**Submission in Response to the**

**United Nations Special Rapporteur on trafficking in persons, especially women and children**

Submitted via e-mail to: SRtrafficking@ohchr.org 21 January 2021

Thank you for the opportunity to provide a submission to the United Nations Special Rapporteur on trafficking in persons, especially women and children in relation to the Human Rights Council Report on the implementation of the non-punishment principle. We welcome this opportunity to draw upon ongoing research in the area of the rights of children of foreign fighters, especially those who are experiencing high levels of uncertainty in relation to repatriation and citizenship. We would welcome the opportunity to discuss any aspects of our submission, recommendations and wider research with the UN Special Rapporteur.

Yours sincerely,

**Dr. Faith Gordon**

*Senior Lecturer, ANU College of Law, The Australian National University; Associate Research Fellow, Information Law and Policy Centre, Institute of Advanced Legal Studies London & Director of the International Youth Justice Network.*

Faith.Gordon@anu.edu.au

**Dr. Rumyana van Ark**

*Research Fellow and a Coordinator at the International Centre for Counter-Terrorism, The Hague and Post-Doctoral Researcher in Terrorism, Counter-Terrorism and International Law at the T.M.C. Asser Institute.*

R.Grozdanova@asser.nl

**Professor Devyani Prabhat**

*Professor of Law, University of Bristol Law School and member of Border Criminologies, Oxford Law Faculty.* Devyani.Prabhat@bristol.ac.uk

***Biographies***

Dr. Faith Gordon is a Senior Lecturer in Law at The Australian National University; Director of the International Youth Justice Network and an Associate Research Fellow at the Information Law & Policy Centre, Institute of Advanced Legal Studies, London.  Dr. Gordon’s first sole-authored monograph entitled: *Children, Young People and the Press in a Transitioning Society: Representations, Reactions and Criminalisation* (2018) built on her PhD and post-doctoral research on the media representations of children and young people in Northern Ireland and other post-conflict societies, and the research has been referred to by the UN Committee on the Rights of the Child and has been referred to in the High Court in Northern Ireland and the Court of Appeal. Her latest international research and recent publications focus on children’s rights in the digital age; journalists’ use of children’s social media content; ‘naming and shaming’ of children in conflict with the law on social media; the unaddressed issue of pre-charge identification of minors. Dr. Gordon is leading Catch22’s latest research into children’s and young peoples’ perceptions of social media, the acceptable use policies across platforms, and the enforcement challenges for addressing online harms when these are breached and is a CI on an ARC Discovery Project on analysing interactions within the criminal deportation system.

 Dr. Rumyana van Ark (née Grozdanova)  is Post-Doctoral Researcher in Terrorism, Counter-Terrorism and Human Rights at the T.M.C. Asser Instituut / University of Amsterdam. She is also a Senior Coordinator (Research and Project Support + Programme Development) and a Research Fellow at the International Centre for Counter-Terrorism. As part of these roles, she is responsible for project management and research deliverables as well as the organisation of the Asser/ICCT Advanced Summer Programme on Terrorism, Counter-Terrorism and the Rule of Law. She has also been an invited counter-terrorism expert to closed door meetings within the Dutch Ministry of Foreign Affairs and the Organisation for the Prohibition of Chemical Weapons. She has extensive academic and professional experience in the area of combatting terrorism. Her research focuses on the evolving relationship between the individual (terror suspect) and the state with particular emphasis on the operation of counter-terrorism measures vis-à-vis the rule of law. Her work has been published in academic and professional journals, as part of edited book collections and within governmental reports.

Professor Devyani Prabhat is a Professor of Law at the University of Bristol Law School, UK, with legal practice experience in Constitutional law. She holds a LL.M and a PhD from New York University. At present, she researches and teaches Migration, Citizenship and Nationality from a socio-legal and comparative perspective. She is an ESRC research grant holder on British Citizenship and the Practice of Nationality laws. The project focuses on the processes of gaining, holding and losing of citizenship and the role of nationality law practice for long term residents or British citizens. She supervises doctoral students researching on citizenship, migration, and the legal profession.  Professor Prabhat's book Unleashing the Force of Law: Legal Mobilization, National Security, Basic Freedoms (Palgrave Macmillan Socio-legal Studies Series) has won the Birks Prize for Outstanding Legal Scholarship (Society of Legal Scholars) 2017. The book was shortlisted by both the Society of Legal Scholars (2017) and the Socio-Legal Studies Association (2016) for book prize awards.

Professor Prabhat, Dr. van Ark and Dr. Gordon have received a small-events grant from the Society of Legal Scholars for their project on: ‘Citizen Children? An Analysis of Counter-Terrorism Measures’ and are currently working on their monograph, to be published by Edward Elgar Publishing (Law). The research team have written several pieces commenting on a number of issues such as: Australia’s trend towards statelessness of children of foreign fighters; repatriation of Dutch children in Syria; COVID-19 and decisions on repatriation of foreign fighters’ children and international children’s rights obligations (see van Ark, Gordon and Prabhat, 2020a; 2020b; 2020c; 2020d).

The response that follows is a brief summary of initial observations from the research team’s studies and previous publications on the rights of children of foreign fighters, citizenship and repatriation.

***Response***

**Background/Context**

The reality of the rights’ breaches of children of foreign fighters and the circumstances in which they find themselves, often with a lack of access to basic medical attention, resources and support, place them in a particularly vulnerable situation. Further, issues arise for children in relation to identity, citizenship and challenges in returning to the state of one or more of their parents’ origin, due to a lack of willingness on the part of home states to repatriate (van Ark, Gordon and Prahbat, 2020).

The scale of these issues is immense. As international bodies such as UNICEF (2019a) report, the legal, political and social realities impacting the children of foreign fighters are grim. There are estimates that some 29,000 children of foreign fighters are languishing in camps across Syria and Iraq (UNICEF, May 2019); children who have already experienced conflict, deprivation and may have witnessed family members being killed (Doherty, 2020).

Having been stigmatized by their communities and shunned by local governments, these children are now ‘doubly rejected’ (UNICEF, 2019b). The lack of efforts to repatriate these children has left them in a “particularly precarious situation” with their rights, well-being and safety compromised (SBS News, 2020). This precariousness is exacerbated in circumstances where a parent or both parents have been deprived of citizenship or the child has been orphaned. If the orphaned or unaccompanied child of an Australian parent or parents, for example, is to access the protections available to it through Australian citizenship, a DNA test may be required (Doherty, 22 October 2019). For a child currently stranded in a camp in Syria or Iraq such a process is in essence almost impossible. In short, these children face considerable challenges, legally and logistically, when attempting to access basic services, legal protections or return to their countries of origin.

**Citizenship and Repatriation**

Children are often the hidden victims in adult-dominated conflicts. This appears to be particularly the case when citizens of other states travel to an area of on-going conflict in order to participate and/or support a side in the conflict. As evidence relating to foreign fighters supportive of ISIS demonstrates, the decisions of the parents have significantly affected the position of their children who either travelled with them or were born there (IPI Global Observatory, 2018).  As noted above, such children number in the many thousands.  Also, these documented figures are likely to not present the full reality, as they may be omitting those children recently born in or currently residing in areas that are challenging to access.  These estimated figures are also unlikely to include those who have not had their births properly recorded, those of whom the authorities have lost track, and those who were unknown to the authorities in the first instance.

To date some countries have repatriated a limited number of orphans of Islamic State fighters. However, these welcome developments mask many years of palpable reluctance on the part of states to actively repatriate their citizens, even if these citizens include children languishing in precarious conditions in camps across Syria and Iraq. While there has been some acknowledgement of the specific vulnerabilities of such children, in reality most affected children continue to linger in overcrowded, insecure camps and face many challenges. A committed engagement to uphold the rights of all of these children is still lacking in the domestic and international discourses. Enforcement of these rights requires more than just a willingness on the part of the relevant states to observe their international obligations, there needs to be a comprehensive understanding of the legal and political issues that have an impact upon the mobility and well-being of the children of foreign fighters.

One such significant legal issue concerns the preventative counter-terrorism measures applied by several states (van Ark 2020/2021), with the dual aim of immobilising and punishing those of their citizens who are suspected of being foreign fighters. Deprivation of citizenship has become a staple response of the national security policies in countries such as the UK and Australia and more recently in other countries such as the Netherlands. Reliance on this measure seems to be particularly popular in the UK where 2017 saw an annual increase of 600% in citizenship deprivations in comparison to 2016 (14 individuals were deprived of citizenship in 2016 as compared to 104 in 2017) (Dearden, 20 February 2019). It is not known how many suspected IS members and/or foreign fighters are included in this figure or what the reasons are behind the deprivations.

The impact of this measure is not limited to preventing the re-entry of the individuals in question however. As poignantly illustrated by the UK’s response in the Shamina Begum case (Prabhat 2020 a and b), children can become the unintended victims of a citizenship deprivation order. While this is a case at the more extreme end of the spectrum, thousands of other children continue to face complex challenges and uncertainty as to whether they will return to their country of citizenship. Regrettably, if the political discourse surrounding these children continues to be dominated by national security risk/ threat considerations, it is likely that the daily precarity these children face will continue, as well as the denial of their basic rights under international law.

The former UK Home Secretary, Sajid Javid, in 2019 asserted that such children should not suffer nor should their rights be affected or denied if a parent loses their citizenship (Hansard, 20 February 2019). However, practice suggests that in reality this is not the case for thousands of children. A significant question then arises how the rights of affected citizen children – whether impacted by parental deprivation of citizenship or due to other circumstances – can be protected and placed at the core of governmental repatriation discussions? This is a key consideration when developing and ensuring full implementation of the non-punishment principle in the context of all children.

**Denial of Children’s Rights**

The international frameworks and standards expressly advocate for the protection of children, the treatment of children as victims in these circumstances and the need for all decisions to prioritise a child’s best interests.  This is clear at the level of the United Nations.  As part of a coordinated interagency effort driven by the United Nations Office of Counter-Terrorism (UNOCT) a set of ‘Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to UN Listed Terrorist Groups’, were developed in order to provide practical guidance to the UN system in offering assistance to its Member States. These Key Principles reiterate that all policies and actions affecting children should be firmly based on the principle of the ‘best interests of the child’ as set out in the Convention on the Rights of the Child and that children must be seen first and foremost as victims.

According to Article 3 of the UN Convention on the Rights of the Child, the best interests of the child should be the primary consideration in all actions concerning children and it applies to children who are with their family members, are unaccompanied or separated from their families.  Irrespective of whether a minor has left voluntarily or has been taken by family members to a conflict zone, the home state has a special responsibility to guarantee his or her safety and well-being under the Article 3 of the UNCRC.  The UN High Commissioner for Refugees has stated that a ‘best interests of the child assessment’ (BIA) is a simple, ongoing procedure which should be undertaken in each individual case where decisions are to be made affecting an individual child, in the light of the specific circumstances of each child or group of children or children in general, and should evaluate and balance all elements necessary to make a decision in a specific situation for a specific child or group of children (see UNHCR, 2008).

If a state is to comply with its international obligations, children’s rights and wellbeing must not be compromised due to the decisions of adults and their alleged actions. If a child’s mother is alleged to have played an active role in a criminal situation, individual assessments of the criminal conduct or security risks of a parent should not be a reason to delay the repatriation of a child. There are ample opportunities on return to investigate the conduct of the parents and assess whether they pose a risk of re-offending without affecting the children (see Bakker and de Bont, 2016).

Children’s rights should not be practically enforced based on the “worthiness” of either the parents or the children. It is paramount that children’s prospective repatriation is not assessed through a national security lens, or on the question of whether or not bringing them home is conducive to the public good. Such an approach assumes, from a distance, that the children have been radicalised and that they may engage in criminal or terrorist activities in an unspecified time in the future.

Some countries such as Australia, Belgium, France and Norway have repatriated a limited number of children of Islamic State fighters. However, the reluctance to bring back children on the part of some European nations such as the Netherlands is likely to influence other countries in their future decisions too (van Ark, R., Gordon, F. and Prabhat, D., 2020b).

In light of the well-accepted international principles, children’s rights framework and obligations towards children, the safe repatriation of children is an urgent matter, and it has already been unnecessarily delayed by court proceedings in some jurisdictions. Every child is deserving enough of legal protection from the country of their citizenship. One important element is ensuring that children are not constructed and treated as perpetrators. They should not be punished but rather their victim status should be acknowledged.

**Recommendations in relation to Human Rights Council Report on the implementation of the non-punishment principle**

1. The development of tailored systems to be put in place and qualified practitioners to be available to holistically support returning children.
2. The approach of local authorities and the police, should ensure that they utilise any safeguarding powers to protect, support the welfare and well-being of the affected children and their families as they return back to their country of citizenship.
3. Responses should not criminalise or further stigmatise the children and their families. This is consistent with international law and the best interests, well-being and future prospects of all children.
4. States should re-consider the continued employment of preventative security and counter-terrorism measures which by virtue their direct application to the parents, have serious and detrimental indirect impacts to the children.
5. While national connections are important for determining state responsibility, child rights should provide sufficient grounds for repatriation of children from conflict areas independent of citizenship rights of their family members or themselves.

***Reference list***

1. Ark, R. van (forthcoming in early 2021) *‘*Family Courts as part of the States’ Counter-Terrorism Toolkit: A Welcome Development for FTFs Families*?’* in Capone, F., Paulussen, C. and Rusteberg, B.’, ‘*Returning Foreign Fighters: Responses, Challenges and Ways Forward*’, Springer/T.M.C. Asser Press
2. Ark, R. van (2020) ‘The Long Hand of 9/11: The Normalisation of Secrecy in the UK and Dutch Courts’ in Scheinin, M and Paulussen, C., ‘*Human Dignity and Human Security in Times of Terrorism’* Springer/T.M.C. Asser Press pp. 333 – 365
3. Ark, R. van (2021) ‘Individual Terrorist Suspects as the New Folk Devil: New Labour, Rights Tokenism and Security Compulsions’?’in Gordon, M. and Tucker, A., ‘*The New Labour Constitution: Twenty Years on*’, Hart Publishing
4. Ark, R. van, Gordon, F. and Prabhat, D. (2020a) ‘Forgotten Children’s Rights: Australian trends towards statelessness of children of foreign fighters’, the *ANZSOC Thematic Group Blog Series*, accessible from University of Oxford, Faculty of Law: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/forgotten>
5. Ark, R. van, Gordon, F. and Prabhat, D. (2020b) ‘Repatriation of Dutch children in Syria now unlikely – but it shouldn’t be a political choice’, submitted to *The Conversation* 14 May 2020, accessible from: <https://theconversation.com/repatriation-of-dutch-children-in-syria-now-unlikely-but-it-shouldnt-be-a-political-choice-137960>
6. Ark, R. van, Gordon, F. and Prabhat, D. (2020c) ‘No one should be left behind: COVID-19 Pandemic and Decisions on Repatriation of Foreign Fighters’ Children’, submitted to *The Monash Lens,* 21 May 2020, accessible from: [https://lens.monash.edu/@faith-gordon/2020/05/21/1380426/covid-19-crisis-and-decisions-on-repatriation-of-foreign-fighters-children](https://lens.monash.edu/%40faith-gordon/2020/05/21/1380426/covid-19-crisis-and-decisions-on-repatriation-of-foreign-fighters-children)
7. Ark, R van,, Gordon, F. and Prabhat, D. (2020d) ‘Repatriating the forgotten children of ISIS fighters: A matter of urgency’, 8 May 2020, accessible from: <http://globalcit.eu/repatriating-the-forgotten-children-of-isis-fighters-a-matter-of-urgency/>
8. Bakker, E. and de Bont, R. (2016) ‘Belgian and Dutch Jihadist Foreign Fighters (2012–2015): Characteristics, Motivations, and Roles in the War in Syria and Iraq’, *Small Wars & Insurgencies,* Volume 27, Number 5, pp. 837-857.
9. Dearden, L. (2019) ‘Shamima Begum: Number of people stripped of UK citizenship soars by 600% in a year: Critics say Sajid Javid has taken ‘easy way out’ by using power against Shamima Begum’, *The Independent*, 20 February 2019, accessible here: <https://www.independent.co.uk/news/uk/home-news/shamima-begum-uk-citizenship-stripped-home-office-sajid-javid-a8788301.html>
10. Doherty, B. (2019) ‘Families urge government to reconsider rescuing Australians in Syria’, *The Guardian*, 22 October 2019, accessible here: <https://www.theguardian.com/world/2019/oct/22/families-urge-government-to-reconsider-rescuing-australians-in-syria>
11. Doherty, B. (2020) ‘Australian children remain trapped in al-Hawl camp as region braces for coronavirus: Calls for countries around the world to repatriate citizens amid fears the camp is vulnerable to a Covid-19 outbreak’, *The Guardian*, 5 April 2020, accessible here: <https://www.theguardian.com/australia-news/2020/apr/05/australian-children-remain-trapped-in-al-hawl-camp-as-region-braces-for-coronavirus>
12. Hansard (2019) Deprivation of Citizenship Status, Volume 654: debated on Wednesday 20 February 2019, accessible here: <https://hansard.parliament.uk/commons/2019-02-20/debates/4DEC2589-7212-48A0-8507-9D38C0DEC42A/DeprivationOfCitizenshipStatus>
13. IPI Global Observatory (2018) ‘The Children of ISIS Foreign Fighters: Are Protection and National Security in Opposition?’, December 2018, accessible online here: <https://theglobalobservatory.org/2018/12/children-isis-foreign-fighters-protection-national-security-opposition/>
14. Prabhat, D. (2020a) ‘Shamima Begum**: what the legal ruling about her return to the UK actually means’,** July 17, 2020, accessible online here: <https://theconversation.com/shamima-begum-what-the-legal-ruling-about-her-return-to-the-uk-actually-means-142860>
15. Prabhat, D. (2020b) Unequal citizenship and subjecthood: a rose by any other name ...? *Northern Ireland Legal Quarterly* 71(2): 175–191
16. SBS (2020) ‘UN says children of foreign IS fighters must be repatriated’, 16 January 2020, accessible from: <https://www.sbs.com.au/news/un-says-children-of-foreign-is-fighters-must-be-repatriated>
17. The UN Convention on the Rights of the Child 1989
18. UNICEF (2019a) ‘Protect the rights of children of foreign fighters stranded in Syria and Iraq: Statement by UNICEF Executive Director Henrietta Fore’, 21 May 2019, accessible from: <https://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq>
19. UNICEF (2019b) ‘Protect the rights of children of foreign
fighters stranded in Syria and Iraq’, accessible from: <https://www.unicef.org.au/about-us/media/may-2019/protect-the-rights-of-children-of-foreign-fighters>
20. United Nations (2019) ‘KEY PRINCIPLES FOR THE PROTECTION, REPATRIATION, PROSECUTION, REHABILITATION AND REINTEGRATION OF WOMEN AND CHILDREN WITH LINKS TO UNITED NATIONS LISTED TERRORIST GROUPS APRIL 2019’, accessible here: <https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf>
21. UNHCR (2008) ‘UNHCR Guidelines on Determining the Best Interests of the Child’, accessible online: <https://www.unhcr.org/4566b16b2.pdf>