

Submission by the UN Special Rapporteur on trafficking in persons, especially women and children, in the cases of *H.F. and M.F. v. France* (App. No. 24384/19) and *J.D. and A.D. v. France* (App. No. 44234/20) before the European Court of Human Rights

Amicus Curiae

INTRODUCTION

1. The United Nations Special Rapporteur on trafficking in persons, especially women and children, established pursuant to Human Rights Council resolution 44/4, has the honour to submit this amicus brief in the cases of *H.F. and M.F. v. France* and *J.D. and A.D. v. France* for the consideration of the European Court of Human Rights (ECtHR).

2. The submission of the present amicus brief is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

3. The Special Rapporteur on trafficking in persons reports annually to the United Nations Human Rights Council and to the United Nations General Assembly. Having addressed the legal issues of protection of victims of trafficking for the purpose of forced criminality, and in particular the protection of victims of trafficking in conflict affected areas,¹ as well as the nature and scope of the non-punishment principle in international

¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, on the gender dimension of trafficking in persons in conflict and post-conflict settings and the importance of integrating a human rights-based approach to trafficking in persons into the women and peace and security agenda of the Security Council (17 July 2018) A/73/171; Report of the Special Rapporteur on trafficking in persons, especially women and children, on trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children (5 August 2016) A/71/303; Report of the Special Rapporteur on trafficking in persons, especially women and children, on due diligence and

law,² the legal questions at the core of the cases of *H.F. and M.F. v. France* and *J.D. and A.D. v. France*, relate directly to the work and concerns of this mandate.

4. The Special Rapporteur is therefore in a unique position to assess the human rights law implications related to a State's refusal to identify, assist and repatriate victims of trafficking and potential victims of human trafficking, who have been detained in camps in North East Syria. This case offers an opportunity for the Court, in addressing this important issue, to set international best practice for compliance with human rights law.

THE TRAFFICKING-TERRORISM NEXUS IN NORTH EAST SYRIA

5. The Special Rapporteur is particularly mindful of the critical need to understand that the factors linked to women's and girls' alleged association with terrorist groups is highly complex. The relevance of age and gender related factors, as well as those of race and ethnicity, and positions of vulnerability, must be acknowledged.

6. States should be mindful of the potential for coercion, co-option, coercive control, grooming, trafficking, enslavement and sexual exploitation when examining their agency, or lack thereof. States shall always undertake individualised assessments with respect to the specific situations of women and girls, and be conscious of the gender-specific traumas that can be experienced by women and girls. Article 17 of the Council of Europe Convention on Action against Trafficking in Human Beings draws attention to the gender dimension of trafficking in human beings.³ The Explanatory Report to the Convention stresses that, "measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims."⁴

7. Human trafficking is a regular and widespread phenomenon in armed conflict. In such situations, women and children are frequently the targets of armed groups, and are recruited for the purposes of, *inter alia*, sexual exploitation, forced marriage, forced labour and exploitation in criminal activities. Recognising these forms of exploitation, and the processes through which individuals are recruited to leave for the territory of Syria, the United Nations Security Council (UNSC) has repeatedly called on states not to

trafficking in persons (3 August 2015) A/70/260; Report of the Special Rapporteur on trafficking in persons, especially women and children, on trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children (3 May 2016) A/HRC/32/41. See also OHCHR, '[Switzerland: Two abducted girls held at grim Syria camp must be returned home – UN experts](#)' (21 April 2021); OHCHR, '[Syria: UN experts urge 57 States to repatriate women and children from squalid camps](#)' (8 February 2021).

² Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle (2021) UN Doc. (17 May 2021) A/HRC/47/34.

³ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) Art. 17.

⁴ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (2005) para. 210.

penalise or stigmatise victims of trafficking for their involvement in any unlawful activities.⁵

8. In Resolution 2331 (2016), the UNSC called upon Member States to implement:

[...] robust victim, and possible victim, identification mechanisms and provide access to protection and assistance for identified victims without delay, also in relation to trafficking in persons in armed conflict, including where such victims are refugees and internally displaced persons (IDPs), and to address comprehensively victims' needs, including the provision of or access to medical, psychosocial assistance and legal aid, as well as ensure that victims are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage.⁶

In addition, the UNSC affirmed that:

[...] victims of trafficking in persons in all its forms, and of sexual violence, committed by terrorist groups should be classified as victims of terrorism with the purpose of rendering them eligible for official support, recognition and redress available to victims of terrorism, have access to national relief and reparations programmes, contribute to lifting the sociocultural stigma attached to this category of crime and facilitate rehabilitation and reintegration efforts.⁷

9. In Resolution 2388 (2017), the UNSC urged Member States to:

[...] assess the individual situation of persons released from the captivity of armed and terrorist groups so as to enable prompt identification of victims of trafficking, their treatment as victims of crime and to consider, in line with domestic legislation, not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having being subjected to trafficking.⁸

10. The UN Working Group on Discrimination against Women and Girls has stated that “measures to combat terrorism and corresponding national security measures sometimes profile and target women, in particular those from certain groups”.⁹ The Working Group has further recommended that States ensure that “measures addressing conflict, crisis, terrorism, and national security incorporate a women’s rights focus and

⁵ UNSC, ‘Statement by the President of the Security Council’ (16 December 2015) S/PRST/2015/25; UNSC Res 2331 (2016); and UNSC Res 2388 (2017).

⁶ UNSC Res 2331 (2016) para. 2(d).

⁷ *Ibid*, para. 10.

⁸ UNSC Res 2388 (2017) para. 17.

⁹ Report of the Working Group on the issue of discrimination against women in law and in practice: Women deprived of liberty (2019) A/HRC/41/33, para. 73.

do not instrumentalise women’s deprivation of liberty for the purposes of pursuing government aims.”¹⁰

11. The OHCHR *Recommended Principles and Guidelines on Human Rights at International Borders* provide that “measures taken to address irregular migration or to counter terrorism, human trafficking or migrant smuggling, should not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds.”¹¹

LEGAL DEFINITION OF TRAFFICKING IN HUMAN BEINGS

12. According to the Council of Europe Convention on Action against Trafficking in Human Beings:

“Trafficking in human beings” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹²

13. Notwithstanding the absence of an express reference to trafficking in the ECHR, in the landmark judgment of *Rantsev v. Cyprus and Russia*, the ECtHR considered that:

[...] trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. [...] There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.¹³

¹⁰ *Ibid*, para. 82(b).

¹¹ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (Geneva, OHCHR, 2014) p. 8. See also the comments by Special Rapporteur on the Committee on the Elimination of Racial Discrimination draft general recommendation on preventing and combating racial profiling by law enforcement bodies.

¹² Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 4(a).

¹³ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (ECtHR, 7 January 2010) paras. 281-282.

14. As noted in the Council of Europe Convention's Explanatory Report, trafficking in human beings is a combination of three constituents – act, means, and purpose – rather than the constituents taken in isolation.¹⁴ The definition endeavours to encompass the whole sequence of actions that leads to exploitation of the trafficked person.

15. The act in trafficking in persons refers to the recruitment, transportation, transfer, harbouring or receipt of persons. The means are the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and giving or receiving payments or benefits to achieve the consent of a person having control over another person. 'Abuse of a position of vulnerability' is a particular means, which "stands apart from others such as 'force' or 'fraud' in its essentially open-ended quality."¹⁵ The Explanatory Report to the Council of Europe Convention defines it as:

[...] abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.¹⁶

The third constituent of the trafficking definition is the purpose element, which must be the exploitation of the individual. In addition to the forms of exploitation specified in the definition (sexual exploitation, labour exploitation and removal of organs), individuals may be trafficked for the purpose of exploitation of criminal activities, including but not limited to those related to terrorism.¹⁷

16. A distinctive element of human trafficking, as defined both in the Palermo Protocol and in the Council of Europe Convention, is the irrelevance of the trafficked person's consent to the intended exploitation where any of the means have been used.¹⁸ With regard to children, understood as persons under the age of eighteen, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation

¹⁴ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (n 4) para. 75.

¹⁵ UNODC, Issue paper. *The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised* (2018) p. 7.

¹⁶ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (n 4) para. 83.

¹⁷ UNODC, *Countering Trafficking in Persons in Conflict Situations* (2018) p. 56; Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle (n 2).

¹⁸ Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 4(b). See also Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 25 December 2003) ('Palermo Protocol') Art. 3(b).

shall be considered trafficking even if this does not involve any of the means.¹⁹ In other words, consent is irrelevant regardless of whether any means have been used.

17. The experiences of women and girls associated with terrorist groups are highly complex, and involve a wide range of factors, including age and backgrounds. In the context of marriages – both with respect to trafficking for the purpose of forced marriage, but also with respect to the role of marriage in trafficking experiences – the UNODC has highlighted that, in certain circumstances, “husbands employ various methods of control to limit the freedom of movement and choice of their spouses, using violence, threats and psychological pressure. Women and girls are abused and exploited ... and they are extremely dependent on their husbands in multiple ways.”²⁰ States must be mindful of the potential for coercion, coercive control, position of vulnerability, deception and trafficking when examining these cases. Indeed, “while some women in the camps may bear various degrees of responsibility for crimes based on their roles in ISIL, some were also victims of abuse, trafficking or sexual exploitation after having been coerced or groomed into joining the group.”²¹

THE DUTY TO TAKE STEPS TO PROTECT THE RIGHTS VICTIMS OF TRAFFICKING DETAINED IN NORTH EAST SYRIA

18. States have an international obligation to identify, assist, and protect victims of trafficking.²² A failure to identify a trafficked person will likely result in a further denial of that person’s human rights. The ECtHR has held that the identification of victims or potential victims of trafficking is a positive obligation resting on the State, flowing from Article 4 of the European Convention on Human Rights (ECHR).²³

19. As the Court found in *Rantsev v. Cyprus and Russia*, “Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking.”²⁴ In order for such obligations to arise, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited. In light of the increasing availability of studies and indicators that young, married women who travelled to Syria with a male

¹⁹ Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 4(c). See also Palermo Protocol (n 18) Art. 3(c).

²⁰ UNODC, *Interlinkages between Trafficking in Persons and Marriage* (2020) p. 56.

²¹ 23rd Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (2021) A/HRC/46/55, para. 55.

²² Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Artt. 10 and 12; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) Guideline 2.

²³ *Rantsev* (n 15). See also, *inter alia*, *L.E. v. Greece*, App. No. 71545/12 (ECtHR, 21 January 2016); *Chowdury and Others v. Greece*, App. No. 21884/15 (ECtHR, 30 March 2017); *S.M. v. Croatia*, App. No. 60561/14 (ECtHR [GC], 25 June 2020); and *V.C.L. and A.N. v. United Kingdom*, Apps. No. 74603/12 and No. 77587/12 (ECtHR, 16 February 2021).

²⁴ *Rantsev* (n 13) para. 286.

partner could have been deceived or coerced to do so²⁵. In this context, States have a positive obligation to take operational measures to protect victims, or potential victims, of trafficking, which “include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.”²⁶

20. Article 4 ECHR, “also entails a procedural obligation to investigate situations of potential trafficking”,²⁷ as the Court has noted in *Rantsev v. Cyprus and Russia* (Application No. 25965/04), as trafficking offences may take place in the country of origin, as well as in the country of destination, a failure to investigate the recruitment aspect of alleged trafficking, “would allow an important part of the trafficking chain to act with impunity.”²⁸ The Court has also held that the, “need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable.”²⁹

21. The consequences of the failure of the State to identify, assist, and protect victims of trafficking have also been highlighted in the recent judgment in *V.C.L. and A.N. v. the United Kingdom*,³⁰ where the failure to identify the victims resulted in the failure to implement the non-punishment principle, resulting in a violation of both Articles 4 and 6 ECHR.

22. In addition, the Special Rapporteur would like to highlight that pursuant to Article 6 of the International Covenant on Civil and Political Rights, as well as to Article 2 of the ECHR, every human being has the right to life. The inalienable right to life not only entails a negative obligation on the State not to engage in acts, which would jeopardise the enjoyment of that right, but it also entails a positive obligation to ensure access to the basic conditions necessary to sustain life.

23. Lastly, as noted by the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, trafficking in persons may fit the legal definition of torture. As the SR’s 2016 report notes:

[...] whenever States fail to exercise due diligence to protect trafficking victims from the actions of private actors, punish perpetrators or provide remedies, they are acquiescent or complicit in torture or ill-treatment.³¹

²⁵ See e.g., UNSC Counter-Terrorism Committee Executive Directorate (CTED), *Identifying and Exploiting the Nexus Between Human Trafficking, Terrorism, and Terrorism Financing* (2019); CTED, Analytical Brief: The repatriation of ISIL-associated women (2019); UNGA, 23rd Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (n 21) para. 55;

²⁶ *V.C.L. and A.N.* (n 23) para. 153. See also *Rantsev* (n 13) para. 286; *Chowdury and Others*, para. 110; *L.E. v. Greece* (n 23) paras. 56, 64.

²⁷ *Rantsev* (n 13) para. 288.

²⁸ *Ibid*, para. 307.

²⁹ *Ibid*.

³⁰ *V.C.L. and A.N.* (n 23) paras. 163-183, 194-210.

³¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2016) A/HRC/31/57, para. 41.

Not only can human trafficking *per se* amount to torture or ill-treatment, but also – as regards the conditions of detention in camps – the Special Rapporteur would like to draw attention to UNGA Res 68/156, which, “remind[ed] all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”³²

THE OBLIGATION TO ENSURE A PROTECTIVE ENVIRONMENT FOR CHILDREN

24. The Special Rapporteur further wishes to stress that States have an obligation to ensure a protective environment for children.³³ The particular rights applicable to children, protected under, *inter alia*, the UN Convention on the Rights of the Child (CRC) and its Optional Protocols,³⁴ state that children must always be treated primarily as victims and the best interest of the child must always be a primary consideration. Article 2 of the CRC further protects the right of children to be free from discrimination, including on the basis of the activities, or status, of their parents. Further, States are to give special consideration to children who have been affected by their parents’ conflict with the law, including those parents who have been accused or convicted of being foreign fighters.³⁵ In line with UNSC Res 2427 (2018), States should recognise that children who are detained for association with armed groups are first and foremost victims of grave abuses of human rights and international humanitarian law, and should facilitate their return.³⁶

25. In a decision on admissibility in *L.H., L.H., D.A, C.D. and A.F. v France* (30 September 2020) the Committee on the Rights of the Child specifically addressed the issue of whether the State Party (France) (UN Doc. CRC/C/85/D/79/2019–CRC/C/85/D/109/2019) has competence *ratione personae* over the children detained in the camps in north-eastern Syrian Arab Republic. In its decision, upholding admissibility, the Committee recalled that, under the Convention, States have the obligation to respect

³² UNGA Res 68/156 (2014) para. 27.

³³ See e.g., Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 5(5); UNSC Res 1261 (1999), 1341 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011), and 2068 (2012). See also, on child victims of trafficking, the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 22) Guideline 8, according to which: “The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.”

³⁴ In particular, Artt. 6, 7, 24(2) and 27 of CRC, respectively on the right to life, the right to birth registration, name and nationality, the right to health, and the right to an adequate standard of living.

³⁵ UNCCT, Handbook: Children affected by the foreign-fighter phenomenon (2019) p. 31.

³⁶ UNSC Res 2427 (2018) paras. 20, 26.

and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State's jurisdiction to "territory". (para.9.6) Territorial jurisdiction was deliberately left out of article 2 (1) of the Convention.³⁷ The Committee concluded that a State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders. Specifically in the migration context, it was noted that the Committee has held that under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection. (para.9.6) In its decision, the Committee concluded that the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. The relevant circumstances cited by the Committee, include, "the State party's rapport with the Kurdish authorities, the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syrian Kurdistan since March 2019." (para. 9.7)

26. The Special Rapporteur has been informed that families of foreign ISIL fighters, including women and children, suffer discrimination on the basis of their alleged affiliation with the group, and face restrictions on their movement and access to medical facilities, in violation of international humanitarian law. Many children carry the stigma of association with ISIL. This stigmatisation risks further isolation and increases risks of recruitment by armed groups, trafficking and re-trafficking.³⁸ The CRC provides that States shall take all feasible measures to ensure the protection and care of children affected by armed conflict, and all appropriate measures to promote their physical and psychological recovery, as well as social reintegration. Articles 38 and 39 of the CRC are of particular relevance to children affected by armed conflict and to children who are victims of any form of exploitation, as is the Optional Protocol to the Convention on the involvement of children in armed conflict. In addition, the ECtHR has held that measures applied by the State to protect children against acts of violence falling within the scope of Articles 3 and 8 ECHR, should be effective and include reasonable steps to prevent ill-treatment of which the authorities were, or ought to have been, aware.³⁹

ASSISTANCE AND REPATRIATION OF VICTIMS OF TRAFFICKING

27. Upon identification, victims or potential victims of human trafficking should not be placed in detention, but they should rather be referred to appropriate services for early support and long term assistance. The Special Rapporteur on the promotion and protection of human rights while countering terrorism noted France's relevant

³⁷ See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Volume 1*, (New York, United Nations, 2007), pp. 332–333.

³⁸ UN Global Study on Children Deprived of their Liberty (2019) 607.

³⁹ *Söderman v. Sweden* [GC] App. No. 5786/08 (ECtHR, 12 November 2013).

positionality to assist women and children associated with foreign fighters who may be victims of terrorism or trafficking.⁴⁰

28. The duty to provide assistance is enshrined, *inter alia*, in Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings, according to which each State Party shall adopt such legislative or other measures to assist victims in their physical, psychological and social recovery. Such assistance shall include, *inter alia*, assistance to enable victims' rights and interest to be presented and considered at appropriate stages of criminal proceedings.⁴¹ Similarly, Article 6(3) of the Palermo Protocol encourages States to provide for the recovery of victims of trafficking in persons. The Special Rapporteur notes that the al-Hol camp is not suitable for the physical, psychological and social recovery of potential victims of trafficking but rather that, in order to be provided with such assistance, potential victims should be repatriated to the country of their nationality. In this respect, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime requires that a State Party whose citizen is a victim of human trafficking, "shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay."⁴² The Council of Europe Convention on Action against Trafficking in Human Beings states that: "the Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay."⁴³

29. In addition to not being removed from an unsuitable context where assistance and protection are unattainable, in the context of detention in North-East Syria, potential victims do not have access to an effective remedy within the meaning of Article 13 of the Convention to put an end to and redress the violations of the rights guaranteed by, *inter alia*, Article 4 ECHR. Further, the *Commission Nationale Consultative des Droits de l'Homme* (CNCDH) has indicated that the repatriation of children is justified by the need for security, which will be better guaranteed by appropriate case by the justice system and social services in France. The return of the parents, the CNCDH stated, is also necessary because the children have already been tested by the war and the conditions of detention in the camps.⁴⁴

⁴⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Visit to France (2019) A/HRC/40/52/Add.4, para. 47. See also Submission by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on arbitrary, summary and extra-judicial executions in the case of *H.F. and M.F. v. France* (Application no. 24384/19) before the European Court of Human Rights.

⁴¹ Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 12.

⁴² Statute of the International Court of Justice, Art. 38 (1) (c).

⁴³ Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 16.

⁴⁴ CHCDH, '[La CNCDH exhorte le Gouvernement à rapatrier tous les enfants français et leurs parents retenus en Syrie sans plus tarder](#)' (25 September 2019). See also CNCDH, '[Avis sur les enfants français retenus dans le camps syriens](#)' (24 September 2019).

30. Similarly, the UN Committee on the Right of the Child in its Concluding observations on the combined fifth and sixth reports of Belgium noted, “the State party’s decision to provide assistance with repatriation of Belgian children under the age of 10 years of foreign terrorist fighters located in Syria or Iraq”, and recommended the State party to take, “into consideration paragraph 26 of the United Nations Security Council Resolution 2427 (2018), promptly facilitate the repatriation for all Belgian children and, wherever possible, their families, regardless of the age or degree of suspected involvement in the armed conflict and in compliance with article 9 of the Convention”.⁴⁵

THE PRINCIPLE OF NON-PUNISHMENT OF VICTIMS OF TRAFFICKING

31. The non-punishment principle is a general principle of law, as defined by Article 38 (1) (c) of the Statute of the International Court of Justice.⁴⁶ It is enshrined in numerous international and regional legal instruments, in domestic legislation, and in case law of regional and domestic courts. It is further set out in the Principles and Guidelines for Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR),⁴⁷ and in the Council of Europe Convention on Action against Trafficking in Human Beings.⁴⁸

32. A range of punishments applied to victims or potential victims of trafficking linked to United Nations designated terrorist groups, have been highlighted in recent communications to States by several UN Special Procedures.⁴⁹ The range of forms of punishment covered by the non-punishment principle include non-repatriation, family separation or refusal of consular assistance. The imposition of such punishments engages States’ obligations under the non-punishment principle.

33. Failure to respect the principle of non-punishment leads to further serious human rights violations, including detention, family separation and unfair trial. It also increases risks of trafficking and re-trafficking. Deliberately exposing victims and potential victims, including children, to such risks is a failure of prevention and an egregious failure of protection.⁵⁰

34. Where restrictions on movement that amount to a deprivation of liberty are imposed on trafficked persons, the obligation of non-punishment is engaged. In this context, Rule 66 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders calls upon States to provide the maximum

⁴⁵ UN CRC, Concluding observations on the combined fifth and sixth reports of Belgium (1 February 2019) CRC/C/BEL/CO/5-6, paras. 50 and 50(b).

⁴⁶ Palermo Protocol (n 18) Art. 8(1).

⁴⁷ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (n 22).

⁴⁸ Council of Europe Convention on Action against Trafficking in Human Beings (n 3) Art. 26.

⁴⁹ See OHCHR (n 1).

⁵⁰ Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle (n 2).

protection to victims of trafficking in order to avoid secondary victimization.⁵¹ The President of the UNSC underscored:

[...] the need for Member States and the UN System to proactively identify trafficking victims amongst vulnerable populations, ... and address comprehensively victims' needs, including proactive victim identification ... as well as ensure that victims of trafficking in persons are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage.⁵²

35. In its decision in *V.C.L. and A.N. v. the United Kingdom*, the ECtHR recognized that the lack of application of the non-punishment principle may conflict with the State's duty to take operational measures to protect a victim, or potential victim, of trafficking, "where [State authorities] are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked."⁵³ The Court further held that the failure to apply the principle would be injurious to a victim's "physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future."⁵⁴

36. Under international law, as well as under UNSC resolutions, States have obligations to hold individuals accountable for the serious and systematic crimes committed in Syria and Iraq, while strictly complying with the right to a fair trial. The Special Rapporteur is of the view that this cannot be currently achieved in the region, given the profound concerns relating to unfair trials and failure to respect the rule of in Iraq and Syria⁵⁵. States that can deliver justice in accordance with international human rights law therefore have a responsibility to prosecute individuals against whom there is sufficient evidence of criminal behaviour, and to apply effective, dissuasive and proportionate sanctions following a fair trial. Where criminal proceedings are initiated, States must ensure that the principle of non-punishment of victims of trafficking is applied, in accordance with Article 4 ECHR, without discrimination.

EXTRA-TERRITORIAL OBLIGATIONS

37. The statement of the CNCDH highlights that, "French nationals are prevented from returning to national soil [a]s the consequence of a decision on the part of the French

⁵¹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the United Nations General Assembly through A/RES/65/229 (2011).

⁵² UNSC, 'Statement by the President of the Security Council' (n 5) p. 2.

⁵³ *V.C.L. and A.N.* (n 23) para. 159.

⁵⁴ *Ibid.*

⁵⁵ The Special Rapporteur, together with other independent experts, have raised in several occasions their concerns over the situation of women and children in detention in Syrian camps, see for example, Allegation letter to France of 26 January 2021 (AL FRA 6/2020) available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25818>

authorities and not of the [Syrian Democratic Forces].”⁵⁶ Given the close relations with the SDF resulting from a military and diplomatic partnership against Da’esh, France has the capacity and opportunity to take action to provide consular assistance and to provide protection against risks of trafficking or re-trafficking, including through repatriation of its nationals.

38. The Special Rapporteur would like to highlight the duty to act with due diligence and take effective measures to protect vulnerable individuals, including victims and potential victims of trafficking located outside of the State’s territory, where they are at risk of serious human rights violations. This obligation applies extra-territorially, when the State’s responsibility is engaged.⁵⁷ The United Nations Human Rights Committee has held that a State’s responsibility to protect applies extraterritorially in circumstances where the State has the capacity to protect the right to life against an immediate or foreseeable threat to life.⁵⁸

39. The determination of whether a State has acted with due diligence is based on an assessment of how much the State knew or ought to have known of the risks; the risks or likelihood of foreseeable harm and the seriousness of the harm.⁵⁹ The duty to act with due diligence to ensure that the lives of their nationals are protected from irreparable harm to their life or to their physical integrity, applies where acts of violence and ill-treatment are committed by State actors or other non-State actors.⁶⁰ The refusal by the State to repatriate its nationals is a failure to exercise due diligence to prevent trafficking in human beings and to ensure protection to victims or potential victims.

CONCLUSION

The Special Rapporteur notes that trafficking in human beings is a serious human rights violation. Ensuring that the protection of human rights is practical and effective and not merely “theoretical and illusory”, requires protective operational measures to be taken by the State. The Council of Europe Convention on Action against Trafficking in Human Beings, applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime. Article 3 of the Convention requires State Parties to ensure that “the enjoyment of measures to protect and promote the rights of victims, shall be secured *without discrimination*”. As the Court has noted in *V.C.L. and A.N. v. the United Kingdom* (applications nos. 77587/12 and 74603/12), the

⁵⁶ Opinion on the French Under-Age Nationals Detained in Syrian Camps (24 September 2019) p. 8.

⁵⁷ See, *inter alia*, *Soering v. The United Kingdom*, App. No. 14038/88 (ECtHR, 7 July 1989); *Drozdz and Janousek v. France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992).

⁵⁸ See UN HRC, General Comment No. 36: Article 6 (Right to Life) (2018) CCPR/C/GC/36, para. 63. In the European Court of Human Rights jurisprudence, see *Opuz v. Turkey*, App. No. 33401/02 (ECtHR, 9 September 2009); *Osman v. United Kingdom* [GC] App. No. 23452/94 (ECtHR, 28 October 1998); *Z and Others v. the United Kingdom* [GC] App. No. 29392/95 (ECtHR, 10 May 2001), and *Talpis v. Italy*, App. No. 41237/14 (ECtHR, 18 September 2017).

⁵⁹ UN HRC, General Comment No. 36 (n 58). See also *Opuz v. Turkey* (n 58); *Osman v. United Kingdom* (n 58); *Z and Others v. the United Kingdom* (n 58), and *Talpis v. Italy* (n 58).

⁶⁰ See Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State (2019) A/74/318.

protection measures required by Article 4 ECHR include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery. This is not an impossible or disproportionate burden to fulfil, where the measures required include repatriation, provision of consular assistance and other specialised assistance, and international cooperation to achieve these ends.