THE PROTECTION OF MINOR NATIONALS ABROAD AND THE RESPONSIBILITIES OF THE STATE OF ORIGIN UNDER INTERNATIONAL LAW: CHILDREN WITH A EUROPEAN NATIONALITY CURRENTLY ON SYRIAN OR IRAQI SOIL AS A CASE STUDY.

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Abstract

In spite of the expansion of child protection in international and municipal law, in particular through the adoption by almost the entire international community of the Convention on the Rights of the Child in 1969 (CRC) and its incorporation into domestic legal framework, children remain victims of many grave violations of their most fundamental rights around the world and especially during conflicts.¹ Their protection is the responsibility of the government in charge of the jurisdiction in which they are located, as stated in article 1 of the CRC. However, when the latter have the nationality of a foreign country, the responsibility of the latter in the protection and enforcement of their fundamental rights deserves clarification.

¹ Signatory States and Parties to the Convention on the Rights of the Child, HUMANIUM.
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<td>EU</td>
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<td>ICCPR</td>
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<td>International Centre for the Study of Radicalisation</td>
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<td>ISIS</td>
<td>Islamic State of Iraq and Syria</td>
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<td>MS</td>
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<td>PCIJ</td>
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CHAPTER I - INTRODUCTION

1. Presentation of the issue

Children’s wellbeing had attracted the international community’s concern over the last decades, especially since the signature and the ratification of the Convention of the Right of the Child by almost all the UN Member States (MS). According to this Convention, the term “child” includes “Every human being below the age of eighteen years.” The Convention was a turning point in child protection by recognizing for the first time at the international level, rights for children and their particular need for protection due to their extreme sensitivity and vulnerability. Such a need for protection is even more important for children in conflict. In this regard, the General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The latter protocol, in addition of the Rome Statute of the International Criminal Court, emphasizes children's sensitivity to violence and call states parties to keep all children under the age of 15 away from participating in hostilities.

Children are the first victims of conflicts that have an obvious negative impact on their health, family lives of course but also their development and education. In addition, children are also the first victims of organized crime groups such as terrorist groups, which like to recruit and exploit them because of their naivety, the ease of influencing them, and their almost free labour.

Thus, the adoption of international commitments to ensure the protection of children is still not enough to ensure that children enjoy the best conditions for their development all around the world. According to UNICEF, millions of children are currently affected by conflicts in the world and thousands had to move to other regions.

Among these victims, some do not come from, and do not even have, the nationality of the countries in which they are trapped but are nevertheless unable to leave the place where they are: sometimes because they are imprisoned, or because the host government prevents them from doing so, or sometimes also because their original states refuses to repatriate them.

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2 Article First of the CRC
3 Article 2 of the CRC
5 Les enfants exposés à la guerre, UNICEF.
In considering child victims of conflict, those who are fortunate enough to be nationals of foreign countries should be able to take advantage of this opportunity to leave the appalling situation in which they find themselves. Although the rights of no child should be violated, it should be easier for those with a foreign nationality to leave this situation.

However, this last detail is currently the subject of much political debate, particularly in Europe, with regard to children affiliated with terrorist parents who have European nationality.

2. Background

According to the report made by the International Centre for the Study of Radicalization (ICSR) conducted by Gina Vale and Joana Cook and published in July 2018: 41,490 Foreign Terrorist Fighters left their homes countries to join the terrorist jihadist group of the Islamic State of Iraq and Syria (ISIS), also called Daesh. The United Nations Security Council defined them as those “who travel or attempt to travel to a state other than their states of residence or nationality, and other individuals who travel or attempt to travel from their territories to a state other than their states of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training.”

It is estimated that 12% of them are minors with 1,502 from Western Europe (mainly from France, Germany, the Netherlands and Belgium). Those children “associated with Foreign Terrorist Fighters” have been the concern of the United Nations Security Council noting their need for particular social support and to be treated “in a manner that observes their rights and respect their dignity, in accordance with applicable international law “ in addition the UNSC stressed the importance of assisting women and children associated with FTF who may be victims of terrorism and to do so taking into account gender and age sensitivities.”

While it is estimated that around 30% of the Foreign Terrorist Fighters and associated children and wives, originally from Western Europe, returned to their home countries, the report illustrates that most of the children associated with ISIS are still in Iraq and Syria.

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6 UNSC Resolution 2178, § 6(a).
7 According to the figures found in the report of ICSR: FTF from France represent approximately between 31% and 47%, Germany 19% followed by the Netherlands 12% and Belgium 10%. ICSR Report, Figure 5 p16.
8 This is the term used by the UNSC in Resolution 2396.
9 UNSC Resolution 1396, § 31.
10 ICSR Report, Introduction p7 and Figure 5 p16.
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The other 70% are consequently still in Iraq and Syria. The major part of the children associated to Foreign Terrorist Fighters are currently living in Syrian refugee camps in north-eastern Syria (Newroz, Roj and Al Hol) controlled by the Kurdish authorities and belongs to the families captured by the Kurds during the attack on cities formerly controlled by Daesh in northern Syria. In these camps, living conditions have been described as appalling by various international associations and organizations, the families are free to move and leave, but they have nowhere to go since their national states refuse to repatriate them. This, for various reasons, the first being that these women and children are seen as a danger to national security. A decision largely influenced by the public opinion of these states. A second reason, or more an excuse, is the official non-recognition by the states of the international community of the Kurdish State and therefore of their administration and jurisdiction. As a result, some states refuse to negotiate with Kurdish forces, leaving their nationals ‘rot' in these camps.

This precarious and supposedly temporary situation seems increasingly risky for foreign families affiliated to ISIS, indeed neither the local administration nor the Kurdish forces [YPG] have the money to maintain hundreds of prisoners for long periods of time, explained the director of the camp, a Kurdish soldier. Kurds cannot put in place a structure to try all these criminals: they must be tried and imprisoned in their homes. Recently, the international non-governmental organisation Save the Children, stressed the urgency for the national states of these children to take them back immediately, regarding the situation in which the children are currently living in.

Others children associated with Foreign Terrorist Fighters are under the control of Iraqi forces. Those captured during the attack on ISIS strongholds are considered terrorists, including sometimes children, and are held in Iraqi prisons. Most children are under 7 years old and are therefore locked up with their mothers, whose 10-minute trials follow one another, are then condemned to long jail sentence or death penalty by the Iraqi State. The older ones are

11 “1 400 foreign women and minors from countries such as France or Germany who surrendered in August 2017 were subsequently held by Iraqi authorities in an informal detention site in Tal Kayf near Mosul”, ICSR Report p 48.
12 The fact that Kurdish forces are not recognised by many states including France is a real problem for negotiating with mothers and children there. This is illustrated by this article by Juliette Pietraszewski, « Françaises de Daech à l’étranger : des avocats portent plainte pour « détention arbitraire » », Liberation, 26 avril 2018.
16 Of the number of French people still in Kurdish hands who are feared to disperse into the wild after the departure of American troops from Syria or to be arrested by Bashar al-Assad's troops - around 115 people - are in fact a
detained in juvenile prison, interrogated as terrorists, and eventually tortured according to HRW.\textsuperscript{17}

The Kurdish and Iraqi authorities requested the national states of these foreigner children there to take them back. While Russia, Kosovo and Kazakhstan belong to the few countries that had taken back a big part of their national minors recently, the local authorities continued to face the unwillingness of others states such as France.\textsuperscript{18}

According to Nadim Houry, director of the terrorism and counterterrorism program for Human Rights Watch, families associated with Foreign Fighters Terrorists are trapped like “a ball of fire that everyone is trying to get rid of and threw to us” (…) “the international community is trying to flee from its responsibilities” said an official of the Iraqi local administration, charged to convince national’s children government to take back their citizen, making those children falling in a ‘legal void’.\textsuperscript{19}

Thus, although children affected by situations of armed conflict are entitled to greater protection under international law, their repatriation to their countries of origin while they are now suffering from living in dire condition is still in the early stages. Although the debate has been opened in countries such as France, Germany, Belgium or Netherlands to quote a few,\textsuperscript{20}


\textsuperscript{18} ”Daesh. La Russie, pionnière dans le rapatriement des enfants de djihadistes”, Le Télégramme, 17 February 2019. See also: Vivian Yee, “Thousands of ISIS Children Suffer in Camps as Countries Grapple with Their Fate”, The New York Times, 8 May 2019.

\textsuperscript{19} “Nadim Houry, director of the terrorism and counterterrorism program for Human Rights Watch, said the women and children are stuck in a “legal void.” Ben Hubbard, “Wives and Children ofISIS: Warehoused in Syria, Unwanted Back Home”, The New York Times, 4 July 2018. See also: Alissa de Carbonnel and Emmanuel Jarry, “Europe torn over Islamic State children in Syria” UK Reuters, November 1rst, 2018. For France, the government said it will work on repatriating the children associated with ISIS but not the mothers. Samuel Osborne, “France to repatriate children of jihadi fighters from Syria”, The Independent, 24 October 2018. For Germany: “The federal government is examining all options for a possible return of German nationals,” the German foreign ministry said.” Justin Huggler, “Germany planning to bring home suspected Isis fighters”, The Telegraph, 28 November 2018. For Belgium, some people returned but the appeal court ruled that the government do not have a duty to take them back under the CRC. See again Alissa de Carbonnel and Emmanuel Jarry, “Europe torn over Islamic State children in Syria”, UK Reuters, November 1st, 2018. For the Netherlands, “Judges ruled the government should bring them to stand trial where they would otherwise be prosecuted in absentia over their role in IS” however no such decision have been taken by the government. “It is a political decision” said a government official. See again: Alissa de Carbonnel and Emmanuel Jarry, “Europe torn over Islamic State children in Syria” UK Reuters, November 1rst, 2018.
concrete decisions and actions have not been taken yet. On the contrary, the latest progress, at least on the legal point and in particular in Belgium, has been stopped in the second jurisdiction. In fact, the very nature of this issue is being debated. Some courts, in particular the French administrative court, declared itself incompetent because it considered that this was a diplomatic case. However, the mere fact that the case could be heard and judged in a court, both in France and Belgium, underlines the ambiguity of this case. Moreover, the decisions taken by the judges of first instance accepting the applicants’ requests confirm the ambivalence of this issue.

Thus, this situation raises a question regarding the legal obligations of states to protect their minor nationals abroad: **What obligations do states have to protect their minor citizens abroad? What is the nature of these obligations and what are the mechanisms to compel them?**

In order to answer this question, this thesis will be divided into two parts. The first part will focus on the diplomatic aspect of this issue and on the traditional and progressive approach of diplomatic protection. The second part of this thesis will focus on the legal aspect of this issue, the international laws that apply and the existing means of coercion.

### 3. Methodology

Many articles have been published concerning the children associated with foreign terrorist fighters, looking at how they were raised among ISIS, in an extreme and violent ideology, or how they can represent a threat for their original countries. However, few articles have been written regarding the living condition in which the children find themselves, and the lack of willingness to take them back from their states of origin.

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21 “Although (most) EU governments consider children – at least, those under a certain age – to be victims, none has taken a proactive position on their repatriation. No European government actively intervenes to have them (and their mothers) exfiltrated, let alone considers undertaking challenging search operations. Some Member States have made a few exceptions for children detained in Iraq, but not in Syria. Whereas Russia or Indonesia have repatriated a handful of families with children from Syria, EU Member States have not done it so far, although some countries are rumoured to be in advanced talks with Kurdish militias. “Thomas Renard and Rik Coolsaet, “Children in the Levant: Insights from Belgium on the dilemmas of repatriation and the challenges of reintegration”, Security and Policy Brief, the Egmont Institute, July 2018.


Thus, this thesis tried to be relevant for the cause of children’s right. These children are in a legal vacuum because no state wants to take care of them. The local authorities are overwhelmed and cannot ensure them good living conditions. Although they asked the states of origin of these children to take them back, the latter tried to avoid to do so. This thesis therefore seeks to demonstrate that states also have obligations under international law to provide protection to their citizens, especially when they are minors, and that they cannot, in the way they currently do, turn a blind eye to their conditions in Iraq and Syria. Being a French citizen, I felt more concern about the French citizens, also it was easier for me to find information in French. Thus, although this thesis can be addressed to every states leaving their citizens minors suffering abroad, this thesis is focusing in particular on France and Belgium.

I first wanted to find out about the current situation of these children, from their recruitment with ISIS, for the older ones, to their capture by the Kurdish or Iraqi authorities, to their conditions of detention. To this end, I have read a lot of articles written by newspapers but also by research centres, international non-governmental organisations or associations, such as HRW and finally reports such as the one written by UNODC.

Concerning data, the report and analysis made by the International Centre for the Study of Radicalization (ICSR) conducted by Gina Vale and Joana Cook was very relevant. The data showed that Western Europe countries were the fourth biggest ‘providers’ of Foreign Terrorist Fighters. In addition, many figures were reported by newspapers such as The New York Times or Al-Jazeera.

Because those countries are generally considered as belonging to the most developed countries in term of human rights protection, I found it more interesting to focus on their response to the current situation involving their own national minors. After gathering enough information to understand the situation in its complexity, I wanted to focus on the legal issues it raised.

First of all, I focused on the link between these states and minors born and present in Syria and Iraq. I needed to establish the nationality of the children, which is essential to my entire thesis. For doing so, I conducted research on nationality laws in Iraq and Syria, then in France, Germany, Netherlands and Belgium. Also, I looked at the international treaties concerning the status of stateless persons and the literature on this topic.

Second of all, I focused my research on the protection of citizens by states when they are abroad. I was really frustrated by the huge number of existing articles and laws providing for the protection of children, and the impossibility of enforcing them due in particular to the limit
of the scope of these articles. Indeed, as I explain in my thesis, when states ratify a treaty, they undertake to respect it only within their jurisdiction. Consequently, the whole point of my thesis was to demonstrate that the decisions of European states to block the return of these children (either by directly refusing their return or by refusing the return of their mothers and indirectly therefore that of the children), the state was taking a measure that concerns its borders and therefore falls within its jurisdiction.

Concerning my first part on diplomatic protection, I first looked on international treaties. However, as I said their application was limited to the national jurisdictions. In addition, diplomatic protection was defined as only a right for the States. Then, I looked at the international customs. I conducted research on diplomatic protection by examining the seven reports made by the Special Rapporteur of the UN International Law Commission, during the elaboration of articles on diplomatic protection, in addition to various articles written by scholars supporting the progressive approach which recognize a right of nationals to diplomatic protection. For this purpose, I used a lot all the documents available on the International Law Commission website. In addition, I used the VU online library to find information on international law and commentaries and consequently the Oxford Library on Public International Law, Cambridge Library, or HEIONLINE, among many others.

Regarding my second part on international and European law, I first focused my research on the Convention on the Rights of the Child. Although I still felt limited by this problem of scope, I knew that this convention was a key element in my thesis. The completion of an internship in the UNODC Justice Section in parallel was very supportive. I would like to thank Mr Hassani Mohamed, Ms Alexandra Souza Martins and Mr Ulrich Garms, legal officers at the UNODC who had the kindness to guide me in my research. Eventually, I would also like to thank Mr Martin Kuijer for the very good and interesting course on Human Rights protection in Europe he is offering at the Vrije Universiteit Amsterdam, which really helped me for the presentation of Chapter III.

Finally, this thesis would not have been possible without the valuable advice of Professor Galina Cornelisse who supervised the entire project. Professor Cornelisse pushed me to form convincing legal arguments which, I hope, will make this thesis a quality article. For all this I am extremely grateful to Mrs Cornelisse.
CHAPTER II – DIPLOMATIC ASPECT

1. State’s duty to protect

Thomas Hobbes in the *Leviathan* wrote: “A principal objective, if not *raison d’être*, of political authority is to protect its subjects from the prospect of violent death. A fundamental moral aim of modern government, even if not the only aim, is to protect its citizens from murder.”  

Indeed, the state appears for some as a form of a social contract, in which individuals renounce part of their freedom in exchange for a guarantee of security from the sovereign.

1.1 The protection of fundamental Rights

From the creation of societies to today, the primary role of a state has been essentially to protect the lives of its citizens. Over time and political developments, this obligation has evolved to include not only the protection of citizens’ lives but also the protection of their rights, especially their fundamental rights. Then, the latter have been the subject of Constitutional Law, guaranteeing respect and protection of the most fundamentals rights by the state. For instance, German Basic Law (*Grundgesetz*) expresses in its First Article: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

In addition, the states of Belgium, Germany, France and Netherlands ratified the European Convention on Human Rights (ECHR), which aims to gather and ensure the protection of the individual’s most fundamental rights in Europe, such as for example the right to liberty and security.

Generally, European States agreed to ensure the protection of human rights through various treaties, with in particular the International Covenant on Civil and Political Rights (ICCPR) and the most relevant to this thesis, the International Convention on the Rights of the Child

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25 Jean Jacques Rousseau, Du Contrat Social, 1762.
26 Article 1 of the German Basic Law: “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt”.
27 See also: Council of Europe, Human Rights Intergovernmental Cooperation, EU accession to the ECHR and the Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human rights and Fundamental Freedoms.
This trend towards the protection of individuals by states is specific to the second half of the 20th century and shows an interest and willingness on the part of states to protect their nationals, by all means in respect of international law.

1.2 Scope of application of this duty

In domestic law, the scope of application of each state’s laws differs between whether, the state’s nationals or the state’s territory. Then the different treaties and conventions established the scope of application of the covenant within the jurisdiction of the states. Accordingly, states have not the responsibility to protect people outside their jurisdiction, neither are they allowed to intervene abroad according to Article 2 (4) of the UN Charter: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.

Yet, some exceptions laid down in the Charter allow the intervention of states abroad. First, following the adoption of a decision by the UNSC of the UN Charter (Article 25); or in case of self-defence (Article 51).

While it is easy to understand the value of this article in appeasing and regulating relations between states, it raises several questions about the protection of human rights. One may wonder whether one of these two commitments is more important than the other. In particular, in a case such as the one covered by this thesis, the question arises concerning the intervention of the national state of child victims of violations of their rights on foreign territory. Indeed, does the non-intervention of a state whom national’s lives are threatened abroad, should be construed as a recognition of a hierarchical order of value between in one hand the respect of the foreigner state sovereignty, and on the other hand the protection of human rights of the state’s nationals.

Moreover, the case dealt with by this thesis no longer seems to require the intervention or the use of force, since ISIS lost its entire territory and that the Kurdish authorities and the Iraqi

28 For instance, in France the scope of application of the law is territorially limited whereas in Germany, the scope of application of the law is limited to the nationals.
29 Article 1 of the ECHR
30 Article 2 (4) of the UN Charter
31 “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
32 Article 51 of the UN Charter.
government are requesting to the national states of the mothers and children to take them back. Although, states do not need to use force, they do need to work together to negotiate the fate of their nationals, most of whom are accused of terrorism, complicity in terrorism or simply because they are related to FTF, including the minors. Consequently, the articulation of external negotiations requires the intervention of the different diplomatic actors specific to each country.

2. Diplomatic and consular relations

The departure of nationals from their state of origin does not remove all the obligations that they have towards their state, and reciprocally. States retain rights and certain obligations towards their citizens abroad, which have been codified in particular in the two Vienna Conventions.

2.1 The Vienna Conventions

In order to codify the diplomatic and consular relations between States, the international community has adopted the Vienna Conventions on Diplomatic Relation and the Vienna Convention on Consular Relations (in 1961 and 1963 respectively) which defined the role of the diplomatic and the consular missions, including for both the duty to protect “in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.” Moreover, since 1993, the term "nationals” has been interpreted broadly as including all European citizens with the adoption of the Treaty on European Union. This, is part of an idea and a constant desire from the Member States, to provide the greatest possible protection of human rights to European citizens. Consequently, the Council of Europe adopted the Decision of the Representatives of the Governments of the Member States meeting within the Council on the protection of the citizens of the European Union by diplomatic and consular representatives. The decision defines, among other things, that the diplomatic and/or consular protection subjects European States to provide assistance to all European citizens in case of death; serious accident or serious illness; arrest or detention; or in case when a citizen has been

33 Article 3(b) of the Vienna Convention on Diplomatic Relations and Article 5 of the Vienna Convention on Consular Relations.
34 Article 8(c) of the Treaty on European Union: “Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.”
35 Decision 95/553/EC
victims of violent crime or eventually should assist the relief and repatriation of distressed citizens of the Union.³⁶

However, both consular and diplomatic protection require a request from the citizen. Indeed, the treaties in force do not seem to suggest, a priori, a duty on the part of the state to exercise its power of protection when it is aware that its citizens, or other European citizens, are victims of crimes abroad.

Making such a request is not necessarily very simple. Firstly, in view of the current situation, particularly in Syria. Indeed, the Embassies of France Germany, Netherlands and Belgium have been suspended in Syria due to the conflict since 2012.³⁷ Moreover, the nationals on whom this thesis focuses are minors and currently within Kurdish forces whom authority is still not officially recognised as a State by European countries and therefore does not have an embassy that could have allowed a link with European states. Accordingly, some states have claimed the impossibility to negotiate with the Kurdish forces which are not officially recognised, as an excuse to do not take back nationals in Syria, including children.³⁸ Nevertheless, embassies and consulates of France, Belgium, Netherlands and Germany are opened in Iraq.³⁹

Consequently, the two Vienna Conventions in addition of the Decision of the Representatives of the Governments of the Member States within the Council have established a positive obligation of protection for both consular and diplomatic missions. Nevertheless, this obligation has been limited firstly, to the request from a citizen or his / her legal representative for such protection. In this regard, some parents of the children currently in Syria or Iraq had requested their repatriation before their national jurisdictions. Some even have filed complaints against the national state for non-action.⁴⁰ Most of these requests concerned the return of

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³⁶ Article 5 of the Council Decision of the Representatives of the Governments of the Member States meeting within the Council.
³⁷ However, consulates mostly in Aleppo or Lattakie are currently opened.
³⁹ John Irish and Emmanuel Jarry, “France plans to repatriate children of jihadist fighters in Syria”, Reuters.
children with their mothers. However, when children are orphans, or when their existence is not even known to the family in Europe, or if the family in Europe simply does not want to hear about this child, then the possibilities for the child to bring a request are non-existent. In this respect, the request by the Kurdish and Iraqi authorities to the states of origin of these children to take them back, could potentially replace the condition for individual request.

Nevertheless, the states of origin do not seem willing to enter into negotiations neither to exercise their right to diplomatic protection in the name of their nationals, even if they are aware of the situation in which the minors find themselves. However, the current trend would rather be to significantly increase the rights of individuals and the duties of States towards them. In this regard, the drafting of articles on diplomatic protection seems to set aside this tendency to no longer grant rights only to states on the international scene, but also to individuals.

### 2.2 Diplomatic protection

Diplomatic protection is an ancient concept enshrined in Customary International Law that first appeared with the Swiss lawyer Emmerich de Vattel who stated: “(W)hoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.” Indeed, while an individual is on the territory of another state from his own, he must comply with the local law and jurisdiction, however, the “residence abroad does not deprive an individual of the protection of the state of nationality.”

Then in 1924, the Permanent Court of International Justice (PCIJ) adopted this principle in the case law *Mavrommatis Palestine Concessions, Greece v. Britain*, indicating that diplomatic protection was a right belonging to the national state only: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his

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behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law.”

In order to codify and frame the practice of this international custom, the International Law Commission launched the drafting of articles on diplomatic protection that were adopted in 2006 with the commentaries. In this set of nineteen draft articles, Article First establishes: “Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” Then, Commentary (2) of Article 1 clarifies the definition of DP by stating: “(2) Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted.”

2.2.1. The normative value of diplomatic protection

Through its use and the recognition of its use by many countries, and subsequently by the PCIJ, diplomatic protection has become an international custom. The legal value of an international custom is recognized by Article 38 (1) (b) of the Statute of the International Court of Justice as a source of International Law and is defined “as evidence of a general practice accepted as law.” It requires both material practice by states of this custom, and an Opinio Juris, i.e. the recognition by the states of this practice.

Thus, unless a state has shown opposition to it since the beginning of the practice, all states are subjected to customary international law, including diplomatic protection.

2.3. The three requirements

The set of the draft Articles have established three requirements to allow a state to exercise its right to diplomatic protection. Firstly, there must be a violation of international law by the respondent State, secondly the applicant must possess the nationality of the requesting State.

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45 The Working Group of the International Law Commission agreed at first that “the customary law approach to diplomatic protection should form the basis for the work of the Commission on the topic.” First Report on Diplomatic Protection § 3.
48 Draft Article 1 on Diplomatic Protection.
49 Draft Article 3 on Diplomatic Protection.
and lastly, the applicant must have exhausted the domestic remedies of the respondent State.  

2.3.1 The violation of international law

The violation of an international law is, according to Article 1 adopted by the Commission, the first essential element imposed by the international custom, to allow the exercise of DP.

With regard to the children covered by this thesis, there have been serious violations of their human rights, starting with their lives under the caliphate, as highlighted in the Handbook on “Children Recruited and Exploited by terrorist and Violent Extremist Groups: The role of the Justice System” produced by UNODC.

Because of their high vulnerability and fragility, children have specific rights under the CRC, in addition to those covered by the ICCPR (Article 11 specifically). The CRC is a binding treaty providing international standards for “health, education, legal, and social services for children” and affirming “children’s right to survival, to development, to be protected and to participate actively in his/her community”.  

However, it was estimated that around 1,400 European children were in Iraq or Syria, last July 2018, in camps, prisons or orphanages, where living conditions are dire. In total, more than 2,500 children are crowded together in three Syrian camps. Indeed, reports realized by Research Source Center in March 2018 on the camps counting the most of foreigners: Al Hol, Roj and Newroz, located in northern east Syria (Al-Hasakeh governorate) show the lack of education and sufficient healthcare for the children. The report on Al-Hol shows that the half of households reported their children did not receive education, most of the time because schools are overcrowded. People are living in tents with an average on 6 people per household for the Al-Hol and the Newroz camp. Ben Hubbard reported in The New York Times that Roj detention camp is “dusty” and “sweltering”. Also, humanitarian organizations urged for the

50 Draft Article 14 on Diplomatic Protection.
51 Eton Gadelaïde, Approche classique et mutations contemporaines de la protection diplomatique.
52 Ibid
53 Article 6 of the CRC: “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.
54 Ministry of Social and Family Development of Singapore, Children and Youth, Obligation under the CRC.
56 The Roj Camp counts 1,400 foreigners. See note 38.
57 Research Source Centre, Camp and Informal Site Pro in Northeast Syria March 2018.
58 See note 38.
lack of medicines, cases of tuberculosis\textsuperscript{59} are reported in addition of hypothermia, which dramatically lead to the death of 29 children and new-borns between early December 2018 and end of January 2019.\textsuperscript{60} Eventually, the advocate Olivia Coletta showed, in her article for the Duke University, the grave effects on mental health for refugees living in refugee camps, highlighting the attempt to commit suicide by a Syrian refugee in the Moria camp last March 2018.\textsuperscript{61}

Regarding the living conditions of children detained with their mothers in Iraq, they are no better.\textsuperscript{62} An article published by the Egmont Institute states: “Cells in Iraq are reported to be overcrowded. No professional psychological support structures are available to assist children in overcoming the war traumas most undoubtedly endured for a significant amount of time. According to Human Rights Watch, children as young as nine have even started to be prosecuted and convicted during expedite trials in Iraq, contrary to international law.” There are also reports of the use of torture by Kurdish and Syrian forces against children.\textsuperscript{63} Although this has not concerned European children so far, it is feared for the near future as states do not seem to want to recover children.\textsuperscript{64}

Moreover, “thousands of young children of ISIS fighters who came from abroad to join the battle have been left to fend for themselves after their parents were imprisoned or killed on the battlefield”\textsuperscript{65} in addition of those who have been rejected by their families because of their parent’s affiliation.\textsuperscript{66} Bel Trew, journalist for The Independent, reported the difficulties faced by the Zahour orphanage in Mosul that she visited: the centre is too “short-staffed and woefully underfunded” even if they money from government: “We are desperate for support. We are dealing with special cases that need a lot of resources, a lot of money. We need backing, so we can continue our jobs and give the children a better life,” according to the orphanage director.\textsuperscript{67}

\textsuperscript{59} See note 57.
\textsuperscript{60} “Children, babies dying from cold at camp in northeast Syria”, MEMO Middle East Monitor, 31 January 2019.

In addition, Human Rights Watch accused the Kurdish forces to recruit children in the camps. See: “Syria: Armed Group Recruiting Children in Camps”, Human Rights Watch, 3 August 2018.
\textsuperscript{62} Pierre Braquet, “the living conditions for families in the refugee camps is simply unacceptable” Medecins Sans Frontières, 3 July 2018.
\textsuperscript{64} See note 57

\textsuperscript{67} Ibid
Clearly, the situation faced by those minors affiliated with ISIS FTF are appalling and in violation of children’s most fundamental rights to life, including their rights to non-discrimination, to education, development and health provided by the CRC and the two optional protocols. In addition, it also violates Rule 135 of the Customary International Humanitarian Law which establishes that: “Children affected by armed conflict are entitled to special respect and protection” and eventually the 2007 Paris Principles and Guidelines on Children associated with Armed Forces or Armed Groups. As Marie Dosé, lawyer for the families in France whom children are currently in Iraq and Syria, expressed: “France violates the CRC to which it is a signatory. The French State is no longer represented in Syria since 2012, there is no other choice to ensure the protection of these children than to repatriate them.”

2.3.2 The nationality link
The nationality link is the second essential element of diplomatic protection. Indeed, it is the only existing link between the individual abroad to his or her country of origin. Thus, diplomatic protection can be seen as a “fiction” according to David Leys that transforms a damage caused to the individual (a dispute between an individual and a state) into a dispute between states. As a result, diplomatic protection is essentially the “discretionary exercise of a substantial and procedural state right”.

Regarding the children on which this thesis is focusing, while the nationality of the minors born in Europe have been already determined, the nationality of those born in Iraq and Syria from one or two European parent can sometimes be unclear. Indeed, the determination of the nationality of these children faced many dilemmas. Firstly, because many have not been registered after they were born, or only in the IS registration system. Secondly, because the foreign parent has disappeared or been killed and therefore the filiation is difficult to prove. Finally, because the nationality law applicable in Iraq or Syria is different from that applicable in Europe.

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68 International Humanitarian Customary Law Rule 135
69 See note 57.
72 Draft Article 2 on Diplomatic Protection establishes: “A State has the right to exercise diplomatic protection in accordance with the present draft articles.” Thus, the exercise of DP does not belong to state’s duties, but is a discretionary right for the State, which “is under no duty or obligation to do so”.
i. Right to have rights

The right to nationality is recognised as one of the most fundamental right because it is “of paramount importance to the realisation of other fundamental human rights.” Particularly, the nationality determines the benefits to which person may be entitled and is therefore referred as the “right to have rights.”

Consequently, various international covenants, including the International Covenant on Civil Political Rights (ICCPR), have established a right to nationality, at least for the child, in Article 24.3: “Every child has the right to acquire a nationality.” Moreover, the 1954 Convention Relating to the Status of the Stateless Persons and the 1961 Convention on the Reduction of Statelessness were adopted and ratified, including by France, Germany, Belgium and the Netherlands. Both of them call on States Parties to reduce as much as possible statelessness persons.

The acquisition of a nationality follows usually two types of rules, according to the nationality law of each states. Firstly, the principle of Jus Sanguinis (also called Jus Personae, in English the right of the blood) which establishes “the principle that the nationality of children is the same as that of their parents, irrespective of their place of birth.” Secondly the principle of Jus Soli (in English the right of the soil) “by which birth in a state is sufficient to confer nationality, irrespective of the nationality of one parent.”

ii. Nationality laws

The principle of Jus Sanguinis is historically the most implemented in national’s law. Nevertheless, nationality laws of Iraq and Syria recognize the Jus Sanguinis principle only deriving from the father, with some exceptions. Moreover neither Syria nor Iraq had signed...
or ratified the two conventions related to stateless persons. Therefore, if the state of origin of a child born from foreign parents in Iraq or Syria, do not recognize him as national, the latter will become stateless in fact.

On the other hand, nationality laws of France, Belgium, Germany, and the Netherlands apply both the *Jus Sanguinis* and *Jus Soli* principles. As a result, a child born in Iraq or Syria from at least one parent with the French, German, Belgian or Dutch nationality becomes a national of his or her parent’s state of origin by birth. Moreover, he or she will acquire European citizenship as well according to Article 20 of the Treaty on the Functioning of the European Union (TFEU) paragraph 1: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

Eventually, the 1961 Convention on the Reduction of Statelessness commit states parties to grant nationality to stateless child born on their soil. While the Iraqi and Syrian governments did not ratified by these two Conventions, they are bound by this rule of international custom but also the articles laid down in the International Convention on the Rights of the Child or the ICCPR. However, having in mind the previous report, showing the clear non application of this rule, children born from non-Syrian or Iraqi father in respective territories have a very high risk to fall in the stateless statute. Consequently, if France, Germany, Belgium or the Netherlands do not recognize the children of their citizens as their own nationals, according to their own nationality law, the latter can fall in one of the most dramatic position where none state is responsible for them. This, in violation of the 1961 Convention they all ratified.

### 2.3.3 The exhaustion of local remedies

Finally, the third condition established by draft article 14 is the exhaustion of the local remedies of the State alleged to be responsible for the violations, i.e Iraq or Syria. This general principle

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82 See the nationality laws of France, Germany, Netherlands and Belgium.

83 The difference between nationality and citizenship lies in the acquisition of political rights such as voting rights. A national becomes a citizen when he or she registers with the civil registry office. However, according to European law, it is sufficient to be a national and not a citizen of a MS to be a European citizen and to acquire political rights at European level. See: Citizenship, Oxford Reference; Citizenship & Nationality, International Justice Resource Center and; European Union, the EU Citizenship.

of international law was first established in the Interhandel case\textsubscript{85} but has been however limited by the draft Article 15 establishing the “Exceptions to the local remedies rules”. The general concept of this article can be found in the first draft of Article 4 which provided: “Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a \textit{jus cogens} norm attributable to another State. “\textsubscript{86}

In this respect, it is worth considering whether the local remedies for children present in Syria are the Kurdish courts, not recognised by the European states, or the Syrian courts. Then it is important to remember the extremely young age of these children and the lack of resources in the camps. It becomes then easy to imagine the impossibility for these children and even their mothers to fulfil the third condition for diplomatic protection.

Final draft article 15 eventually establishes that “local remedies do not need to be exhausted (in particular) where: (e) “the State alleged to be responsible has waived the requirement that local remedies be exhausted.” In this respect, both the Iraqi and Kurdish authorities have asked the original states to take back their nationals and judge them on their soil, including and most importantly the minors.\textsubscript{87} The commentary to this paragraph does not provide further details on this situation, thus it is reasonable to consider that such a request from the local authorities waives the obligation for the foreigners to exhaust local remedies.

2.4 Conclusion

The protection of nationals by a state can sometimes go beyond national borders. If in the present case external intervention is not necessary, following the willingness of local authorities to cooperate, the use of diplomatic protection to repatriate children on the spot is an option to be considered. Indeed, the children on which this thesis is focused on, gather all the requirements stated in the adopted draft articles for diplomatic protection. Accordingly, their states of origin should be able to exercise their right to diplomatic protection. However, when a state shows no willingness to exercise this right, one may wonder, in view of the grave violations suffered by these children, whether the diplomatic protection does not go beyond

\textsuperscript{85} Draft Article 14, Commentary (1).
\textsuperscript{86} John Dugard explains this idea more in detail §89 in the First Report on Diplomatic Protection
\textsuperscript{87} Bethan McKernan, “Foreign Isis fighters must face trial on home soil, Kurds say”, \textit{The Guardian}, 24 September 2018.
the mere right for the State to become a right for individuals to enjoy diplomatic protection and in this sense a duty for the State to do so.

3. Progressive approach to diplomatic protection

The definition established by the PCIJ in the *Mavrommatis* case belongs to a very traditional approach where States are the only actors on the international scene. However, the increasing consideration of individuality in international bodies balances this traditional conception with a more progressive one. The progressive approach to diplomatic protection recognizes a specific right to diplomatic protection for nationals suffering abroad: a right to request but above all, a right to receive diplomatic protection, which would therefore create a duty for States to address such protection to their nationals abroad. And it is precisely because of this last point that the drafters were more reluctant to adopt the progressive approach to diplomatic protection, which would then impose a positive obligation on States, which could hinder their adoption of the future treaty.

3.1 State practice and recognition

Although the Commission has adopted the traditional approach in the draft articles, the seven annual reports produced by John Dugard, Special Rapporteur for the Commission, showed a strong willingness from a part of the drafters to introduce the progressive approach of diplomatic protection into the set of articles. In fact, when the Commission invited governments to submit their comments and observations, Italy’s government suggested on *Draft Article 2. Rights to exercise Diplomatic Protection* that: “an exception to that rule would be appropriate in some particular and very limited circumstances, from the perspective of the progressive development of international law, when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake.”

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88 John Dugard quotes Enrico Milano’s article as a critical literature on the decision of the Commission for “failing to impose a duty on States to exercise diplomatic protection.” See the Seventh Report on Diplomatic Protection, Introduction, § 4; “Discussion in the Sixth Committee revealed that some members of the international legal community believed that the individual should be entitled to diplomatic protection as a matter of right. Although limited, there is in fact some State practice to support this view.” First Report on Diplomatic Protection, § 80.

89 Comments and observations received from Governments, 38.
Since his first report, John Dugard illustrated the growing importance of the practice of the progressive approach by states, including firstly those of the communist bloc. In addition, others states, such as Germany, took this position, in particular during the case *Rudolf Hess and Eastern Treaties Constitutionality* before the German Federal Constitutional Court. The Court established that the State have “a constitutional duty to provide diplomatic protection if certain prerequisites have been met”. John Dugard also referred to cases judged in the Supreme Courts of Israel and of Switzerland where both established a duty, however limited, for the each State, to assist nationals abroad through diplomatic protection. Finally, the Special Rapporteur suggested that, “the submission of the claims (in France, Netherlands, and Belgium) indicates that the claimants had reasons to believe that they had such a right.”

Therefore, as John Dugard concluded: “there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad.” Thus, “it cannot, be dismissed out of hand as it accords with the principal goal of contemporary international law—the advancement of the human rights of the individual rather than the sovereign powers of the State.”

### 3.2. Adopted commentaries

Although this vision is not the one adopted in the draft articles, the adopted commentaries completing set of Articles on diplomatic protection also reflect the progressive approach. In particularly Commentary (3) of draft Article 2 states: “Today there is support in domestic legislation and judicial decisions for the view that there is some obligation, however limited, either under national law or international law, on the State to protect its nationals abroad when they have been subjected to serious violation of their human rights”. Regarding ‘judicial decisions’ the authors refers to the law cases *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* ruled by the UK Supreme Court of Judicature - Court of Appeal, and the case *Kaunda v. President of the Republic of South Africa* ruled by the South African Constitutional Court.

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90 First Report on Diplomatic Protection, § 80.
91 Ibid §81
92 Ibid § 82-83.
93 Ibid § 86.
94 Ibid § 87.
95 Commentary (3) of Draft Article 2 on Diplomatic Protection with commentaries (2006).
While draft Article 2 on diplomatic protection affirms the “discretionary nature of the State’s right to exercise diplomatic protection”, John Dugard eventually highlighted in Commentary (3) of Article 19: “there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations.” (...) Thus, “in these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad.”

3.3. After 2006

Commentary 3 on Article 19 will subsequently be reinforced by other judgments, in particular in the Von Abo v. Government of the RSA decision ruled by the Constitutional Court of South Africa in 2008. In this decision the Court ruled that the government's failure to “rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in respect of the violation of his rights (by the foreigner Government)” was unconstitutional. In addition, the Court established that South African citizens, “are entitled to request South Africa for protection under international law against wrongful acts of a foreign state” and declared that the applicant enjoys a “right to diplomatic protection and that the government has a corresponding obligation to provide diplomatic protection.” The Court finally established that the government “must take all necessary steps to have the applicant’s violations of his rights (...) remedied.”

The progressive approach to diplomatic protection is therefore the subject of an “extensive and virtually state practice”, with domestic courts decisions and finally of a doctrine of qualified publicists such as the Special Rapporteur of the International Law Commission. This practice thus becomes a binding international custom, according to article 38(1)(d) of the Statute of the ICJ.

4. Conclusion

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96 Von Abo v. Government of the RSA, 2008, § 1
98 Ibid.
99 See note 105 § 4
It is therefore reasonable to consider that the progressive approach now belongs to customary international law, as does the traditional approach. The International Court of Justice is thus competent to judge the non-compliance with this custom, according to Article 38 (1) of its Statute. Consequently, states have obligations towards their nationals even abroad, including an obligation of protection. Accordingly, states leaving their nationals, and especially minors, suffering from various violations of international law abroad, while the local authorities themselves request their repatriation, are in violation of customary international law on diplomatic protection, in addition of the Vienna Conventions on consular and diplomatic relations but not only. Indeed, John Dugard stated in this regard: “if a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.”¹⁰⁰ This can then be observed in relation to the international and regional commitments of France, Belgium, Germany and the Netherlands, in contrast to their inactions towards their minors currently living in dire conditions in Iraq and Syria.

¹⁰⁰ First Report on Diplomatic Protection §89.
CHAPTER III – LEGAL ISSUES

In terms of rights, children are the most protected beings and are subject to special conventions and treaties. Their fragility and vulnerability prompted the international community to adopt the International Convention on the Rights of the Child in 1989, making it the first binding international convention on the protection of children in addition of recognizing them children as a subject to rights.\(^{101}\) The historical consensus that this treaty has formed is also an emblematic mark of this Convention, giving it all the more legitimacy. Indeed, the CRC is the most widely ratified international convention (192 of the UN's member countries), making it the most ratified of all human rights conventions in history.\(^{102}\) Moreover, these children and mothers trapped in a country other than their own are also protected by the ICCPR and in particular their right to move and return to their own countries. On the other hand, at European level, the European Convention on Human Rights has also become emblematic for the efficient protection of vulnerable people.

1. The Convention on the Rights of the Child\(^ {103}\)

The CRC provides specific protection for anyone under 18 and invites all States to protect children, by any means in the respect of international law. Essentially, the CRC requires States Parties to protect children’s right to live\(^ {104}\), to health\(^ {105}\), to have their best interest taken into primary consideration,\(^ {106}\) to development and education\(^ {107}\) and to non-discrimination, within their jurisdiction.\(^ {108}\)

1.1 The best interest of the child

Article 3(1) of the Convention establishes with certainty one of the most important provisions of the latter. Indeed, it states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

\(^{101}\) See note 1.
\(^{102}\) Committee on the Rights of the Child: What it is and how it works, HUMANIUM.
\(^{104}\) Article 6 of the CRC.
\(^{105}\) Article 24 of the CRC.
\(^{106}\) Article 3 of the CRC.
\(^{107}\) Article 28 of the CRC.
\(^{108}\) Article 2 of the CRC.
Subsequently, the Committee on the Rights of the Child drafted a general commentary on Article 3. In this general comment No. 14, the Committee wished to strengthen the scope of this article by clarifying its meaning. It then indicates that the best interests of the child must in reality not simply be “… a primary consideration” but “the paramount consideration”. Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.” 109

Thus, Article 3 “… requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions.” 110

Finally, the Committee also clarifies the definition of actions that may impact children and states that the terms "in all actions" refers to “every action relating to a child or children has to take into account their best interests as a primary consideration. The word “action” does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.” In addition, “inaction or failure to take action and omissions are also “actions” (…)”. 111

In March 2019, Laurent Nunez, the Secretary of State to the Minister of the Interior, had stated that “the question of return is not an issue at this time” and that French children should be left in detention.” 112 Consequently, the inaction of the states towards those children, clearly aware of the situation in which they find themselves, raises serious questions about the correct application and the respect of Article 3. As demonstrated in the previous section, child protection associations are sounding the alarm about children’s current living conditions in Syrian camps. It therefore seems impossible to consider that the best interests of the child are currently the priority condition for decisions on them.

109 General Comment No.14 on Article 3 (CRC/GC/2013/14), para 38
111 Ibid
112 « Pour l'exécutif, la question du retour des enfants jihadistes "ne se pose pas à l'heure actuelle" », BFMTV, 14 March 2019.
Although states are only subject to CRC compliance within their territorial jurisdiction, the refusal and inaction from the states to repatriate their children, are government decisions taken within their own jurisdictions for borders related issues. Therefore, states’ inactions are in serious violation of Article 3 of the CRC while absolutely not taking the best interests of these children as the paramount consideration in decisions that would obviously directly impact them. 113

1.2 Articles 6 and Article 9 of the Convention

In addition to Article 3, two other articles of the Convention appear strongly relevant when analyzing the legal situation observed by this thesis.

i. Article 6 of the CRC
First of all, Article 6 of the Convention provides that: “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development.” The principle of the right to life is already enshrined in the Declaration of Human Rights (article 3) and Article 6 of the ICCPR, however, the Committee clarifies that ensuring survival and physical health must be broader than just a right to life. State Parties are also required under Article 6 to ensure all the other interdependent aspects of such as the development, health and psychosocial well-being of young children.114

ii. Article 9 of the CRC
Finally, current debates concerning the repatriation of mothers with their children, and court decisions rejecting their requests, also raise compliance with Article 3 and Article 9 of the Convention. Indeed, Article 9(3) states: “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.” However, both France and Belgium have implied that it would be possible for children to return but not for mothers. This, without justifying that this decision would be in the best interests of the children, as provided for in Article 9(1) of the CRC.115

113 Ibid
114 General Comment No. 7 on Article 6 (CRC/C/GC/7/Rev.1) § 10
115 Article 9(1) of the CRC: “The child shall not be separated from his or her parents against is or her will “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is necessary for the best interests of the child” ; See also note 109.
All these articles appear to be relevant in strengthening child protection. Nevertheless, their correct application by the State Parties is often questionable, as this thesis demonstrates. Thus, the Committee on the Rights of the Child strives to ensure compliance with the Convention, with the resources allocated to it.

1.3 The Committee on the Rights of the Child

In order to ensure proper compliance with the CRC, a Committee on the Rights of the Child was established in 1989. Composed of 18 independent experts of high moral character, the Committee ensures respect by the States Parties to the Convention. To this end, it meets three times a year and examines the mandatory reports made by States on the situation of children's rights on their territory. In addition, the Committee may also receive "State communications". The latter are carried out by States Parties on alleged violations of the Convention by other States Parties. 116

In 2011, the binding third Optional Protocol to the Convention on the Rights of the Child on communication procedure (third Optional Protocol) introduced an individual and an inter-state procedure to bring a complaint before the Committee for the violation of the Convention or of the optional protocols.117 Essentially Article 13(1) established that: “If the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention or in the Optional Protocols thereto on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict, the Committee shall invite the State party to cooperate in the examination of the information and, to this end, to submit observations without delay with regard to the information concerned.” Subsequently, the Committee will conduct an investigation to determine whether or not such a violation has occurred. Therefore, several lawyers including Marie Dosé made a request before the Committee on the Rights of the Child in order to urge France to repatriate these minors, hoping for an injunction which, although binding but without enforcement mechanism, would still be meaningful.118

116 The third Optional Protocol was ratified in particular by France, Germany and Belgium. The Committee on the Rights of the Child: Role and competence – Study of reports and communications, HUMANIUM.
117 See Article 5 and Article 12 of the Third Optional Protocol of the CRC.
Indeed, perhaps due to the too young age of the Convention and the Committee, or of this inquiry procedure, the Committee’s powers of coercion remain quite limited. In fact, the Committee is not allowed to impose sanctions on a State when a violation of a child’s rights is proven.\textsuperscript{119} Nevertheless, the extraordinary number of countries that have acceded to the Convention certainly gives it and its Committee a certain importance and legitimacy. Thus, it is certain that a country would not appreciate being singled out for a serious violation of the Convention before the rest of the world.\textsuperscript{120}

1.4 Conclusion

According to the court’s decision in France and Belgium, the current problem is not the return of children but that of mothers. The position of both jurisdictions is for the time being to refuse the return of women currently in Iraq and Syria, and therefore indirectly prevents the return of children, without any legal basis. In this, and in full awareness of the facts, the courts have not taken the best interests of the child into primary consideration in their decisions, thus violating Article 3 of the Convention, but also Article 6 and Article 9(3), while requiring the children to choose between staying in such life-threatening conditions or returning without their mother, sometimes the only parent they have ever known.

More than an abandonment of their own nationals, the lack of support from states can also be read as support for the Kurdish and Iraqi authorities and an acceptance of the situation. Indeed, several associations have alarmed about the detention of these children in prisons, sometimes the same as those of adults, or in camps, particularly in Syria. Thus, while there is no doubt about the primary responsibility of host states that lock these children in prison, the lack of action by the states of origin of these children to fight against their imprisonment could be interpreted as a violation of Article 37 of the CRC preventing child imprisonment.

Finally, it is important to note that given the age of most children, it is impossible for them to have been involved in the fighting, according to the report made by the ICSR. Thus, these children find themselves in such a situation because they are affiliated with the actions of their


\textsuperscript{120} Every two years the Committee is submitting a summary report of its activities, and can highlight the grave or systematic violation of States according to Article 16 of the Third Optional Protocol on the CRC.
parents, which is prohibited by Article 2 of the CRC, providing the right to non-discrimination.\textsuperscript{121}

As Khawla Ben Aicha, a member of Tunisia’s Parliament, had cleverly noted: “Every day they spend in the camp is one more day outside of school and their fundamental rights.”\textsuperscript{122} The number of violations of the Convention on the Rights of the Child is thus dramatically increasing every day. As lawyers William Bourdon and Vincent Brengarth point out in their rostrum, "by refusing to repatriate mothers, the State takes children hostage and risks sacrificing them to what must be described as state cynicism, which itself sacrifices our international obligations”.\textsuperscript{123} On the other hand, although the responsibility of states is clear in that it is their non-action, leaving these minors to rot in camps without really caring, it is also quite difficult to force states to take action without any real means of sanctioning them by the Committee.

2. Right to return

The right to return (or right of return) belongs to the most fundamental rights, listed in the UN Universal Declaration of Human Rights (UNDHR) of 1948. This principle of international law provides the guarantee to anyone to return or to enter voluntary to his or her “own country”. As such, Article 13 (2) of the Declaration establishes: “(2) Everyone has the right to leave any country, including his own, and to return to his country.” Later the ICCPR, which has binding power over ratifying states, established in Article 12(4): “No one shall be arbitrarily deprived of the right to enter his own country.”

The definition of “own country” was then developed by the Human Rights Committee, in charge of interpreting the ICCPR. In its General Comment No.27\textsuperscript{124} the Committee provides that a relationship is obviously necessary between the individual and his or her “own country” and that this relationship is not restricted only to the nationality but embraces a broader concept. The International Court of Justice further established the concepts that could be integrated to

\textsuperscript{121} ICSR report
\textsuperscript{122} Vivian Yee, “Thousands of ISIS Children Suffer in Camps as Countries Grapple with Their Fate”, \textit{The New York Times}, 8 May 2019.
\textsuperscript{124} Human Right Committee, General Comment No.27 on Article 12 (Freedom of Movement) (CCPR/C/21/Rev.1/Add.9)
determine the relationship with someone’s “own country”. In the Nottebohm Case, the ICJ stated: “Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”

Consequently, children of European nationality currently in Iraq and Syria, but also their mothers, have a right to return to Europe not only because of their nationality, but also because of the family ties they have to European territory. The legal proceedings initiated by several grandparents for the return of their grandchildren from Syria illustrate this strong family link between these children and their families in Europe. The international organisation Human Rights Watch concluded that: “the right (of return) is held not only by those who fled a territory initially but also by their descendants.”

The Committee subsequently added that: “the reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”

However, the refusal to allow women and their children to return to European territories is in no way justified by legal arguments. On the one hand, the judicial authorities declare themselves without jurisdiction in this matter, on the other hand, governments take few actions, and almost none with regard to mothers. It can therefore be concluded that decisions to refuse the return of these women and children are arbitrary decisions in violation of their right of return. Consequently, once again, the European states, and in particular France and Belgium, are in violation of international law.

### 3. The European Court of Human Rights

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is an international treaty signed by the Member States of the Council of Europe in 1950. Today, 47

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125 Nottebohm Case (*Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955 §20

126 Human Rights Watch policy on the right to return.

127 See note 114 §21
states are members of this Convention. The ECHR enshrines the fundamental principles of human rights such as the right to life, security, freedom from torture and the right to the family.

In addition, the creation of this binding convention was followed by an international court, the European Court of Human Rights (ECtHR), which has the power to control, judge and sanction member states that do not comply with the Convention. The enforcement power of the ECHR is thus much stronger, at least at the European level, than the International Convention on the Rights of the Child.

2.1 Fundamental right

Traditionally, contracting states of a Convention are subjected to negative obligations, obligations to not violate the rights laid down in the covenant. Therefore, the ECHR differs from other international conventions by imposing not only negative but also positive obligations on member states. Indeed, the latter are required to comply with this Convention and to ensure the protection and safety of individuals rights and freedoms within their jurisdictions.

2.1.1 Article 3 – Prohibition of torture

Already codified in Article 5 of the Universal Declaration of Human Rights and Articles 7 and 10 of the ICCPR, the prohibition of torture is in turn codified by the ECHR in Article 3. The latter is the most concise article of the Convention, and this is probably in order to avoid any interpretation by States. In fact, the prohibition of torture is absolute and is formulated without the possibility of exception: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Unlike the rest of the articles of the Convention, this one imposes a negative obligation on Member States: not to torture any individual. The Court subsequently provided some clarification regarding the scope of this article. Three core elements must be met to consider an act as torture. First, the pain or suffering must be severe, it may be physical or mental.

128 Article 1 of the ECHR
129 “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
Second, it should be inflected for a certain purpose. Third, it should be inflected by or under the aegis of a public official. While a minimum intensity must be assessed in order to determine whether or not there is a violation of Article 3, the court nevertheless broadened the scope of application of the latter.

2.1.2 Court decisions for violation of Article 3

With regard to the application of Article 3, France has recently been condemned on several occasions by the ECtHR for the living conditions of the ‘inhabitants’ of the slums of Calais. The Court thus acknowledged that the plaintiff, a 12 years old child, was a victim of degrading treatment. In its decision, the Court found that, in the absence of care by the authorities and despite the support he was able to obtain from non-governmental organisations present on the moor, the applicant lived for six months in an environment manifestly unsuitable for his childhood, characterised in particular by insalubrity, precariously and insecurity.

The ECtHR then recalls the State's obligations towards minors, whose situation of extreme vulnerability must prevail even when minors are not seeking protection. In this case, the Court punished, inter alia, the shortcomings of the French authorities in deploying sufficient and appropriate means for the protection of minors.

Already in 2016, France had been condemned by ECtHR in five cases involving families locked up with minor children in the detention centres of Toulouse and Metz. The Court had unanimously declared a violation of Article 3 of the Convention. In some other cases, France has been also convicted of violating Article 5 (right to freedom and security) and Article 8 (right to respect for family life). Moreover, as is argued in this thesis, the application of Article 2 should not be ruled out.

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131 CASE OF AKKOC v. TURKEY §115
133 Ibid §85
2.2 Article 2 – Right to life

Article 2 of the ECHR is similar to the already stated article 6 of the CRC. The latter provides that: “Everyone’s right to life shall be protected by law.” In depth, the Convention binds MS, not only “to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction”. The general idea of this article is thus very clear: the protection of the lives of individuals and their safety must be the first duty of states. And it is no coincidence that this article is the first in the section on the rights and freedoms to be ensured by the Member States.

Regarding this duty, states must respect and ensure the protection of individuals not only in their actions but also in their non-action, i.e. their omissions. This was particularly observed during the Osman case. Indeed, the United Kingdom was charged with a violation of Article 2 after its police failed to react sufficiently to prevent the murder of a child. The omission of the State was therefore at the heart of this decision, where it was accused of having failed in its duty to protect individuals’ life under Article 2. In this case, however, the Court considered that the UK had fulfilled its commitments, considering that the real and immediate risk to the child’s life was not obvious. Nevertheless, this decision allows us to understand that in a case where the authorities, aware of a real immediate risk to the life of a child, have not reacted, or not in a sufficient manner to ensure the protection of the right to life of these children, the court could sanction these authorities.

However, in view of the very broad obligations imposed by Article 2, the Court has clarified the scope of application, in the course of these decisions. Considering that this obligation is very broad and requires States to comply with an obligation that is almost impossible to fulfil, the Court established that the obligation to protect under Article 2 was an obligation not of results but of means for States.

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2.3 Limits and conclusion

According to Article 1 of the ECHR, States are only subject to compliance with the Convention within their jurisdiction. Thus, as demonstrated in the first part, a priori, Member States are not subject to compliance with Article 2 outside their jurisdictions.

Nevertheless, if European states cannot be held responsible for the current situation of these children, they must be held responsible for preventing the improvement of this situation for their nationals, by refusing to act and repatriate them or simply by ignoring for them.

Indeed, the testimonies presented in the first part confirmed the appalling situation in which these children found themselves. In parallel, France was condemned by the ECHR [state the month as it may have changed by the date you submit, “ay 2019” or whatever] for violation of Article 3 because of the appalling circumstances in which a minor lived on its territory, similar to the circumstances in which European nationals currently living in Iraq or Syria find themselves. Thus, although neither Syria nor Iraq are subject to the ECHR, France or Belgium should be sanctioned by the Court under Article 3 for not preventing these minors from living in such conditions, but rather for contributing to the continuation of this situation.\textsuperscript{139} Moreover, the alarming figures of children who died as a result of the hygiene conditions in these camps suggest that these individuals face a real and immediate risk to their lives.

Therefore, one theory would be that, while states are not obliged to comply with the Convention abroad, the Court should be able to sanction the latter for not having taken measures to allow the repatriation and return of its minors, in order to stop further violations of their fundamental rights. Thus, the French and Belgian decisions not to repatriate mothers and indirectly, children, or the total absence of government action as pointed out by lawyers,\textsuperscript{140} can be considered as actions and omissions from these States leading directly, and in a known manner, to the continuation of the violation of the rights of these minors. Therefore, these European states should be condemned by the ECtHR for the violation of Article 3, Article 8 and Article 2 of the Convention.

\textsuperscript{139} See note 133 §85
\textsuperscript{140} M.-L.W, « Rapatriements de Syrie : le Conseil d’Etat rejette quatre requêtes de familles de djihadistes », Le Parisien, 23 April 2019
4. Court decisions in Belgium and France regarding the repatriation of these children

The return of mothers and children of French nationality or Belgium among many others has been in the news many times in recent years. Indeed, as this thesis shows, each country has chosen to adopt a different policy. However, in the absence of any real action by the French and Belgian governments, among others, families present on national territories have chosen to seize national courts in order to bring their children and grandchildren back to Europe.

3.1 Court decision in Belgium

Among these two countries, the Belgian justice system is undoubtedly the most encouraging. Indeed, after two mothers had once again referred the Belgian State for interim measures for the purpose of repatriating the children, the President of the Court of First Instance of Brussels, by an order of 26 December 2018, acknowledged the urgency of the situation this time. It thus assigned the Belgian state to take all necessary and possible measures for the repatriation of these children.\(^{141}\)

In this decision, the President of the Court relies in particular on Article 3§1 of the International Convention on the Rights of the Child, in addition to Articles 5 and 9 and Article 8 of the ECHR\(^ {142}\). In this respect, this decision would have made it possible both to repatriate the children and also the mothers.\(^ {143}\) However, the Court of Appeal finally overturned this decision.\(^ {144}\)

Indeed, on 27 February the Brussels Court of Appeal considered the two mothers' application as simply inadmissible, on the grounds that it was identical to another application already rejected by the courts. The Court subsequently stated that the Belgian State has no judicial power in Syria and that it cannot therefore be forced to repatriate.\(^ {145}\) Nevertheless, the Belgian


\(^{142}\) Article 5: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

\(^{143}\) See note 140.

\(^{144}\) « Cour d'appel: l'Etat belge ne doit plus rapatrier les six enfants de deux combattantes en Syrie », RTBF.be, 27 February 2019.

\(^{145}\) Ibid
Minister of Justice, Mr Koen Geens, commented on this decision by stating that Belgium will continue to work towards the return of children.\footnote{Ibid; « Le gouvernement en appel contre le rapatriement des six enfants de Syrie », 7 sur 7, 30 December 2018.}

\subsection*{3.2 Court decisions in France}

Concerning orphans, in March, lawyer Samia Maktouf lodged a complaint before the Paris Administrative Court on behalf of the grandmothers of two orphans aged 5 and 2 detained in Roj camp in view of the real dangers faced by these children.\footnote{Elise Vincent, « Enfants de djihadistes en Syrie : les familles s’impatientent », Le Monde, 13 March 2019.} In their complaint, the families consider that France’s failure to provide assistance to these “endangered” children would be contrary to the CRC and the ECHR.\footnote{« Deux familles attaquent l’État en justice pour faire rapatrier leurs petits-enfants de Syrie », Orange, 12 March 2019.} For the time being, the court’s decision is pending. However, the repatriation of five orphans last March gives hope.\footnote{“France repatriates ‘several’ children from camps in Syria”, France 24, 15 March 2019.}

In France, the President of the Republic announced in October 2018 that these children would be repatriated on a case-by-case basis. Only since then has the government taken almost no action for these children.\footnote{“On March 15, five French children returned from Syria.” They are orphans or isolated children. However “there are still about 80 children left, perhaps more so many have arrived in recent days as Daech’s last reduction empties of its inhabitants. Most of them are with their mothers.” See note 123.} As a result, lawyers for French women currently in Iraq and Syria with their children have increased their claims before the French courts. Thus, in January, these lawyers filed a complaint against the French authorities for "arbitrary detention" and "abuse of authority". Indeed, these mothers and children were preparing to be tried in Syrian Kurdistan - not recognised as a State - and therefore held in the area for an indefinite period with their offspring. However, this complaint was dismissed without further action.\footnote{See note 147.}

Further, like their Belgian counterparts, the lawyers William Bourdon and Vincent Brengarth brought an action before the administrative court in December asking it to force French diplomacy to repatriate these families. The applicants argued that, because of the continued presence in Roj camp of minor children exposed to inhuman and degrading treatment and a risk of death, several fundamental freedoms were seriously violated, requiring their repatriation within a short period of time.\footnote{Julien Muchielli, « Le tribunal administratif rejette les demandes de rapatriement de Syrie de deux mères et de leurs enfants », Dalloz Actualité, 10 April 2019.}Among other things, the lawyers state first of all that France is
bound by moral but above all legal obligations, in particular international obligations, in
particular with the CRC and its Article 3§1. The applicant also states that "States Parties
undertake to ensure to the child the protection and care necessary for his or her well-being".153

The lawyers then brought an application for interim release before the administrative court
requesting the repatriation of the two women and their children. However, on April 9, the court
issued two orders dismissing these applications. The judges considered that the organisation of
the repatriation of the persons concerned cannot be separated from the conduct of France's
external relations, and therefore fall outside the competence of the French administrative
court.154

In addition, lawyer Nabil Boudi had also applied to the administrative court for provisional
measures155 on the grounds of inaction aimed at "holding the Ministry of Foreign Affairs to
account of its responsibilities”. The lawyer claims that the Ministry of Foreign Affairs has an
obligation to ensure the safety of its nationals. 156 In total, four requests for the repatriation
French nationals and their children detained in Syria were submitted to the judge of the Conseil
d'Etat on appeal.

However, their actions had been dismissed without any hearing, on the grounds that
administrative justice was not competent to conduct France's international relations in the end
of April. The Court stated that the measures requested for repatriation, which cannot be made
possible by the mere issue of a permit allowing them to cross French borders, as requested at
the hearing, would require the opening of negotiations with foreign authorities or an
intervention on foreign territory. They cannot be separated from the conduct of France's
international relations. Consequently, a court has no jurisdiction to hear the case. 157

Among their requests, the lawyers had asked the Conseil d'Etat to file an appeal with the
ECHR. This request was also rejected by the Conseil d'Etat. 158 In addition, they fulfilled a

153 See note 118.
154 See note 152.
155 “référé-liberté” is the name of the procedure. This is an emergency procedure initiated when a person's
fundamental rights and/or freedoms are threatened
156 See note 140.
157 Conseil d'Etat, Rejet des demandes de rapatriement de ressortissantes françaises et de leurs enfants retenus en
158 « Rapatriements de Syrie. Le Conseil d'Etat rejette les requêtes de familles de jihadistes », Le Télégramme, 23
April 2019.
request to hear about the opinion of the ECtHR on this issue, according to Protocol No.16 of the Convention.  

3.3 Bringing an action before the ECtHR

Very active today, the ECHR allows states, but also any individual who is the victim of a violation by a member state, to appeal to it (under certain conditions). Article 34 of the ECHR provides that: “The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

However, Article 35 sets out the conditions for admissibility of applications and specifies, inter alia, that domestic remedies must be exhausted before creating an application before the ECtHR. Thus, regarding the last decisions made by the Conseil d'Etat, one of the two Supreme Courts of France, French lawyers are now able to file an individual application before the ECtHR. Concerning the previous quoted decision of the Court of Appeal of Brussels applicants have until the end of May to apply before the Belgian Supreme Court.

5. Conclusion

The existing legal decisions in both France and Belgium allow us to conclude first of all that this issue is also a legal issue. Indeed, the fact that these issues have been dealt with by the judicial or administrative courts, and even that the Belgian judge has, in the first instance, ordered the repatriation of these children, makes it possible to consider this issue not only at the diplomatic but also at the legal level.

Moreover, if states oppose the repatriation of these mothers and children on the grounds of the incompetence of the courts to judge the matter, the ECtHR remains an important means and hope for these families. It is conceivable that, in view of the provisions of the Convention but also of the Court's recent decisions on the living conditions of minors in France, similar to

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161 Article 35§1 of the ECHR
those reported in Syria, the Court will take a crucial decision by sanctioning countries such as France and Belgium for violating the Convention.
CONCLUSION

The repatriation of Foreign Terrorist Fighters’ families to their countries of origin has been at the heart of the debate for the last years. While some states, such as Russia, have agreed to negotiate with Iraqi forces to bring the children and the mothers back with the repatriation of almost one hundred of them by the end of December 2018, others states are more cautious. Thus, the nature of this issue is clearly contentious, being at the same time both diplomatic and legal but also political.

1. **Diplomatic aspect**

The international and extra-European nature of this situation hinders the latter in the field of diplomacy. Indeed, as Thomas Hobbes demonstrated, the duty to protect its nationals is the *raison d'être* of a state. This duty, however intense it may be, can lead to a state's external intervention, through diplomatic means. Diplomatic protection, as inserted in the Vienna Conventions but also in the draft articles of the International Law Commission, thus allows States to continue their duty to protect their citizens, even when they are abroad, in accordance with international law. In addition, while the text does not specifically provide for it, the comments and court decisions on the subject have made it possible to refine the meaning of the rights and obligations arising from diplomatic protection. It is then understood that diplomatic protection is not simply a right of states, but is an extension of their obligation to protect their citizens when they are abroad, by diplomatic means.

In this sense, the recent intervention of a French mission, composed of diplomats from the Quai d'Orsay and doctors, in Roj camps in Syria confirms the diplomatic aspect of this situation, without fully resolving it. Indeed, if this mission allowed the repatriation of children, it was only 5 children, all orphans. The question of the other children currently with their mothers whom the states refuse to repatriate therefore remains unresolved.  

2. **Legal aspect**

Moreover, as this thesis illustrated, this issue can also be treated as a legal matter. The people on which this thesis focuses are victims of violations of International and European law. In

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addition, actions or inactions from governments would both impact seriously and directly the rights and freedoms of these children in a very negative or positive way.

The situation in which these children find themselves is unbearable. In addition to living in appalling conditions, where 30 children have already died, or in detention with their mothers who may at any time be sentenced to death by the Iraqi state, these children find themselves abandoned by their own state of origin. The latter turning a blind eye to its duties of protection and the alarming situation of these children. Thus, more than just a moral issue, this situation must be taken as a serious violation of international law and governments have the duty to protect those children, according to the lawyer William Bourdon and Adeline Gouttenoire, associate Professor of Law in Bordeaux, child protection specialist and President of the Departmental Observatory for Child Protection.

More importantly, this thesis wished to demonstrate that these children, victims above all of this situation, are not abandoned by international law. Their states of origin are clearly subject to legal obligations to repatriate them to their territories of origin. Thus, as stated the U.N. humanitarian coordinator for the Syria crisis, Mr. Panos Mountzis: "There is a prime responsibility of states vis-a-vis their own nationals."

3. Political aspect

Obviously, the political aspect is the most important in this situation. The actions and inactions of each state reflect not only respect or not for international law on their part, but simply a strategic political decision not to frustrate public opinion.

Moreover, the recent decisions from the Belgium and French courts to declare themselves without jurisdiction, stating that this situation was a matter for diplomacy, and thereby leaving

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164 See note 118.


166 "Pour 7 Français sur 10, les enfants des djihadistes français doivent rester en Syrie et en Irak », LCI, 1 March 2019.
governments to manage this situation, has once again returned this situation to the political arena in a worrying manner.

For this reason, women's and children's lawyers stated that the French authorities must no longer be protected in their refusal to repatriate them because of the political nature of the measure, in the light of international and, in particular, European law. In order to make their voices heard at the political level several French intellectuals, including lawyer Marie Dosé, magistrates, politicians and artists have created a petition to demand the repatriation of the French children and not only the orphans.167

3.1 Time bomb for host states and states of origin

Rejecting the problem, or as Nadim Houry the "fireball" would say, will not stop the situation and could even make it worse. Indeed, states refusing the return of mothers and their children think they are acting for national security, once again without taking into account the interest of the child as a primary consideration in addition of violating children’s rights to non-discrimination, presumption of innocence and eventually UNSCR Resolution 1396 (1) bonding states to assist those who “may be victims of terrorism.”

It should not be ignored that this decision will have a very negative impact on children, but also on the host state and the state of origin. According to Kurdish Forces, the “hundreds of foreign ISIL fighters held in custody inside Syria are a "time bomb" for the region and the world.” 168 Obviously, children growing up in such conditions, with a feeling of being abandon by their country of origin, based not on their acts but on their affiliation with FTF, with no access to school and good conditions of development, will not "grow up well" and in the sense that in the end France and Belgium will pay the consequences instead of treating the problem at the source now while the children are still young.

Accordingly, Gilles de Kerchove, the EU’s counterterrorism coordinator named those children a “ticking time bomb” and revealed that around “45,000 children born in Iraq but denied citizenship because they were in areas controlled by Islamic State risk becoming “the next generation of suicide bombers.”169 In addition, the New York Times newspaper reports that

168 “Syria: SDF calls for help with 'time bomb' ISIL fighters”, Al Jazeera, 18 February 2019.
169 Tom Kington,”45,000 children of Isis ‘are ticking time bomb”, The Times, 8 May 2019.
experts have agreed that in most countries it would be smarter, safer ultimately more humane
to bring ISIS members home for prosecution or surveillance than to leave them stranded in the
desert or to entrust their prosecution by the Iraqi courts. Indeed, “abandoning ISIS followers
to the camps or to Iraqi justice (...) may only postpone a reckoning later on.”

3.2 Government’s interest

As Tanya Mehra, a researcher at the International Center for Counter-Terrorism at The Hague,
stated: “If you leave them there and you lose track of them, sooner or later they’ll try to come
back and you have no clue what’s happened with them.” “At least it’s a controlled risk if you
bring them back.” Moreover, following the handing over of thirteen French nationals
suspected of being Daesh fighters to the Iraqi authorities, who will be tried under Iraqi law,
lawyers denounce that, in addition to the fact that this procedure is not respectful of human
rights, the French intelligence services would benefit from questioning them.

Leaving these children to rot in Syrian camps or detention in Iraq would only delay a bomb
that will one day explode. Associations reported that some division was beginning to form in
the camps between women wishing to return to their countries of origin and those wishing to
remain in Syria and talk about ‘micro-caliphate’. Those wishing to stay put pressure on those
wishing to leave, for example by burning their tents. It must be understood that although the
Islamic state has lost its territory, ideology is still present for many. For example, a British
woman, currently pleading for her return, said that the Manchester Arena attack was
justified.

In the absence of financial resources, the Kurdish forces will not be able to keep these citizens
who are not its own indefinitely. Moreover, now that the war against the Islamic state is “over”,
another battle against Syrian forces, opposed to a Kurdish state, awaits them. Thus, it is easy
to imagine that these children could be sold, or hired as soldiers.

170 Vivian Yee, “Thousands of ISIS Children Suffer in Camps as Countries Grapple With Their Fate”, The New
171 Ibid
172 Ibid
173 « Djihadistes français jugés en Irak : des avocats dénoncent un déni de procès équitable et une perte
174 Inès Daïf, « Dangereuses ou repenties, les « étrangères de Daech » n’ont aucun espoir de retour », Middle East
Eye, 13 March 2019.
175 Lize Dearden, “Shamina Begum: Manchester Arena bombing ‘justified’ because of Syria airstribles, Isis
teenager says”, The Independent, 18 February 2019.
The chances of these children being taken over by violent groups and embroiled in a violent ideology, beyond the control of their states of origin, is therefore extremely high. Raised in violence and hatred of the West, these children with European nationality may one day represent a danger to the West if they are not cared for now.

Therefore, as explained by the various experts, in addition to compliance with international law, the repatriation of these children would for the time being be a safer choice for national security. Respect for international and European law would then be consistent with the protection of national security. It is therefore important that political decisions are based on common sense and respect for international standards, and not influenced by public opinion and election issues.

3.3 The bad faith of the States and the lack of legal arguments

Finally, the inaction of states towards these children, whereas, as demonstrated by this thesis, there are many reasons to do so with regard to diplomatic duties and international legal obligations, is a political decision to turn a blind eye, but above all a decision to act in bad faith. Indeed, French government's behavior is not based on any legal argument. As lawyers point out, little information has been provided by the government about these children since last fall's statement that they will be reduced on a case-by-case basis. Since then, the government has taken almost no action, and one can imagine that this has a link with public opinion, refusing 70% of these children to return to French territory according to a survey. In this sense, the French government is aware of the violation of international law it is committing, but prefers to close its eyes.

The Vienna Convention on the Law of Treaties provides that states undertake to respect their international commitments with good faith: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Although the concept of good faith is difficult to define, it is understandable that states, in their actions and inactions, must not go against the meaning of the texts they have ratified. It is widely accepted that it aims to make the treaty

176 Article 31(1) of the Vienna Convention on the Law of Treaties
apply according to the intention of the state parties rather than regarding the ‘formalistic understanding of the wording’ and then needs to be analysed on a case by case basis.\textsuperscript{177}

In this regard, Lord McNair stated that the interpretation of a treaty with good faith must “giv(e) effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances.”\textsuperscript{178}

However, by allowing these children to live in these abominable conditions, at the risk of their lives, when they are their nationals, and when their families are seeking their return, the states of origin of these children completely contradict the meaning of the ICCPR, the Convention on the Rights of the Child, the European Convention for the Protection of Human Rights, and finally the Vienna Convention on the Law of Treaties. This is what drives French lawyers to talk about cynicism on the part of the state.\textsuperscript{179}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{177} Steven Reinhold, \textit{GOOD FAITH IN INTERNATIONAL LAW, UCL Journal of Law and Jurisprudence}, 61.
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