sup>6</sup> Edwin Bakker, Christoph Paulussen and Eva Entenmann 'Returning Jihadist Foreign Fighters' (2014) 25 *Sec. & HUM. Rts.* 14.

<sup>7</sup> Edwin Bakker, Christoph Paulussen and Eva Entenmann (n 6) 12.

<sup>8</sup> Elzbieta Karska and Karol Karski, 'The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters: An International and Human Rights Perspective' (2016) 18 *INT'L COMM. L. REV.*

<sup>9</sup> The Third Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 *UNTS* 135.

<sup>10</sup> Marten Zwanenburg, 'Foreign terrorist fighters in Syria: challenges of the 'sending' state' (2016) Volume 92 *Int'l L. Stud.*

International humanitarian law clearly distinguishes between the groups in a conflict guaranteeing them different protections, but international human rights law treats everyone the same at face value which means that regardless of one's actions, they are guaranteed the same human rights as everyone else on a base level. Certain groups that are considered more vulnerable than others are also protected by specialised international human rights treaties.<sup>11</sup> However, human rights are generally not prioritised during armed conflicts when the state responsible for upholding them is in crisis. Further, although human rights are equal, conflict and a lack of resources cause prioritising and aid is usually only given to those most in need. This thesis will discuss the differences between these groups of foreign nationals at Al Hol; women, children, and men and how states have distinguished between them. It will also be argued that they should be entitled to the same protection guaranteed by international human rights treaties. A vast international interest in this conflict exists, because of the international counter-terrorism efforts. An argument can be made that at least some of the women and children at the camps are victims of terrorism and should receive international assistance.<sup>12</sup> Another aspect to consider in the repatriation process is preventing the spread of terrorism which is one of the UN's key counter-terrorism targets.<sup>13</sup>

Guaranteeing human rights is difficult for a state when it is losing control over its territories and its infrastructure is being destroyed. Therefore, while the human rights of all the foreigners in Syria are clear, a question remains as to who should guarantee them now that the local government seems unable to.<sup>14</sup> The local government in Syria has failed to protect the civilians from harm and the question is whether outside states can and if they must aid specifically in situations where their nationals are at risk of human rights violations.<sup>15</sup> Even if international human rights laws permit this interference, states might not be eager to act unless they consider it their binding obligation. Hence, it must be analysed whether international human rights law obligates these states to act when those whose rights are being violated are their nationals or whether states are merely responsible for protecting the human rights within their territory regardless of nationality. If there is a duty to assist, it will apply to all nationals in Syria that

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<sup>11</sup> Alexander Betts, 'Soft Law and the Protection of Vulnerable Migrants' (2010) 24 GEO. IMMIGR. L.J.

<sup>12</sup> United Nations Security Council Resolution 2396 (21 December 2017) S/RES/2396 (2017).

<sup>13</sup> United Nations Security Council Resolution on Global Counter-terrorism Strategy (8 September 2006) A/RES/60/288.

<sup>14</sup> Dara Conduit and Ben Rich, 'Foreign Fighters, Human Rights and Self-Determination in Syria and Iraq: Decoding the Humanitarian Impact of Foreign Fighters in Practice' (2016) 18 Int'l Comm. L. Rev.

<sup>15</sup> Lyndsey Kelly, 'The Downfall of the Responsibility to Protect: How the Libyan and Syrian Crises Secured the Fate of the Once-Emerging Norm' (2016) 43 Syracuse J. INT'L L. & COM. 387.



are willing to accept the assistance. The humanitarian crisis has caused the inhumane conditions at the camps in Syria will be analysed in the light of international law and state practices with a focus on international human rights law and the obligations imposed on states. The actions that states have taken thus far to protect the human rights of their nationals in Syria will be discussed and compared.

## 1.2 Method and material

This is an academic thesis that focuses on the analysis of international law and state practice. The conflict in Syria and the human rights obligations relating to the Al Hol camp that contains thousands of foreign nationals will be used as an example to analyse positive human rights obligations. This thesis will accept that the conflict in Syria is a non-international armed conflict as the main parties are the Syrian official armed forces and internal non-state armed groups, and the international nature of this conflict will not be analysed in detail as it falls outside the scope of the thesis.<sup>16</sup> The different political interests of the involved parties, as well as the armed groups and interests of other states, will not be discussed due to the focus on legal obligations. Further, the different actors of the conflict will not be analysed in-depth as the main focus will be on the foreign civilians rather than the nature of the parties involved and their conduct.<sup>17</sup> The international crimes that occurred during this conflict will be discussed only as far as they are related to the treatment of those at the camps who are foreign nationals. The thesis will also assume that children hold, or are entitled to, the same nationality as their mothers regardless of where they were born.

The main source of international law will arise from international human rights law conventions and treaties. The focus will be on the following international human rights instruments; the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (UNCAT) 1984,<sup>18</sup> the Convention on the Rights of the Child (CRC)

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<sup>16</sup> Tom Ruys 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict' (2014) 50 *Stan. J. INT'L L.* 251.

<sup>17</sup> For more information, please look at: Terry D. Gill (n 2).

<sup>18</sup> The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 U.N.T.S. 85, 113. Ratified by Finland in 1989. Ratified by the Netherlands in 1988.

1989,<sup>19</sup> the International Covenant on Civil and Political Rights (ICCPR) 1966,<sup>20</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979<sup>21</sup> and International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.<sup>22</sup> The Universal Declaration on Human Rights (UDHR) 1948 will also be referred to even though in itself it is not a legally binding instrument, but rather contains the principles and rights that are enshrined in the international human rights instruments and customary law.<sup>23</sup> The regional treaties the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950<sup>24</sup> and the Charter of Fundamental Rights of the European Union (the Charter)<sup>25</sup> will also be analysed. Finland and the Netherlands will be used as example countries as they have ratified all these treaties which means that the obligations set in them are legally binding on both states. The main rights analysed are the right to life, right to equal treatment, prohibition of torture, right to family unity, and the right to leave and enter a country.

Some references to intentional humanitarian law, for example, the 1949 Geneva Conventions, will be made as the cooperation of treaties will be analysed.<sup>26</sup> Customary international law refers to a globally accepted state practice and the obligations set by it.<sup>27</sup> State practice is a vital element to the formation of customary international law, and it will be discussed whether repatriation is already well enough established state practice to constitute a customary norm or as a general principle of law. The research will include an in-depth analysis of the interpretation of these norms and the obligations they set on states. The research will also analyse the future implications that are established by state actions in this conflict.

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<sup>19</sup> The Convention on the Rights of the Child (adopted 7 March 1989, entered into force 2 September 1990) E/CN.4/RES/1990/74. Ratified by Finland in 1991. Ratified by the Netherlands in 1995.

<sup>20</sup> The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Ratified by Finland in 1975. Ratified by the Netherlands in 1978.

<sup>21</sup> The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) vol. 1249. Ratified by Finland in 1986. Ratified by the Netherlands in 1991.

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) General Assembly Resolution 2200A (XXI). Ratified by Finland in 1975. Ratified by the Netherlands in 1978.

<sup>23</sup> United Nations Universal Declaration on Human Rights 10 December 1948 217 A (III). Finland joined the UN in 1955. The Netherlands joined the UN in 1945.

<sup>24</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5. Ratified by Finland in 1970. Ratified by the Netherlands in 1954.

<sup>25</sup> The Charter of Fundamental Rights of the European Union (adopted 2 October 2000, entered into force 1 December 2009). The Charter is automatically binding on all EU states.

<sup>26</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

<sup>27</sup> Ryan M. Scoville, 'Finding Customary International Law' (2016) 101 IOWA L. REV. 1893.

As many of the foreign fighters, women and children in Syria are European, this thesis is limited to discussing examples of how Finland and the Netherlands have addressed the human rights violations at the Al Hol camp and whether they have repatriated their nationals because of their international human rights law obligations. The countries were selected because they are both parties to the several international human rights treaties analysed as well as the Council of Europe (CoE) and the European Union (EU). Notably, they have taken different approaches to repatriation regardless of working with similar international human rights obligations. Even though these states will be discussed, they work as examples of different interpretations of international human rights obligations and state practices and therefore, their domestic legislation will not be analysed in depth.

The Al Hol camp is one of many camps in Syria and has been selected as the focus of this thesis due to its size and the high number of foreign nationals in it. The other camps can be discussed when making general points about the situation. Due to the examples of Finland and the Netherlands, regional treaties will also be analysed keeping in mind that this is not a comparative thesis between the states. References to actions from other states can be used as examples to show the effect of these regional laws on Finland and the Netherlands. The special focus will be on the regional ECHR because this is a binding human rights instrument for both states with its supervising European Court of Human Rights (ECtHR). Besides the mentioned international and regional legal instruments, peer-reviewed journal articles and newspaper sources will be referred to as examples of the treatment of those in the camps, and after they have been repatriated. However, the main sources will be in law and academic literature.

The ECtHR is available to all citizens of the CoE member states once they have exhausted all national judicial remedies. The cases can also be brought to the court by other states that are concerned about a specific situation developing.<sup>28</sup> This allows states an opportunity to monitor each other. The ECtHR judgments are binding to those states involved in the case and require them to take action to amend domestic laws and remedy the consequences of their actions to abide by the ECHR.<sup>29</sup> Once the states receive a final judgment, they must make and implement

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<sup>28</sup> Council of Europe, 'European Court of Human Rights: Rights and Freedoms in Practice – teaching resources' (2013) *ECHR CoE* Available at <[https://www.echr.coe.int/documents/pub\\_coe\\_teaching\\_resources\\_eng.pdf](https://www.echr.coe.int/documents/pub_coe_teaching_resources_eng.pdf)> Accessed on 20 February 2022, 8.

<sup>29</sup> Council of Europe (n 28) 7.

an action plan and then file a report on it.<sup>30</sup> Other member states should pay attention to the decisions because they are obligated to follow the same protocol if a similar situation arises for them or if they have similar conflicting domestic mechanisms and policies.

The purpose of this research is to address the extraterritorial nature of international human rights and if that enables a state to take action in another. Further, it will be discussed whether human rights law creates binding positive obligations for states and what can or should be done to enforce these obligations. This will be discussed taking into consideration state practices and other international legal norms. Even though the Syrian conflict is used as an example, the research will be a legal analysis and therefore transferrable to other situations where a state is violating human rights in their territory or is unable to protect human rights, therefore, placing individuals at risk. There is an international law principle called non-refoulement which means that a state cannot return a person from their territory to their homeland if there is a significant risk that their human rights will be violated there.<sup>31</sup> This thesis will not discuss sending Syrian nationals back to Syria where they have fled from but rather whether the principle could work in reverse; states are under a positive obligation to assist their nationals from states where their human rights are violated. This reverse rule may in the future be accepted as an international custom and a part of states' positive human rights obligations. However, whether it has already reached the status will be analysed.

### 1.3 Research question

The research in this thesis will answer the following: considering states' international human rights obligations in light of the selected international human rights instruments and norms, to what extent are they required to assist their nationals to return to their home country when they are trapped abroad in a situation where their human rights are being violated. More specifically, when those at risk of losing their lives or facing inhumane treatment such as starvation. To answer the question, it will first assess the obligations international law and regional law place on the selected two European states: Finland and the Netherlands, to protect the human rights of their nationals and whether these obligations include a more interactive obligation to take positive action to bring nationals to their home country or rather just a general obligation not

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<sup>30</sup> Council of Europe, 'The supervision process' *CoE* Available at <<https://www.coe.int/en/web/execution/the-supervision-process>> Accessed on 29 December 2021.

<sup>31</sup> Mike Sanderson, 'The Syrian crisis and the principle of non-refoulement' (2013) 89 *Int'l L. Stud* 776, 780.

to prevent anyone from independently returning. It will also be discussed whether international treaties allow states to distinguish between the different groups at the camps. The international and regional treaty obligations of these states will be compared considering the treaties they have ratified. While the obligations of the two European states will be analysed in detail, the thesis will cover international positive obligations as well. This is done to demonstrate state practice which can also be binding to the selected states.

It will be analysed whether there is a hierarchy in human rights and whether these positive obligations only arise when the human rights that are considered most sacred are being violated. The thesis will discuss whether being or having children changes the level of assistance due to the special protection granted for children and the sanctity of a family unit under the CRC<sup>32</sup> and other international human rights treaties that specifically provide rights for children such as the UDHR.<sup>33</sup> The different approaches taken by Finland and the Netherlands will be evaluated and the consequences of these actions discussed. The preferred diplomatic and peaceful methods of assisting their nationals will be analysed as well as states' willingness to act. The challenges states face when fulfilling the possible positive obligations will also be discussed considering the doctrine of 'protection of nationals' which allows states to organise a humanitarian intervention due to the ill-treatment of their nationals and enter other states and repatriate their nationals.<sup>34</sup> Finally, a conclusion on the obligations and recommendations for the future are given.

#### 1.4 Background of the Al Hol camp

The Al Hol camp is in north-eastern Syria, and it holds tens of thousands of people. The people have gathered there from all over Syria, moving away from the conflict, yet a number of them are not Syrian nationals. The camp has been growing exponentially since 2018 along with other camps in the region.<sup>35</sup> Eighty per cent of the estimated 62 000 individuals at the Al Hol camp

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<sup>32</sup> The Convention on the Rights of the Child (n 19).

<sup>33</sup> United Nations Universal Declaration on Human Rights (n 23) Articles 25 and 26.

<sup>34</sup> Tom Ruys, 'The Protection of Nationals Doctrine Revisited' (2008) 13 J. CONFLICT & Sec. L. 233.

<sup>35</sup> The International Committee for the Red Cross, 'Life in Al Hol' (6 March 2019) *ICRC* Available at <<https://www.icrc.org/en/document/life-syria>> Accessed on 2 June 2021; The International Committee for the Red Cross, Operational update – Syria 6500 meals a day helping vulnerable unaccompanied children' (2019) *ICRC* Available at <<https://www.icrc.org/en/document/operational-update-syria-6500-meals-day-helping-vulnerable-unaccompanied-children>> Accessed on 6 February 2022.

are women and children; the camp contains hundreds of foreign women, children, and men.<sup>36</sup> There are other similar camps around Syria, especially in the north-eastern part, but Al Hol is the largest camp. According to the United Nations (UN), there are nationals from at least 57 UN Member States and the UN has made repeated pleas for these states to repatriate their nationals from the camp.<sup>37</sup> Hundreds of men and boys are detained in Syria in prisons under suspicion of being members of ISIS. Many of these are foreign nationals and they are facing horrible conditions in detention.<sup>38</sup> However, due to the focus of this thesis, these detention centres will not be analysed.

Different non-state armed groups have taken control over regions around Syria following the uprising against the current internationally recognised Syrian government. The Al Hol camp along with other similar camps in the area are ruled by the Kurdish armed forces called the Syrian Democratic Forces that have declared the area an autonomous region called Rojava. The declaration has not been confirmed by states or organisations, but to repatriate their nationals from Al Hol, states must establish diplomatic relations with the Kurdish armed forces since they are effectively in power in the region.<sup>39</sup> The main reason why the Kurdish armed forces have held the women and children at the camp to date is their suspected affiliations with ISIS. However, now the Kurdish armed forces are eager to clear the camp and have been repeatedly calling on states to repatriate their nationals.<sup>40</sup> To date, no successful efforts have been made to provide humanitarian assistance to the detained men and they seem to be completely excluded from the repatriation process.<sup>41</sup>

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<sup>36</sup> Danielle Moylan and Torsten Flyng, 'United Nations Resident Coordinator and Humanitarian Coordinator in Syria, Imran Riza and Regional Humanitarian Coordinator for the Syria Crisis, Muhannad Hadi – Statement on Deaths in Fire Incident at Al Hol Camp' (28 February 2021) *Reliefweb* Available at <<https://reliefweb.int/report/syrian-arab-republic/united-nations-resident-coordinator-and-humanitarian-coordinator-syria-7>> Accessed on 4 June 2021.

<sup>37</sup> United Nations Special Procedures, *Syria: UN experts urge 57 states to repatriate women and children from squalid camps* (8 February 2021) Available at <<https://www.ohchr.org/en/press-releases/2021/02/syria-un-experts-urge-57-states-repatriate-women-and-children-squalid-camps>> Accessed on 2 June 2021.

<sup>38</sup> Human Rights Watch, 'Northeast Syria: Fate of Hundreds of Boys Trapped in Siege Unknown' (4 February 2022) *HRW* Available at <[https://reliefweb.int/sites/reliefweb.int/files/resources/EN\\_26.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/EN_26.pdf)> Accessed on 15 April 2022.

<sup>39</sup> Sayed Nasrat, 'Embargo and Humanitarian Aid in Rojava' (2017) 18 *WHITEHEAD J. DIPL. & INT'L REL.* 45.

<sup>40</sup> Loyal Shakir, 'Over 300 ISIS-affiliated people leave al-Hol camp' (15 September 2021) *Rudaw* Available at <<https://www.rudaw.net/english/middleeast/iraq/150920212>> Accessed on 06 February 2022.

<sup>41</sup> Human Rights Watch (n 38).

There have been continuous reports on the violence taking place at the camp, the inhumane living conditions, and the failed attempts to provide sufficient humanitarian assistance.<sup>42</sup> According to the UN experts, states must take positive steps to protect those in the camp due to their specific vulnerability and the ongoing human rights violations such as starvation and insufficient medical care.<sup>43</sup> The armed conflict continues outside these camps and firefights caused by the volatile situation have killed several people.<sup>44</sup> Besides the armed conflict, there are other humanitarian issues such as fires, floods, fights within the camps for resources and the general lack of resources such as food and shelter.<sup>45</sup>

Those in the Al Hol camp are dependent on international humanitarian support. The UN and its partners have been providing the camp with shelter, water, food, and other necessities, but they have faced difficulties in these resources reaching the camp making the humanitarian aid inconsistent and insufficient to stabilise the lives there despite their efforts. The conditions at the camp are brutal and it is vital to find more durable solutions for those living there.<sup>46</sup> The conflict has already lasted for over a decade, and it seems unlikely that these camps will be dispersed soon. The Kurdish armed forces have allowed some Syrian nationals to leave to relieve the pressure on the camp. They have slowly cooperated with other states as well to enable to repatriation process because they are running out of resources to maintain the camps and to shift responsibility to the states who have nationals at the camp.<sup>47</sup> While some have left the camps on their own and sought refuge elsewhere, others do not want to leave even if they could because they are hoping that they can settle in Syria once the conflict is over. Others are unable to leave and have nowhere to go. Due to the unstable situation elsewhere in Syria as the armed conflict continues, individuals are not eager to leave these camps unless they can seek refuge outside Syria.<sup>48</sup> However, it is clear that these camps violate several human rights such

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<sup>42</sup> For example; Neil J Saas, 'The Al Hol camp in Northeast Syria: health and humanitarian challenges' (13 March 2020) *BMJ Global Health* Available at <<https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Al%20Hol%20camp%20in%20Northeast%20Syria.pdf>> Accessed on 2 May 2022, 1.

<sup>43</sup> United Nations Special Procedures (n 37).

<sup>44</sup> United Nations News, 'UNICEF urges repatriation of all children in Syria's Al-Hol camp following deadly fire' (28 February 2021) *United Nations News* Available at <<https://news.un.org/en/story/2021/02/1085982>> Accessed on 2 June 2021.

<sup>45</sup> Danielle Moylan and Torsten Flyng (n 36).

<sup>46</sup> *Ibid.*

<sup>47</sup> OCHA Report, 'Syrian Arab Republic. North East Syria: Al Hol Camp' (11 October 2020) *Reliefweb* Available at <[https://reliefweb.int/sites/reliefweb.int/files/resources/Al%20Hol%20Snapshot\\_11Oct2020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Al%20Hol%20Snapshot_11Oct2020.pdf)> Accessed on 12 February 2021, 1.

<sup>48</sup> Al Jazeera 'Kurdish-led authorities to remove Syrians from al-Hol camp' (5 October 2020) *Al Jazeera* Available at: <<https://www.aljazeera.com/news/2020/10/5/kurds-to-allow-is-linked-syria-families-to-quit-al-hol-camp>> Accessed on 4 June 2021.

as the right to health, freedom of opinion, the women being sexually abused and the children being denied education, and that it is necessary to provide tangible assistance for them.<sup>49</sup>

States have been slow in the repatriation process referring to various reasons for their inaction. The repatriation process is not simple; firstly, the process requires states to reach an understanding with the Kurdish armed forces. One of the main hold-ups is the question of the status of those at the camps: many of them have been accused of being involved with terrorist groups and the Kurdish do not want to release them. The Kurdish administration has been accused of unlawfully detaining individuals at these camps and preventing them from receiving necessities such as food and medication to gain power and resources for themselves.<sup>50</sup> Many of the women and children are family members of the foreign fighters. They are used as bargaining chips and their human rights are being violated by detaining them at the camps under suspicion of terrorist connections. The majority of the foreign men are being detained elsewhere. This is part of the domestic desire in Syria to prosecute adults regardless of their nationality for their affiliations with known terrorist organisations, such as ISIS.<sup>51</sup> States cannot prevent those from entering their home country, but the dilemma of the repatriation seems to be more about whether the state must facilitate, pay and arrange the repatriation rather than the security risk it poses because those who were able to leave the camps on their own may pose the same risk anyway.

Outside states have struggled to receive information on those at the camps, their condition and whether they wish to be repatriated. Most individuals do not have official identity documentation and states have had to rely on local authorities to help them identify their nationals and to establish a line of communication with them. Since those at the camps can't secure their passage to their home country, they are stuck unless their home state decides to repatriate them. There is yet to form an international consensus on how the repatriation process should be done leading to states having bilateral agreements with the Kurdish armed forces. Further, states have taken different positions in addressing this issue of who they prioritise in the repatriation and how they are treated upon arrival to their home country.<sup>52</sup> While their

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<sup>49</sup> United Nations General Assembly (n 1).

<sup>50</sup> Human Rights Watch, 'Under Kurdish Rule. Abuses in PYD-run Enclaves of Syria' (19 June 2014) *HRW* Available at <<https://www.hrw.org/node/256559/printable/print>> Accessed on 17 November 2021.

<sup>51</sup> Al Jazeera (n 48).

<sup>52</sup> Shams Shamil, 'UN urges countries to repatriate 27 000 'IS children' from Syria' (30 January 2021) *DW* Available at <<https://www.dw.com/en/un-urges-countries-to-repatriate-27000-is-children-from-syria/a-56390032>> Accessed on 4 June 2021.



treatment upon arrival in their home country is a domestic matter, there is an international interest in it due to counter-terrorism efforts and consistency in the interpretation of international human rights laws. These bilateral treaties and different approaches have led to inconsistent interpretations of international human rights obligations and execution. For these reasons, calls to the international community to ensure a ceasefire, enable a peace process, and rescue everyone from these camps in a harmonious way continue.

The situation is made even more difficult in practice; a lot of individuals no longer have identity documents, there is no comprehensive list of people, and therefore they are difficult to locate and open channels of communication.<sup>53</sup> Further, it is unlikely that they will be able to leave the camps on their own due to the lack of resources and the ongoing conflict in Syria. Therefore, if states choose to interpret their international human rights obligations as negative obligations that do not require them to assist their national but rather not prevent them from returning home, states might deny them the only possible means of returning home.<sup>54</sup>

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<sup>53</sup> Ibid.

<sup>54</sup> Letta Tayler, 'Foreign ISIS suspects, families; why a single 'R' word matters at the UN' (7 June 2021) Human Rights Watch Available at <<https://www.hrw.org/news/2021/06/17/foreign-isis-suspects-families-why-single-r-word-matters-un>> Accessed on 20 February 2022.

## 2 Violations of human rights and other international norms as triggers for calls to repatriate

### 2.1 What kinds of violations have occurred in Al Hol?

Syria has been ruled by President Bashar al-Assad since the beginning of the 2000s.<sup>55</sup> The current crisis began in 2011 and since then over half a million people have been killed.<sup>56</sup> These killings can be attributed to the Syrian government as well as the non-state armed groups in the area. Besides the loss of life, the different armed forces have also committed torture, sexual violence, and unlawful detentions.<sup>57</sup> The civilian population in Syria has constantly been trapped in the middle of this power struggle and they have been used as weapons and shields by all sides.<sup>58</sup> The conflict in the region is still not over and the government is unstable which is why the civilians' human rights violations continue. The official Syrian government has lost control over several parts of its territory which are now governed by different armed groups.<sup>59</sup> Admittedly, it is difficult for a state to guarantee human rights during an armed conflict due to the lack of resources and the damage to the infrastructure. However, the Syrian government armed forces have also participated in the systematic destruction of these necessities rather than attempting to secure them which displays their lack of interest in guaranteeing human rights.<sup>60</sup> In unstable situations like this with a government that is not effectively in power anymore, it is difficult to identify the party responsible for upholding human rights and to hold them accountable for the failure of doing so. If no one is responsible for upholding human rights standards domestically in Syria, can the situation give cause for other states to take on the responsibility?

Syria is a party to several international human rights treaties such as the CRC,<sup>61</sup> the ICCPR<sup>62</sup> and the UNCAT.<sup>63</sup> The duty to implement and abide by these treaties lies on the government that has ratified the treaty. The following governments are bound by the treaties as well unless

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<sup>55</sup> Raneer Khooshie and Lal Panjabi, 'The Syrian Crisis: Violations of Basic Human Rights and Particularly Children's Rights' (2017) 46 GA. J. INT'L & COMP. L. 1, 26.

<sup>56</sup> Global Centre for the Responsibility to Protect 'Syria – populations at risk' (1 December 2021) *Globalr2p* Available at <<https://www.globalr2p.org/countries/syria/>> Accessed on 1 September 2021.

<sup>57</sup> Ibid.

<sup>58</sup> United Nations General Assembly (n 1).

<sup>59</sup> Amnesty International (n 1) 61.

<sup>60</sup> Raneer Khooshie and Lal Panjabi (n 55) 30.

<sup>61</sup> The Convention on the Rights of the Child (n 19).

<sup>62</sup> The International Covenant on Civil and Political Rights (n **Error! Bookmark not defined.**).

<sup>63</sup> The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (n 18).

they specifically withdraw from the treaty.<sup>64</sup> The Syrian government has not withdrawn from these treaties. Therefore, it is not a question of whether the Syrian government is bound by its international obligations to protect the rights and welfare of its citizens and others within its territory. It has been widely accepted that all parties to the Syrian conflict have committed violations of these human rights obligations as well as breaches of international criminal law. For example, the government has not only failed to protect civilians during this conflict, but they have also targeted them.<sup>65</sup> Further, children have been recruited to participate in the armed conflict which is a violation of the Optional Protocol of the CRC and customary international law.<sup>66</sup> For these reasons, not only is the government unable to protect the citizens but also unwilling to and purposefully violate their human rights. These violations have not only been limited to Syrian nationals but rather all the individuals within its territory. These examples show the dire human rights situation in Syria and the need for a change.

## 2.2 How has the international community reacted to the situation?

Since there is no doubt that a state must protect those in its territory, we face an interesting situation when a state loses control over a part of its territory due to a separatist movement. It raises the question of whether that state can be held responsible for the human rights violations in an area it cannot control.<sup>67</sup> While the international community has shown concern over the situation, the ground politics and chaos have made it difficult to provide humanitarian aid and organise the repatriation process. States must first determine who to approach regarding those held in the camps and then try to solve the situation through peaceful means. A state can intervene in another's territory only through invitation, consent, or acquiescence. Without one of these, a state cannot enter the territory of another one and simply pull its nationals out.<sup>68</sup> This would be a breach of state sovereignty and therefore, outside states must assess the situation carefully and through peaceful means. It could be argued that since the Syrian government has lost control over the territories and is not trying to improve the human rights

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<sup>64</sup> The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679 Article 42.

<sup>65</sup> Raneer Khooshie and Lal Panjabi (n 55) 30.

<sup>66</sup> The Rome Statute (adopted 17 July 1998, entered into force 1 July 2002) UN TS 2187 n38544, 1998.

<sup>67</sup> Amal Sethi, 'Separatist Regimes and Positive Human Rights Obligations' (2017) 9 LAW REV. GOV't L.C. 2.

<sup>68</sup> United Nations Human Rights Special Procedures, *Extra-territorial jurisdiction of states over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic: legal analysis* (2020) Available at <<https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf>> Accessed on 15 April 2022.

situation that it effectively is acquiescence. Further, it must be considered whether international treaty obligations bind non-state groups that are not a direct party to them and are protesting the government that has ratified the treaties. This consideration matters when determining the cooperation and rules between outside states and the armed groups in power in Syria. While this issue is not directly linked to repatriation, it is important not to make the situation on the ground worse and therefore put the repatriation process at risk.

Since 2012, the UN Security Council has passed several resolutions related to the conflict but none of them has been effectively implemented.<sup>69</sup> These have mainly focused on enforcing the Syrian government's responsibility to protect its citizens which it has been unable to do and demanding a ceasefire between the different armed groups. In 2014, a UN Resolution passed that authorised UN humanitarian aid operations to enter and work in Syria without the permission of the Syrian government.<sup>70</sup> At the same time, the UN Security Council called for the neighbouring countries to enable refugees to enter, but there are so many fleeing the conflict that it is an enormous burden for the neighbouring states, and they are reluctant to accommodate the process any further. They have also expressed that if they allow refugees to enter, other states must be willing to relieve the pressure by taking their nationals.<sup>71</sup> Without international assistance to help deal with the refugee and some hope that the conflict in Syria will end, it is not surprising that the neighbouring states are not eager to open their borders.

With the increasing proportion of global conflicts being non-international, a practice is evolving to hold non-state actors bound by the same international obligations that traditionally belong to the state. This arising customary international law rule binds all the parties to a conflict regardless of their official standing.<sup>72</sup> This means that the Kurdish armed forces are considered bound to respect, protect, and fulfil the same human rights obligations as the Syrian

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<sup>69</sup> See further: United Nations Security Council Resolution 2139 (22 February 2014) S/RES/2139 (2014) and United Nations Security Council Resolution 2042 (14 April 2012) S/RES/2042 (2012).

<sup>70</sup> United Nations Security Council Resolution 2139 (n 69).

<sup>71</sup> Oxfam, 'Failing Syria: Assessing the impact of UN Security Council Resolutions in protecting and assisting civilians in Syria' (12 March 2015) *Oxfam* Available at <<https://oxfamilibrary.openrepository.com/bitstream/handle/10546/346522/bp-failing-syria-unsc-resolution-120315-en.pdf;jsessionid=9B78BF25529CC3D93E23B9230F911321?sequence=1>> Accessed on 12 February 2022, 5.

<sup>72</sup> See, for example, United Nations Security Council Resolution 1894 (11 November 2009) S/RES/1894 (2009) in which the Security Council, while recognising that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law.

authorities.<sup>73</sup> Since they are unable or unwilling to protect the human rights of those at the camps, they should allow other parties to step in and ensure that the human rights obligations are fulfilled.<sup>74</sup> This failure of the Kurdish armed forces to fulfil their international humanitarian and human rights obligations can give other states rise to intervene in the situation that applies to their nationals.

There have been repeated calls for the situation to be investigated by the International Criminal Court (ICC), but it seems unlikely that the ICC will have the jurisdiction to start such an investigation.<sup>75</sup> While the investigation might be able to bring solutions under international criminal law and deter the local armed groups from committing further violence, it would not solve the issue of current violations under international human rights obligations. Finally, one of the major reasons behind these failed attempts is the political aspect of the conflict; several outside states have a political interest and agenda concerning the situation and preventing them from effectively cooperating to find a peaceful solution. Instead, there are some regional courts ready and willing to assess the criminal responsibility.<sup>76</sup> It seems that states are postponing their repatriation processes to wait for possible larger-scale criminal consequences and find a more unified approach to it.<sup>77</sup> The lack of international consensus has made it clear that states must aim at bilateral solutions concerning the foreign nationals in the Syrian territory. However, as the analysis of the European states below shows, it is good if states can put pressure on others to force them to take action.

### 2.3 What is repatriation and how does it work?

Repatriation means returning a person to the country of their origin. Typically, repatriation is voluntary which means that the person is returning to their country out of their free will.<sup>78</sup> Repatriation is most used in the refugee context and the Convention Relating to the Status of

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<sup>73</sup> Noam Lubell, 'Human rights obligations in military occupation' (2012) International review of the Red Cross Available at <<https://international-review.icrc.org/sites/default/files/irrc-885-lubell.pdf>> Accessed on 9 May 2022.

<sup>74</sup> Yearbook of the International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty-third session* (2001) A/CN.4/SER.A/2001/Add.1 vol. II, Part II, 26.

<sup>75</sup> Human Rights Watch 'Q&A: Syria and International Criminal Court' (17 September 2013) *HRW* Available at <<https://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court#>> Accessed on 12 February 2022.

<sup>76</sup> Global Centre for the Responsibility to Protect (n 56).

<sup>77</sup> *Ibid.*

<sup>78</sup> United Nations High Commissioner for Refugees, Handbook on repatriation and reintegration

Refugees Preamble provides the framework for voluntary repatriation.<sup>79</sup> Repatriation is linked to the principle of non-refoulement which means that a person cannot be returned to a country where their human rights are at risk.<sup>80</sup> The principle of non-refoulement has been confirmed in other international human rights treaties such as the UNCAT and is characterised as absolute, therefore, states are not allowed to exclude it through reservations.<sup>81</sup> It is important to discuss these principles in the Syrian context because the majority of the foreign nationals in Syria are not able to leave the country on their own and are living in inhumane conditions. The UN has made repeated pleas to states to repatriate the women and children from the camps. According to UN experts, states have a primary responsibility to take positive action and protect those who are most vulnerable. This applies to the women and children in Syria who are at risk of serious human rights abuses.<sup>82</sup>

The repatriation plea does not extend to the men who are being held in captivity in Syria. Most of these men have travelled to Syria to participate in the armed conflict and are called foreign fighters. A foreign fighter is a person who travels to a country other than their own to participate in an armed conflict and who does not have an affiliation to an official organised military organisation and is unpaid for their military services.<sup>83</sup> Most of the foreign men in Syria are being held in prisons and only some of them are at the camps with the women and children.<sup>84</sup> However, from a human rights perspective, the men at Al Hol should be treated the same as everyone else and be repatriated. If states have a positive obligation to repatriate nationals, it should apply to all nationals regardless of their status. In reality, foreign fighters typically join non-state armed groups, and these armed groups are labelled as terrorist or extremist groups creating the stigma that all foreign fighters are terrorists. This stigma creates an issue when discussing repatriation because states are not eager to repatriate those who might pose a security risk. States refer to the men volunteering to go to Syria knowing the situation and

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<sup>79</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) General Assembly resolution 429 (V) Preamble.

<sup>80</sup> Ibid, Article 33.

<sup>81</sup> United Nations High Commissioner for Refugees, 'The principle of non-refoulement under international human rights law' (2018) *OHCHR* Available at <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> Accessed on 15 April 2022.

<sup>82</sup> United Nations Special Procedures (n 37).

<sup>83</sup> United Nations General Assembly, *Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* (19 August 2015) 70th session A/70/330, 2.

<sup>84</sup> Human Rights Watch (n 38).

therefore, they are not in the same vulnerable position as the others at the camps.<sup>85</sup> This special vulnerability is used to differentiate between the different groups at al Hol.

As a result of the negative stigma, and due to the dominance of transnational threats such as the jihadist organisation ISIS in the Syrian territory, a heated global debate about the best approach is regarding these foreign fighters. From a human rights perspective, this focus on possible terrorist affiliations creates several issues. First, counter-terrorism strategies overlap with or even contradict human rights obligations because they typically suspend rights rather than protect them.<sup>86</sup> Second, the international discussion of a harmonious strategy to combat the foreign fighter issue in Syria takes the focus away from the women and children held at the camps around Syria who are in dire need of assistance. Finally, the repatriation process is linked to the global counter-terrorism response because some of the adults waiting for repatriation are accused of having terrorist affiliations which brings a political aspect to human rights protection.<sup>87</sup> In light of international human rights laws, there is no distinction between different actors in a conflict because human rights are the same for everyone.<sup>88</sup> Even though everyone has the same rights, the position of different parties influences the decision of the governing party in Syria on whether they are willing to allow the departure of the foreign fighters and their families and how far other states are willing to go to assist those in the first place.<sup>89</sup> Further, international humanitarian and human rights laws provide special protection for individuals who are internally displaced in their native countries, but this protection does not extend to foreign nationals leaving the foreign nationals at Al Hol camp without this safety mechanism.<sup>90</sup>

A state of emergency has often been used as a reason for suspending human rights temporarily.<sup>91</sup> However, the International Court of Justice (ICJ), the main judicial organ of the

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<sup>85</sup> Jeffrey Colgan and Thomas Hegghammer, 'Islamic Foreign Fighters: Concept and Data' (2011) Paper presented at the International Studies Association Annual Convention, Montreal, 6.

<sup>86</sup> Omer Faruk Topal (n 5) page 285.

<sup>87</sup> Letta Tayler (n 54).

<sup>88</sup> The International Committee for the Red Cross, *International humanitarian law and the challenges of contemporary armed conflicts - Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions* (1 October 2015) 62.

<sup>89</sup> Neil McDonald and Scott Sullivan, 'Rational Interpretation in Irrational Times: The Third Geneva Convention and the War on Terror' (2003) 44 HARV. INT'L L.J. 313.

<sup>90</sup> United Nations High Commissioner for Refugees, *Guiding Principles on Internal Displacement* (22 July 1998) ADM 1.1, PRL 12.1, PR00/98/109, Available at <<https://www.refworld.org/docid/3c3da07f7.html>> Accessed on 9 February 2022.

<sup>91</sup> Michael J. Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr. L. REV. 453.

UN,<sup>92</sup> has affirmed several times that during an armed conflict, international humanitarian and human rights laws are co-applicable which means that international human rights obligations cannot be ignored even during an armed conflict. This is an important point to notice because states have used the humanitarian crisis and the armed conflict as a reason to postpone their repatriation process. Case law shows that despite the armed conflict, states cannot suspend their human rights obligations. This also applies to Finland and the Netherlands with their repatriation process. If there is a positive obligation to repatriate nationals, this obligation cannot be suspended waiting on international criminal law consequences. For example, in 2004, the ICJ issued an advisory opinion on the Israeli built barrier between Israel and Palestine. The ICJ held that the CRC as well as other international human rights instruments are extraterritorially applicable when the states in question are parties to the treaty which means that if one of the states is not protecting human rights, the other one must do so on their behalf.<sup>93</sup> This was further reaffirmed in other ICJ judgments as shown in this Chapter. This means that a conflict cannot be used as a valid reason to divert from all the state's human rights obligations and that any action in a conflict must also be considered from a human rights angle even if it does not take place on the state's territory. While the temporary justification of some rights can be justified, most human rights, such as the right to life, cannot be suspended.<sup>94</sup>

To harmonise the legal obligations arising from these two sources, the international courts have relied on the concept of *lex specialis*, which means that a special law has a priority over general law justified by the fact that it is more accurate in certain circumstances.<sup>95</sup> This principle was applied to the aforementioned case and the ICJ was able to find Israel in breach of both international humanitarian and human rights law simultaneously.<sup>96</sup> *Lex specialis* highlights the increasing importance and consideration of human rights during armed conflicts and ensures the accountability of states for human rights violations in such circumstances. It aims to clarify that exceptional circumstances cannot be used as a reason to suspend all human rights.<sup>97</sup> This means that if we find that states are under a positive obligation to repatriate their nationals out

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<sup>92</sup> International Court of Justice, 'Home page' (2022) ICJ Available at <<https://www.icj-cij.org/en>> Accessed on 12 February 2022.

<sup>93</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (2004) I. C. J. Reports 136.

<sup>94</sup> Jonathan Horowitz, 'Human Rights, Positive Obligations, and Armed Conflict: Implementing the Right to Education in Occupied Territories' (2010) 1 J. INT'L HUMAN. LEGAL Stud. 305.

<sup>95</sup> Ibid 319.

<sup>96</sup> International Court of Justice (n 93) 136.

<sup>97</sup> Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AM. J. INT'L L. 240.



of Syria, the armed conflict itself cannot be used as an excuse not to take immediate action to do so.

According to Article 13 (2) of the UDHR, everyone has a right to leave a country and return to their home country. This right has also been confirmed in several international treaties such as the ICCPR.<sup>98</sup> The right is not absolute and can be deterred from protecting, for example, national security. However, this Article itself does not impose any positive obligations on the receiving state to assist in the process. This has been one of the cornerstones in the arguments, whether the state of nationality is under an obligation to act or whether they simply must allow their nationals to enter back in if they arrive by their means. For those unable to leave Syria on their own, this makes all the difference in their rights.

Originally the Kurdish armed forces were detaining people at Al Hol in breach of their human rights. However, they have shown recent eagerness for the camp to be dissolved and everyone repatriated. Now that there is a clear indication that they will be allowed to leave the camp and that they should do so, some states have referred to this exception made for national security and implied those at Al Hol pose a national security risk due to the terrorist nature of the conflict and the possible extremist views those at the camp have.<sup>99</sup> This exception is being used as an excuse for the failure to repatriate.

Another well-established fundamental principle of international human rights law is the principle of non-discrimination. Article 2 of the UDHR states that everyone is entitled to the same rights and cannot be discriminated against on bases such as nationality, race, religion, or political views.<sup>100</sup> Therefore repatriation and assistance from their home country cannot be withheld on grounds of possible radicalisation.<sup>101</sup> States that are founding their opinion of repatriation in counter-terrorism are in breach of this international principle because they are not allowed to discriminate against someone or limit their rights based on idealism or religion. Human rights can only be temporarily dispensed in the interests of national security that must

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<sup>98</sup> ICCPR 1966 Article 12 (3)

<sup>99</sup> United Nations Interregional Crime and Justice Research Institute, 'Addressing the threats related to returning Foreign Terrorist Fighters' UNICRI Available at <<http://www.unicri.it/addressing-threats-related-returning-foreign-terrorist-fighters>> Accessed on 17 November 2021.

<sup>100</sup> United Nations Universal Declaration on Human Rights (n 23) Article 2.

<sup>101</sup> Commissioner for Human Rights, 'The right to leave a country. Issue paper – Council of Europe' (1 October 2012) *CoE* Available at <<https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510>> Accessed on 19 February 2022, 13.

have sufficient grounds.<sup>102</sup> For these reasons, repatriation should apply to all nationals regardless of their circumstances in Syria.

The right to enter is also enshrined in the CRC where Article 10(2) provides that the right of the child to leave and enter any country extends to their parents as well.<sup>103</sup> This Article also highlights the importance of family unity guaranteed by the CRC.<sup>104</sup> However, while the right to enter has been established very securely, the legislation and case law have not answered the question of whether either state involved has or should have any duty to assist such a person. There is no question of whether those in Syria are legally allowed to leave the country on their own account, but rather what is expected of other states.

Because of the inconsistency in international norms on terrorism, the states involved in the Syrian conflict can act based on different domestic laws and interpretations. The concept of national security depends on the state's definition and interpretation of the level of threat. This concept allows states very wide discretion.<sup>105</sup> Considering the foreign nationals held at the Al Hol camp and the risk of harm they are facing; states should repatriate them first and then consider domestic actions they want to undertake after.

Automatically assuming that all foreign fighters are terrorist fighters creates a negative stigma which adds to the resistance states have when considering humanitarian assistance for the foreign fighters and their families. While there is sympathy for foreign civilians under the occupation, there rarely is any for those considered terrorists. Further, there is a vacuum in international law concerning the families of these fighters because they are typically seen as guilty of supporting acts of terror.<sup>106</sup> Regardless of how these laws identify people, in practice, individuals with any affiliation to terrorism are treated differently than those generally viewed as innocent civilians. The presumption of innocence and the consideration that the families of foreign fighters might be victims of terrorism themselves are typically overlooked thanks to

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<sup>102</sup> Ibid, 43.

<sup>103</sup> CRC 1989 Article 10 (2).

<sup>104</sup> CRC 1989 Preamble and Article 10.

<sup>105</sup> Eckart Klein, 'Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy' (2008) 41 *Isr. L. REV.* 482.

<sup>106</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978).

the negative stigma.<sup>107</sup> No tangible efforts have been made to diminish this stigma and it seems unlikely that it will change soon.

#### 2.4 The special protection of children and women

The conflict has cost the lives of thousands, mainly men, leaving thousands of women and children displaced around Syria and its neighbouring states. The women and children who have not been able to leave the country on their own and have been forced to gather at the camps to escape the ongoing armed conflict. They are now stuck at the camps with the conflict ongoing on the outside, but they are no longer able to participate in the conflict in any way. However, these camps are viewed as a breeding ground for violent extremism which is a significant encouragement for states to find solutions for those stuck at these camps.<sup>108</sup> International human rights are inherent to all human beings regardless of their nationality or actions. Certain human rights cannot be limited or deferred under any circumstances while others can be temporarily limited. However, especially when individuals are linked to terrorism, a special political dilemma arises where governments are trying to limit the full enjoyment of human rights from those based on radicalism.<sup>109</sup> At the moment, the children in Al Hol are being caught in the middle of this dilemma where their caretakers are suspected of terrorism and hence the right to get state assistance is limited for the children.

Children are protected by several international treaties, such as the CRC, and customary international law principles that are applicable in non-international armed conflicts that require states to take special care in protecting children from armed conflicts.<sup>110</sup> These protections are well established in international law instruments, such as the CRC, and practice.<sup>111</sup> However, typically women fall outside these special protections, and they are merely protected as

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<sup>107</sup> United Nations Office of the High Commissioner for Human Rights and United Nations Counter-Terrorism Implementation Task Force, *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters* (2018) Available at <[https://www.ohchr.org/sites/default/files/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web\\_final.pdf](https://www.ohchr.org/sites/default/files/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web_final.pdf)> Accessed on 17 November 2021, 24 para. 47.

<sup>108</sup> Frontex, 'Risk Analysis for 2017' (February 2017) *Frontex* Available at <[frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf)> Accessed on 19 February 2022, 30.

<sup>109</sup> Human Rights Committee, *General comment No. 29: HRC on derogations from provisions of the Covenant during a state of emergency* (2001).

<sup>110</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (n 106) Article 4 (3).

<sup>111</sup> The International Committee for the Red Cross, 'Customary international humanitarian law – Rule 135 Children' *ICRC* Available at <[https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule135](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule135)> Accessed on 16 April 2022.

civilians. Women's rights are mainly protected by international human rights treaties which require states to guarantee fundamental human rights under all circumstances to everyone such as the CEDAW.<sup>112</sup> This puts women with and without children at unequal standing which is not compatible with human rights.<sup>113</sup> Special protection in an armed conflict should apply to everyone equally and it should extend beyond the armed conflict as well including the repatriation process.

Women with children vicariously receive wider protection because of the sanctity given to childhood and the family unity in international law. International children's rights instruments typically place more responsibility on states to act than other international human rights instruments which automatically provide some protection for the mothers, too.<sup>114</sup> The concept of family unity was first confirmed in 1949 with the Fourth Geneva Convention Article 26 which states: "Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations."<sup>115</sup> This only applies to international armed conflict, but the concept has been adopted so widely since its establishment that it has become universal through customary international law.<sup>116</sup> For example, family unity is recognised in Article 16(3) of the UDHR<sup>117</sup>, Article 23(1) of the ICCPR<sup>118</sup> and the preamble of the CRC.<sup>119</sup>

According to international law, the family unit must be protected, and their separation must be avoided as far as possible. There is also a positive obligation to facilitate the reunion of family

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<sup>112</sup> The Convention on the Elimination of All Forms of Discrimination against Women (n 21).

<sup>113</sup> United Nations Population Fund, *The impact of conflict on women and children - a UNFPA Strategy for Gender Mainstreaming in Areas of Conflict and Reconstruction* (13-15 November 2002) Available at <[https://www.unfpa.org/sites/default/files/pub-pdf/impact\\_conflict\\_women.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/impact_conflict_women.pdf)> Accessed on 17 November 2021, 3.

<sup>114</sup> Daniel L. Byman, 'Frustrated Foreign Fighters' (13 July 2017) *The Brookings Institution* Available at <[www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/](http://www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/)> Accessed on 20 February 2022.

<sup>115</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 26).

<sup>116</sup> Frances Nicholson, *The right to family life and family unity of refugees and others in need of international protection and the family definition applied* (January 2018) UNHCR Legal and protection policy research series, PPLA/2018/01 3.

<sup>117</sup> United Nations Universal Declaration on Human Rights (n 23) Article 16(3).

<sup>118</sup> The International Covenant on Civil and Political Rights (n 20) Article 23(1).

<sup>119</sup> The Convention on the Rights of the Child (n. 19) Preamble.

members who have been separated.<sup>120</sup> Purposefully separating family members would be contrary to these international law norms. For these reasons, simply repatriating children from the Al Hol camp in Syria without a parent would be a breach of said international law norms. When discussing family unity, it is often referred to as the child's right to it. International documents do not often discuss the family unity of a wife and husband and whether it is just to separate them from each other. The CRC confirms the child's right to be with their parents without a distinction between the mother and the father or stipulating that only one parent is sufficient.<sup>121</sup> Considering the special protection granted to children, separating them from their families should not be a condition for their repatriation. It should also not be a condition that the parent in question must be the mother of the child. Further, states must provide special protection and assistance to children who are facing human rights violations which implies that the repatriation of children is a positive international human rights obligation.

The CRC has been nearly universally ratified. The only non-member state of the CRC is the United States of America.<sup>122</sup> The CRC's core principle is the best interest of a child in Article 3 (1) which should be considered in situations relating to children.<sup>123</sup> The CRC confirms family reunification in Article 9(1) which states that a child shall not be separated from their parents against their will.<sup>124</sup> The family reunification established in Articles 9 and 10 of the CRC applies to families divided by state borders. Further, it places the children and the parents at an equal status meaning that both are entitled to join the other regardless of their status in the country they are in. While the principles allow a person to leave any country, it also allows entry to any country for family reunification.<sup>125</sup> Article 10(1) specifically refers to states' positive obligations which means that states are required to take action to guarantee the welfare of the child and their family unity.<sup>126</sup> According to Article, 9, the only exception to this rule is a situation where the reunification is not in the best interests of the child.<sup>127</sup>

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<sup>120</sup> The International Committee for the Red Cross, 'Customary international humanitarian law – Rule 105 Respect for family life' *ICRC* Available at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule105](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105)> Accessed on 20 February 2022.

<sup>121</sup> The Convention on the Rights of the Child (n 19) Article 9.

<sup>122</sup> United Nations Office of the High Commissioner for Human Rights, 'Committee on the Rights of the Child' *OHCHR* Available at <<https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>> Accessed on 17 November 2021.

<sup>123</sup> The Convention on the Rights of the Child (n. 19) Article 3 (1).

<sup>124</sup> *Ibid*, Article 9 (1).

<sup>125</sup> Kate Jastram and Kathleen Newland, 'Family unity and refugee protection' *Refworld* Available at <<https://www.refworld.org/pdfid/470a33be0.pdf>> Accessed on 20 February 2022, 578.

<sup>126</sup> The Convention on the Rights of the Child (n. 19) Article 10 (1).

<sup>127</sup> *Ibid*, Article 9 (1).

One of the core issues in the repatriation from Syria is the fact that while states can accept that they should repatriate the children from the Al Hol camp, they are reluctant to repatriate the mothers as well and especially reluctant to repatriate other civilians.<sup>128</sup> As the debate about the mothers continues, the minority group of women who are at the camps without children are being overlooked. If the mothers are repatriated on the account of family unity, what happens to the other women? Regardless of whether the women have children, they should all be guaranteed the same rights and the opportunity to safely return to their homeland.

With the international pleas for states to repatriate their nationals from the Al Hol camp, these principles are referred to as the majority of the individuals at the camps are children and their mothers.<sup>129</sup> The CRC applies to the situation because being detained at the camp is not in the best interests of the children which has been acknowledged by states and is why states accept that they are responsible for organising the repatriation of these children. However, the reluctance to repatriate the mothers, as well as the children, is a breach of state obligations under Articles 9 and 10 of the CRC.<sup>130</sup> Reading these articles together leaves no doubt about the international human rights obligations that states have to the children and their mothers. Furthermore, because human rights are inherent and one of the fundamental principles is equality, the obligation to repatriate their nationals cannot only be based on the special protection provided for children, therefore, excluding a group from the process.<sup>131</sup> Excluding a group would be a breach of the state's international human rights obligations.

## 2.5 The special protection of those most vulnerable

With the safeguards for children in armed conflicts and the lack of them for the adults, there is another angle that requires states to provide special protection to all those at the Al Hol camp. International human rights law recognises that there are groups who require more protection due to their vulnerability. Vulnerability is used to describe individuals who require extra care

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<sup>128</sup> Al Jazeera, 'Germany, Finland repatriate women and children from Syria camps.' (20 December 2020) *Al Jazeera* Available at: <<https://www.aljazeera.com/news/2020/12/20/germany-finland-to-repatriate-women-children-from-syria>> Accessed 4 June 2021.

<sup>129</sup> United Nations News (n 44).

<sup>130</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 26) Article 26.

<sup>131</sup> United Nations Universal Declaration on Human Rights (n 23) Preamble.

and attention due to a physical or psychological impairment. There is no separate treaty or a convention to outline their protection or rights, but rather those protections are referred to in other international law instruments such as the Preamble for CEDAW.<sup>132</sup> Vulnerability can be divided into several categories including inherent vulnerability and circumstantial vulnerability.<sup>133</sup> Inherent vulnerability refers to physical and psychological characteristics that a person possesses at birth making them less independent than others, for example, individuals with disabilities such as blindness. Circumstantial vulnerability must be determined on a case-by-case basis and is temporary. Those trapped in conflict regions can fulfil the criteria for being circumstantially vulnerable considering their dependence on humanitarian aid and the high risk of harm. Children, in general, are considered vulnerable due to their age and level of maturity.<sup>134</sup> Victimhood is considered a signal of vulnerability and therefore those who are victims of crimes, domestic or international, are generally considered vulnerable. Another signal is living in precarious situations, especially in a state outside your nationality. A person exposed to inhumane treatment should always be considered vulnerable.<sup>135</sup> Being in a conflict zone outside your homeland equates to living in a precarious situation especially considering the inhumane treatment those at the Al Hol camp are subject to.

While women are often categorised as vulnerable, being a woman does not automatically qualify someone for this special protection.<sup>136</sup> This has been established in the case law as well, for example, in the case of *Hossein Kheel v the Netherlands* where the ECtHR found the woman to be vulnerable due to her circumstances.<sup>137</sup> Women tend to end up in circumstances that qualify them as temporarily vulnerable more often than men. In armed conflicts, women are often subjected to cruel and inhumane treatment and reports confirm that this is the situation in Syria as well. Unstable situations such as this put women in a vulnerable position where their human rights are being violated rather than protected.<sup>138</sup> The systematic violation of women's rights has been recognised by international criminal tribunals and there have been several pleas

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<sup>132</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1.

<sup>133</sup> Denise Venturi, 'Protecting Vulnerable Groups: The European Human Rights Framework' (2017) 17 *HUM. Rts. L. REV.* 188.

<sup>134</sup> *Ibid.*, 189.

<sup>135</sup> Francesca Ippolito and Sara Iglesias Sanchez, *Protecting Vulnerable Groups: The European Human Rights Framework* (Bloomsbury Academic 2015) 14.

<sup>136</sup> Icelandic Human Rights Centre, 'Women and Girls' *The human rights education project* Available at <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups/women-and-girls>> Accessed on 14 April 2022.

<sup>137</sup> *Kheel v the Netherlands* Case no 34583/08 (Judgment) (ECtHR 1849, 16 December 2008)

<sup>138</sup> John Shattuck, 'Violations of Women's Human Rights' (1993) 4 *Department of State Dispatch* 709.

to enforce women's rights during armed conflicts.<sup>139</sup> With these examples, it seems clear that women deserve special protection in armed conflicts as vulnerable groups without the need to evaluate their situations on a case-by-case basis. Unfortunately, this is not a priority consideration.

The CEDAW was adopted in 1979 and it has been ratified by 189 countries making it nearly as widely ratified as the CRC.<sup>140</sup> The CEDAW is the main convention focusing on women's rights, but the focus is on the discrimination and the equal treatment of women.<sup>141</sup> CEDAW does not provide any special protection for women but merely defines that, women should have the same human rights as everyone else. While it is a great international legal instrument highlighting some of the difficulties women face in life, it remains very narrow and leaves room for improvement on gender equality.

Women's vulnerable position was recognised when drafting the CEDAW prohibiting all discrimination against women based on their sex. The Convention allows temporary special measures taken to achieve equality.<sup>142</sup> While the CEDAW accepts that women are more often discriminated against and therefore in a more vulnerable position, it does not establish any special protection as a vulnerable group nor forces states to recognise them as such but merely acknowledged that women are often discriminated against and that states should establish safeguards to prevent systematic discrimination. In 1993, the Declaration on the Elimination of Violence against Women was established recognising the historical inequality between men and women and placing special guards to protect women from gender-based violence.<sup>143</sup> The declaration was the first international instrument to address the violence women face, but it is not legally binding on states but rather sets a framework of standards states should apply.<sup>144</sup> This was followed by several regional treaties prohibiting violence against women which

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<sup>139</sup> Department of Peacekeeping Operations, *Review of the sexual violence elements of the judgments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820* (9 March 2009).

<sup>140</sup> The Convention on the Elimination of All Forms of Discrimination against Women (n 21).

<sup>141</sup> Ibid, Preamble.

<sup>142</sup> Ibid, Article 4.

<sup>143</sup> United Nations General Assembly, Declaration on the Elimination of Violence Against Women (20 December 1993) A/RES/48/104.

<sup>144</sup> United Nations Women, 'Global norms and standards: ending violence against women' United Nations Women Available at <<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards>> Accessed on 22 April 2022.



shows that the issue has been widely recognised.<sup>145</sup> Despite these international instruments, inequality persists and women still face violence and discrimination which is why it is so important to protect their human rights, especially in situations where they are already vulnerable.

International humanitarian law provides some special protection for women, that is directly linked to their sex recognising the vulnerabilities it creates. However, breaches of international humanitarian law are typically dealt with after the conflict is over with a small possibility to put pressure on the parties involved to comply with it during the conflict. Considering the situation in Syria, it is vital that states acknowledge these international law protections and put pressure on the local authorities to ensure that everyone in the camps is treated according to these legal instruments. They must also recognise their human rights obligations and assist those at risk, regardless of the circumstances that put them at risk.

Women's vulnerability has also been recognised in customary international law. International legal instruments have acknowledged women's special needs since the first Geneva Convention<sup>146</sup> enabling the formation of customary international law Rule 134 on the special protection of women in armed conflicts, in a list of customary international law rules created by the International Commission for the Red Cross.<sup>147</sup> These provisions recognise that women are more affected by armed conflicts than men and therefore require special protection. These rules are internationally binding yet difficult to enforce during the armed conflict giving little hope to the women suffering from them. Further, even these rules provide a higher level of special consideration for pregnant women and women with young children.<sup>148</sup> Understandably, these women have more special needs, but they should not be prioritised at the expense of others whose needs might not be as obvious. International human rights laws provide special

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<sup>145</sup> The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 9 June 1994 (entered into force 5 March 1995) OAS; Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa March 1995 (entered into force 11 July 2005); The Declaration of the Council of Europe's First Summit 9 October 1993.

<sup>146</sup> The First Geneva Convention governing the sick and wounded members of armed forces was signed in Geneva in August (adopted 22 August 1864, entered into force 22 June 1885) Article 12, fourth paragraph cited in Vol. II, Ch. 39, para 1.

<sup>147</sup> The International Committee for the Red Cross, 'Customary international humanitarian law – Rule 134 Women' *ICRC* Available at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule134#Fn\\_A9C6FACF\\_00002](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule134#Fn_A9C6FACF_00002)> Accessed on 20 February 2022.

<sup>148</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 26) Articles 16–18, 21–23, 38, 50, 89, 91 and 127 and Additional Protocol I, Article 70(1).

protection to those most vulnerable, and this applies to all the women and children at the camps regardless of their relation to each other or their physical fitness.<sup>149</sup>

Even though international law provides special protection for those most vulnerable, it is most often the category of people that get overlooked. This is because they are typically not equipped to voice their needs or are aware of mechanisms that could help them. Further, categorising vulnerability is still vague and difficult.<sup>150</sup> The foreign women in Syria are not often considered vulnerable because they made a conscious choice to travel there. States have often referred to the voluntary argument in the repatriation process when justifying why they would only repatriate the children. International law in general places an emphasis on the different treatment of those who, for example, join the armed forces voluntarily.<sup>151</sup> It is assumed that they have full knowledge of the situation and their duties and therefore cannot defend themselves through misunderstanding and mistakes. In practice, this is not typically the case and the emphasis on volunteering should be decreased. The established vulnerability can change very quickly and the choice they made should not influence how they are treated now because their circumstances are very different to those they were in when arriving in Syria which is why the concept of temporary vulnerability exists. Individuals must also be allowed to make mistakes and change their minds when circumstances change. When a lot of the foreign fighters and their families travelled to Syria, the conflict had not yet turned so violent. Many of those who travelled to Syria in hopes of migrating there permanently with their families to live in a country that was primarily Islamic.

Considering the foreign nationals at the Al Hol camp, especially the women and children, there should be little doubt that they are especially vulnerable. The people are stranded in a conflict with very little food or shelter with an armed force at guard that is not their own. Most of them are also in a country that is not their native country. Typical of the inability to seek help is how difficult it has been to contact those at Al Hol and communicate with them about their needs and the possibilities that they might have. The fact that the process relies on the Kurdish armed forces to seek out, identify and consult foreign individuals shows that the process does not take their special needs sufficiently into consideration. The individual people-based focus has also

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<sup>149</sup> Raymond A. Smith, *Extending International Human Rights Protections to Vulnerable Populations* (1st edn, Routledge 2019) 10.

<sup>150</sup> Sanda Fredman, 'Substantive equality revisited' (2016) I•CON Vol. 14 No. 3 730.

<sup>151</sup> Rachel Brett, 'Adolescents volunteering for armed forces or armed groups' (2003) 85 INT'L REV. RED Cross 859.

suffered and is overshadowed by the nature of the armed conflict and the atrocities others have committed. It is very likely that they have experienced significant trauma and require psychological assistance. It is also possible that they were lured into Syria on false pretences and therefore their choice to travel there should not prevent them from getting assistance now.

Protecting those at the Al Hol camp and repatriating them on the account of vulnerability would provide them all with special protection and not discriminate against those who do not have children with them or the adults in general. This would also make the process faster since people would not have to try and prove their family relations or age. Considering that states have not been able to enter the Al Hol camp and locate and interview their nationals, it has not been possible for them to sufficiently fulfil the positive obligation to evaluate vulnerability on a case-by-case basis. The failure to consider this is a breach of international human rights obligations. To diminish this breach, everyone should be repatriated as soon as possible, and their circumstances should be evaluated on a domestic level.

3 Positive human rights obligations and extraterritorial human rights obligations: can one argue that there is a legal obligation to repatriate?

### 3.1 Positive obligations

The foundation for international human rights laws is the UDHR proclaimed in 1948.<sup>152</sup> Since then, there have been several thematic human rights treaties that are part of the international human rights instruments including the five core human rights treaties: Convention on the Elimination of Racial Discrimination (CERD) 1969,<sup>153</sup> the ICCPR,<sup>154</sup> the ICESCR,<sup>155</sup> CEDAW<sup>156</sup> and CRC.<sup>157</sup> These core treaties as well as the UDHR have been ratified by most states creating some customary norms for human rights besides the treaty obligations.<sup>158</sup> In the past seventy years, there has been considerable evolution in how human rights treaties are interpreted and what kind of obligations they pose. The importance of considering human rights in all circumstances has increased even though cultural differences and different priorities in societies still prevent all human rights from being considered equally important.<sup>159</sup> According to the Vienna Convention on the Law of Treaties Article 27, states cannot invoke internal institutional structures or laws as a justification for their failures to perform their treaty obligations, both positive and negative. If a state has ratified a treaty, it is bound by the obligations stated in it unless it has made reservations in advance. Domestic legislation and infrastructure must be adjusted so that the state can fulfil its obligations.<sup>160</sup>

Most of the international human rights obligations are so-called negative obligations that require to state to refrain from taking action that might violate or unnecessarily restrict human rights. Positive human rights obligations mean human rights obligations that states can violate by omission therefore they require the state to take action to protect human rights.<sup>161</sup> The

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<sup>152</sup> United Nations Universal Declaration on Human Rights (n 23).

<sup>153</sup> Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) General Assembly Resolution 2106 (XX). Ratified by Finland in 1970. Ratified by the Netherlands in 1971.

<sup>154</sup> The International Covenant on Civil and Political Rights (n 20).

<sup>155</sup> International Covenant on Economic, Social and Cultural Rights (n 22).

<sup>156</sup> The Convention on the Elimination of All Forms of Discrimination against Women (n 21).

<sup>157</sup> The Convention on the Rights of the Child (n 19).

<sup>158</sup> Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988-89) Australian Yearbook of International Law 82–108.

<sup>159</sup> Human Rights Committee (n 109) para. 11.

<sup>160</sup> The Vienna Convention on the Law of Treaties (n 64) indicates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" Article 27

<sup>161</sup> Amal Sethi (n. 67) 3.

concept of negative obligations is more widely accepted in state practice because they are easier to fulfil. While states have submitted to certain positive obligations, such as changing the national laws when implementing international human rights treaties or improving the impartiality of judges, it is very difficult to force states to force the acceptance of such positive obligations.<sup>162</sup> Generally, international treaties do not have a direct enforcement body but the enforcement mechanism is strengthened through individual complaint systems.<sup>163</sup> The supervision of the implementation and fulfilment is based on monitoring and reporting and states policing each other. The monitoring is typically done through a committee in charge of the treaty, but these committees do not have other than administrative means to sanction states which is why international pressure is so vital for the fulfilment of the treaties.<sup>164</sup> Cultural differences, different infrastructures and financial situations of states open loopholes for governments to fall short of their human rights obligations by claiming different interpretations and a lack of resources.

According to the UN, the responsibility to fulfil obligations under the core human rights instruments requires states to take positive action to facilitate the enjoyment of basic human rights.<sup>165</sup> For example, states must implement international treaties into national legislation after ratification. These positive obligations must be approached with caution because whenever a state takes action to protect one person's rights, it essentially limits another's.<sup>166</sup> For example, freedom of speech is limited through the prohibition of hate speech that aims to protect individuals from verbal abuse and discrimination. This automatically forces a consideration of the hierarchy of rights. It must be weighed whether the protection from verbal abuse warrants the limitation of someone else's freedom of speech. Officially human rights do not have a hierarchy but rather should be guaranteed as a whole. In reality, there has to be some hierarchy of rights because occasionally they overlap, and states have limited resources. Certain human rights have always been considered more important than others; these are called fundamental human rights which can be deduced from the core treaties. However, the

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<sup>162</sup> Ibid.

<sup>163</sup> United Nations Office of the High Commissioner for Human Rights, 'Treaty body strengthening' *OHCHR* Available at <<https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening>> Accessed on 9 May 2022.

<sup>164</sup> Laurence R. Helfer, 'Monitoring Compliance with Unratified Treaties: The ILO Experience' (2008) 71 *LAW & CONTEMP. Probs.* 194.

<sup>165</sup> United Nations, 'Foundation of international human rights law' *United Nations* Available at <<https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>> Accessed on 1 December 2021.

<sup>166</sup> Silvia Venier, 'Exploring the Dichotomy: The Evolving Role of Positive Obligations under International and European Human Rights Law' (2017) *Human Rights & International Legal Discourse* 11, no. 2, 292.

fundamental human rights are not a codified list of rights, but rather a global understanding that rights such as the right to life, physical security, freedom, and equality form a foundation for all other human rights.<sup>167</sup> This hierarchy also means that these rights should be protected even at the cost of other human rights. A state cannot fulfil its human rights obligations by limiting other rights, however, it should protect the fundamental rights in situations where human rights clash with each other.<sup>168</sup>

While several international treaties seem to establish both positive and negative obligations, they do not clearly distinguish between the two.<sup>169</sup> The wording of these obligations is typically up to interpretation. It often seems that the distinction is merely symbolic rather than tangible. Further, the wording tends to be over-ambitious creating high expectations that cannot be fulfilled in practice especially when the sole responsibility relies on the state.<sup>170</sup> Because of this high and unreachable standard, international human rights treaties often refer to ‘*the maximum available resources*’ to recognise that not all states can fulfil their obligations and that states will prioritise their rights differently.<sup>171</sup> Because of the criteria for resources and the different priorities, states are more likely to prioritise human rights obligations that are negative because refraining from taking action is cheaper and easier. To prove that states have used their available resources, they must demonstrate it through implementation strategies and by reporting their progress to the treaty bodies. The UN has expressed its view that resources do not simply refer to financial resources, but states should also utilise the knowledge and tools of the international community to fulfil their treaty obligations and find solutions that can be achieved.<sup>172</sup> For example, states in the same region might deal with similar resources and can share best practices on how to utilise them for the most effective. There are also UN experts who advise states on the best strategies.<sup>173</sup> Seeking international advice and assistance to fulfil treaty obligations is a positive obligation which means that for a state to claim that they are using the maximum available resources does include the state taking action. However, even if

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<sup>167</sup> World Law: Comment, ‘International Recognition and Protection of Fundamental Human Rights’ (1964) DUKE L.J. 855.

<sup>168</sup> Eckart Klein (n 105) 482.

<sup>169</sup> Amal Sethi (n 67) 4.

<sup>170</sup> David Levin, ‘Practicalities and Positive Human Rights Obligations in International Law’ (2005) 1 CAMBRIDGE Student L. REV. 23.

<sup>171</sup> Sigrun Skogly, ‘The Requirement of Using the Maximum of Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity’ (2012) 12 HUM. Rts. L. REV. 394.

<sup>172</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of the State Parties’ Obligations* (1990) supra no 15 paragraph 10.

<sup>173</sup> Ibid.

this obligation is positive, it remains vague to what extent the state should go to protect human rights.

International human rights instruments outline several obligations for their state parties. For example, to protect people against human rights violations and to facilitate the basic enjoyment of human rights.<sup>174</sup> These are positive obligations since they require a state to do something. These obligations leave room for interpretation as well, it is not immediately clear whether these obligations apply to all nationals as well as those within the state territory or simply to the territory. This distinction is vital when determining whether states have an obligation to their nationals at Al Hol. If the obligation to protect against human rights violations extends to all nationals, states must repatriate from Al Hol because of the vast human rights violations taking place. Because of the room for interpretation, it is important to investigate state practice to understand how the law should be applied.

There are also obligations that these instruments lay on states through accepted interpretations and practice rather than direct wording. For example, under the UDHR Preamble states must ensure that human rights are being upheld in their territories under their jurisdiction. However, the Preamble itself or the UDHR does not create binding obligations for the states but rather outlines the common purpose to protect human rights and fundamental freedoms universally.<sup>175</sup> Therefore, states accept that their possible reservations and implementation and enforcement mechanisms cannot contradict this main purpose. The Preamble also outlines the state as the main party responsible for upholding human rights within its jurisdiction.<sup>176</sup>

According to the Vienna Convention on the Law of Treaties Article 31(1) “[a] treaty shall be interpreted in good faith following the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.”<sup>177</sup> This means that states should not try to interpret a treaty to impose as few obligations on them as possible when it is convenient but rather accept the obligations they are bound by. Therefore, treaty preambles are important to

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<sup>174</sup> Human Rights Advocacy and the History of Human Rights Standards, ‘Government Obligations’ *University of Michigan* Available at <<http://humanrightshistory.umich.edu/accountability/obligationr-of-governments/>> Accessed on 14 April 2022.

<sup>175</sup> The Universal Declaration of Human Rights (n 23) Preamble.

<sup>176</sup> *Ibid.*

<sup>177</sup> The Vienna Convention on the Law on Treaties (n 64) Article 31 (1).

highlight the object and purpose of each treaty and to prevent states from ratifying treaties with no intention of fully respecting their obligations.

Because of the space left for interpretation, international courts have established case law to distinguish between positive and negative obligations. This case law forms a part of customary international law. Customary international law is not codified law or based on treaties, but international state practises that are so universally accepted that they are considered binding. International case law forms a part of this because it interprets international treaties and practises according to customary international law. For example, even though international treaties can be vague on whether a state's obligations are positive or negative and whether the state fulfilled their obligations, international courts can clarify the nature of those obligations. Once these interpretations have been made, international courts can require states to change their practices and affirm the rules of the existing custom.<sup>178</sup> When these rules have been affirmed, states are bound to follow them as part of international law irrespective of their treaty commitments. International and regional courts have influenced how the uncodified hierarchy of human rights should be interpreted. For example, according to the regional ECtHR, the right to life and prohibition of torture are supreme among human rights.<sup>179</sup> Therefore, even though the international human rights treaties do not form a fixed hierarchy of rights, such a hierarchy is established as an international norm through case law. However, while there is some international consensus on the hierarchy regarding fundamental human rights, it is also influenced by social and cultural values which differ between states and therefore will not be internationally accepted about all human rights.<sup>180</sup> Priorities change even on an international level which is why it is more efficient to have a level of fluidity in the human rights hierarchy as well. This allows human rights to remain current and inclusive.

International law remains ambiguous as to what positive human rights obligations states have and how far states must go to fulfil them. Positive obligations have not been codified into a set list and while they exist, the extent states must go to fulfil these obligations is up for the state's interpretation. For this reason, to qualify for positive obligations, state practice and case law must be analysed. For example, according to the CRC Article 3, a state has a positive obligation

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<sup>178</sup> The International Committee for the Red Cross, 'Customary law' *ICRC* Available at <<https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>> Accessed on 20 February 2022.

<sup>179</sup> *McCann v United Kingdom* Case no 18984/91 (Judgment) (ECtHR, 27 September 1995).

<sup>180</sup> Jootaek Lee, 'Paradox of Hierarchy and Conflicts of Values: International Law, Human Rights, and Global Governance' (2020) 18 *NW. U. J. INT'L HUM. Rts.* 74.



to consider the best interest of the child. However, the Article states that the best interests of a child must be „a“ primary consideration when making a decision regarding children.<sup>181</sup> The wording implies that other considerations can also be weighted and that if those considerations are persuasive enough, they can trump the best interests of the child. This means that the positive obligation can be fulfilled rather easily because it is only necessary to consider the best interests and not act solely based on them. According to Article 9(1) of the CRC, states must ensure that a child is not separated from their parents unless it is necessary in light of the best interests of the child.<sup>182</sup> Reasons for such determination must be determined by a competent authority and involve abuse or neglect by the parent. The obligation to investigate the circumstances of the child and the possible reason for separation is a positive obligation that requires a state to appoint an authority responsible for it.<sup>183</sup> A failure to appoint such an authority would be a breach of human rights obligations. Because this investigation is compulsory for the separation, the authorities cannot separate the children at the Al Hol camp from their parents without conducting it and deciding in the best interests of the child. The children have the right to be considered when making such a decision and this includes an investigation on whether they should remain with their families. It is safe to say that being at the Al Hol camp is not in the best interests of any child.

### 3.2 Extraterritorial human rights obligations

If we accept that states have positive human rights obligations, it must be analysed whether these obligations are extraterritorial. The question is whether a state is responsible for upholding human rights on an international level or a territorial level and how this is compatible with state sovereignty. According to Article 29 of the Vienna Convention on the Law of Treaties, “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”<sup>184</sup> This means that if a treaty is silent on territorial or jurisdictional applicability, the treaty should be considered territorially applicable which means that states are only responsible for fulfilling their international treaty obligations within their physical territory.

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<sup>181</sup> The Convention on the Rights of the Child (n 19) Article 3.

<sup>182</sup> Ibid, Article 9.

<sup>183</sup> Ibid, Article 9 (1).

<sup>184</sup> The Vienna Convention on the Law on Treaties (n 64) Article 29.

Traditionally, the principle of territoriality has dictated that human rights obligations should be applied territorially which means that states' basic duty is to ensure that human rights are not being violated in their territory. This has typically been considered a negative obligation.<sup>185</sup> States must also ensure that their domestic actions do not violate human rights and that the state acts in the interests of its citizens. In comparison, international humanitarian law applies cross borders because of the nature of armed conflicts, and this approach is becoming more accepted when applying international human rights law as well.<sup>186</sup> The Human Rights Committee, the monitoring body of the ICCPR, says that states "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".<sup>187</sup> The statement confirms the interpretation that the protection of certain human rights can require the state to act extraterritorially. This view has also been adopted by the ICJ who has held in judgments that the fundamental human rights instruments are applicable extraterritorially. However, the exercise of these rights cannot hinder the right to self-determination.<sup>188</sup> This implies that human rights should be respected extraterritorially, but they cannot be used as a tool to undermine the sovereignty of other states.

The CRC, on one hand, states in Article 2 that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction".<sup>189</sup> Respect has generally been accepted as meaning that states must refrain from interfering in the enjoyment of such a right.<sup>190</sup> The treaty does not define as to what action a state must take to ensure the enjoyment of these rights. Similarly, the UNCAT states in Article 2 that "[e]ach State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>191</sup> Therefore it seems that some human rights instruments distinguish between jurisdiction and territory and specifically extend the state's obligations outside the principle of territoriality. The distinction is crucial when determining the scope of responsibility that a state has and whether positive obligations are extraterritorial.

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<sup>185</sup> United Nations Universal Declaration on Human Rights (n 23) Preamble.

<sup>186</sup> United Nations Office of the High Commissioner for Human Rights 'International legal protection of human rights in armed conflict' (2011) *OHCHR* Available at <[https://www.ohchr.org/documents/publications/hr\\_in\\_armed\\_conflict.pdf](https://www.ohchr.org/documents/publications/hr_in_armed_conflict.pdf)> Accessed on 17 December 2021, 42.

<sup>187</sup> Human Rights Committee, *General comment No. 31: The nature of the general legal obligation imposed on State Parties to the Covenant* (2004) para. 10.

<sup>188</sup> International Court of Justice (n 93) 136.

<sup>189</sup> The Convention on the Rights of the Child (n 19) Article 2 (1).

<sup>190</sup> United Nations (n 165).

<sup>191</sup> The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (n 18) Article 2 (1).

Further, extraterritorial obligations cannot be discussed without considering their implications on state sovereignty. The international courts have taken the view that if a state has an obligation to those within its jurisdiction, this obligation is extraterritorial. On the other hand, when treaties speak to obligations within its territory or do not specify the extent of state obligations, a state cannot and should not extend its power beyond its borders.<sup>192</sup>

Further, if we accept that a state must ensure the rights of everyone within its jurisdiction regardless of their nationality then we could conclude that a state cannot be extraterritorially responsible for its nationals because the human rights guarantees would fall on the state the nationals are in at the time.<sup>193</sup> This interpretation seems to support the idea that, due to state sovereignty, only one state at the time is responsible for guaranteeing human rights to avoid conflicts. However, an argument can be made that since human rights are inherent and universal, the protection of them should be too and that the more states are involved, even outside their territory, in guaranteeing those rights, the better. The approach should be that human rights are universal and therefore focused on individuals and the state is irrelevant for anything else than providing a mechanism where those rights are protected. In practice, the fulfilment of rights does not work without the state being the responsible party. International case law shows that international and regional courts are more likely to consider human rights territorial. The ICJ found in its advisory opinion on the *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* that the rights provided in the International Convention on Economic, Social and Cultural Rights are primarily territorial rather than extraterritorial even though the extraterritorial nature of the fundamental human rights in exceptional circumstances was accepted. The extraterritorial protection of fundamental human rights is allowed when the action is compatible with the purpose of the human rights treaty.<sup>194</sup>

The territorial nature of human rights seems to leave individuals who are in states with no functioning government in a vacuum. The state is the primary protector of human rights within its territory while state sovereignty protects the state from outside interference. International law avoids these vacuums with the principle of effectiveness which automatically places positive obligations on other states. The principle of effectiveness forms from two rules;

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<sup>192</sup> Human Rights Committee (n 187) para. 10 provides: “[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.”

<sup>193</sup> Michael J. Dennis (n 91) 455.

<sup>194</sup> International Court of Justice (n 93) para 112.

vacuums must be avoided in international law and states are held liable for failing to guarantee positive human rights.<sup>195</sup> The extraordinary circumstances give cause for other states to extend their power extraterritorially, too because human rights must be universally upheld at all times.<sup>196</sup> The theory of effective control clarifies that while a state is the primary guarantor of human rights, the true liability and responsibility is on the party actually in control of the territory.<sup>197</sup> With the number of non-international armed conflicts increasing, this principle has become a very important tool in the protection of human rights. This also enhances the idea that there cannot be a vacuum of rights. For example, in the case of *Loizidou v Turkey*, Turkey was held liable for human rights violations in Northern Cyprus due to their effective control over the territory.<sup>198</sup> However, these situations require an international court decision to find the party accountable which makes the remedy of fulfilling human rights obligations a very slow process and does not necessarily provide any protection to those living in an armed conflict.

These examples show that there is a global consensus that human rights should be protected everywhere and if a state acts in good faith to protect the fundamental human rights, it is allowed to do so extraterritorially. Therefore, states should protect the human rights of their nationals, if they are unable to convince the Syrian government to do so, they must act themselves and repatriate their nationals. Hence, Finland and the Netherlands are obligated to repatriate their nationals when their rights are not protected through other means, and they are at a substantive risk of human rights violations. This view is supported by the several international pleas for the repatriation process as well as the interpretation of the right of the child and the family unity.<sup>199</sup>

### 3.3 Can these positive state obligations require states to repatriate everyone?

A key principle in international human rights law is called non-refoulement which means that no state is allowed to return a person to a state where their human rights are in jeopardy. The

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<sup>195</sup> Hans Kelsen, *Principles of International Law* (Rinehart & Company New York 1952) 414.

<sup>196</sup> Alina Kaczorowska, *Public International Law* (4th edition Routledge Oxfordshire 2010) 185.

<sup>197</sup> International Court of Justice (n 93) para 112.

<sup>198</sup> *Loizidou v Turkey* Case no. 15318/89 (Judgment) (ECtHR, 28 July 1998): The European Court of Human Rights refers on page 45 to the ICJ decision in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Reports 1971 16.

<sup>199</sup> See further: United Nations Special Procedures (n 37).

principle of non-refoulement is confirmed in international case law, international humanitarian law and customary international law. This means that non-refoulement is universally binding under all circumstances.<sup>200</sup> The rule of non-refoulement can be viewed as a way for states to express their opinion on the human rights situations in other states and put pressure on those states by not returning their nationals to them. This situation is similar when considering a state that is no longer able to fulfil its human rights duties leading to other states pulling their nationals away from those territories. Similarly, repatriation of nationals could be viewed as states rightfully expressing their opinions on the human rights situation in Syria and drawing international attention to it. International human rights instruments do not have mechanisms to enforce states to act but rather rely on monitoring and states putting pressure on each other.<sup>201</sup> Other states intervening in Syria by repatriating their nationals could kindle peace processes and stability. Further, the rule of non-refoulement must be kept in mind in the repatriation process because states are not allowed to use later extradition as an escape clause to send their repatriated nationals back to Syria if it turns out that their reintegration process is difficult.

Since the beginning of the conflict in Syria, the UN Human Rights Council has urged the Syrian government to end human rights violations on its territory.<sup>202</sup> Since this has failed and the violations continue, several states have imposed sanctions to put international pressure on the Syrian government to comply with its human rights obligations. However, this has not stopped the human rights violations especially since the Syrian government is no longer in control of the area where the camps are in their territory. The Human Rights Council has made it clear that it has reasonable grounds to believe that human rights violations will continue in Syria for the unforeseeable future and that the international community must protect the civilians victimised by the conflict.<sup>203</sup> This extraordinary situation gives cause for other states to intervene to guarantee human rights in the area.

One significant argument for the repatriation of everyone is that the receiving state can control and keep books of those who have returned. Because everyone is allowed to return to their

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<sup>200</sup> Mike Sanderson (n 31) 780.

<sup>201</sup> Yvonne M. Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34 U. PA. J. INT'L L. 1.

<sup>202</sup> Human Rights Council, *Situation of human rights in the Syrian Arab Republic - Resolution S-17/1* (29 April 2011).

<sup>203</sup> Global Centre for the Responsibility to Protect, 'Atrocity Prevention and Outcomes of the Human Rights Council's 47<sup>th</sup> Session' (20 July 2021) *Globalr2p* Available at <<https://www.globalr2p.org/publications/atrocity-prevention-and-outcomes-of-the-human-rights-councils-47th-session/>> Accessed on 20 February 2022.

home country by their means, it is more difficult for states to supervise these people. Finland and the Netherlands are both parties to the Schengen area which means that once someone from Syria has crossed into the Schengen area from another country, they can arrive in their home country without being checked.<sup>204</sup> This makes it possible for former foreign fighters to enter unnoticed. Since one of the main reasons for not repatriating former foreign fighters is the risk of radicalism spreading, it would be better for the states to be in control of the situation and then act domestically how they see fit.<sup>205</sup> Another reason why states have been opposing the repatriation of former foreign fighters is that it is very difficult to get evidence of their actions and possible crimes in Syria which would mean that their domestic sentencing is nearly impossible. Many states view it as a better option to leave those in Syria and allow the local authorities there to deal with them.<sup>206</sup> However, this is not without serious risk to their human rights, such as a right to a fair trial. The same reasoning applies to all adults held at the Al Hol camp.

### 3.4 Can the protection of human rights override state sovereignty?

State sovereignty means the right for a state to use the power within its territory without the interference of other states and outside parties. This right also comes with a responsibility to protect those in the state. The only exception where state sovereignty must yield is when a population is suffering harm from a conflict, an international responsibility arises to protect these people. However, such intervention can only take place when a state is unwilling or unable to protect the people by themselves.<sup>207</sup> This is an international humanitarian law principle which means that it is applicable during armed conflicts, and mainly refers to military intervention in an armed conflict. While international actors would have this permission to interfere in the conflict in Syria through a military response, the issue of protection of international human rights and foreign nationals is slightly different. International human rights laws are not tied to specific circumstances like international humanitarian law which makes their active enforcement more difficult, especially in armed conflicts. The increased importance

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<sup>204</sup> European Commission, 'Schengen Area' *EU* Available at <[https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area\\_en](https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area_en)> Accessed on 22 April 2022.

<sup>205</sup> H. J. Mai, 'Why European countries are reluctant to repatriate citizens who are ISIS fighters' (10 December 2019) NPR Available at <<https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why?t=1650805027808>> Accessed on 14 April 2022.

<sup>206</sup> *Ibid.*

<sup>207</sup> Gareth Evans and Modamed Sahnoun, *International Commission on Intervention and state sovereignty - the responsibility to protect* (the International Development Research Centre 2001).

of international human rights has created new demands on state sovereignty that have not yet formed an accepted practice.<sup>208</sup> The shift has transferred the focus from state sovereignty to a more people-centred approach. This shift is difficult because states must independently decide which treaties, they want to be a party to and how they are willing to limit their sovereignty to fulfil their chosen international obligations. Yet human rights have been globalised to the extent where this choice for governments has become limited.

International case law confirms that a state is only allowed to exercise its jurisdiction in another state's territory through an invitation, consent, or acquiescence. It is made clear, for example, through case law, that a failure to comply with human rights obligations is not sufficiently mitigated by this rule.<sup>209</sup> While extraordinary circumstances allow other states to protect fundamental human rights, it is not possible in practice to simply enter another state to enforce those rights. This means that the only possible way for states to enter Syria and help their nationals to return home is through the invitation or acceptance of the party holding effective control over the territory. Since the invitation has been given by the Kurdish armed forces who are effectively in power in north-eastern Syria, this should not prevent states from entering Syria and collecting their nationals.<sup>210</sup> For Finland and the Netherlands, the situation means establishing diplomatic relationships with the Kurdish armed forces to organise the repatriation process. It would be beneficial for states to adopt a harmonious approach to the repatriation process to ease the logistical and legal consequences.

Should the peaceful means of the repatriation process fail, a state could rely on the doctrine of protection of nationals. Generally, it means an evacuation operation from another country. As such it is an intervention in another country to protect its nationals if they are at a risk of an injury and the host state fails to protect them.<sup>211</sup> This process consists of cumulative circumstances; first, there is an imminent threat of injury to nationals; second, a failure or inability on the part of the territorial sovereign to protect them, which leads to a state

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<sup>208</sup> International Commission on Intervention and State Sovereignty, *The responsibility to protect: report of the International Commission on Intervention and State Sovereignty* (IDRC 2001) 7

<sup>209</sup> *Bankovic v Belgium* Case no 52207/99 (Judgment) (ECtHR 890, 19 December 2001) 890, para 59.

<sup>210</sup> Open Society Justice Initiative, 'European States' Obligations to Repatriate the Children Detained in Camps in Northeast Syria' (July 2021) *Open Society Justice Initiative* Available at <<https://www.justiceinitiative.org/uploads/d9762590-424c-4cb6-9112-5fedd0d959d1/european-states%E2%80%99-obligations-to-repatriate-the-children-detained-in-camps-in-northeast-syria-20210722.pdf>> Accessed on 15 April 2022, 54.

<sup>211</sup> Andrew Thomson, 'Doctrine of the protection of nationals abroad: rise of the non-combatant evacuation operation' (2012) 11 Wash. U. Global Stud. L. Rev. 627, 628.

intervening state to protect its nationals.<sup>212</sup> While this doctrine has been heavily criticised, it is still valid.<sup>213</sup> However, this is a humanitarian intervention and should be a tool of last resort in the Syrian context with other peaceful human rights efforts taking priority.

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<sup>212</sup> Tom Ruys (n 34), 233.

<sup>213</sup> *Ibid*, 234.



#### 4 European regional human rights laws

While several international treaties protect and guarantee human rights, some regional treaties enhance that protection. Considering the comparison between the actions of Finland and the Netherlands, it is important to investigate these regional treaties. Regional treaties have different enforcement mechanisms than international treaties and commonly human rights violations in Europe are addressed through these regional processes.<sup>214</sup>

##### 4.1 European bodies for human rights

In general, regional treaties have a better enforcement and compliance rate than international mechanisms which is why human rights are typically well protected in those regions where such mechanisms exist.<sup>215</sup> There are two major bodies in Europe that both play a part in guaranteeing human rights and freedoms in the region. These two bodies work simultaneously in the region to provide a strong ground for human rights protection. European states are known for working closely together to protect human rights, especially within Europe.<sup>216</sup> States also have mechanisms to supervise each other and put pressure on others to fulfil their human rights obligations.<sup>217</sup> These mechanisms are important when assessing state practices in Europe and whether Finland and the Netherlands have lived up to their human rights obligations. The selected states are both members of the CoE<sup>218</sup> and the EU.<sup>219</sup> Because of the existence of these mechanisms and their close monitoring, it is more likely that Finland and the Netherlands will be held accountable for failing to abide by their possible positive human rights obligations regionally first rather than through the international mechanisms.<sup>220</sup>

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<sup>214</sup> Christine Evans, *The right to reparation in international law for victims of armed conflict- Cambridge studies in international and comparative law* (Cambridge University Press 2012).

<sup>215</sup> Ibid.

<sup>216</sup> Council of Europe, 'Ukraine, EU and Council of Europe working together to support freedom of media in Ukraine' (16 March 2022) CoE Available at <<https://www.coe.int/en/web/freedom-expression/ukraine-eu-and-council-of-europe-working-together-to-support-freedom-of-media-in-ukraine>> Accessed on 15 April 2022.

<sup>217</sup> European Parliament, 'Supervisory powers' *Europarl* Available at <<https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/supervisory-powers>> Accessed on 14 April 2022.

<sup>218</sup> Council of Europe, 'Our member states' CoE Available at <<https://www.coe.int/en/web/about-us/our-member-states>> Accessed on 14 April 2022.

<sup>219</sup> European Union, 'Country profiles' *European Union* Available at <[https://european-union.europa.eu/principles-countries-history/country-profiles\\_en](https://european-union.europa.eu/principles-countries-history/country-profiles_en)> Accessed on 14 April 2022.

<sup>220</sup> Gabriel M. Wilner, 'Reflections on Regional Human Rights Law' (1995) 25: Issues 1 & 2 Ga J Int'l & Comp L. 409.

#### 4.1.1 The Council of Europe

First, the CoE was established in 1949 and now it has 46 member states.<sup>221</sup> The CoE was created to pioneer human rights and one of its major achievements is the ECHR adopted in 1950<sup>222</sup> and the ECtHR in charge of supervising its obedience of it. All member states have ratified the ECHR because doing so is a prerequisite to joining the CoE.<sup>223</sup> The ECtHR became the first human rights system able to deliver legally binding and enforceable judgments. The judgments are enforced by the CoE's Committee of Ministers who supervises that the judgment is executed properly.<sup>224</sup> This is a key aspect when discussing Finland and the Netherlands' obligations to repatriate their nationals because this mechanism allows CoE member states to put pressure on each other and for the ECtHR to uphold a very high standard for human rights in Europe. While the human rights obligations from international and regional human rights treaties are similar, it is more likely that these obligations will be enforced through the regional mechanisms for Finland and the Netherlands.<sup>225</sup>

The ECHR sets a wide range of human rights and prohibitions to ensure them. According to Article 1 of the ECHR, state parties must secure human rights for everyone within their jurisdiction. Article 2 establishes a right to life as an absolute human right that must be protected by law. The right to life includes an obligation to refrain from taking a life but also a positive obligation to take necessary steps to prevent a loss of life. This means having laws to criminalise taking life and dissuading individuals from harming others.<sup>226</sup> The ECtHR has interpreted the Article as creating positive obligations as well by finding states in violation by failing to take preventative measures to protect life in situations where a loss of life was likely. For example, in 2008 in the case *Budayeva and others v. Russia* the ECtHR found Russia in violation of Article 2 by ignoring the likelihood of a disastrous mudslide and failing to protect lives.<sup>227</sup> This shows that there is an obligation to take pre-emptive actions when a risk to life is significant and that states can be held liable for omitting to act to prevent it.

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<sup>221</sup> Council of Europe, 'Founding fathers' *CoE* Available at <<https://www.coe.int/en/web/about-us/founding-fathers>> Accessed 20 April 2022.

<sup>222</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (n 24).

<sup>223</sup> Council of Europe, 'A Convention to protect your rights and liberties' *CoE* Available at <<https://www.coe.int/en/web/human-rights-convention>> Accessed on 20 February 2022.

<sup>224</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (n 24) Article 46.

<sup>225</sup> Evans (n 214).

<sup>226</sup> Council of Europe (n 28) 14.

<sup>227</sup> *Budayeva and Others v Russia* Case no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (Judgment) (ECtHR, 29 September 2008).

Linked to the right to life is the prohibition of torture in Article 3 of the ECHR. According to the ECtHR judgments, the prohibition of torture applies to extradition and deportation cases as well. In 2008, in the case of *Saadi v Italy*, the ECtHR found Italy in violation of this Article when Italy decided to deport a Tunisian national to circumstances with a high probability of human rights violations.<sup>228</sup> This case displays how the ECtHR evaluates the level and probability of the risk when making its decisions. It also means that states are not only responsible for their actions but can be held liable if their actions or omissions lead to torture in situations where the state knew or should have known of the risk of torture. This interpretation establishes the prohibition of torture to have at least some positive obligations because it prohibits states from declaring ignorance as a defence. This is a positive obligation to research, be aware of the situation in other countries and analyse the risk of torture. For example, the ECtHR has decided not to allow its member states to extradite anyone to the United States of America since they may face the death penalty because it would violate the prohibition of torture as well as the right to life. The death penalty has been abolished in Europe since 1985.<sup>229</sup> This shows how Europe is interested in protecting human rights outside its territory when it is probable that those rights are being violated and how the protection of human rights is being held at a high standard in Europe. Similar principles should be applied to the repatriation process; since human rights are being violated in Syria, Finland and the Netherlands could use the repatriation as a tool to display their view on how Syria has failed to fulfil its human rights obligations, and this could put pressure on Syria to live up to its obligations in the future. Theoretically, the acts of not sending and not leaving someone in a human rights violations situation should not be distinguishable.

Considering the case law established by the ECtHR, it shows that the court consistently imposes positive obligations on state parties to ensure different human rights outlined in the ECHR. The risk of harm must be considered in the balance with probability. Case law has confirmed this principle unambiguously over the years.<sup>230</sup> This means that the rights in ECHR must be interpreted as creating both horizontal and vertical obligations: individuals must act in a way that does not violate the rights of others and states are required to have measures and

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<sup>228</sup> *Saadi v Italy* Case no 37201/06 (Judgment) (ECtHR, 28 February 2008).

<sup>229</sup> Council of Europe, 'The ECHR and the death penalty: a timeline' *CoE* Available at <<https://www.coe.int/en/web/portal/death-penalty>> Accessed on 20 February 2022.

<sup>230</sup> Bernhard Hofstötter, 'European Court of Human Rights: Positive Obligations in *E. and Others v. United Kingdom*' (2004) 2 INT'L J. Const. L. 526.

take action to secure these rights.<sup>231</sup> However, the ECtHR has also created limitations to the application of the ECHR to ensure that state parties can fulfil their obligations in practice. According to the court, the obligations cannot impose an impossible or disproportionate burden on states. The relevant criteria are to evaluate on a case-by-case basis whether a state knew or should have known about the risk to human rights and whether it failed to act within the scope of its powers to avoid the situation.<sup>232</sup> This is a well-established two-fold criterion, but the exceptions leave space for interpretation. For example, a state that has gone through a domestic crisis can claim that upholding human rights creates a disproportionate burden when the state is rebuilding itself.<sup>233</sup> These situations always create a temporary risk for human rights, and it must be ensured that such exceptions are not allowed to stretch beyond the necessary time.

According to the ECHR, a state must take measures to provide effective protection for those most vulnerable. The ECtHR has also confirmed this in its judgments, for example, in the *Storck v Germany* case.<sup>234</sup> According to the ECtHR, states must determine vulnerability considering the circumstances the person is in. Determining vulnerability places positive obligations on states to determine whether vulnerability applies to the situation and warrants special protection.<sup>235</sup> If international human rights instruments leave room for ambiguity in the protection of those most vulnerable, the European approach does not. It has been affirmed through state practice and case law that vulnerable people, whether inherently or temporarily, have the right to special protection and that their circumstances must be evaluated individually.<sup>236</sup> Since regional instruments have stronger enforcement mechanisms, this provides particularly high protection for Europeans or individuals in Europe who are considered vulnerable.

#### 4.1.2 The European Union

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<sup>231</sup> Silvia Venier (n 166) 291-292.

<sup>232</sup> *Osman v United Kingdom* Case no 23452/94 (Judgment) (ECtHR, 28 October 1998) 115.

<sup>233</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights – Handbook for Parliamentarians No 26* (Courand et Associés 2005) 48.

<sup>234</sup> *Storck v Germany* Case no 61603/00 (Judgment) (ECtHR 406, 16 June 2005) 406.

<sup>235</sup> *Opuz v Turkey* Case no 33401/02 (Judgment) (ECtHR, 9 June 2009) and *Mudric v the Republic of Moldova* Case no 74839/10 (Judgment) (ECtHR, 16 July 2013). In the following, all obligations to investigate, prosecute and otherwise protect victims of violence will be referred to as positive obligations of due diligence, which is a specific sub-category of the positive obligation to protect.

<sup>236</sup> *DH and Others v the Czech Republic* Case no 57325/00 (Judgment) (ECtHR, 13 November 2007) para 182; *JD and A v the United Kingdom* Case nos 32949/17 and 34614/17 (Judgment) (ECtHR, 24 October 2019) paras 9, 32.

The second body is the EU which was established in 1992 and all EU member states have been members of the CoE before joining the EU.<sup>237</sup> The EU also has its human rights instrument and a monitoring court. Respect for human rights is one of the core values of the EU and is enshrined in its founding Treaty Article 2.<sup>238</sup> The EU human rights instrument is the Charter which is interpreted by the Court of Justice of the European Union (CJEU).<sup>239</sup> The Charter is binding to all EU states and is consistent with the CoE's ECHR.<sup>240</sup> The judgments from the CJEU are binding to the member states involved and the referring domestic court. Further, all domestic courts in the EU dealing with the same issue later are bound by the preliminary ruling.<sup>241</sup> This is important to note should an EU member state refer another to the court for the failure to repatriate their nationals.

One of the reasons for creating a separate EU human rights instrument is related to better enforcement. The EU member states cooperate on various other aspects outside human rights making them more dependent on each other than other regional treaties do. EU states are tightly linked to one another also financially and politically and have agreed to give away much of their self-determination right to achieve their common goals. Within the EU, states can put more pressure on each other to abide by the Charter because a failure to fulfil obligations followed by a judgment from the CJEU can lead to financial and political penalties. The Charter also has a broader scope than the ECHR on several specific issues such as non-discrimination.<sup>242</sup> However, the Charter and EU law overall remain narrower than the UN human rights instruments which cast very wide human rights and obligations. These different mechanisms guarantee a high standard for human rights in Europe and a possibility of a binding court decision that states have a positive obligation to repatriate their nationals from Syria.

#### 4.2 Obligations of EU member states

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<sup>237</sup> Council of Europe (n 221).

<sup>238</sup> The Treaty on European Union (7 February 1992) 2008/C 115/01 Article 2.

<sup>239</sup> The Charter of Fundamental Rights of the European Union (n 25).

<sup>240</sup> Equality and Human Rights Commission, 'What is the Charter of Fundamental Rights of the European Union?' (2 August 2021) *Equality Human Rights* Available at <<https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union>> Accessed on 20 February 2022.

<sup>241</sup> Court of Justice of the European Union, 'Court of Justice' *Curia Europa* Available at <[https://curia.europa.eu/jcms/jcms/Jo2\\_7024/en/](https://curia.europa.eu/jcms/jcms/Jo2_7024/en/)> Accessed on 20 February 2022.

<sup>242</sup> *Ibid.*

Due to being a party to the EU and the CoE as well as several UN human rights treaties, Finland and the Netherlands are bound by several overlapping international obligations to respect and promote human rights. Because of the harmony and authority of the ECtHR and the CJEU, human rights decisions from these courts are binding to the states involved in the case as well as guiding factors to all other EU states on how to interpret their human rights obligations. For example, if an EU state considers it an obligation under these regional instruments for all member states to repatriate their nationals from the camps in Syria, the state could bring the case to either the ECtHR or the CJEU and the situation would be investigated. The case would have to be brought against a specific state or state. This route is also possible for any citizen of the member states; however, they must try to rectify the situation through domestic courts first. If the investigation leads to a court procedure, all member states would be bound by the judgment when dealing with the same issue.<sup>243</sup> Such a case has not yet been launched concerning European states' obligation to repatriate nationals from conflict zones. The matter could also be discussed more generally, for example, by raising the issue at the European Parliament, the governing body of the EU.<sup>244</sup>

The ECHR and the Charter protect the core human rights such as the right to life. Further, both instruments protect a child's right to family life.<sup>245</sup> Taking into consideration the best interests of a child, the European Parliament has appealed for the member states to repatriate all the children from the camps. To this end, a Resolution was adopted in 2021 outlining that a greater political response is needed from the EU states regarding the situation in Syria.<sup>246</sup> The European Parliament feels that a military response will not help to solve the situation. It was decided that diplomatic relations with the Syrian regime will not be normalised until significant progress on the ground takes place.<sup>247</sup> The Resolution did not specify any action regarding the repatriation of the mothers or the other women at the camps. The repatriation of the European children was called for with consideration to a statement by The United Nations Children's Fund (UNICEF) in February 2021 on the safe reintegration and repatriation of all children at

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<sup>243</sup> Ibid.

<sup>244</sup> European Parliament, 'About Parliament – Protecting fundamental rights within the Union' *Europarl* Available at <<https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu>> Accessed on 28 January 2022.

<sup>245</sup> The Charter of Fundamental Rights of the European Union (n 25) Article 16; European Convention for the Protection of Human Rights and Fundamental Freedoms (n 24) Article 8.

<sup>246</sup> European Parliament, 'European Parliament resolution of 11 March 2021 on the Syrian conflict – 10 years after the uprising (2021/2576(RSP))' (11 March 2021) *Europarl* Available at <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0088\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0088_EN.html)> Accessed on 28 January 2022.

<sup>247</sup> Ibid, para 43.

the Al Hol camp.<sup>248</sup> This shows how much international attention those at the camps, especially the children have attracted. It has also increased the pressure on states to act or explain their approach to the situation. During the repatriation process, the family situation of the children should be taken into an account and the best interests of the child must be considered in full compliance with international law.<sup>249</sup> Considering the special protection towards family unity in EU law and the consideration of the child's family situation, this should mean that the mothers will be repatriated with their children. Further, since the European human rights instruments, specifically discuss the special protection granted to those in vulnerable situations, the repatriation should extend to all the individuals at the Al Hol camp.

#### 4.3 The different steps by European countries

Even though Finland and the Netherlands are bound by these the regional human rights treaties, they have attempted to work around them. Several children at the Al Hol camp still have other family members in their home countries. The states have claimed that this family should be sufficient to fulfil the criteria of family life and that it will not be required to repatriate the mothers who, it is argued, have endangered their children in the first place, but rather guarantee the children's safety by taking them away from their mothers.<sup>250</sup> Besides the regional human rights instruments, both states are party to the CRC which casts a wider net of rights for children than either of the regional treaties. The exception to family reunification under the CRC is the best interests of the child and several sources have appealed to the fact that being with the mothers who voluntarily took their children to the conflict zones is not in the best interests of the child, but rather the children should be with the family left behind in Europe. However, these justifications are weak at best and several EU states have opposed this loophole.<sup>251</sup> Without a more concrete consensus on the approach and states monitoring each other in fulfilling these obligations, European nationals will remain stuck at the Al Hol camp waiting for this very slow repatriation process.

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<sup>248</sup> Ted Chaiban, 'UNICEF calls for the safe reintegration and repatriation of all children in al Hol camp and across the northeast of Syria' (28 February 2021) *UNICEF* Available at <<https://www.unicef.org/press-releases/unicef-calls-safe-reintegration-and-repatriation-all-children-al-hol-camp-and-across>> Accessed on 22 April 2022.

<sup>249</sup> Ibid.

<sup>250</sup> Mustasaari, Sanna, 'Finnish children or 'cubs of the caliphate'?' (21 April 2020) *Oslo Law Review* Available at <<https://www.idunn.no/doi/10.18261/ISSN.2387-3299-2020-01-03>> Accessed on 09.05.2022

<sup>251</sup> Kate Jastram and Kathleen Newland (n 125) 582-583.

One of the main reasons states are unable to come to a consensus on how to repatriate their nationals from Syria is the religious extremist nature of the conflict and the terrorist ideologies that are attached to it. States are very cautious in repatriating individuals they assume have radical ideologies and might pose a threat to national security later. Further, the repatriation process is financially expensive and requires states to spend taxpayer money to fund the process.<sup>252</sup> For this reason, the repatriation process has attracted a lot of public attention which mainly focuses on the moralism of the repatriation process rather than the international human rights and legal obligations of a state. With so much negative attention on the issue, it is difficult for states to make decisions that are purely based on law rather than politics.<sup>253</sup>

While European states have had different approaches to their repatriation processes, there is no denying that these processes have been unacceptably slow and inconsistent.<sup>254</sup> Especially western European states have received backlash about their lack of action. In May 2021, Human Rights Watch published a letter calling out to Nordic countries to promptly repatriate their nationals.<sup>255</sup> The Human Rights Watch had found the conditions at the camps inhumane and life-threatening. It argued that states have a positive obligation to repatriate those from the camps, with a focus on the children with their mothers. At that point, the Human Rights Watch reported an estimate of 135 Nordic nationals waiting for repatriation out of which at least 85 were children. The Nordic countries had repatriated 27 nationals when the letter was published, and the treatment of these individuals varied between the states. Only three of the 27 repatriated persons were adults, all women, and two of those adults were repatriated to Finland.<sup>256</sup> In response to the letter, the Finnish authorities agreed that they must repatriate the children. The Finnish authorities have considered whether the mothers could be accused of human trafficking due to them taking their children to circumstances where their human rights were at risk.<sup>257</sup> This has been used as another reason for the reluctance to repatriate the mothers. The Nordic

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<sup>252</sup> H. J. Mai (n 205).

<sup>253</sup> Save the Children, 'Children abandoned by their governments are 'wasting away' in Syrian camps' (23 September 2021) *Save the Children* Available at <<https://www.savethechildren.net/news/children-abandoned-their-governments-are-%E2%80%98wasting-away%E2%80%99-syrian-camps-%E2%80%93-save-children>> Accessed on 20 February 2022

<sup>254</sup> Open Society Justice Initiative (n 210) 5.

<sup>255</sup> Kenneth Roth, 'To the Foreign Ministers of Denmark, Finland, Norway, and Sweden: Comments and Questions Regarding Nordic Nationals Arbitrarily Held in Northeast Syria' (26 May 2021) HRW Available at <[https://www.hrw.org/sites/default/files/media\\_2021/06/Nordic\\_letter\\_17062021.pdf](https://www.hrw.org/sites/default/files/media_2021/06/Nordic_letter_17062021.pdf)> Accessed on 2 February 2022.

<sup>256</sup> *Ibid.*

<sup>257</sup> Susanna Reinboth and Paavo Teittinen, 'Keskusrikospoliisi on tutkinut al-Holista palanneita naisia epäiltyinä ihmiskaupasta' (4 May 2021) *Helsingin Sanomat* Available at <<https://www.hs.fi/kotimaa/art-2000007958171.html>> Accessed on 20 February 2022.



countries also referred to the lack of diplomatic channels with the local authorities as a reason for the slow process. This seems like a weak argument considering that 25 states have repatriated their nationals from the camps fully and the local authorities have repeatedly expressed their willingness in the process.<sup>258</sup> Since May 2021, the situation has changed some and the Nordic countries have repatriated more nationals, however, the issue remains, and the considerations and justifications must be considered for their global impact.<sup>259</sup>

The local Kurdish authorities have supported the repatriation process and have been willing to let individuals leave the camp. However, they have also requested the Nordic countries for financial assistance to create a court to prosecute the foreign adult detainees who they accuse of having terrorist affiliations, but these efforts have failed. Currently the Kurdish are insisting on the repatriation of the children with their mothers.<sup>260</sup> Because of this impasse, the repatriation processes have started with the unaccompanied or orphaned children.<sup>261</sup> The Nordic countries are being looked up to as models for human rights protection and the Human Rights Watch pleads them to show a good example to other states rather than lower the standard for human rights. For these reasons, the Human Rights Watch found that the Nordic countries mentioned were in breach of their international human rights obligations under the CRC and regional obligations under the ECHR.<sup>262</sup> As regards the Netherlands, the state has stated that its citizens have the right to return to the Netherlands, however, it does not consider this as a duty to proactively repatriate.<sup>263</sup> A Dutch court orders the state to repatriate the children from Syria, but this decision was overturned on appeal.<sup>264</sup>

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<sup>258</sup> Kenneth Roth (n 255).

<sup>259</sup> Ibid.

<sup>260</sup> Autonomous Administration of North East Syria, 'Press release' (18 March 2021) *Twitter* Available at <<https://twitter.com/RojavaIC/status/1372518844720353282>> Accessed on 12 April 2022.

<sup>261</sup> Open Society Justice Initiative (n 210) 4.

<sup>262</sup> Human Rights Watch, 'Nordic Countries: Repatriate Nationals from Northeast Syria. Potential complicity in unlawful detention of ISIS suspects, children' (26 May 2021) *HRW* Available at <<https://www.hrw.org/news/2021/05/26/nordic-countries-repatriate-nationals-northeast-syria>> Accessed on 20 February 2022.

<sup>263</sup> F. BJ Grapperhaus, 'Reactie op het verzoek van het lid Buitenweg, gedaan tijdens de Regeling van Werkzaamheden van 5 februari 2019, over het bericht 'Nederland onderzoekt terughalen vrouwelijke Syriëgangers en kinderen'' (21 February 2019) *Tweede Kamer / House of Representatives* Available at <[https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2019Z03634&did=2019D07750](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z03634&did=2019D07750)> Accessed on 24 April 2022.

<sup>264</sup> *The Netherlands v GHDHA* Case No NL:GHDHA:2019:3208 (Judgment) (Court of Appeal of The Hague (NL), 22 November 2019); *The Netherlands v GHDHA* Case no NL:HR:2020:1148 (Judgment) (Supreme Court (NL), 26 June 2020).

Another compelling argument for the repatriation process was highlighted in the UN Security Council Resolution 2396 of 2017<sup>265</sup> which calls for member states to consider the women and children at the camps as victims of terrorism rather than perpetrators. These people, the resolution argues, are and have been in a vulnerable position and require rehabilitation and assistance.<sup>266</sup> Considering this, instead of being viewed as having a negative impact on counter-terrorism efforts, repatriation could prove to be a vital tool to support these efforts.

Some women at the camp in Al Hol have openly participated in spreading ISIS ideology and propaganda. At least previously, these women did not wish to leave the camp even though the circumstances are unsafe.<sup>267</sup> However, the intent of the Kurdish authorities to prosecute these women for their terrorist affiliations and the desire for the camp to be broken down still create a dilemma for the foreign states who are responsible for protecting their nationals from human rights violations. The current worldwide pandemic has also influenced the conditions at the camp and slowed down the repatriation process.<sup>268</sup>

#### 4.3.1 The repatriation of nationals in Finland

When the first European states started the repatriation, the conflict was still very volatile, and the public had a very negative and loud attitude. Now that the conflict has quieted down and some nationals have already been repatriated, the dilemma does not cause just an outcry.<sup>269</sup> However, the logistical difficulties of the repatriation process in practice do not negate the possible positive obligation to repatriate which is based on law. The authorities' estimate of the security risk has also changed from considering the women too dangerous to be repatriated to them becoming more dangerous the longer they stay at the camps.<sup>270</sup> While states have been slow in the repatriation process, they have been obligated to allow entry to those nationals who have managed to leave the camps on their own. For example, Finland has organised transport

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<sup>265</sup> United Nations Security Council Resolution 2396 (n 12).

<sup>266</sup> Ibid.

<sup>267</sup> Susanna Reinboth and Paavo Teittinen (n 257).

<sup>268</sup> Ibid.

<sup>269</sup> Jarmo Huhtanen, 'Jihadismitutkija: Euroopassa on käynnissä laaja ajattelutavan muutos suhteessa Syyristä ja Irakista palaaviin' (19 May 2021) *Helsingin Sanomat* Available at <<https://www.hs.fi/kotimaa/art-2000007987177.html>> Accessed on 20 February 2022.

<sup>270</sup> Ibid.

for their nationals out of Turkey who was originally at the Al Hol camp.<sup>271</sup> States are defending their actions by saying that they will allow the entry of their nationals from Syria but will not facilitate this process. The public seems to fully support this view. However, most of the women and children at the Al Hol camp do not have any opportunity to obtain travel documents and make their way across Europe which is why promises like this are meaningless.<sup>272</sup> Another issue with this decision is that some individuals might be able to leave the camps in the future and travel back to their home countries and still pose the same security risk whereas if they were quickly and efficiently repatriated and reintegrated, the spread of radicalised ideologies would be controlled.

It is estimated that 80 individuals of Finnish nationality travelled to Syria. In July 2021, the Finnish government repatriated a mother with her two children. This was the fifth time Finland assisted its nationals to return from Syria. It was originally reported that there were 11 Finnish women with their 30 children at Al Hol camp. The Finnish legislation on terrorism is lenient and does not criminalise participating in a terrorist group. The Finnish central police have investigated two Finnish women who returned from Al Hol for human trafficking. However, the police have struggled to gather evidence and at least one of the women has been indicted. These charges have been based on the women taking their children to areas controlled by terrorists. According to the Finnish Criminal Law, it is trafficking to transport an underage person to circumstances where their human rights are being violated. There are at least two Finnish women at Al Hol who are known for having spread terrorist propaganda.<sup>273</sup>

In two years since the repatriation operations began, Finland has brought home 35 people. A vast majority of the repatriated persons have been children. Some of them were only repatriated after they had escaped Syria and the camps on their own and were assisted by the neighbouring states. In March 2021, the Ministry of Foreign Affairs informed that at that stage, the repatriation process had cost nearly 400 000 euros. According to the Ministry, each repatriated person is obligated to pay for their travel costs and the documents enabling it. The other costs

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<sup>271</sup> Pekka Hakala, 'Äiti ja kaksi lasta kotiutettiin Suomeen ISIS-vankien leiriltä Syyriasta' (16 July 2021) *Helsingin Sanomat* Available at <<https://www.hs.fi/ulkomaat/art-2000008127669.html>> Accessed on 20 February 2022.

<sup>272</sup> Open Society Justice Initiative (n 210) 21.

<sup>273</sup> Pekka Hakala (n 271).

will be covered by the Ministry.<sup>274</sup> The local Kurdish armed forces have stated that they do not know the location of the Finnish nationals but are happy to negotiate their repatriation if they are not suspected of having ISIS affiliations. This situation shows how complicated the negotiations and getting information are and highlight a part of the reason why the process has been so slow.<sup>275</sup>

Now the local authorities admit that there are still Finns left at the camps in Syria. In December 2021, the Finnish authorities reported that they had successfully repatriated another family from Al Hol: a mother and her four children. One of the children is already an adult but the youngest was reported to be under 5-years-old and was born in Syria. The family was repatriated to Finland through Turkey which required cooperation with the Turkish authorities, however, the process was reported as having gone smoothly. Finland has had to cooperate with several different countries when repatriating their nationals and this has required good foreign relations and time and effort. The authorities say that the children will now be protected, but the mother's possible criminal actions will get investigated first. They confirm that the family left Finland to join ISIS. According to the authorities, it was not possible to repatriate the children without their mother because the best interests of the children dictated that the family should be treated as a unit.<sup>276</sup>

This repatriation of children (and, to a lesser extent, their mothers) is further evidence that Finland appears to have recognized its responsibility to protect and repatriate children from Al Hol. In further support of this position, it can also be argued that this obligation is further founded in additional European legislation, namely Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, also known as the Brussels IIa Regulation.<sup>277</sup> In particular, Articles 8 through 14 of the Brussels IIa Regulation, which is applicable extraterritorially,

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<sup>274</sup> The Finnish Ministry of Foreign Affairs, 'Al-Holin leirillä ollut perhe Suomeen' (1 August 2020) *UM* Available at <[https://um.fi/ajankohtaista/-/asset\\_publisher/gc654PySnjTX/content/al-holin-leirill-c3-a4-ollut-perhe-suomeen](https://um.fi/ajankohtaista/-/asset_publisher/gc654PySnjTX/content/al-holin-leirill-c3-a4-ollut-perhe-suomeen)> Accessed on 14 December 2021.

<sup>275</sup> Ville Similä, 'Kurdihallinto sanoo, että al-Holin leirillä ei enää ole suomalaisia, mutta Suomella on parempaa tietoa: 'Vartijat eivät löydä ihmisiä' (10 October 2021) *Helsingin Sanomat* Available at <<https://www.hs.fi/ulkomaat/art-2000008292080.html>> Accessed on 20 February 2022.

<sup>276</sup> Elina Nissinen and Anni Keski-Heikkilä, 'UM: Suomi kotiutti al-Holissa olleen viisihenkisen perheen perjantaina, Syyrian leireille jäi 'useampi kuin yksi perhe'' (10 December 2021) *Helsingin Sanomat* Available at <<https://www.hs.fi/politiikka/art-2000008467526.html>> Accessed on 20 February 2022.

<sup>277</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (27 November 2003).

stipulate that decisions regarding the child should be made in their home country. Because Syria is not a party to the CRC, the child's current place of residence in Al Hol would not give it jurisdiction under CRC. And since, additionally, any action by the relevant local authorities is unlikely given the current state of the Syrian conflict, an argument can be made that Article 14 of the Brussels IIa Regulation gives Finnish authorities jurisdiction over the Finnish children in Al Hol based on local legislation. As a result of this jurisdiction, it can then be argued that the Brussels IIa Regulation requires decisions regarding the Finnish children in Al Hol to be made by Finnish authorities, thus resulting in an obligation to repatriate the children to enable such decisions.<sup>278</sup>

However, this leaves the issues of the mothers and the fathers. Regarding the mothers, on the one hand, the issue is ultimately not legal, but political. Legally, the situation is clear: there is no room to argue that these obligations regarding the children in Al Hol apply to the children alone. As a result, the Finnish government is legally not allowed to separate children from their mothers.<sup>279</sup> Further, the Finnish government noted that, in practice, the repatriation of children requires cooperation with their mothers. This further complicates matters for mothers who do not volunteer to be a part of their children's repatriation but does not change the legal analysis. The fathers, on the other hand, are not mentioned in most of the analyses of these obligations, however, there is an argument to be made that family unity and a child being with either or preferably both of their parents should be the best solution.

The Finnish Ministry of Foreign Affairs does not consider its mission in Syria completed until all the children have been repatriated. The only way to protect the children is through the repatriation process.<sup>280</sup> The official policy does not refer specifically to the repatriation of the women at the camp, but so far in practice, Finland has respected the concept of family unity. The authorities have also highlighted the requirement for voluntary repatriation of adults therefore there may be more Finnish women in Syria who do not wish to return home. The Foreign Ministry's interpretation of the Finnish Constitution is that there is an obligation to assist the children at the camps in Syria and to consider the best interests of the child, but this

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<sup>278</sup> Sanna Mustasaari, 'al-Hol's Finnish women and children from the perspective of private international law' (17 December 2019), *Perustuslakiblogi* Available at <<https://perustuslakiblogi.wordpress.com/2019/12/17/sanna-mustasaari-al-holin-suomalaisnaiset-ja-lapset-kansainvalisen-yksityisoikeuden-nakokulmasta/>> Accessed on 8 May 2022.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

obligation does not extend to the adults. The adults are only protected vicariously through respect for the family unit.<sup>281</sup>

#### 4.3.2 The repatriation of nationals in the Netherlands

The Netherlands is among the most represented countries regarding women and children currently detained in Syria.<sup>282</sup> The Kurdish armed forces have made it clear that they will not release the women and children from the camps until the Dutch authorities repatriate them.<sup>283</sup> One of the reasons for the denial of consular assistance to its citizens and the slowness of repatriations is that the Dutch maintain that they do not recognise the Kurdish armed forces and that they do not have diplomatic ties with Syria.<sup>284</sup> This is a position that the government of the Netherlands' has since maintained and argued that they do not entertain diplomatic relations with Syria anymore and also do not want to establish any with the Kurdish armed forces since they are linked to an organisation called the PKK which is on the EU terrorism list.<sup>285</sup> Finally, the Dutch government has also stated that the Netherlands do not actively repatriate the foreign fighters or their families due to the security risk they pose.<sup>286</sup> However, in the case of orphans, the government is willing to assess on a case-by-case basis.<sup>287</sup>

The Netherlands does not have any presence at the camps in Syria and does not actively engage in repatriation operations. However, they have expressed interest in cooperating in a controlled return of their nationals.<sup>288</sup> In 2019, 23 Dutch women initiated a summary proceeding to request their repatriation together with their 55 children.<sup>289</sup> The Dutch court in Rotterdam did not

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<sup>281</sup> The Finnish Ministry of Foreign Affairs (n 274).

<sup>282</sup> Rights and Security International, 'Europe's Guantanamo: The indefinite detention of European women and children in North East Syria' (17 February 2021) *Rights and Security* Available at <[https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE\\_REPORT.pdf](https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE_REPORT.pdf)> Accessed on 8 May 2022, 7.

<sup>283</sup> *Ibid*, 5.

<sup>284</sup> Tanya Mehra, 'European countries are being challenged in court to repatriate their foreign fighters and families' (7 November 2019) *International Centre for Counter-Terrorism* Available at <<https://icct.nl/publication/european-countries-are-being-challenged-in-court-to-repatriate-their-foreign-fighters-and-families/>> Accessed on 8 May 2022.

<sup>285</sup> Rights and Security International (n 282) 54.

<sup>286</sup> *Ibid*.

<sup>287</sup> *Ibid*, 55.

<sup>288</sup> Thomas Van Poecke and Evelien Wauters, 'The repatriation of European nationals from Syria as contested before domestic courts in Belgium and beyond' (January 2021) *KU Leuven* Available at <<https://ghum.kuleuven.be/ggs/documents/wp229-van-poecke-wauters-tvp-2.pdf>> Accessed on 8 May 2022, 35.

<sup>289</sup> Two women had Moroccan nationality, but as their children were Dutch, they were treated identically; *[Redacted] v The Netherlands*, Case no. ECLI:NL:RBDHA:2019:11909 (Judgment) (Court of First Instance of the Hague (NL), 11 November 2019) para 4.3.

address the human rights issue in its decision but merely considered whether the Dutch authorities had jurisdiction since The Netherlands did not have a consular or an embassy in Syria anymore.<sup>290</sup> The court decided that the Netherlands should take all reasonable measures to protect the children and since this cannot be actualised in other ways, they should be repatriated.<sup>291</sup> The court also held that the mothers did not have a free-standing right to repatriation but since this was also a condition from the Kurdish armed forces, they should be repatriated with their children.<sup>292</sup> Finally, the court stated that should the Kurdish armed forces agree to repatriate only the children but the mothers refused, the positive obligation towards the children would become void.<sup>293</sup>

The case was then appealed<sup>294</sup> and was ultimately referred to the High Council of the Netherlands, which acts as the country's Supreme Court.<sup>295</sup> In considering the case, the High Council first decided that the Netherlands did not have extraterritorial human rights jurisdiction.<sup>296</sup> Furthermore, the High Council held that the repatriation of Dutch nationals would be an issue concerning national security and concluded that the decision was, therefore, a matter of politics not law.<sup>297</sup>

This decision highlights a trend in The Netherlands' approach to avoid repatriation wherever possible, even with significant efforts, if necessary. Any Dutch nationals in Syria are, therefore, left to make their way out of Syria; only then can they be extradited and brought to justice. Before that point, the Dutch government holds that the parents of the children are the primary caretakers and that the Dutch government has no obligations until they are in a Dutch embassy.<sup>298</sup> While reaching such an embassy outside of Syria is already not feasible for most of the affected Dutch citizens, additional hurdles are faced even by those that do manage. For example, two Dutch women had reached the embassy in Ankara, Turkey, together with three children, only for the Netherlands to strip away the Dutch nationality of one of the women and

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<sup>290</sup> Ibid, para 4.6.

<sup>291</sup> Ibid, para 4.11.

<sup>292</sup> Ibid, para 4.20.

<sup>293</sup> Ibid, para 4.22.

<sup>294</sup> [Redacted] v *The Netherlands*, Case no. ECLI:NL:GHDHA:2019:3208 (Judgment) (Court of Appeal The Hague (NL), 22 November 2019).

<sup>295</sup> [Redacted] v *The Netherlands*, Case no. ECLI:NL:HR:2020:1148 (Judgment) (High Council (NL), 26 June 2020).

<sup>296</sup> Ibid, paras. 3.2.2, 3.7.1.

<sup>297</sup> Ibid, paras. 3.10.3, 3.19.4, 3.21.2.

<sup>298</sup> Tanya Mehra (n 284).

express reluctance to extradite the rest.<sup>299</sup> Stripping a citizen of his or her nationality is not strictly allowed under international law,<sup>300</sup> but is possible in cases where a person has dual citizenship. This is another example of how far the Netherlands are willing to go to avoid any possible human rights obligations regarding their nationals in Syria.

#### 4.4 The possible solutions for the remaining European nationals at Al Hol

There are at least four lawful methods that other states can use to improve the human rights situation in Syria and promote a peaceful solution to the conflict. Lawful measures are permissible, non-military means that can be utilised to solve armed conflicts and prevent the loss of further life.<sup>301</sup> Firstly, states can sever diplomatic ties with Syria and use this as a tool to express their disapproval of the situation. This would also mean the end of humanitarian aid which is a financial motivation for the parties in Syria to maintain diplomatic relationships. However, these relationships are currently vital to the states that have nationals in Syria that they are trying to expatriate. It would also be difficult due to the many groups in power in different regions in Syria. Secondly, the international community could expel Syria from international bodies and organisations. Considering the different non-state actors in the area and how little Syria has participated in global actions recently, this might not carry weight. Thirdly, states and international organisations can gather peacekeeping forces and send them to Syria to promote peace and the end of hostilities. Peacekeeping missions have already taken place, but there are too many colliding interests in the area to build lasting peace among them at the moment. However, efforts continue and will eventually pay off. And lastly, criminal accountability should be pursued in international and domestic courts. The violations in Syria

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<sup>299</sup> Tanya Mehra (n 284); NL Times, 'Two Dutch ISIS women, three children escaped Syrian camp, fled to Turkey' (1 November 2019) *NL Times* Available at <<https://nltimes.nl/2019/11/01/two-dutch-isis-women-three-children-escaped-syrian-camp-fled-turkey>> Accessed on 8 May 2022; Fionnuala Ní Aoláin, Miriam Estrada-Castillo, E. Tendayi Achiume, Nils Melzer, Siobhán Mullally, Melissa Upreti, 'Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (8 December 2021) Available at <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26814>> Accessed on 8 May 2022.

<sup>300</sup> The International Covenant on Civil and Political Rights (n **Error! Bookmark not defined.**) Article 14; United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness' (May 2020) *OHCHR* Available at <<https://www.refworld.org/docid/5ec5640c4.html>> Accessed on 8 May 2022, para 100.

<sup>301</sup> Yasmine Nahlaw 'Symposium: The Responsibility to Protect in Libya and Syria: Mass Atrocities, Human Protection, and International Law' (20 April 2020) *Opinio Juris* Available at <<http://opiniojuris.org/2020/04/20/symposium-the-responsibility-to-protect-in-libya-and-syria-introductory-post/>> Accessed on 20 February 2022.



have continued for a decade already and have caused a massive loss of life and irreplaceable harm. International crimes have been committed by all sides of the conflict and holding parties accountable for their actions deters them from further violations. The most useful of these means at the moment are the last two. However, while they are useful in signifying States' collective outrage against potential or ongoing mass atrocity crimes, they are generally insufficient to bring an end to a mass atrocity situation.<sup>302</sup> There have been efforts to improve the situation in Syria that have at least managed to keep peace and humanitarian aid negotiations ongoing. For example, the EU and the USA have imposed extensive sanctions and condemned the violations of international human rights laws. Further, there is support for the accountability for violations and some criminal proceedings have already begun.<sup>303</sup> These steps bring hope that the conflict will end, but Syria will never look the same again.

Despite the difficult situation in peacebuilding and counter-terrorism, the UN has continuously encouraged states to repatriate the nationals, even if the states intend on prosecuting them. One of the main reasons to support the swift repatriation process is to prevent any possible further radicalisation and to rehabilitate people.<sup>304</sup> Some of the children have already spent years at Al Hol and the window to integrate them into the society in their home country is closing.

One of the main pillars of the UN Counter-Terrorism Strategy is to ensure respect for human rights while preventing the spread of terrorism.<sup>305</sup> Because of the armed groups in Syria that have been identified as being terrorists, the UN has a special interest in states' actions to repatriate their nationals. While repatriation is widely encouraged, the UN also expects states to have reintegration and rehabilitation mechanisms in place to deter radical thinking. UN entities have been encouraged to assist states in this process according to their mandate to provide support for member states as they comply with their international human rights obligations.<sup>306</sup>

The response to this crisis is globally meaningful as well due to its precedential nature. This is the first large scale response to the foreign fighter dilemma as well as the mechanism for

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<sup>302</sup> Ibid.

<sup>303</sup> Human Rights Watch, 'Syria, Events of 2020' (2021) *HRW* Available at <<https://www.hrw.org/world-report/2021/country-chapters/syria>> Accessed on 20 February 2022.

<sup>304</sup> United Nations Special Procedures (n 37).

<sup>305</sup> United Nations Security Council Resolution on Global Counter-terrorism Strategy (n **Error! Bookmark not defined.**).

<sup>306</sup> Open Society Justice Initiative (n 210)

repatriation. While the Syrian conflict is the most known conflict with foreign fighters, there are other conflicts with foreign fighters to whom the same principles should apply. Further, there are people around the world whose human rights are being violated and who might be entitled to the same repatriation process as those held in the camps in Syria. Hence the decisions have lasting global impacts, even a possibility to shape customary international law. If states decide that it is their prerogative not to assist their national to return, it can send a message that states are willing to dispense fundamental human rights from foreign fighters and their families which can cause further radicalism and polarisation.<sup>307</sup>

The UN experts have issued a letter stating that the particular vulnerability of those at the camps gives sufficient ground for states to protect human rights extraterritorially.<sup>308</sup> These situations arise when a state is unable to protect the individuals themselves. This decision highlights the importance of the situation and reaffirms the place for human rights in a world that seems to be moving away from global unity.<sup>309</sup>

One possible step that European countries could take is to make the camps more habitable. This must be done through cooperation with the Kurdish in power. It would be an immense effort considering that arranging humanitarian aid to the region has failed despite several efforts. If the camps were no longer a hub for human rights violations, those who would prefer to stay in Syria could do so and the states could, in turn, provide humanitarian support for the camp as well as the Kurdish. However, the issue with this solution is that the Kurdish wish to prosecute the adults in the camp for the affiliation with ISIS and it is unlikely that these would be fair trials, especially considering that the death penalty is still in use in Syria. This adds to the urgency of repatriating the mothers with the children unless significant changes happen at the camp and in the cooperation with the Kurdish.<sup>310</sup>

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<sup>307</sup> Ibid.

<sup>308</sup> United Nations Special Procedures (n 37)

<sup>309</sup> Kenneth Roth (n 255).

<sup>310</sup> Human Rights Watch, 'Thousands of foreigners unlawfully held NE Syria' (23 March 2021) *HRW* Available at <<https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria>> Accessed on 20 February 2022.

## 5 Final remarks

A state violates its human rights obligations when through an act or an omission act it fails fulfilling its legally binding duty to respect, protect and fulfil human rights. The principle of universality guarantees that human rights apply to all human beings at all times. Temporary restrictions can only be imposed for very specific reasons, and they must be lawful. When human rights are at risk, a state must act to prevent further violations and ensure that they do not occur again. A state must protect human rights both territorially and within its jurisdiction. When a state faces a situation where the rights of its nationals are at risk abroad and the host state does not act to protect their rights, the home country must act.

International humanitarian and human rights laws function complementarily during armed conflict due to their common purpose to protect human life and dignity. Both sources of law provide a level of protection to the most fundamental human rights. In the Syrian context, it is clear that human rights have been violated and are at risk for further harm. Those at the camps are particularly vulnerable and unable to improve their situation without outside assistance. Considering their position, the only way to protect their fundamental human rights is to assist them out of these camps. Special protections granted for children, their families and vulnerable persons should cover all those stuck at these camps and ignite the repatriation process.

### 5.1 Conclusions

While it is difficult to definitively argue that there is a positive obligation to repatriate, it is without a doubt the best course of action considering the future peace in Syria and the guarantee of the human rights of foreign nationals in Syria. It is also the best way to combat radicalisation spreading because it allows states to be in control of the process and aware of possible future risks. For all parties, it would be easier to repatriate the nationals and then assess the best approach. While the question remains on the obligation to assist in the repatriation, the domestic legislation on accountability is significant for states as it influences their decision to assist. The repatriation process does not end when the nationals are brought home and they will receive assistance for years. The main purpose is to reintegrate the children into society and

ensure that they do not hold radical ideologies or pose a threat to general security.<sup>311</sup> So far, states have made a clear distinction between the different groups at the camps and applied different rights to them. It remains to be seen what assistance, if any, will be given to the remaining people.

Regional policy on repatriation from European states or the EU is unlikely, but the cooperation between states and the pressure between them may cause a harmonisation in their domestic policies. While the situation in Syria may have surprised Europe with its long-term effect, it has been a learning opportunity as to how European states react to such situations and how they help and contradict each other. The ECHR enables states to bring actions against other state parties to the ECtHR when they believe that human rights violations have taken place.<sup>312</sup> International human rights bodies have made it clear that further threat to life and health is probable at the camps which fulfil the criteria that a state is aware or should be aware of the risk. This mechanism creates a possibility for the state parties to put pressure on each other to act regarding their nationals at the Al Hol camp. Another unlikely solution is that European states will bring official actions against each other over the situation in Syria, but the regional pressure has already made the repatriation process more effective. However, the states, also Finland and the Netherlands, have already committed to the repatriation of the children from Al Hol which indicates that there is a generally accepted state practice that there are positive human rights obligations to nationals at risk of human rights violations abroad that at least applies to children. Further, the repatriation process has also confirmed the high respect for family unity and that states are willing to uphold this in practice. Considering these state practices, a norm is forming where states accept positive human rights obligations that are extraterritorially applicable. These obligations are always not applicable and are limited to the most heinous violations of human rights, but recognising the existence of such obligations, even if only towards children, is a positive step towards the international protection of human rights.

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<sup>311</sup> The Finnish Ministry of the Interior, 'Syyriasta palaavat lapset ja aikuiset' *Intermin* Available at <<https://intermin.fi/poliisiasiat/vakivaltainen-radikalisoituminen/palaajat-syyriasta>> Accessed on 14 December 2021.

<sup>312</sup> United Nations Office of the High Commissioner for Human Rights (n 233) 29.

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**ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS**  
**Abstract for Master's Thesis**

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
Author: Mira Luoma	
Title of the Thesis: Positive obligations for states in light of international human rights laws to assist nationals abroad to return home from situations where their rights are at risk: an analysis of the situation at Al Hol camp and the strategies states have used to ensure the protection of human rights	
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<p>Med tanke på staters internationella mänskliga rättigheter i ljuset av internationella instrument och normer för mänskliga rättigheter, i vilken utsträckning krävs det att de hjälper sina medborgare att återvända till sitt hemland när de är fångade utomlands i en situation där deras mänskliga rättigheter kränks.</p> <p>Den väpnade konflikten i Syrien har pågått i över ett decennium nu och användes som ett exempel. Syrienkonflikten har fått mycket internationell uppmärksamhet på grund av grymheterna och det stora antalet utländska människor som har anslutit sig till konflikten. Många av utlännarna hålls för närvarande i läger runt om i Syrien, oförmögna att lämna det krigshärjade landet på egen hand, varför frågan om repatriering har varit allmänt förknippad med konflikten.</p> <p>Folket borde ha rätt till skydd som garanteras av internationella människorättsfördrag och att eftersom den syriska regeringen inte kan skydda dessa rättigheter bör rättigheterna skyddas av deras hemländer. Eftersom många av de utländska medborgarna i Syrien är europeer analyserar forskningen exempel på hur Finland och Nederländerna har tagit itu med kränkningarna av de mänskliga rättigheterna i lägren och om de har repatrierat sina medborgare med tanke på deras internationella åtaganden om mänskliga rättigheter.</p> <p>Olika internationella aktörer har väddat till stater att repatriera sina medborgare från dessa läger, men stater har varit långsamma i repatrieringsprocessen med hänvisning till olika orsaker till deras passivitet. Internationella människorättsorgan har gjort det klart att ytterligare hot mot liv och hälsa är troligt i lägren och att stater är medvetna om eller borde vara medvetna om risken för sina medborgare. Stater borde sätta press på varandra att agera när det gäller sina medborgare i lägren, men det har inte hänt ännu.</p> <p>Det finns minst fyra lagliga metoder som andra stater kan använda för att förbättra människorättsituationen i Syrien och främja en fredlig lösning på konflikten. Den bästa och mest fredliga lösningen är en repatrieringsprocess som uppfyller staternas internationella åtaganden om mänskliga rättigheter, garanterar skydd för deras medborgare och som skulle lätta på trycket i Syrien.</p>	
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