

The Children of ISIS: Statelessness and Eligibility for Asylum under International Law

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Abstract

This Comment focuses on the thousands of foreign children who are indefinitely detained at al-Hol camp in Northern Syria due to their perceived affiliation with ISIS. Specifically, this Comment explores whether stateless children who lived under the ISIS regime and cannot repatriate are eligible for asylum under international law, including the 1951 Convention on the Status of Refugees and its accompanying 1967 Protocol. After examining the relevant international law protecting children and the stateless, this Comment finds that the detention of children at al-Hol camp violates the laws of war and international human rights law. Specifically, the squalid conditions of the camp do not advance the children’s best interest, which every country in the world except the U.S. has committed to uphold through the Convention on the Rights of the Child. Western countries’ refusal to repatriate prevents their citizens from exercising their right to nationality and their right to return to their home country. Thus, the children become de facto stateless when countries refuse to take them back. Taking into consideration the constant violations of international law present at al-Hol camp, this Comment argues that the foreign children at al-Hol camp meet the requirements for refugee status because they are being persecuted as a particular social group (defined as “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country”). They are persecuted by, first, their home countries, which refuse to repatriate them and, second, the Syrian government and Kurdish administration.

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I. INTRODUCTION

On March 23, 2019, the Islamic State of Iraq and Syria (ISIS) lost its last territorial stronghold at the Battle of Baghuz Fawqani, leading the Syrian Democratic Forces to officially declare final victory over the terrorist organization.¹ Even though no official ISIS territory remains, it is estimated that there are still tens of thousands of ISIS followers in Syria and Iraq.² ISIS's "defeat" has led to the incarceration of over 11,000 male fighters.³ Additionally, former refugee camps in Syria, Iraq, and Libya have been converted into detention camps for thousands of women and children who were previously affiliated with ISIS.⁴ The fall of ISIS has raised legal, political, and ethical questions about "what to do with the tens of thousands of people who had flocked to join the jihadists from around the world and now have nowhere else to go."⁵

The territorial victory over ISIS has led to a dire humanitarian crisis in the detention camps housing the thousands of women and children previously affiliated with ISIS. Al-Hol camp is the largest of three detention camps located in northern Syria and is run by the autonomous Kurdish administration.⁶ Though it is challenging to gather the exact number of detainees in the camp, as of January 2020, there are an estimated 63,000 women and children in detention at al-Hol camp.⁷ Around 9,000 of the detainees are non-Iraqi and non-Syrian foreigners.⁸ 41,000 of the camp's residents are children under eighteen, of whom 7,000 are foreign.⁹ Of all the children in the camp, ninety-five percent are under the age of twelve.¹⁰ Foreigners in the camp include people from about fifty countries,

¹ Rukmini Callimachi, *ISIS Caliphate Crumbles as Last Village in Syria Falls*, N.Y. TIMES (Mar. 23, 2019), <http://perma.cc/X6RV-5HBN>.

² Eric Schmitt, Alissa Rubin, and Thomas Gibbons-Neft, *ISIS is Regaining Strength in Iraq and Syria*, N.Y. TIMES (Aug. 19, 2019), <http://perma.cc/N75B-WT6N>.

³ Ben Hubbard, Charlie Savage, Eric Schmitt, & Patrick Kingsley, *Abandoned by U.S. in Syria, Kurds Find New Ally in American Foe*, N.Y. TIMES (Oct. 13, 2019), <http://perma.cc/4JR7-68EU>.

⁴ Ben Hubbard, *In a Crowded Syria Tent Camp, the Women and Children of ISIS Wait in Limbo*, N.Y. TIMES (Mar. 29, 2019), <http://perma.cc/5975-NSY5>.

⁵ *Id.*

⁶ *Id.*

⁷ Eric Rosand, B. Heidi Ellis & Stevan Weine, *Minding the Gap: How to Provide More Comprehensive Support to the Children of ISIS*, BROOKINGS (Jan. 28, 2020), <http://perma.cc/5298-5EPF>.

⁸ *Id.*; see also U.N. Office for the Coordination of Humanitarian Affairs, *Syrian Arab Republic, North East Syria: Al Hol Camp* (Jan. 15, 2020), <http://perma.cc/UU6A-AHQV> [hereinafter *Syrian Arab Republic*].

⁹ Rosand et al., *supra* note 7; International Rescue Committee, *IRC Data Reveals Staggering Child Mortality in Al Hol Camp*, RELIEFWEB (Sep. 16, 2019), <http://perma.cc/WRA7-6CQD>.

¹⁰ Liz Sly, *New Suffering for the Children of the ISIS Caliphate as Hunger and Sickness Spread*, WASH. POST (June 19, 2019), <http://perma.cc/ZMS4-HT25>.

including, among others, Australia, Belgium, Canada, France, the Netherlands, Trinidad, Algeria, and Russia.¹¹ The Kurdish administration has stated that it has no intention to prosecute the detainees, and it has repeatedly emphasized that home countries should repatriate their citizens.¹² Al-Hol camp has made international headlines due to the lack of humanitarian assistance available to its detainees. Women and children are severely malnourished and have limited access to basic resources.¹³

Some detainees at al-Hol camp have been involved in ISIS-related activities. While there are not any publicly available data with exact numbers, many women in the camp are avid ISIS followers, and some of the children were trained by jihadists.¹⁴ However, not all the women and children were directly involved with ISIS. Some women were coerced to marry ISIS fighters against their will, and many children had no choice but to follow their parents who chose to join the group.¹⁵ Nevertheless, the radicalization of some women and the stigmatization of the children as terrorists have made repatriation and the delivery of humanitarian aid difficult.¹⁶

Various solutions have been proposed to address the humanitarian crisis at al-Hol camp, including local or Iraqi prosecution,¹⁷ citizenship stripping,¹⁸ and repatriation.¹⁹ Repatriation would help end this humanitarian crisis for foreigners at al-Hol camp because countries would take their citizens back to their respective home countries instead of leaving them at the camps. However, repatriation numbers have been low.²⁰ The reluctance to repatriate citizens leaves foreigners

¹¹ *Syria: Dire Conditions for ISIS Suspects' Families*, HUMAN RIGHTS WATCH (June 23, 2019), <http://perma.cc/Y5GM-JVWR> [hereinafter *Dire Conditions for ISIS Suspects' Families*].

¹² *Turkey-Syria Border: Trump Threatens to "Obliterate" Turkish Economy*, BBC NEWS (Oct. 8, 2019), <http://perma.cc/LT2G-MTCS>; *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

¹³ *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

¹⁴ Hubbard, *supra* note 4.

¹⁵ Louisa Loveluck & Souad Mekhennet, *At a Sprawling Tent Camp in Syria, ISIS Women Impose a Brutal Rule*, WASH. POST (Sep. 3, 2019), <http://perma.cc/JCX4-X9MT>.

¹⁶ Jessica Trisko Darden, *The Al-Hol Case: Left-Behind ISIS Adherents Pose a Unique Challenge*, REALCLEAR WORLD (July 30, 2019), <http://perma.cc/9LW6-8RZD> (explaining that many countries have laws that prevent the delivery of financial or humanitarian support to individuals linked to terrorist organizations).

¹⁷ In local or Iraqi prosecutions, the government of Syria or Iraq would be prosecuting the women and children who are currently detained at camps and who are allegedly affiliated with ISIS.

¹⁸ *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

¹⁹ Hubbard, *supra* note 4.

²⁰ *Id.*

in these detention camps effectively stateless.²¹ Consequently, thousands of foreign women and children have nowhere to go, while the Kurdish administration detains them indefinitely. Countries' refusals to take back their citizens make it difficult to see an end to the detention centers like al-Hol camp.

This Comment focuses on the foreign children, meaning children who are not Syrian or Iraqi,²² in al-Hol camp and proposes an alternate solution to their detention. Foreign children are of special significance because they have the option to repatriate to their home country, unlike the Iraqi and Syrian children in these detention camps. Because al-Hol camp has received the most international coverage of the camps, this Comment discusses the conditions there. However, the solutions discussed and proposed in this Comment are not inherently limited to al-Hol camp and apply to the other detention camps that house women and children who lived under the ISIS regime. This Comment does not propose implementing a new law. Rather, it proposes a new understanding of the current doctrine. Specifically, the main question addressed in this Comment is whether stateless children, assuming they cannot be charged with a terrorist-related crime,²³ who lived under the ISIS regime and are unable to repatriate are eligible for asylum under relevant international law, such as the 1951 Convention on the Status of Refugees and its 1967 Protocol.²⁴ This Comment's conclusions would thus be applicable in any country that has ratified either document. Being eligible for asylum would be an alternate way for children to gain residency in a foreign country and to end foreign child detention in these camps.

This Comment focuses on children because of a long-standing international norm of commitment to protecting children's rights. The United Nations (U.N.) has given children a special status and protection framework, deeming them a

²¹ Article 1(1) of the 1954 Convention to the Status of Stateless Persons defines a stateless person as "a person who is not considered as a national by any State under the operation of its law." People may be born stateless, but people may also become stateless due to various causes including the deprivation of nationality. CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE 3, 83 (Jacqueline Bhabha ed., 2011).

²² Even though Iraqi children are technically foreigners in Syria, Iraqi children are not included in the scope of this Comment because ISIS was not only present in Syria but also in significant portions of Iraq. This Comment focuses on the children that come from countries where ISIS did not project territorial authority.

²³ This qualification is included because, in some circumstances, children who meet certain criteria that demonstrates their direct involvement with a terrorist organization may be disqualified from refugee status. For the disqualification to apply to children, he/she must have reached the age of criminal responsibility, which is determined by each country, and it must be established that he/she had the mental capacity to commit the crimes. More of this will be discussed under Section IV.B.5.

²⁴ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol].

particularly vulnerable group treated with special concern.²⁵ The Convention on the Rights of the Child (CRC), which has 196 parties to it, is the most comprehensive treaty addressing heightened duties toward children.²⁶ Not only is the CRC the most widely ratified human rights treaty, but there are over twenty additional treaties that specifically address special protection for children.²⁷ As a whole, these treaties demonstrate states' uniform agreement that children are a unique and vulnerable population that merit special protection.

Children's rights are different than other areas covered by international law. In fact, the rights of children are "among the most elaborated within contemporary international law,"²⁸ making violations against children by state and non-state actors "particularly grave."²⁹ If children continue to be held at al-Hol camp against their will, and without a way to return to their home countries, the international community will stand idly by as international law—specifically the CRC—is openly violated. These violations would demonstrate an important deficiency in the international community's ability to exercise its power.

This Comment advances as follows: Section II describes al-Hol camp, its detainees, the conditions at the camp, and home countries' responses to this situation. Section III discusses relevant international law addressing children, detention, statelessness, and the right to return. Section IV, primarily focusing on the 1951 Refugee Convention and its 1967 protocol, argues that the foreign "children of ISIS"³⁰ are eligible for asylum under international law when their home countries refuse to repatriate them. Specifically, this Comment argues that these children meet the requirements for asylum because they are being persecuted as a particular social group ("children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country"). The persecution is carried out by first, their home countries who refuse to repatriate them, and second, the Syrian government and the Kurdish administration. This means that asylum eligibility occurs not only when a home country strips children's citizenship but when a home country actively decides to block the return of its children. This Comment distinguishes itself from the existing literature on displaced children and refugee law because it focuses on the children of ISIS, who

²⁵ *Children's Rights*, INT'L JUST. RESOURCE CTR., <http://perma.cc/FLF3-9W99> [hereinafter "*Children's Rights*"].

²⁶ Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter CRC].

²⁷ *Id.*

²⁸ CHILDREN WITHOUT A STATE, *supra* note 21, at 62.

²⁹ *Children's Rights*, *supra* note 25.

³⁰ In this Comment, "children of ISIS" is defined as anyone detained under eighteen years of age in the following categories: 1) children who were born abroad but were brought by their parents into the ISIS regime; 2) children who were born into the ISIS regime and who have foreign-born parents; 3) children who were involuntarily trafficked or forced to be part of ISIS; and 4) children who travelled voluntarily (without parents) to the ISIS regime.

may have been involved in radicalization and who have very little chance to return to their countries. This Comment concludes by addressing the family separation critique implied by the premise of the paper.

II. THE AL-HOL CAMP HUMANITARIAN CRISIS

This Section describes the detainees at al-Hol camp, which include thousands of women and children who were previously living under the ISIS regime. It continues by discussing the camp's appalling conditions, including the lack of international aid and organizational presence. This Section ends by addressing previously proposed solutions to the situation at al-Hol camp. These solutions include repatriation, prosecution of the detainees at the camp, and citizenship stripping. This Section demonstrates that al-Hol camp represents a great humanitarian crisis whose detainees are being overlooked by the international community due to their association with ISIS.

A. The Detainees

After the fall of ISIS in March 2019, al-Hol camp became a detention center for women and children affiliated with ISIS. The population at al-Hol camp was approximately 9,000 people in December 2018 but rose to over 70,000 people by March 2019, overwhelming local camp administration officials and creating an urgent need of humanitarian supplies and assistance.³¹ As of January 2020, there are an estimated 63,000 women and children at al-Hol camp.³² Around 9,000 are non-Iraqi and non-Syrian women and children who are housed in a foreigners' annex.³³ Detainees in the foreigners' annex come from about fifty countries and currently have no legal immigration status.³⁴

The detainees are not allowed to freely leave al-Hol camp because of their perceived dangerousness. Many of the women are considered national security threats because "some [women] were . . . combatant[s] . . . [and] still endorse the extremists' ideology, making local officials reluctant to let them leave."³⁵ The women in al-Hol camp had various reasons for joining or being a part of ISIS.

³¹ Hubbard, *supra* note 4.

³² *Syrian Arab Republic*, *supra* note 8.

³³ *Id.*

³⁴ Hubbard, *supra* note 4.

³⁵ *Id.*

Some joined voluntarily, while others were coerced.³⁶ Experts state that “some [women are] both victims and perpetrators.”³⁷

While many of the women may suffer as much as the children in the camp, this Comment specifically focuses on the foreign children at al-Hol camp. Al-Hol camp’s “[c]hildren make up about two-thirds of [a]l-Hol’s residents. Some are orphans. . . . All ha[ve] witnessed violence, and some ha[ve] been taught to practice it.”³⁸ Furthermore, “[t]he Islamic State, researchers say, employed children as scouts, spies, cooks and bomb-planters, and sometimes as fighters and suicide bombers.”³⁹ Some of the children “have had years of ISIS indoctrination and, in the case of older boys, military training.”⁴⁰ However, not every child was involved in terrorist-related activities. A majority of the children had no choice but to live under ISIS, and many were even born into the regime. In total “20,000 residents are under the age of 5,” and “11,000 of the kids aged 6 to 18 have not been exposed to learning for at least five years.”⁴¹ Several hundred of the children are orphans as well.⁴² The specific number of children who are suspected of involvement in terrorist-related crimes at al-Hol camp is not publicly available, nor is there evidence that this information has been recorded. However, the U.N. suggests that limits in children’s knowledge, options, and cognitive development support that these children are primarily victims and in need of special attention.⁴³

Even with the lack of specific data concerning children detained at al-Hol camp,⁴⁴ the foreign children more than likely fall into one of four categories: 1)

³⁶ Vivian Yee, *Thousands of ISIS Children Suffer in Camps as Countries Grapple With Their Fate*, N.Y. TIMES (May 8, 2019), <http://perma.cc/HF2R-4MJ2> [hereinafter *Thousands of ISIS Children Suffer*].

³⁷ *Id.*

³⁸ Hubbard, *supra* note 4.

³⁹ Yee, *Thousands of ISIS Children Suffer*, *supra* note 36.

⁴⁰ *Id.*

⁴¹ Robin Wright, *The Kids of the Islamic State*, FOREIGN POL’Y (June 3, 2019), <http://perma.cc/3WRL-TK9M>.

⁴² Sly, *supra* note 10.

⁴³ U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED BY TERRORIST AND VIOLENT EXTREMIST GROUPS: THE ROLE OF THE JUSTICE SYSTEM 75 (2017).

⁴⁴ Data regarding the children at al-Hol camp specifically does not exist at the moment. However, estimates do exist for foreign children involved in ISIS as a whole. A study attempting to trace the number of foreign children who joined ISIS describes that “at least 4,640 foreign minors have been accounted for within IS in Iraq and Syria.” Additionally, the top five contributing countries include France (with an estimated 460-700 children), Morocco (391 children), Kazakhstan (390), Tajikistan (293), and Germany (290). However, there are discrepancies in these numbers because collected data does not differentiate between minors actively engaged in ISIS and those who were occupied by ISIS. These numbers include children from any of the four groups mentioned above, thus the numbers do not separate those coerced or forced into ISIS and those who joined on their own. Joana Cook & Gina Vale, *From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State*, INT’L

children who were born abroad but were brought by their parents into the ISIS regime; 2) children who were born into the ISIS regime and who have foreign-born parents; 3) children who were involuntarily trafficked or forced to be part of ISIS; and 4) children who travelled voluntarily (without parents) to the ISIS regime.⁴⁵ The first three groups describe children that lacked agency when becoming part of ISIS. The fourth group, however, describes children that were, presumably, not forced or coerced to join. This Comment will demonstrate that refugee designation may be available to *any* child in the aforementioned groups. Those in the fourth group are at the highest risk of being denied refugee status. However, as discussed in Section II.F, foreign fighters may gain refugee status under certain conditions.

This Comment solely focuses on the child detainees in the foreigners' annex because foreigners are technically entitled to citizenship and residence in countries other than Syria and Iraq. The local Kurdish administration is demanding that Western states repatriate their citizens, arguing that each foreign detainee is the responsibility of his or her own country. However, apart from each country's reluctance to repatriate its citizens, determining the nationality of the women and children can be challenging due to many of the detainees' lack of identification and the use of fake identities.⁴⁶

B. Conditions in the Camp

At al-Hol camp, there is a shortage of medicine, food, clean water, and sanitary conditions.⁴⁷ Because of the population surge in 2019, the camp is overcrowded, especially the foreigners' annex, whose conditions are worse than the camp's main area housing Syrians and Iraqis.⁴⁸ Those in the foreigner's annex experience worse treatment than other detainees in the camp.⁴⁹ Unlike the Syrian and Iraqi detainees, foreign women and children have more limited mobility, a lack of access to direct medical services, and a lack of sustenance.⁵⁰ Foreigners are not allowed to have cell phones, and they are not allowed to make purchases with

CTR. FOR THE STUDY OF RADICALIZATION, KING'S COLLEGE LONDON DEPARTMENT OF WAR STUDIES 28–29 (2018).

⁴⁵ See generally *id.*

⁴⁶ Hubbard, *supra* note 4.

⁴⁷ Yee, *Thousands of ISIS Children Suffer*, *supra* note 36.

⁴⁸ Vivian Yee, *Guns, Filth and ISIS: Syrian Camp Is 'Disaster in the Making'*, N.Y. TIMES (Sept. 3, 2019), <http://perma.cc/3E5A-9MP3>.

⁴⁹ *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

⁵⁰ *Id.*

the camp's internal currency.⁵¹ There have also been reports that women have had to give births in their tents, illustrating how little care is given to detainees.⁵²

Many children have already died due to sickness and malnutrition. So far, over 390 child deaths have been reported en route to al-Hol camp or in the camp due to preventable diseases and lack of food.⁵³ Currently, there is a cemetery outside the camp with bricks and little mud mounds marking the graves for the children who have lost their lives.⁵⁴

Radicalization experts worry that camps like al-Hol will become breeding grounds for terrorism and warn of the danger of leaving children, already vulnerable, in conditions where they may be exposed to extremist ideologies.⁵⁵ There is evidence that al-Hol camp does house ISIS followers,⁵⁶ which means that radical ideology is something to which children may be exposed, especially due to the lack of alternative education in the camp. Because “[t]here are no schools in the camp, and the children remain vulnerable to the teachings of their surviving parents or guardians, who were among the staunchest holdouts of the Islamic State,”⁵⁷ the camps are counterproductive to fighting ISIS indoctrination. Additionally, unjust punishment has been a common rallying cry for extremist organizations in the past, and consequently, this camp could spark another insurgency movement.⁵⁸ Many academics and radicalization experts cite lessons from Camp Bucca, the detention center where ISIS's leader Abu Bakr al-Baghdadi was schooled.⁵⁹ They are of the opinion that unless a “secure and humane resolution to the issue of those thousands displaced by the collapse of the IS caliphate” is found, then the detention camps are “ticking time bombs that Europe and other parts of the world will live to regret.”⁶⁰ There is fear that if detainees are not taken back by their countries, the women may be radicalized

⁵¹ *Id.*

⁵² Jane Arraf, *Misery Grows at Syrian Camp Holding ISIS Family Members*, NPR (May 23, 2019), <http://perma.cc/V7C7-RMZA>.

⁵³ Nick Cumming-Bruce, *Horrid Conditions in Syria Camp Where ISIS Families Fled Risk Fostering Extremism*, N.Y. TIMES (Sept. 11, 2019), <http://perma.cc/2AJQ-R3YQ>.

⁵⁴ Sly, *supra* note 10.

⁵⁵ Frank Gardner, *Islamic State Group: Europe Has Ticking Time Bomb in Prison Camps*, BBC NEWS (Oct. 26, 2019), <http://perma.cc/JET3-3PYT>.

⁵⁶ *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

⁵⁷ Sly, *supra* note 10.

⁵⁸ Gardner, *supra* note 55.

⁵⁹ See, for example, Andrew Gilmour, *The Children of ISIS Don't Belong in Cages, Either*, N.Y. TIMES (Dec. 9, 2019), <http://perma.cc/EV97-7AC4>; Aaron Zelin & Wilayat al-Hawl, “Remaining” and Incubating the Next Islamic State Generation, WASH. INST. FOR NEAR E. POL’Y (2019), <http://perma.cc/3QK2-D9BE>.

⁶⁰ Gardner, *supra* note 55.

further or even absorbed into what remains of ISIS, taking their children along with them.

C. International Aid and Organizations

The stigma attached to detainees prevents countries and individuals from sufficiently supporting the humanitarian efforts in the camp. Many international donors have been reluctant to help the detainees because they fear that this will be seen as helping terrorist organizations. Often, “[t]heir excuse is that these are ‘terrorist families’ and they say, as humanitarian NGOs, they don’t support terrorists.”⁶¹ Numerous countries also have laws that criminalize financial support to individuals linked with terrorist organizations.⁶² Additionally, there are fears that the Assad government will weaponize humanitarian assistance, as it has done so in the past.⁶³ The Assad regime has been known to actively block the delivery of aid to territories held by his opposition. In early 2019, the U.N. High Commissioner for Refugees (UNHCR) was allegedly temporarily blocked from delivering aid to al-Hol camp due to a dispute with the Assad regime.⁶⁴ Because of the aid hold-up, many residents lacked shelter for various weeks.⁶⁵ The regime “may exploit the increasingly dire conditions in al-Hol camp to pressure the Kurdish forces ...to hand over control.”⁶⁶ The lack of humanitarian assistance exacerbates the suffering of the children al-Hol camp.

D. Repatriation Efforts

The women and children at al-Hol camp are unable to leave the camp because the majority of countries where they come from have refused to take them back. The refusal to repatriate is driven by home countries’ fear of importing extremism. However, some governments have been willing to repatriate citizens. For example, as of October 2019, Kazakhstan took back 156 of its children.⁶⁷

⁶¹ *Id.*

⁶² Darden, *supra* note 16.

⁶³ *Rigging the System: Government Policies Co-Opt Aid and Reconstruction Funding in Syria*, HUMAN RIGHTS WATCH (June 28, 2019), <http://perma.cc/8WAH-J92N>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Darden, *supra* note 16. *See also* Jasmine Perry, *The Weaponization of Humanitarian Aid in Syria*, REV. OF INT’L CONFLICT AND SECURITY (Oct. 27, 2019); Press Release, Security Council, Mandate Renewal for Cross-Border Assistance Mechanism Critical to Help Millions of Syrian Civilians, Top Official Tells Security Council, U.N. Press Release SC/14020 (Nov. 14, 2019).

⁶⁷ *A Tiny Proportion of Foreign Children in North East Syria Camps Repatriated in 2019*, SAVE THE CHILDREN (Oct. 16, 2019), <http://perma.cc/5FZD-L8N4> [hereinafter *Children Repatriated in 2019*].

Kosovo repatriated seventy-four children.⁶⁸ The total number of children repatriated from the three main camps holding ISIS women and children in northeast Syria remains low, however, and is around 350 total.⁶⁹ Considering there are still over 7,000 foreign children in the camps, repatriation efforts have been lagging and “piecemeal.”⁷⁰

Most other countries refuse to take children back due to logistical difficulties such as security threats and the complications of nationality certifications. For example, some children have been born to parents with different nationalities, making it hard to determine which nationality the child should claim, especially if one parent has died in battle.⁷¹ Overall, “few [countries] seem ready to send people to Syria and Iraq to collect them. Several countries require children born in the [ISIS regime] to undergo DNA testing to prove their parentage, and therefore their citizenship, before repatriation.”⁷² Due to the lack of resources in the camp, DNA testing for determining citizenship makes it extremely challenging for children to be able to return to their country of citizenship.

Western states have received the most criticism for their failure to undertake repatriation efforts. France has repatriated seventeen children, yet there are an estimated 200 French children in the detention camps.⁷³ Belgium repatriated six children.⁷⁴ Germany repatriated twelve,⁷⁵ and Sweden brought home seven.⁷⁶ Norway has repatriated five orphans, yet left thirty-five children behind.⁷⁷ The Netherlands repatriated two,⁷⁸ but there are an estimated ninety Dutch children in Syria and Iraq.⁷⁹ Additionally, as of October 20, 2019, Save the Children reported that thirty unaccompanied British children remained in the camps.⁸⁰ Lastly, the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11.

⁷¹ Letta Tayler, *Western Europe Must Repatriate Its ISIS Fighters and Families*, ALJAZEERA (June 21, 2019), <http://perma.cc/HQ6L-VJEH>.

⁷² Yee, *Thousands of ISIS Children Suffer*, *supra* note 36.

⁷³ *Children Repatriated in 2019*, *supra* note 67; *Families Sue French Foreign Minister Over Children Stuck in Syria*, FRANCE24 (Sept. 16, 2019), <http://perma.cc/J3X4-ZNPT>.

⁷⁴ *Children Repatriated in 2019*, *supra* note 67.

⁷⁵ *Repatriate or Reject: What Countries Are Doing with IS Group Families*, FRANCE24 (June 11, 2019), <http://perma.cc/3TWC-WJCS>.

⁷⁶ *Children Repatriated in 2019*, *supra* note 67.

⁷⁷ *Id.*; Tayler, *supra* note 71.

⁷⁸ *Children Repatriated in 2019*, *supra* note 67.

⁷⁹ Louisa Loveluck, Souad Mekhennet, Loveday Morris & Alice Martins, *Castaway from the Islamic State*, WASH. POST (Dec. 23, 2019), <http://perma.cc/6BM5-3H5R>.

⁸⁰ Mark Townsend, *Britain Makes Move to Bring Home Children of ISIS Suspects from Syria*, THE GUARDIAN (Oct. 20, 2019), <http://perma.cc/PEE5-4NRC>.

U.S. has repatriated sixteen Americans, both adults and children.⁸¹ The U.S., however, is one of the countries with the smallest number of citizens who joined ISIS.⁸² Because only around 300 Americans joined ISIS abroad, “few if any of the children [at al-Hol camp] appear to be U.S. citizens.”⁸³

Moreover, after the U.S. forces’ withdrawal from the Kurdish region in Syria in 2019, Turkey’s subsequent encroachment into Syrian territory has added an obstacle to home governments’ involvement in repatriating their citizens.⁸⁴ For example, the Australian government explained that it is too dangerous for their officials to go into Syria to take children back now that Turkey was increasing its presence in the area.⁸⁵ Even though al-Hol camp is not located in a combat area, al-Hol camp has been negatively affected by Turkey’s actions. Since the invasion in October 2019, the Kurdish forces have prioritized fending off the invasion rather than monitoring their detention camps.⁸⁶ Additionally, most international groups have suspended their activities in the camp, making the humanitarian situation more dire than before.⁸⁷ Lastly, escapes have been confirmed at a detention center near al-Hol.⁸⁸ Overall, the fighting at the border has increased danger to children in the camp, highlighting the need for repatriation or other action by the international community. The need for more people to fight at the Syria–Turkey border may decrease security at the camps, leading to an insurrection by detainees or more escapes. There are no reported plans for the repatriation of children in case the Kurds leave the camps as they go fight Turkish forces at the border.⁸⁹

Legal arguments have recently arisen challenging various governments’ choice to not repatriate their citizens. Detainees and their families from Germany,

⁸¹ Ari Shapiro, *What Happens When Americans Who Joined ISIS Want to Come Home*, NPR (Feb. 21, 2019), <http://perma.cc/Z53W-82BX>.

⁸² Liz Sly, *Eight Americans, Including Six Children, Detained During ISIS Battles in Syria Are Sent Home*, WASH. POST (June 5, 2019), <http://perma.cc/GR6M-S5SX>.

⁸³ Editorial Board, *The World Must do Something About the Children of ISIS Fighters*, WASH. POST (Jan. 12, 2020), <http://perma.cc/7N6Y-JAQX>.

⁸⁴ Devorah Margolin, Joana Cook, & Charlie Winter, *In Syria, the Women and Children of ISIS Have Been Forgotten*, FOREIGN POLICY (Oct. 26, 2019), <http://perma.cc/B3PZ-UA5T>.

⁸⁵ Livia Albeck-Ripka, *Desperate Pleas to Free Women and Children from ISIS Camps in Syria*, N.Y. TIMES (Oct. 21, 2019), <http://perma.cc/YZX5-2PYK>.

⁸⁶ Isabel Coles, *Almost 10,000 Children of Islamic State Live in Perilous Limbo in Syrian Camps*, WALL ST. J. (Dec. 30, 2019), <http://perma.cc/26UF-E2VS>.

⁸⁷ *Id.*

⁸⁸ Isabel Coles, *Islamic State Affiliates Break Free from Camp in Syria*, WALL ST. J. (Oct. 13, 2019), <http://perma.cc/DU44-KR2E>.

⁸⁹ W.J. Hennigan & John Walcott, *Trump, Pentagon Have No Contingency Plan for ISIS Jailbreakers as Turkey Attacks U.S. Allies in Syria*, TIME (Oct. 9, 2019), <http://perma.cc/9EQ5-ADEF>.

France, Belgium, Australia, and the Netherlands have challenged their detention in their respective courts.⁹⁰ In Belgium, a Brussels court ordered the government to bring back ten children from al-Hol camp within six weeks.⁹¹ 5,000 euros will be fined per child per day if the government does not comply.⁹² However, an appeals court in the Hague ruled that the Netherlands is not required to take back approximately ninety children from ISIS.⁹³ France has rejected the appeals of cases that claimed a right to repatriation.⁹⁴ The French Council of State denied communal repatriation and stated that decisions would have to be decided on a case-by-case basis.⁹⁵ In Germany, an appeals court in Berlin required the German government to repatriate a woman and her three children due to the “life-threatening” conditions in the camp.⁹⁶ Furthermore, while Australia has repatriated eight children so far, Australia has proposed laws preventing the return of children as young as fourteen years old for two years if they are suspected of terrorism.⁹⁷ It is unclear whether governments will cooperate with rulings that force them to repatriate their detainees. However, while the decision whether to cooperate is made by governments, detainees remain in a legal limbo and indefinite detention.

E. Local Prosecution

As an alternative to repatriation, states may choose to leave their citizens in al-Hol camp with the hope that they will face local prosecution, meaning prosecution in either Syria or Iraq. Presumably, if people at al-Hol camp were successfully, and fairly, prosecuted, they would either be imprisoned or released from detention, and the camps would therefore no longer be necessary. In the

⁹⁰ Valentina Pop & Isabel Coles, *Detained Islamic State Members Turn to Europe's Courts to Come Home*, WALL ST. J. (Nov. 8, 2019), <http://perma.cc/H3QA-E2ZK>; *Families of Islamic State Fighters to Sue Australia Over Repatriation*, FRANCE24 (July 25, 2019), <http://perma.cc/RX6C-L8EV>.

⁹¹ Marine Strauss, *Belgium Ordered to Take in 10 Children Born to IS Fighters*, REUTERS (Dec. 12, 2019), <http://perma.cc/KHY7-2F2B>.

⁹² *Id.*

⁹³ Stephanie van den Berg & Bart Meijer, *Dutch State Not Obligated to Take Back Islamic State Children: Appeals Court*, REUTERS (Nov. 22, 2019), <http://perma.cc/R85J-ZB2Q>.

⁹⁴ *French Council of State Rejects Appeals to Allow Jihadist Families to Come Home*, RFI (Apr. 24, 2019), <http://perma.cc/NBG3-NWBZ>.

⁹⁵ *Id.*

⁹⁶ Loveday Morris & Souad Mekhennet, *Europe Has Resisted Taking Back Citizens Who Joined ISIS. Now, It May Not Have a Choice*, WASH. POST (Nov. 14, 2019), <http://perma.cc/WS6P-BNLP>.

⁹⁷ Rosemary Bolger, *Dutton to Move on Legislation to Ban Returning Australian Foreign Fighters for up to Two Years*, SBS NEWS (July 4, 2019), <http://perma.cc/86PX-B9XQ>; Letta Tayler, *Australian Mother's Plea to Come Home from Crowded Camp After Fleeing Islamic State*, HUMAN RIGHTS WATCH (Aug. 20, 2019), <http://perma.cc/2KDX-G3W8>.

eyes of some countries, local prosecution is a better option than prosecution in a detainee's country of citizenship ("prosecution at home") because local authorities have greater access to evidence and witnesses, and local prosecutions allow the country to avoid the costs associated with those prosecutions. France has taken this route with respect to eleven adult male citizens, who were all sentenced to death for their involvement with ISIS after a hasty trial in Iraq.⁹⁸ Stark criticism of the decision to pursue local prosecution followed because for terrorism cases, Iraqi law does not convict based on a defendant's actions ("the underlying crime").⁹⁹ Rather, Iraqi law convicts people simply because they joined ISIS.¹⁰⁰ Critics of Iraqi prosecution claim that Iraqi law contemplates terms of punishment too broadly. Forty-five French defense lawyers criticized the French government's decision to support local trials because "it violated the [French] constitution by risking the execution of its citizens and . . . [by] using the threat of terrorism to justify an overall erosion of protections for suspects and detainees."¹⁰¹

So far, Iraqi trials¹⁰² have attracted criticism because they also violate Iraqi law. Iraqi trials have been found to be rushed, based on coerced confessions, and without victim participation.¹⁰³ No significant efforts have been undertaken to gather evidence for prosecution.¹⁰⁴ Additionally, authorities have violated the due process rights of ISIS suspects under Iraqi law, which provides the ability to see a judge within twenty-four hours of detention, to have access to lawyers during interrogations, and to notify their families that they are being detained.¹⁰⁵ Regarding the prosecution of allegedly ISIS-affiliated women, judges have rejected claims of foreign women who have testified that their husbands forced them to come to Syria without giving them any choice.¹⁰⁶ These observations demonstrate that Iraq has not upheld its own judicial protections for terrorist-related suspects,

⁹⁸ Alissa J. Rubin, *French ISIS Supporters on Death Row in Iraq Ask for Mercy*, N.Y. TIMES (June 3, 2019), <http://perma.cc/44RF-ZWKX>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Section II.E focuses on Iraqi trials rather than Syrian trials because Syria does not have the infrastructure or resources at the moment to create courts to prosecute foreign fighters. Syria's call for an international tribunal was rejected by the Security Council, and as of February 2020, Syria is attempting to create a court system where foreign fighters will be tried by local judges with collaboration of legal representatives from the detainee's country. Hind Hassan, Amel Guettatfi & Adam Desiderio, *Thousands of Foreign ISIS Fighters in Syria Will go on Trial Starting in March*, VICE NEWS (Feb. 19, 2020), <http://perma.cc/C5GJ-U94A>.

¹⁰³ *Iraq: Events of 2018*, HUMAN RIGHTS WATCH, <http://perma.cc/2P8X-3QQW>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

making it unlikely that it will uphold any international standards¹⁰⁷ that provide protection for detainees in al-Hol camp.

Flaws in the Iraqi trials also raise questions about the general ideal of, and international right to, a fair trial. For example, children not yet detained at al-Hol camp have been subjected to arbitrary arrests and prosecutions, with torture being utilized as a way to coerce confessions.¹⁰⁸ Apart from utilizing torture, “the lack of transparency . . . , the use of the death penalty, limited to no access to defen[s]e counsel . . . , [and] the collapse of a functioning judiciary . . . in Syria [and Iraq] all indicate that foreign fighters and their families do not receive a fair trial, if they receive a trial at all.”¹⁰⁹ The U.N. Human Rights Committee has stated that the right to a fair trial “may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”¹¹⁰ It further states that “[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”¹¹¹ So far, Iraq, a signatory to the International Covenant on Civil and Political Rights (ICCPR), is violating this treaty¹¹² by hastily conducting local trials that do not ensure fair trials for detainees.

Moreover, even if local prosecutions offered an opportunity for foreign detainees to clear their names, this opportunity may not be available to the women and children held in al-Hol camp. First, there is a lack of probative evidence indicating that many of the women and children were not involved with ISIS, and this evidence would require significant resources to find. Second, because the Iraqi government is seeking millions of dollars to prosecute male fighters, far more

¹⁰⁷ Relevant sources regarding fair trial standards include: International Covenant on Civil and Political Rights arts. 13–15, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention on Human Rights art. 6, Nov. 4, 1950, C.E.T.S. No. 005; American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and People’s Rights art. 7, June 27, 1981, 1520 U.N.T.S. 217; Revised Arab Charter on Human Rights art. 13, May 22, 2004; ASEAN Human Rights Declaration art. 20, Nov. 19, 2012; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Aug. 12, 1949, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Rome Statute of the International Criminal Court, July 17, 1988, 2187 U.N.T.S. 90.

¹⁰⁸ *Iraq: ISIS Child Suspects Arbitrarily Arrested, Tortured*, HUMAN RIGHTS WATCH (Mar. 6, 2019), <http://perma.cc/FMD9-7QNV> [hereinafter: *ISIS Child Suspects Arbitrarily Arrested*].

¹⁰⁹ Tanya Mehra & Christophe Paulussen, *The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking*, INT’L CTR. FOR COUNTER-TERRORISM: THE HAGUE (Mar. 6, 2019), <http://perma.cc/4YDD-AQ49>.

¹¹⁰ U.N. Human Rights Comm., General Comment No. 32, art. 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, Aug. 23, 2007, CCPR/C/GC/32.

¹¹¹ *Id.*

¹¹² *See* ICCPR, *supra* note 107, at arts. 14–16.

resources would be necessary to expand the prosecution of women and children as well.¹¹³ Third, the prisons in Syria are already overwhelmed with male militants who may face trial. It is unlikely that the prosecution of women and children will take priority over this imprisoned population. Lastly, the Kurdish administration has stated that they are not going to prosecute the women and children in the detention camps.¹¹⁴ The focus of prosecution is placed on the men who are being held in actual prisons. The women and children at al-Hol camp are being held indefinitely without access to court proceedings that determine guilt or innocence, in violation of international law.¹¹⁵ Thus, local prosecution is unlikely to be an adequate solution for the children at al-Hol camp.

F. Prosecution at Home

Prosecution at home is available to countries under the nationality doctrine of prescriptive jurisdiction.¹¹⁶ This is a proposed solution to detention camps because presumably, detention camps would not be necessary if each country took back their citizens and placed them in prosecution proceedings at home. However, there are major logistical challenges associated with prosecution at home. First, prosecution at home has been deeply criticized because in most countries in Europe, sentences for those convicted of being part of terrorist organizations only consist of a few years in jail.¹¹⁷ In Belgium and Germany, the average sentence is five years, and in the U.K. the average is seven.¹¹⁸ France stands out for having longer sentences, around fourteen to twenty years of imprisonment.¹¹⁹ The short sentences cause fear amongst people at home that regard this prosecution as a quick way for terrorists to be free from real punishment, making it an unpopular solution. Additionally, there is fear that evidence would be hard to find in battlefields, thus making prosecution, in Iraq or in the home country, even more challenging.¹²⁰ States may also have admissibility rules regarding evidence that also prevents it from being used in court. For example, the U.K. does not allow intercepted evidence in court, and Germany does not allow social media posts to

¹¹³ Trent Murray, *French Foreign Minister Travels to Iraq to Push for Local Trials of European IS Fighters*, EURONEWS (Oct. 19, 2019), <http://perma.cc/3F8Y-J9T8>.

¹¹⁴ *Turkey-Syria Border: Trump Threatens to "Obliterate" Turkish Economy*, *supra* note 12.

¹¹⁵ The legal basis for detention will be discussed in Section III ("Relevant Law").

¹¹⁶ BENCHMARK ON INTERNATIONAL LAW II.A-3 (Diane Marie Amman ed., 2014).

¹¹⁷ Anthony Dworkin, *Beyond Good and Evil: Why Europe Should Bring ISIS Foreign Fighters Home*, EUR. COUNCIL ON FOREIGN REL. (Oct. 25, 2019), <http://perma.cc/4Y7G-TEDW>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Gardner, *supra* note 55.

be admitted as evidence.¹²¹ If people are taken back to home countries without enough evidence for prosecution, there will likely be political backlash against the home government, which would be seen as bringing in national security risks.¹²² Also, even if convicted, imprisonment may pose a “potential difficulty” because “prisons are often an incubator of radicali[z]ation.”¹²³ Because home prosecutions will be difficult and may be distrusted, countries seem unwilling to trust that this process will provide meaningful redress when women and children are brought home. Thus, prosecution at home is also not an adequate solution to children’s needs at al-Hol camp.

G. Stripping of Citizenship

Some countries have encouraged stripping citizenship from the detainees at al-Hol camp. The U.K. has stripped the citizenship of various nationals,¹²⁴ and Denmark has proposed stripping citizenship from children born abroad to Danish jihadists.¹²⁵ Between 2018 and 2019, those stripped of citizenship by the U.K. increased by 600 percent, but the U.K.’s Home Office refused to identify how many of these people were related to ISIS.¹²⁶ Critics of the practice of stripping citizenship state that this practice leaves people “homeless without protection,” making international cooperation challenging because other countries have to take on the costs of detaining, housing, or prosecuting the stateless.¹²⁷ Overall, stripping of citizenship is often criticized as an inefficient, counterproductive, and even dangerous way to fight terrorism because it eliminates the possibility of

¹²¹ Dworkin, *supra* note 117, at 9.

¹²² See Mehra & Paulussen, *supra* note 109

To conclude, despite the security risks, as well as the prosecutorial and reintegration challenges involved, in our view States have legal and moral obligations to take back their own citizens that are currently in Syria and Iraq However, we acknowledge it is definitely not the easiest or cheapest option and many challenges remain. The associated uncertainties and costs of bringing persons back, including the political cost of conveying an unpopular message, might prevent governments to go down this path.

¹²³ Dworkin, *supra* note 117, at 8.

¹²⁴ Lizzie Dearden, *Shamima Begum: Number of People Stripped of UK Citizenship Soars by 600% in a Year*, THE INDEPENDENT (Feb. 20, 2019), <http://perma.cc/TW8X-HCQ7>; Cumming-Bruce, *supra* note 53.

¹²⁵ *Denmark to Deprive Jihadists’ Children of Citizenship*, FRANCE24 (Mar. 28, 2019), <http://perma.cc/3EFR-KS4R>.

¹²⁶ Dearden, *supra* note 124.

¹²⁷ Megan Specia, *ISIS Cases Raise a Question: What Does It Mean to Be Stateless?*, N.Y. TIMES (Feb. 22, 2019), <http://perma.cc/J4U4-3XHL/>.

rehabilitation, reintegration, and prosecution in the country of citizenship.¹²⁸ As of this writing, there are no documented instances of children being stripped of citizenship so, for the purpose of this Comment, this solution will be regarded as an extreme action. Nonetheless, the fact that governments might take this action against children in the future raises the risk of leaving children without a nationality.

III. RELEVANT LAW

This Section will discuss the international legal frameworks that address children's rights, detention, stateless people's rights, and the right to return. A discussion of the relevant law will demonstrate how the detention of the children of ISIS in al-Hol camp and other similar camps is in violation of international law, including major international human rights treaties.

A. Children under International Law

The CRC is the most comprehensive treaty providing protection for children worldwide, with 196 states party to it. Under the treaty, a child is defined as any person who is under the age of eighteen.¹²⁹ The Convention¹³⁰ is organized by four principles: (1) the principle of non-discrimination,¹³¹ (2) the principle of the best interest of the child,¹³² (3) the right to life, survival, and development,¹³³ and (4) the right to be heard.¹³⁴ Additionally, the Convention guarantees various fundamental rights including but not limited to the right to protection from abuse, exploitation, and neglect, the right to education, and the right to adequate food and health.¹³⁵

¹²⁸ Lizzie Dearden, *Shamima Begum: Government Was Warned Three Years Ago that Stripping People of Citizenship Could Increase Terror Risk, Official Documents Reveal*, THE INDEPENDENT (Feb. 23, 2019), <http://perma.cc/MKK6-JSVS>; see also Naomi Wayne et al., *Shamima Begum Citizenship Decision Sets a Dangerous Precedent*, THE GUARDIAN (Feb. 21, 2019), <http://perma.cc/B569-RCKT>.

¹²⁹ CRC, *supra* note 26, at art. 1.

¹³⁰ *Four Principles of the Convention on the Rights of the Child*, UNICEF (June 24, 2019), <http://perma.cc/2GYL-333G>.

¹³¹ CRC, *supra* note 26, at art. 2.

¹³² *Id.* at art. 3.

¹³³ *Id.* at art. 6.

¹³⁴ *Id.* at art. 12.

¹³⁵ FRANCES NICHOLSON & JUDITH KUMIN, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 24 (Cornelis Wouters et al. eds. 2017), <http://perma.cc/VE4U-ERKL>.

The principle of the best interest of the child is the cornerstone of children's rights in international law.¹³⁶ According to Article 3, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities[,] or legislative bodies, the best interest of the child shall be a primary consideration.”¹³⁷ This is applicable to all children no matter whether they live in their country of origin or not. The Committee on the Rights of the Child¹³⁸ has explained that this principle is a substantive right, a legal principle, and a rule of procedure.¹³⁹

The CRC also addresses situations of children in armed conflict, especially those used in combat zones. Articles 39 and 40 describe states' commitment to promote the recovery and social reintegration of child victims in armed conflict.¹⁴⁰ Recovery and reintegration “shall take place in an environment which fosters the health, self-respect[,] and dignity of the child.”¹⁴¹ Additionally, regarding the prosecution of children involved in armed conflict, every child is entitled to a presumption of innocence until being proven guilty, to have “the matter determined without delay by a competent, independent,” and impartial authority in a fair manner, to have his privacy respected, and more.¹⁴²

The foreign children at al-Hol camp are a vulnerable population not only because they are children but also because they are perceived as ISIS affiliates. Some were born into ISIS, some joined on their own, and some were introduced to ISIS by their parents. No matter the reason, due to their age, the U.N. has emphasized that “the recruitment and exploitation of children by terrorist and violent extremist groups [is] to be considered a serious form of violence against children.”¹⁴³ Consequently, children recruited by extremists or those born into the group should be treated as victims under international law.¹⁴⁴ The CRC, along with

¹³⁶ JANE McADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173 (2017).

¹³⁷ CRC, *supra* note 26, at art. 3(1).

¹³⁸ Even though U.N. body committees do not have binding authority, their pronouncements have strong persuasive and moral authority in the world of international human rights.

¹³⁹ U.N. Comm. on the Rights of Children, General Comment No. 14 On The Right Of The Child To Have His Or Her Best Interests Taken as a Primary Consideration, Section I.A, U.N. Doc. CRC/G/GC/12 (2013).

¹⁴⁰ CRC, *supra* note 26.

¹⁴¹ *Id.* at art. 39.

¹⁴² *Id.* at art. 40.

¹⁴³ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 43, at 2.

¹⁴⁴ *Id.* at 43; *see also* CRC, *supra* note 26, at art. 39 (“State parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts.”); G.A. Res. 54/263, Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4 (May 25 2000); G.A. Res 70/291, United Nations Global Counter-Terrorism Strategy Review (July 1, 2016).

U.N. guidelines, emphasizes that at least up until some age (most often eighteen years old under the CRC, “unless under the law applicable to the child, majority is attained earlier”),¹⁴⁵ children are often understood not to be able to exercise meaningful choice, even if they claim to act on their own.¹⁴⁶ Overall, the labeling of the children of ISIS as terrorists puts them at a high risk of being ostracized by their communities.¹⁴⁷ In fact, the children are already victims due to the international community’s refusal to remove them from the appalling detention camps.

The U.N. takes the position that recognizing children that participated in armed conflict as victims rather than combatants is justified. Doing so provides children with critical access to the rights of victims of crime.¹⁴⁸ Thus, the legal status of victim grants them access to specific rights, like the right to reparations and rehabilitation.¹⁴⁹ Additionally, this recognition aids the process of reintegration.¹⁵⁰ Being considered a victim rather than a terrorist would fundamentally shift how the world views these children, and hopefully, how the world reacts to their current plight. Additionally, the U.N. has emphasized that “there should be a presumption against the prosecution of children, and they should be treated primarily as victims.”¹⁵¹ Even for children accused of crimes

¹⁴⁵ CRC, *supra* note 26, at art. 1 (“A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”).

¹⁴⁶ A counterargument to this proposition is a hypothetical where a seventeen-year-old child voluntarily joins ISIS and commits terrorist-related crimes. Would the recognition of him as a victim under international law imply that this child cannot or should not be prosecuted for his or her actions? The U.N. Office on Drugs and Crimes negates this claim.

[T]he imperative of treating a child recruited by a terrorist or violent extremist group ‘primarily as a victim’ does not mean that the child should be granted immunity for criminal acts committed during his or her association with the terrorist or violent extremist group. Instead, the notion of primary victimization should be duly recognized, integrated[,] and considered at the different stages of the justice process. This means that children should be awarded the safeguards and guarantees of child victims, concerning safety, safeguards and appropriate assistance, including reparations. It also means that prosecution should always be regarded as a measure of last resort and, whenever a child is alleged to have committed a criminal offence, the rights and safeguards provided by the international legal framework for child offenders should be fully respected and applied.

U.N. OFFICE ON DRUGS AND CRIMES, *supra* note 43, at 75–76

¹⁴⁷ *Id.* at 107.

¹⁴⁸ *See generally id.* at 105–43.

¹⁴⁹ *Id.* at 40.

¹⁵⁰ *See generally id.* at 105–43.

¹⁵¹ U.N. Secretary-General, *Key Principles for the Protection, Repatriation, Rehabilitation, and Reintegration of Women and Children with Links to U.N. Listed Terrorist Groups* 7 (Apr. 7, 2019); *see also* S.C. Res. 2178 (Sept. 24, 2014) (Member states should develop prosecution, rehabilitation, and reintegration strategies for foreign fighters); S.C. Res. 2396 (Dec. 21, 2017) (noting that women and children are

related to terrorist organizations, the prioritization of non-judicial measures, rehabilitation, and reintegration is necessary in order to prioritize children's best interest.¹⁵²

The four main rights guaranteed to children worldwide by the CRC are being denied to the children of ISIS as of 2020. Regarding non-discrimination, the foreign children of ISIS are being discriminated against when compared to the Iraqi and Syrian children, who have more access to resources in al-Hol camp.¹⁵³ The right to survival and development is being disregarded with over 390 child deaths due to preventable causes.¹⁵⁴ The right to be heard is also ignored because these children, so far, have had minimal success in appealing their detentions.¹⁵⁵ Lastly, detention in a squalid camp without education and an increased chance of radicalization cannot be regarded as in the best interest of any child.¹⁵⁶ Even going beyond the four main rights guaranteed by the CRC, camps like al-Hol violate a child's rights to protection from abuse, exploitation, and neglect, the right to education, and the right to adequate food and health.

Two other specific issues regarding the children in al-Hol camp merit discussion: child-sensitive age assessment and cross-border cases.¹⁵⁷ Because of the Syrian civil war, birth certificates and other forms of identification for children are scarce.¹⁵⁸ Thus, it is difficult to judge whether teenagers are under the age of eighteen. The presence of armed conflict and lack of documentation may lead more states to try children as adults rather than presuming they are under eighteen and trying them as minors.¹⁵⁹ However, the U.N. recommends that serious effort should be taken to determine the age of children, while respecting the dignity of those children.¹⁶⁰ Additionally, in cases where there is no conclusive determination

often victims of terrorist groups and international human rights law should be respected when dealing with these groups of people); S.C. Res 2427 (July 9, 2018) (noting that children in armed groups should be treated primarily as victims).

¹⁵² See generally U.N. Secretary-General, *supra* note 151.

¹⁵³ Yee, *Guns, Filth and ISIS*, *supra* note 48.

¹⁵⁴ Cumming-Bruce, *supra* note 53.

¹⁵⁵ See, for example, *Australian Children Plea Directly to PM: Bring Us Home from Syria*, SAVE THE CHILDREN (Dec. 20, 2019), <http://perma.cc/TG6A-BGH2>.

¹⁵⁶ See Sarah Ferguson, *Tens of Thousands of Children in Syria's Al-Hol Camp Need Help Now*, UNICEF (July 19, 2019), <http://perma.cc/PR4A-BVKV>.

¹⁵⁷ A "cross-border case," for purposes of this Comment, is a situation where a child crossed a national border (no matter whether on his own or by his own volition) and became associated with a terrorist-organization in another country.

¹⁵⁸ U.N. Report on Syria Conflict Highlights Inhumane Detention of Women and Children, U.N. NEWS (Sept. 11, 2019), <http://perma.cc/6M6J-TMQK>.

¹⁵⁹ U.N. Office on Drugs and Crime, *supra* note 43, at 43–44.

¹⁶⁰ *Id.*

by a judge, public officials “must treat the young person as a child if he or she claims to or appears to be younger than eighteen.”¹⁶¹

As for cross-border cases, U.N. discussions focus on the possible extradition of children to their home countries, as long as the principle of non-refoulement is respected.¹⁶² This is not a possibility for the children in al-Hol camp because their home countries refuse to take them back. Overall, however, under the CRC, States have the responsibility to protect the rights of children within their territory without discrimination, no matter whether children are their own citizens or not.¹⁶³ Furthermore, “[t]he obligation to promote social reintegration continues to apply when public authorities enter into contact with children who are not nationals of their countries, including if they have crossed a national border following their recruitment by a terrorist or violent extremist group.”¹⁶⁴ None of these efforts are being made by Syria or Iraq today. The rehabilitation and the reintegration of children who have been exploited should be the overall goal of administrative detention, rather than punitive reasons of prosecution.¹⁶⁵

Even when children have been involved in terrorist-related activities, because of their age, lack of agency, and vulnerability as a group, the international community has uniformly agreed by signing the CRC that treating children as victims of exploitation by terrorist organizations is in the best interest of children.¹⁶⁶ This discussion on the international protection for children’s rights makes it clear that the detention of the children of ISIS, the current detention conditions, and the lack of return possibilities all violate the CRC.

B. The Legal Basis of Detention

The international legal basis for detention falls under international human rights law during peacetime and the law of armed conflict (international humanitarian law) under wartime. During peacetime, international human rights law allows detention when it is “necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.”¹⁶⁷ According to the U.N. Human Rights Committee, “[t]he right to liberty of person is not

¹⁶¹ *Id.*

¹⁶² *Id.* at 130 (“The non-refoulement principle entails that States shall not extradite, expel or otherwise remove a person to another State where that person faces a real risk of persecution, including substantial risk of torture or other irreparable harm.”).

¹⁶³ CRC, *supra* note 26, at art. 2.

¹⁶⁴ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 43, at 130.

¹⁶⁵ See U.N. Secretary-General, *supra* note 151; S.C. Res. 2427, *supra* note 151.

¹⁶⁶ See U.N. Secretary-General, *supra* note 151; see also S.C. Res 2427, *supra* note 151; S.C. Res. 2396, *supra* note 151; S.C. Res 2178, *supra* note 151.

¹⁶⁷ *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11.

absolute” and deprivation of liberty is sometimes justified as long as it is not arbitrary and is carried out “with respect for the rule of law.”¹⁶⁸ Thus, detention should only be imposed “according to law, on an individual basis, and with all basic rights of the detained under international law including judicial review of detention.”¹⁶⁹ The Kurdish administration can claim that the detention of women and children is a lawful preventive detention because the detainees are a national security threat. However, according to the U.N. Human Rights Committee, “[e]gregious examples of arbitrary detention [which is forbidden under the ICCPR]¹⁷⁰ include detaining family members of an alleged criminal who are not themselves accused of any wrongdoing.”¹⁷¹ Thus, under international human rights law—specifically the ICCPR—the detention of children at al-Hol camp violates international law.

During wartime, the law of armed conflict—which allows states to detain those “reasonably suspected of threatening state security, without affording them judicial guarantees”—applies.¹⁷² Even though the War on Terror is technically not an international armed conflict under the definition of the 1949 Geneva Convention, it can and has been used as a basis for creating detention centers where the international law of armed conflict applies.¹⁷³ The law of armed conflict “permit[s] states to detain anyone reasonably suspected of posing a security threat until the circumstance justifying detention cease[s] to exist, or until the end of hostilities.”¹⁷⁴ Because the foreign women and children are at al-Hol camp due to their perceived connection to ISIS, the Kurdish administration can claim that under the international law of armed conflict, the detention is lawful until hostilities with ISIS fully come to an end. However, the U.N. Human Rights Committee has explained that in situations where the law of armed conflict applies, international human rights law acts as a complement to it.¹⁷⁵ While no case has clearly delineated the relationship between the two bodies of law, it is clear that international armed conflict law cannot openly disregard the requirements

¹⁶⁸ U.N. Human Rights Comm., General Comment No. 35 on Article 9 (Liberty and Security of the Person), U.N. Doc. CCPR/G/GC/35, ¶ 10 (2014).

¹⁶⁹ *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11.

¹⁷⁰ See ICCPR, *supra* note 107, at art. 9.

¹⁷¹ U.N. Human Rights Comm., *supra* note 168, at ¶ 16.

¹⁷² Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 370 (2008).

¹⁷³ *Id.* at 370–71.

¹⁷⁴ *Id.* at 379–80; see Third Geneva Convention, *supra* note 107, at arts. 21, 118 (allowing detention of POWs in an international armed conflict until the “cessation of hostilities”); Fourth Geneva Convention, *supra* note 107, at art. 42 (protected civilians may be interned if “absolutely necessary”).

¹⁷⁵ See Diane Webber, *Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict*, ASIL INSIGHTS (Apr. 2, 2015), <http://perma.cc/U4KW-YDLQ>.

found under major international human rights treaties, which includes the ICCPR.¹⁷⁶ Thus, even if international armed conflict law is used to rationalize al-Hol camp, national security concerns do not invalidate ICCPR guarantees.

Regarding the children specifically, their detention due to security concerns has unfortunately become the “norm rather than the exception.”¹⁷⁷ At various times in history, the presumption that some children are a risk for society has led to child detention all over the world, including Thailand, Iraq, Nepal, Sri Lanka, and the U.S.¹⁷⁸ However, Article 37 of the CRC states that detention of children should be a measure of last resort and for the shortest period possible.¹⁷⁹ Additionally, children should have access to facilities that provide health and human dignity.¹⁸⁰ The limited use of detention is emphasized due to the negative effects that detention has on children and their development. Detention of children leads to an increased chance of exposure to violence, stigmatization, and an overall negative effect on wellbeing.¹⁸¹

If and when child detention must occur, “the conditions of detention and the treatment of the child must be respectful of the dignity and special needs of the child”¹⁸² The squalid conditions of al-Hol camp,¹⁸³ combined with the international outcry regarding the humanitarian crisis these children face,¹⁸⁴ demonstrate that the children are not being treated with dignity and respect at the camp. Additionally, “not all children de jure can be considered to have the capacity to commit crimes.”¹⁸⁵ There is not a presumption of guilt that applies to these children as a population. There is also “no requirement under the universal counter-terrorism instruments to criminalize association with or membership in a terrorist group.”¹⁸⁶ The detention of children at al-Hol camp for over one year now violates the international norms delineating the correct way to detain them, and this is a situation which must be remedied.

¹⁷⁶ *See id.*

¹⁷⁷ U.N. Office on Drugs and Crime, *supra* note 43, at 97.

¹⁷⁸ Carolyn Hamilton et al., *Administrative Detention of Children: A Global Report* 24 (UNICEF Child Protection Ctr., Feb. 2011).

¹⁷⁹ CRC, *supra* note 26, at art. 37(b).

¹⁸⁰ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 43, at 99.

¹⁸¹ *Id.* at 98.

¹⁸² *Id.*

¹⁸³ *See, for example*, Hubbard, *supra* note 4.

¹⁸⁴ *See, for example*, Gilmour, *supra* note 59.

¹⁸⁵ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 43, at 71.

¹⁸⁶ *Id.* at 72–73.

Although international law allows punishment only after an individual is deemed guilty at trial,¹⁸⁷ according to Syria, its detention camps do not serve as punishment. Instead, the camps are used as a way to incapacitate a person who is a threat to national security.¹⁸⁸ However, under international law, “preventing [families] from leaving the camps” qualifies as “collective punishment,” which “violates the laws of war.”¹⁸⁹

Additionally, international law violations are occurring because restriction must be “nondiscriminatory, proportionate, and necessary to achieve legitimate aims.”¹⁹⁰ Restriction has been discriminatory given the worse conditions that the foreign detainees experience compared to Iraqi and Syrian detainees.¹⁹¹ Restriction has not been proportionate because this detention is indefinite and has continued for more than a year.¹⁹² Lastly, restriction does not achieve legitimate aims because there are no pending trials against the detainees at the moment. The Kurdish administration has already stated they will not prosecute detainees,¹⁹³ and there are currently no criminal charges being brought against the detainees by their own nations. Detainees are simply being held because Syria cannot return them to their home countries, and this violates international law. The U.N. Human Rights Committee has clearly stated that detention “not in contemplation of prosecution on a criminal charge . . . presents severe risks of arbitrary deprivation of liberty,” especially if there are alternative measures to detention.¹⁹⁴

A recent report also demonstrates that the Iraqi and the Kurdish administrations have prosecuted over 180 children linked to ISIS, with the possibility of torture being used to force confessions.¹⁹⁵ However, at least at al-Hol camp, the Kurdish administration has stated that it does not intend to prosecute the foreign children.¹⁹⁶ Thus, children are being held indefinitely without an option for future trials. Although it is outside the scope of this Comment to determine whether these prosecutions would be lawful, the reality is

¹⁸⁷ See ICCPR, *supra* note 107, at arts. 14, 16.

¹⁸⁸ See Hakimi, *supra* note 172, at 373.

¹⁸⁹ *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11; Fourth Geneva Convention, *supra* note 107, at art. 33.

¹⁹⁰ *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11.

¹⁹¹ See Yee, *Thousands of ISIS Children Suffer*, *supra* note 36; Louisa Loveluck, *A Desperate Struggle for Survival Inside the Last Corner of the Islamic State*, WASH. POST (Feb. 18, 2019), <http://perma.cc/F3MT-8SHD>.

¹⁹² See *Dire Conditions for ISIS Suspects’ Families*, *supra* note 11; Yee, *Guns, Filth and ISIS*, *supra* note 48.

¹⁹³ *Turkey-Syria Border: Trump Threatens to “Obliterate” Turkish Economy*, *supra* note 12.

¹⁹⁴ Human Rights Comm., *supra* note 168, at ¶ 15.

¹⁹⁵ *ISIS Child Suspects Arbitrarily Arrested*, *supra* note 108.

¹⁹⁶ *Turkey-Syria Border: Trump Threatens to “Obliterate” Turkish Economy*, *supra* note 12.

that regardless of whether the law of armed conflict or international human rights covers this specific instance of detention, at least some of the children of ISIS, who are to be regarded as victims according to the U.N., are being detained without causing a threat to national security. Young orphans who have not been indoctrinated are not a threat to national security. Children who were born into the regime are not automatically ISIS fighters. Detaining children for no reason but political stigma violates both the law of armed conflict and international human rights law. The detention of children demonstrates a state overreach and the sacrifice of children's rights in favor of illegitimate national security goals.

C. Stateless Persons Law/Right to Nationality

The international community views stateless persons as “some of the most vulnerable and oppressed people in the world.”¹⁹⁷ The right to a nationality is a basic human right guaranteed to all under the Universal Declaration of Human Rights (UDHR),¹⁹⁸ the ICCPR,¹⁹⁹ and the CRC.²⁰⁰ Furthermore, the 1954 Convention Relating to the Status of Stateless Persons²⁰¹ and the 1961 Convention on the Reduction of Statelessness²⁰² expounds rights for stateless people and seeks to limit state practices that leave someone stateless (for example, stripping citizenship from someone who is not a dual citizen).

A person is *de jure* stateless “if he or she is not considered to be a national by any State.”²⁰³ If a country formally strips citizenship from the detainees at al-Hol camp, and they do not have citizenship somewhere else, they would be *de jure* stateless. However, detainees can be *de facto* stateless as well. This designation covers “individuals who technically possess a nationality but are unable to enjoy its benefits because . . . the State of their nationality is not able or willing to offer them protection.”²⁰⁴ A majority of the foreign children at al-Hol camp are *de facto* stateless because even though their citizenship has not been stripped by their home country, most home countries are actively preventing their

¹⁹⁷ FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 108 (Brian Opeskin, Richard Perruchoiud, & Jillyanne Redpath-Cross eds., 2012).

¹⁹⁸ Universal Declaration of Human Rights, art. 15, U.N. Doc. A/810 (1948) [hereinafter “UDHR”] (stating that everyone has the right to a nationality, and none should be arbitrarily deprived of his or her nationality).

¹⁹⁹ ICCPR, *supra* note 107, at art. 12 (“[N]o one shall be arbitrarily deprived of the right to enter his own country.”).

²⁰⁰ CRC, *supra* note 26, at art. 7 (asserting that children have a right to nationality).

²⁰¹ Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117.

²⁰² Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175.

²⁰³ FOUNDATIONS OF INTERNATIONAL MIGRATION LAW, *supra* note 197, at 102.

²⁰⁴ *Id.* at 103.

return or turning a blind eye towards them. The 1961 Statelessness Convention—which has seventy-four parties including Belgium, the U.K., the Netherlands, and Germany—recommends that “persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality.”²⁰⁵

While authority to make decisions about a person’s nationality primarily rest with domestic governments, according to the U.N. Office of the High Commissioner, “the right of States to decide who their nationals are is not absolute . . . and must comply with their human rights obligations.”²⁰⁶ Specifically, Article 15 of the UDHR prohibits the arbitrary deprivation of nationality.²⁰⁷ Additionally, the “prohibition of arbitrary deprivation of nationality has been widely recognized as a norm of customary international law.”²⁰⁸ Arbitrary deprivations can take many different forms, including when states deprive citizenship and by doing so “do not serve a legitimate state purpose or are procedurally unfair.”²⁰⁹ Many states currently argue that national security trumps the children of ISIS’s right to nationality, and thus the de facto statelessness of their children serves a legitimate state purpose. However, this justification cannot be squared with international human rights law, which treats the children of ISIS as victims rather than terrorists.²¹⁰ Because there is no legitimate purpose for western governments to prevent victimized children from exercising their right to nationality, states are violating international law by leaving their children in camps. For adults, certain behavior might justify depriving someone of nationality. This is beyond the scope of this Comment. However, there is no such equivalent exception for the foreign children at al-Hol camp because they are treated as victims under international law. Because the international community has emphasized that states should do all they can to prevent statelessness²¹¹ or to refrain from depriving their citizens of a nationality, the de facto statelessness of

²⁰⁵ 1961 Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175; *see also* Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT’L L.J. 1, 65 (2004).

²⁰⁶ *Right to Nationality and Statelessness*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://perma.cc/FEP8-JNRS>.

²⁰⁷ UDHR, *supra* note 198, at art. 15.

²⁰⁸ Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE 21 (2018).

²⁰⁹ FOUNDATIONS OF INTERNATIONAL MIGRATION LAW, *supra* note 197, at 102.

²¹⁰ *See* Section II.B (discussing the international commitment to treat children as victims when they have been recruited by terrorist organizations, even if the children have committed terrorist-related activities); U.N. Secretary-General, *supra* note 151; S.C. Res. 2427, *supra* note 151.

²¹¹ *See, for example*, Convention on the Reduction of Statelessness, *supra* note 202.

the children of al-Hol camp violates the CRC, the ICCPR, and the 1961 Statelessness Convention.

D. Repatriation

Repatriation, or the right to return, is embodied in several major international declarations, treaties, and conventions, such as in Article 13 of the UDHR, Article 12 of the ICCPR, and the 1951 Refugee Convention. The right to return is both embodied in the preceding hard law (for example, binding treaties) but also “soft law,” such as U.N. Resolutions.²¹² The U.N. Human Rights Committee has also stated that governments “must not, by stripping a person of nationality . . . arbitrarily prevent this person from returning to his or her own country.”²¹³ The U.N. Human Rights Committee adds that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.”²¹⁴ Repatriation is also recognized under international customary law: “[m]any commentators conclude that aside from being required by specific provisions in international treaties, the right to return is obligatory under customary international law in the human rights context.”²¹⁵ The right to return is a principle that ensures refugees and exiles a right of return to their home countries. The right to return is a legally binding obligation on governments. In fact, individuals are the only ones who control the decision not to return.²¹⁶ Applying this principle to the situation of the foreigners at al-Hol camp, all countries are legally obliged to allow their citizens to return home if they so wish.

Even though some citizens may, in fact, be linked to ISIS, there are binding U.N. Security Council Resolutions²¹⁷ that require states to bring terrorists to justice and to “develop and implement appropriate prosecution, rehabilitation, and

²¹² G.A. Res. 34/30 (Nov. 20, 1979); G.A. Res. 3212 (XXIX), ¶ 5 (Nov. 1, 1974) (stating that the General Assembly “considers that all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end”); S.C. Res. 774 (Aug. 26, 1992); S.C. Res. 365 (Dec. 13, 1974); S.C. Res. 361 (Aug. 30, 1974).

²¹³ Wayne et al., *supra* note 128.

²¹⁴ Press Release, U.N. Human Rights Council, U.N. Commission of Inquiry on Syria: *Respect for the Rule of Law and Fundamental Rights Must Not Be Undermined for Political Expediency or Sacrificed for Security Considerations* (May 9, 2019), <http://perma.cc/S2FH-S5YP>; U.N. Human Rights Comm., General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 21 (1999).

²¹⁵ Akram & Rempel, *supra* note 205; *see also* Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT’L L. 1091, 1121 (1998).

²¹⁶ *See Human Rights Watch Policy on the Right to Return*, HUMAN RIGHTS WATCH, <http://perma.cc/X7HU-YK45>.

²¹⁷ *See, for example*, S.C. Res. 2178, *supra* note 151; S.C. Res. 2396, *supra* note 151.

reintegration strategies for returning foreign terrorist fighters.”²¹⁸ If detainees are guilty of some crime, rather than leaving them in camps, steps should be taken towards prosecution. Repatriation does not imply that one’s crimes should be pardoned, nor does it provide an avenue towards impunity. Repatriation simply allows detainees to return to their home country and face the consequences of their actions abroad in their own judicial system.

Regarding children, Articles 7 and 8 of the CRC address their right to return. Article 7 states that every child has a right to nationality and that “State Parties shall ensure the implementation of [this] right . . . in particular where the child would otherwise be stateless.”²¹⁹ Article 8 emphasizes that when a child is illegally deprived of his identity, states “shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”²²⁰ Like any adult under international law, children at al-Hol camp have a right to return to their countries of nationality, and the international framework’s heightened duties towards children protect this specific right. The duty to protect the right to nationality is not being accomplished by states with citizens at al-Hol camp, especially with respect to speediness, because many children have been detained for over one year.

Overall, international law grants every person the right to return to their country and specifically requires countries to fulfill a child’s right to acquire a nationality.²²¹ This duty extends to children born abroad so they do not become stateless.²²² A right of return does not exist if there is no practical ability to return, which is what the children and women are experiencing in al-Hol camp. Theoretically, repatriation would end the humanitarian crisis for foreign children at al-Hol camp because children would be taken out of detention and returned to their countries of nationality. However, because states have been so slow at repatriating children, it is hard to rely on this option to end the humanitarian crisis of the children of ISIS. Thus, the following Section will propose a novel solution to the humanitarian crisis at al-Hol camp: the children of ISIS could qualify for asylum under international refugee law.

²¹⁸ Mehra & Paulussen, *supra* note 109.

²¹⁹ CRC, *supra* note 26, at art. 7.

²²⁰ *Id.* at art. 8.

²²¹ *See id.* at art. 3.

²²² *See* U.N. High Comm’r for Refugees, *Good Practices Paper – Action 2: Ensuring That No Child Is Born Stateless* (2017), <http://perma.cc/8DMM-8Y6B>.

IV. PROPOSED SOLUTION: CHILD PROTECTION UNDER REFUGEE LAW

This Section focuses on international refugee law, which is primarily covered by the 1951 Refugee Convention and its 1967 Protocol. After discussing international refugee law and the protection it grants to refugees, this Section argues that foreign children at al-Hol camp qualify as refugees under the 1951 Refugee Convention when their countries refuse to repatriate them. Specifically, this Comment argues that the children at al-Hol camp meet the requirements for asylum because they are being persecuted as a particular social group (defined as “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country”). The persecution is carried out by first, their home countries who refuse to repatriate them, and second, the Syrian government and Kurdish administration. This means that asylum eligibility occurs not only when a home country strips children’s citizenship but when a home country actively decides to block the return of its children. Even though repatriation is the preferred and least complicated solution to the humanitarian crisis at al-Hol camp, the refusal to repatriate, along with the human-rights-violating treatment in the detention camp, entitles the children at al-Hol camp to refugee status.

A. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol

The most important international treaty regarding refugee protection is the 1951 Convention Relating to the Status of Refugees. This Convention defines the term “refugee,” establishes the right to non-refoulement,²²³ and addresses government responsibilities towards the protection of refugees. The Convention’s 1967 Protocol is foundational to refugee rights as well because it removes the temporal and geographic limitations present in the 1951 Refugee Convention. When states ratify both the 1951 Refugee Convention and the 1967 Protocol, they commit to upholding refugee rights. Even if states just ratify the 1967 Protocol on its own, they still commit to refugee rights but without the original time and geographic limitations present in the original 1951 Refugee Convention.²²⁴ As of 2015, 145 countries were parties to the 1951 Refugee Convention, 146 to the Protocol, and 142 to both the Convention and the Protocol.²²⁵ Regional

²²³ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 43, at 130 (“The non-refoulement principle entails that States shall not extradite, expel or otherwise remove a person to another State where that person faces a real risk of persecution, including substantial risk of torture or other irreparable harm.”).

²²⁴ Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees. Protocol Relating to the Status of Refugees*, U.N. AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), <http://perma.cc/GT3X-LEYT>.

²²⁵ U.N. High Comm’r for Refugees, *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (2015), <http://perma.cc/PC93-PBHM>.

mechanisms also exist that provide various refugee protections in different parts of the world. These include the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration. However, for the purpose of this Comment, the focus is on the 1951 Refugee Convention and the 1967 Protocol, as these two documents serve as the international framework that binds over 140 countries in the international community to protect refugees around the world.

Syria is not a signatory to the 1951 Refugee Convention nor the 1967 Protocol. However, this is irrelevant to determining refugee status. The 1951 Refugee Convention sets obligations for countries to determine refugee status and to provide protection if it is feasible, but not being a signatory does not deprive refugees of a status determination if they are present in a non-signatory country. In non-signatory countries, UNHCR often conducts Refugee Status Determination through its mandate “to address protection gaps.”²²⁶

International human rights law, international humanitarian law, and international criminal law also provide complementary protection to refugees worldwide. Relevant treaties include the UDHR (“all human beings are born free and equal in dignity and rights”),²²⁷ the Convention Against Torture (prohibiting refoulement in an absolute manner),²²⁸ the CRC (emphasizing the principle of non-discrimination, the principle of the best interest of the child, the right to be heard, and the right to life and survival and development),²²⁹ the ICCPR (the right to life, the right to liberty and security of a person, the right to liberty of movement),²³⁰ the International Covenant on Economic, Social, and Cultural Rights (the right to an adequate standard of living, the right to health, the right to free education),²³¹ and the Convention on the Elimination of All Forms of Discrimination Against Women (guaranteeing the right to non-discrimination based on gender or sex).²³²

Additionally, even though states are obligated to uphold the rights of all refugees, states have additional responsibilities toward refugee children. This

²²⁶ U.N. HIGH COMM’R FOR REFUGEES, UNHCR RESETTLEMENT HANDBOOK 76 (2011), <http://perma.cc/RMG2-LQBT> [hereinafter Resettlement Handbook].

²²⁷ UDHR, *supra* note 198, at art. 1.

²²⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

²²⁹ CRC, *supra* note 26, at arts. 2, 3, 6, 12.

²³⁰ See ICCPR, *supra* note 107, at arts. 6, 9, 12.

²³¹ International Covenant on Economic, Social, and Cultural Rights arts. 11, 12, 1, Jan. 3, 1976, 993 U.N.T.S. 3.

²³² Convention on the Elimination of All Forms of Discrimination Against Women art.1, Dec. 18, 1979, 1249 U.N.T.S. 13.

obligation stems from the CRC itself.²³³ UNHCR's Executive Committee Conclusion No. 107 emphasizes the importance of protecting the fundamental rights of children and recommends various steps to uphold these rights. These recommendations include: "establishing and implementing procedures to determine [refugee] children's best interests, ensuring that children can enjoy their rights without discrimination, providing and monitoring alternative care and accommodation arrangements for unaccompanied and separated children, and supporting durable solutions for children."²³⁴ While not binding, UNHCR strongly recommends states to treat foreign refugee children within their jurisdiction in a way that upholds these international protections.

The definition of a refugee is provided by the 1951 Refugee Convention. According to the Convention, a refugee is "someone who is unable or unwilling to return to their country of origin, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."²³⁵ It is important to note that internally displaced persons (IDPs), meaning those who have not crossed an international border, do not meet the definition of refugees.²³⁶

Being stateless does not immediately qualify someone as a refugee. Article 1(A)2 of the Convention makes a distinction between refugees with a nationality and those that are stateless. For refugees with a nationality, they should be "unable or unwilling to avail themselves of the protection of their State of nationality,"²³⁷ while the latter "not having a nationality and being outside the country of his former habitual residence" should be "unable or, owing to such fear, unwilling to return [to their State of former residence]."²³⁸ However, the most generally accepted view by courts worldwide is that "no substantial difference is intended between the stateless and other refugees, and that the Convention aims to provide protection to a person, whether outside their country of nationality, or, not having a nationality and outside their country of former habitual residence, who has a well-founded fear of being persecuted on Convention grounds."²³⁹

The fact that the 1951 Refugee Convention differentiates the standard for refugees and stateless people is extremely significant to this Comment's argument.

²³³ See generally CRC, *supra* note 26.

²³⁴ UNHCR & Inter-Parliamentary Union, *supra* note 135, at 38.

²³⁵ 1951 Refugee Convention, *supra* note 24, at Introductory Note.

²³⁶ UNHCR EMERGENCY HANDBOOK: UNHCR'S MANDATE FOR REFUGEES, STATELESS PERSONS, AND IDP'S, UNHCR 1 (2020).

²³⁷ GUY S. GOODWIN-GILL & JANE McADAM, THE REFUGEE IN INTERNATIONAL LAW 67 (3d ed. 2007).

²³⁸ 1951 Refugee Convention, *supra* note 24, at art. 1(2).

²³⁹ GOODWIN-GILL & McADAM, *supra* note 237, at 69–70.

Both stateless people and those with a nationality have the right to qualify as refugees under the 1951 Refugee Convention.²⁴⁰ Thus, the refugee definition does not necessarily dictate that persecution must come from actors within a country of origin. If this were a requirement, stateless people could never qualify as refugees because they would by definition not reside in their country of origin. For stateless people, a well-founded fear of persecution (linked to any of the five convention grounds) is what must be present, no matter if it is in the state of nationality or if it is in the state where the stateless person is residing. For the children at al-Hol camp, who are de facto stateless, one of the two types of persecution they face is not in their home country but rather at the hands of their home country. This will be discussed at length in Section IV.B.3, but it is important to note that this differentiation of the source of persecution does not disqualify the children at al-Hol camp from refugee status under international law. In conclusion, the 1951 Refugee Convention does not disadvantage stateless people from becoming refugees just because they do not have a nationality.

B. Applying International Refugee Law to the Children at al-Hol Camp

The foreign children at al-Hol camp are unable to return to their country of origin. Their country of origin is not Syria—assuming that they came to Syria from abroad or that they are entitled to their parent’s citizenship even if born into the ISIS regime. Unfortunately, there is no publicly available data that explains how many of these children were brought into ISIS or were born under ISIS. The following analysis of the key elements of the refugee definition will demonstrate that these children have a well-founded fear of persecution on account of their being members of a particular social group, specifically “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country.”²⁴¹ Because they meet the definition of a refugee, foreign children in al-Hol camp qualify as refugees under international law when their home country actively prevents them from coming back into their country. This argument does

²⁴⁰ See 1951 Refugee Convention, *supra* note 24, at art. 1(A)(2).

²⁴¹ UNHCR defines “particular social group” as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 7, 2002). Even though there is no inclusive list of what groups constitute particular social group, “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country” seeks to meet both the immutability requirement and the perception requirement of the UNHCR definition.

not mean to imply that countries are entitled to render children effectively stateless nor that this solution is the most appropriate for the current humanitarian crisis. However, when countries violate their duty of repatriation towards their children, leaving them no practical path to return, the international community may consider refugee designation for children, when it is in the children's best interest to do so. Such action could end the human rights violations occurring at al-Hol camp and give displaced children the opportunity to integrate into a new society. Though, refugee designation is considered a method of last resort given the challenging diplomacy issue of determining which countries will take children and how many, the unacceptable alternative is to allow vulnerable children to be sacrificed in the name of political stigmas.

1. The refugee definition: outside his or her country of origin

To qualify for refugee status, the claimant (in this case, the child) must be residing *outside* his or her country of origin. However, the Convention “requires neither that the putative refugee shall have fled by reason of fear of persecution, nor that persecution should have actually occurred.”²⁴² The foreign children at al-Hol camp clearly meet this standard. Assuming they were either born abroad and brought into ISIS, or that they were born into ISIS but are entitled to their parent's nationality, the children at al-Hol camp are not in their country of origin. They are located in Syria, which is where they would make their claim of asylum, even if Syria does not have the capabilities to provide safe refuge for these children. Although Syria's inability to serve as an adequate asylum provider is outside the scope of this Comment, in such a case, third-country resettlement can be done by UNHCR, allowing refugees to avail themselves of the protection he or she is entitled to have.

2. The refugee definition: well-founded fear

To demonstrate a well-founded fear, asylum seekers must demonstrate that “there is a reasonable possibility that they will suffer persecution if returned to their home country of nationality or habitual residence.”²⁴³ There is an objective and subjective standard to this definition. The objective standard assesses whether the fear of persecution can be corroborated by available conditions in the state. This can take the form of country conditions reports, for example. The subjective standard assesses whether refugees can demonstrate that they are experiencing “an extreme form of anxiety that is neither feigned nor overstated.”²⁴⁴

²⁴² GOODWIN-GILL & MCADAM, *supra* note 237, at 63.

²⁴³ See *Asylum & the Rights of Refugees*, INT'L JUST. RESOURCE CTR. [hereinafter: *Asylum & the Rights of Refugees*], <http://perma.cc/DPU9-KGA4>.

²⁴⁴ JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 91 (2d ed. 2014).

Objective criteria for a well-founded fear in the situation at hand comes from two sources because the children at al-Hol camp are facing persecution²⁴⁵ from two different actors. First, the children are being persecuted by their own home countries because they are not willing to take the children back. Home countries' failure to withdraw their children from the mistreatment at al-Hol camp constitutes the persecution. Press releases from those countries—especially those that have proposed stripping citizenship from children—and reports and newspaper articles that demonstrate the lack of response to this situation fulfill the objective criteria for persecution. Additionally, the children are being persecuted by the Kurdish local administration, which is violating international law by detaining them indefinitely, without fair trials, and without access to basic resources. Furthermore, the fact that foreign children in al-Hol camp are subject to disparate and discriminatory treatment compared to their Iraqi and Syrian counterparts provides more evidence that they are the subjects of persecution. Such treatment violates the principle of non-discrimination. Regarding the children's fear of Kurdish persecution, the countless reports by human rights organizations, civil society, and news outlets detailing the conditions in al-Hol camp fulfill the objective element of a well-founded fear. The articles themselves present the external circumstances that satisfy the requirement.

The subjective criteria for a well-founded fear is hard to quantify, and “it is by no means clear . . . from the definition, jurisprudence or commentary, how much of a role the subjective element is expected to play in a determination process.”²⁴⁶ Additionally, this criterion is much more individualized than the objective criteria explained above. However, it is reasonable to assume that children who do not have access to an adequate living standard, experience violence, see that they are treated worse than others in the camp, and realize they are no longer wanted by their home countries would demonstrate a subjective fear of persecution. Because both the objective and subjective criteria can likely be met by the actions of the Kurdish administration and the home country's refusal to allow children to return, the children of ISIS are experiencing a well-founded fear.

3. The refugee definition: persecution

Persecution is not specifically defined in the 1951 Refugee Convention nor the 1967 Protocol. Persecution may amount to actions by the state itself, but also by non-state agents, like “armed groups . . . family members . . . or the general population, where the State is unable or unwilling to provide protection.”²⁴⁷ In an attempt to provide guidance, the Council of the E.U. included a non-exhaustive

²⁴⁵ Persecution will be discussed in the following Section. This Subsection solely focuses on establishing a well-founded fear.

²⁴⁶ GOODWIN-GILL & MCADAM, *supra* note 237, at 64.

²⁴⁷ UNHCR & Inter-Parliamentary Union, *supra* note 135, at 132.

list in the Qualification Directive of acts that can be considered persecution. E.U. law matters in this case because most of the states that are refusing to allow children back into their countries are in Western Europe. Though some children have home countries outside the E.U., this list serves as a guide that demonstrates the flexibility and scope of the definition of persecution. The Council of the E.U.'s guiding list includes:

acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment, which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); acts of a gender-specific or child-specific nature.²⁴⁸

The definition of persecution is meant to be flexible “given the duty under the 1967 Protocol to apply the refugee definition in a manner that ensures its relevance to ‘new refugee situations.’”²⁴⁹ The modern understanding of this definition regards persecution as “the sustained or systemic denial of basic human rights demonstrative of a failure of state protection.”²⁵⁰

The children of ISIS are facing persecution from two actors: their own home countries and the Kurdish administration/Syrian government. First, the fact that home countries are rendering children effectively stateless amounts to persecutory harm in this case. Generally, being stateless does not automatically give rise to refugee status, but in this case, it puts children at a higher risk of persecution. When looking at the Convention’s history, “the intention of the drafters [of the Convention] was . . . to restrict refugee recognition to situations in which there was the risk of a type of injury inconsistent with the willingness and ability of a state to protect its own population.”²⁵¹ The case of actively blocking the return of children to their home country is compelling evidence for denial of protection. Even though the existence of a risk of serious injury alone does not suffice as persecution as defined by the Convention, it raises to the level of a “being persecuted” when “the risk has an unrelenting or inescapable character because there is no domestic remedy.”²⁵² The children at al-Hol camp meet this standard because they are unable to leave the camps (“unrelenting or inescapable character”) and because their countries refuse to take them back, with some even

²⁴⁸ *Asylum & the Rights of Refugees*, *supra* note 243.

²⁴⁹ HATHAWAY & FOSTER, *supra* note 244, at 182.

²⁵⁰ *Id.* at 185.

²⁵¹ *Id.* at 184.

²⁵² *Id.* at 185.

threatening to strip them of their citizenship. When citizens are unable to avail themselves of the same protections that other nationals of a country are entitled to, refugee law acts as a substitution for protection.²⁵³

Second, even if the home countries' failure to repatriate their children does not constitute persecution, the Kurdish administration—by implementing unlawful administrative detention centers in a discriminatory manner—is persecuting the children. In this case, the Syrian government is unwilling to protect the detainees from the Kurdish administration at al-Hol and other camps, all of which serve to unlawfully punish children for their affiliation with ISIS and deny them judicial redress. Because the Syrian government is allowing the Kurdish administration to treat children like this, foreign children in al-Hol camp are facing persecution from the Syrian government and a non-state agent (the Kurdish administration).

According to refugee law experts, for detention to be deemed legal and thus non-persecutory under international law, three benchmarks must all be met: the detention must be lawful, not arbitrary, and conducted in a manner that respects the dignity and human rights of the detainees.²⁵⁴ The first benchmark determines whether detention is “on such grounds and in accordance with such procedure as are established by law.”²⁵⁵ This Comment has established that the al-Hol camp violates international law regarding universal detention standards, thus making it unlawful. Additionally, refugee experts explain that “persons facing arrest or detention at the hand of non-state actors will almost always face the risk of persecutory harm.”²⁵⁶ In this case, the first benchmark is not met because the children of ISIS are being unlawfully detained by the Kurdish administration, a non-state actor. Second, even if the first benchmark is met, detention cannot be arbitrary or discriminatory. Arbitrary detention includes “the detention of innocent family members of alleged criminals,” which is exactly what is occurring at al-Hol camp.²⁵⁷ Detention of the foreign children at al-Hol camp is also discriminatory because they are treated considerably worse than the rest of Iraqi and Syrian children.²⁵⁸ Children in the annex receive less humanitarian aid and have restricted access to markets, hospitals, and food centers compared to Syrian and Iraqi detainees.²⁵⁹ Thus, the second benchmark is also not met. Third, even if

²⁵³ *Id.* at 292.

²⁵⁴ HATHAWAY & FOSTER, *supra* note 244, at 239 (defining “by law” as a genuine legal framework).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 240.

²⁵⁸ See Yee, *Thousands of ISIS Children Suffer*, *supra* note 36; *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

²⁵⁹ Yee, *Guns, Filth and ISIS*, *supra* note 48; *Dire Conditions for ISIS Suspects' Families*, *supra* note 11.

detention is lawful and not arbitrary, detention must also be done in a way that respects the dignity and human rights of the person.²⁶⁰ The international coverage that focuses on al-Hol camp highlights the dire humanitarian crises present at the camps, demonstrating that al-Hol camp fails to meet this third requirement. Failing this three-part test, the detention by the Kurdish administration amounts to persecution.

4. The refugee definition: on account of race, religion, nationality, political opinion, and membership in a particular social group

The “on account of” requirement maintains that there must be a legal nexus between the five grounds listed in the refugee definition and the persecution. The relevant category of asylum in the case of the children at al-Hol camp is “membership in a particular social group.” Because so many different kinds of children are being mistreated by the Kurdish administration and are being ignored by their home countries, it is impossible to make a claim that they are being persecuted due to a specific race, religion, nationality, or political opinion. Rather, the reason these children are being persecuted is because they are perceived as part of a particular social group which this Comment terms “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country.”²⁶¹

There is no set definition by the international community on what it means to be a member of particular social group. However, relevant courts have interpreted “particular social group” to mean groups of persons that either (1) share a common immutable characteristic, “something innate to their being or so fundamental to their being that they cannot be expected to change it” or (2) “have a distinct identity within their country . . . because they are perceived as being different by that society.”²⁶² The first requirement is described as the immutable characteristic test and the second is the social perception test.²⁶³ Courts vary on whether one or both tests must be satisfied.²⁶⁴ UNHCR recommends that one standard or the other should be met.²⁶⁵

Regarding the immutable characteristic test, former status or association—such as a status of a former child soldier—is enough to fulfill the innate

²⁶⁰ HATHAWAY & FOSTER, *supra* note 244, at 240.

²⁶¹ This particular social group name was created with the intention of fulfilling both the immutability characteristic test and social perception test, which are often necessary (sometimes both, but sometimes just one) for a particular social group to be accepted by courts.

²⁶² *Asylum & the Rights of Refugees*, *supra* note 243.

²⁶³ HATHAWAY & FOSTER, *supra* note 244, at 429.

²⁶⁴ *Id.* at 430.

²⁶⁵ *Id.*

characteristic test because “history or experience is not within a person’s current power to change.”²⁶⁶ It is controversial whether association with criminal groups, such as gangs, or in this case, ISIS, is enough to meet the immutability requirement. However, “where a person is at risk of being persecuted on the basis of his or her *former* membership in such an entity,” especially when he or she was forced to join, then the claim “ought logically to be included within the ambit of social group because former status is immutable.”²⁶⁷ Many of the children at al-Hol camp did not have a choice but to move with their parents when they chose to join ISIS, and many were born into ISIS without having the ability to choose what to be born into. These types of children had no agency when choosing to be associated with ISIS, thus their ISIS affiliation is an immutable characteristic. Additionally, even those who joined ISIS on their own may qualify as a refugee so as long as they have renounced membership in ISIS (provided they do not meet the requirements of Article 1(F) described below). As two experts on the law of refugee studies state:

the non-discrimination norms that underpin the nexus clause supports the inclusion of groups based on former status within the social group ground, notwithstanding some element of undesirability As abhorrent as a person’s behavior may appear, if their immutable or protected status will give rise to a risk of being persecuted . . . refugee status cannot be denied based on subjective ideas of merit.²⁶⁸

Although many scholars advocate for the renunciation of the social perception test due to its ambiguity,²⁶⁹ the children of ISIS easily fall within its definition as well. For the social perception test, it must be demonstrated that the children of ISIS are a “group within society which is faced with persecution within the social context of that very society.”²⁷⁰ The children of ISIS are a distinct group within Syria and within their respective host countries. The detention of these children in camps makes the separation physically clear, demonstrating that this test can be met. Additionally, the physical separation of the children of ISIS from society constitutes persecution.

Case law from the U.S. and elsewhere demonstrates that particular social groups can be extremely specific. For example, the U.S. Board of Immigration Appeals admitted that “young women who were members of the Tchamba-Kunsuntu Tribe of northern Togo who had not been subjected to female genital mutilation, as practiced by the tribe, and who opposed the practice” were a

²⁶⁶ *Id.* at 459.

²⁶⁷ *Id.*

²⁶⁸ HATHAWAY & FOSTER, *supra* note 244, at 460.

²⁶⁹ *Id.* at 430.

²⁷⁰ GOODWIN-GILL & MCADAM, *supra* note 237, at 85–86.

particular social group.²⁷¹ Additionally, the High Court of Australia also recognized “those who have only one child [and who] do not accept the limitations placed on them or who are coerced or forced into being sterilized,” as a discrete social group.²⁷² These examples demonstrate that the social group description for children of ISIS, “children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country,” should not be deemed as too specific to constitute a particular social group.

5. Article 1(F) Exceptions

Even though this Comment has established that the foreign children at al-Hol camp qualify for refugees status under the 1951 Refugee Convention, the Convention also states that refugee status can be denied when a person has committed a terrorist-related crime.²⁷³ Article 1(F) states that the Refugee Convention:

shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he/she committed a crime against peace, a war crime, or a crime against humanity . . . (b) he/she has committed a serious non-political crime outside the country of refuge . . . (c) he/she has been guilty of acts contrary to the purposes and principles of the U.N.²⁷⁴

While some of the children, especially those who were directly involved with ISIS, may fall under this article, there are exceptions for acts committed when the applicant was a child and for former combatants. For the Article 1(F) exception to apply to children, he/she must have reached the age of criminal responsibility,²⁷⁵ which is determined by each country, and it must be established

²⁷¹ *In re Fauziya Kasinga*, 21 I&N Dec. (BIA) 357 (June 13, 1996).

²⁷² *A and Another v. Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 (Austl.); *Asylum & the Rights of Refugees*, *supra* note 243.

²⁷³ 1951 Refugee Convention, *supra* note 24, at art. 1(F)(b).

²⁷⁴ 1951 Refugee Convention, *supra* note 24, at art. 1(F).

²⁷⁵ The Resettlement Handbook states that the age of criminal responsibility is the age below which a child cannot commit a crime (as opposed to the age of majority, the age at which a person acquires the full legal rights of an adult). There is no internationally binding standard as to which age should be used, although Article 40 of the [CRC] recommends that States establish a minimum age. If the age of criminal responsibility is different in the country of origin and the country of asylum, the higher should normally be applied.

RESETTLEMENT HANDBOOK, *supra* note 226, at 97.

that he/she had the mental capacity²⁷⁶ to commit the crimes.²⁷⁷ According to UNHCR, “[t]he younger the child, the greater is the presumption that he/she did not have the necessary mental capacity at the time.”²⁷⁸ This mental capacity threshold is hard to meet for minors because the international community is supposed to treat children who were part of former terrorist organizations as victims rather than perpetrators.

Concerning former combatants, those “who request asylum should be admitted to [asylum procedures] once it has been established that they have genuinely and permanently renounced military activities.”²⁷⁹ This determination would take place at an individual Refugee Status Determination. Furthermore, “[t]he fact of having taken part in armed conflict does not in and of itself constitute a ground for exclusion, nor does it as such establish a presumption of responsibility for acts within the scope of an exclusion clause”²⁸⁰ Article 1(F) will not apply for many children in al-Hol camp since they were not even part of the conflict or were too young to actively participate in ISIS. However, for those children at al-Hol camp that may be subject to Article 1(F), it must be demonstrated that they committed crimes above the age of criminal responsibility with the mental capacity to do so for the exception to apply. Plus, if they were actual child soldiers, the fact that they have renounced ISIS permanently could still provide them refugee status. Furthermore, it is unclear if any children at al-Hol would need to establish that they do not qualify for the Article 1(F) exception in order to gain refugee status; journalists so far have been able to find various women at al-Hol camp who are strict ISIS followers, but no mention of children pledging allegiance to ISIS has occurred to date.

²⁷⁶ In order to establish whether a child has the mental capacity to commit crimes,

[i]t is necessary to determine whether the child was mature enough to comprehend the nature and consequences of his/her acts. In cases involving child soldiers, relevant factors in the analysis include the child’s age when becoming involve in the armed group; reasons for joining (voluntary or coerced); consequences of refusal to join; length of time as member; forced use of drugs, alcohol, medication; level of education and understanding; trauma, abuse or ill-treatment suffered; absence of positive role models etc. If the child did not have the requisite mental capacity, individual responsibility does not arise.

Id.

²⁷⁷ *Id.* at 97.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 98.

²⁸⁰ *Id.*

6. Article 33(2) Exception

This Comment has demonstrated that most of the foreign children at al-Hol detention will qualify for refugee status even when considering under the Article 1(F) exception. While this Comment does not discuss the logistics behind third-country resettlement, it is important to note that Article 33 allows a state to “divest itself of protection obligations to even a recognized refugee where critical issues of safety and security are demonstrated.”²⁸¹ Even though states may claim that it is dangerous for them to take in refugee children who were associated with ISIS, this claim is insufficient when it is executed by a blanket policy that denies *all* of the detained children the right to asylum. By denying individual assessments of children’s situations, state security interests fail when balanced against the international duty to uphold children’s rights. That is to say, where it has not been demonstratively proven that a child poses a danger to the security of the country, the refugee must be granted asylum. If children are not charged as terrorists through a fair trial and final judgment, they must be presumed as victims who are entitled to international protection as refugees.

C. Family Separation

Granting the children of ISIS refugee status may create its own negative externalities, one being the separation of children from their families.²⁸² In Article 9, the CRC specifically addresses a child’s right not to be separated from his or her parents against their will. However, a child may be separated from his or her parents when it is in the child’s best interests. Critics of this Comment’s argument could claim that without considering the mother’s legal status, the re-location of a child as a refugee to a third country could potentially separate an innocent child from an innocent mother. This would technically violate the CRC. However, one could argue that this family separation is in the best interest of the child because even if the mother is not an ISIS follower, the squalid conditions at the camp are putting the child’s life at risk. This argument might be regarded as weak because it could imply that any time a child and a mother are detained for an indefinite time, family separation would be a lawful option to protect the child.

A stronger and more nuanced response to this critique finds its legal basis in Articles 20 and 22 of the CRC. These articles address the right to “special protection and assistance” by the state if “a child is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot

²⁸¹ HATHAWAY & FOSTER, *supra* note 244, at 460; *see also* 1951 Refugee Convention, *supra* note 24, at art. 33(2).

²⁸² Family separation would not apply to orphans or children who are unaccompanied in al-Hol camp. However, orphans are not the majority of the child population at al-Hol camp.

be allowed to remain in that environment.”²⁸³ This Comment has established that the conditions at al-Hol camp are against the best interest of the child, especially due to the severe health risks, the lack of education, and the constant exposure to avid ISIS followers, even if this does not include their mother. Article 20 of the CRC allows alternative care for children including “foster placement, *kafalah* of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children.”²⁸⁴ This implies that states are allowed to find alternate solutions of care when a child’s present environment is not conducive to a child’s best interest. Furthermore, Article 22 mandates states with refugee children to trace the child’s parents or any family members that may be found.²⁸⁵ While this Comment does not describe the logistical ramifications of granting al-Hol camp children refugee status, the CRC provides a helpful avenue once a child receives status. Every state in the world except the U.S. is required under the CRC to attempt family reunification for refugee children (covered under Article 10). Thus, refugee designation would be a way for children to leave al-Hol camp, with states seeking to reunify the child with other family members if available.

V. CONCLUSION

After the territorial defeat of ISIS on March 23, 2019, thousands of women and children who were associated with ISIS were detained at various camps in Syria because of their perceived link to the terrorist organization. The conditions at al-Hol camp, the largest of the detention camps, have led to international outcry due to the humanitarian crisis experienced by the detainees.²⁸⁶ There is an overall lack of food, water, medicine, and other basic resources.

The Kurdish administration has stated that it has no intention to prosecute the detainees, and it has repeatedly asked detainees’ home countries to repatriate their citizens.²⁸⁷ However, most western countries have either repatriated only a few of the detainees or outright denied repatriating them due to national security concerns. Because repatriation numbers have been low, and because prosecution in Iraq or in the detainees’ home countries is unlikely to meet the children of ISIS’s needs under international standards, thousands of children have nowhere to go and are detained indefinitely.

This Comment focused on the foreign children at al-Hol camp and proposed a novel solution to end their detention. Specifically, this Comment argued that the

²⁸³ CRC, *supra* note 26, at art. 20.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at art. 22.

²⁸⁶ See, for example, Hubbard, *supra* note 4.

²⁸⁷ *Turkey-Syria Border: Trump Threatens to “Obliterate” Turkish Economy*, *supra* note 12.

de facto stateless children at al-Hol camp are eligible for asylum under international law.²⁸⁸ Being eligible for asylum is an alternate way for children to gain residency in a foreign country and to end child detention in these camps.

After analyzing relevant international law, this Comment found that indefinitely detaining children solely because of a perceived link to ISIS violates both the law of armed conflict and international human rights law. The detention of children demonstrates a state overreach and the sacrifice of children's rights in favor of illegitimate national security goals. Furthermore, because countries are purposefully preventing their detained citizens from returning to their country of origin, the children of ISIS are being prevented from exercising their right to nationality²⁸⁹ and their right to return.²⁹⁰ Thus, the lack of repatriation is leaving the foreign children at al-Hol camp de facto stateless.

Because the 1951 Refugee Convention grants protection to people who have a nationality and to the stateless, the children of ISIS are eligible for asylum under international law when their home countries refuse to repatriate them. Specifically, these children meet the requirements for asylum because they are being persecuted as a particular social group (defined as "children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country"). The persecution is carried out first, by their home countries who refuse to repatriate them, and second, by the Syrian government and the Kurdish administration. The fact that children may have been associated with ISIS does not automatically disqualify them from refugee status because of the international norm to treat children involved in armed conflict as victims. However, if a rare case occurs where there is clear evidence that a child can be charged with a terrorist related crime, then this child could potentially be disqualified from refugee designation.²⁹¹

Even though family separation might seem like a shortcoming of the proposed solution, the CRC specifically allows for states to find alternate care when a child's environment is not conducive to the best interest of the child.²⁹² Al-Hol camp's uninhabitable conditions, the lack of education, the constant exposure to extremist views, and the indefinite aspect of detention all demonstrate that children's best interests are not being met at the camp. However, in order to prevent family separation, the CRC mandates that states must try to reunify children with other family members if they are relocated or separated from their parents.²⁹³ Thus, qualifying as a refugee would be a way for children to be able to

²⁸⁸ 1967 Refugee Protocol, *supra* note 24; 1951 Refugee Convention, *supra* note 24.

²⁸⁹ CRC, *supra* note 26, at art. 7 (asserting that children have a right to nationality).

²⁹⁰ *See id.* at arts. 7, 8.

²⁹¹ *See* 1951 Refugee Convention, *supra* note 24, at art. 1(F).

²⁹² *See* CRC, *supra* note 26, at art. 20.

²⁹³ *Id.* at art. 22.

leave al-Hol, and the CRC would require states to promote family reunification once a child is no longer detained.

This Comment's purpose was to propose an alternate solution to the problems presented by al-Hol camp, which is acting as an illegal collective punishment for children who are associated with ISIS. By granting refugee status to those children who qualify under international standards, children will have a way to gain residency in another country and to escape indefinite detention in squalid conditions.