



[HOME](#) | [ZOOM IN](#) | [ZOOM OUT](#) | [AUTHORS' GUIDELINES](#) | [NEWSLETTER](#) | [ABOUT US](#) | [QIL ETHIC STATEMENT](#)

## CHILDREN IN CONFLICTS AS VICTIMS AND PERPETRATORS? REASSESSING THE DEBATE ON CHILD SOLDIERS IN LIGHT OF THE INVOLVEMENT OF CHILDREN WITH TERRORIST GROUPS

Intra-party sexual crimes against child soldiers as war crimes in Ntaganda. 'Tadić moment' or unwarranted exercise of judicial activism?

by LUCA POLTRONIERI ROSSETTI  
 on Sep 23, 2019

Children associated with terrorist groups in the context of the legal framework for child soldiers

by NINA JORGENSEN on Jun 30, 2019

The children (and wives) of foreign ISIS fighters: Which obligations upon the States of nationality?

by FRANCESCA CAPONE on Sep 23, 2019

War Crimes relating to child soldiers and other children that are otherwise associated with armed groups in situations of non-international armed conflict. An incremental step toward a coherent legal framework?

[NEW QIL RELEASE SCHEDULE](#)

[Press release of the Editorial Board](#)

[THE JOURNAL](#)



Vol. 1 (2014) (forthcoming)  
 Vol. 2 (2015)

[IN THE NEWS / ON THE SPOT](#)

[PAST ISSUES](#)

### ZOOM IN

The latest wave of genocide cases before the International Court of Justice: Unpacking substantive and procedural issues

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Is democracy a challenge to inter-legality?

Third-party participation in international adjudication: recent trends and ongoing issues

The war in Ukraine: An ongoing debate

### ZOOM OUT

The Irreparability of Colonialism

Science before international tribunals: Deference or distrust?

What room for collective reaction to the aggression against Ukraine?

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What are amicus interventions for? Some provocations on non-disputing party submissions in international investment arbitration  
Seeking a pragmatic and creative solution to the challenge of sea-level rise: The case of Tuvalu  
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## The children (and wives) of foreign ISIS fighters: Which obligations upon the States of nationality?

Francesca Capone\*

### 1. Introduction

The presence of Foreign Terrorist Fighters (FTFs) in Syria and Iraq triggers a number of questions that States, individually and collectively, do not seem equipped and/or willing to address. One of the most problematic aspects is represented by the claim, eloquently summarized in a famous tweet from President Trump, that there exists an obligation, incumbent upon FTFs' States of nationality to repatriate them – and their family members – by proactively seeking their return also in the absence of formal mechanisms.<sup>1</sup>

Notably, after the military defeat of ISIS, the Syrian Democratic Forces (SDF) and the Iraqi Government are implementing different approaches to deal with foreign nationals accused of having ties with ISIS. On the one hand the SDF, ie a non-State armed group – opposed to the current Syrian Government – that is exercising governmental functions over part of the Syrian territory with the support of the Global Coalition against Daesh, has declared, on various occasions, that it is not willing nor able to prosecute FTFs and that it is equally not capable of managing the camps where FTFs' family members are held.<sup>2</sup> On the other hand, the Iraqi Government is relying on its sovereign right to prosecute adult FTFs, both men and women, but is asking States of origin to repatriate

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<sup>1</sup> F Capone, 'Is Trump Right? Foreign Fighters and the States' Obligation to Repatriate Them' *Versfassungsblog* (10 March 2019) <verfassungsblog.de/is-trump-right-foreign-fighters-and-the-states-obligation-to-repatriate-them/>.

<sup>2</sup> 'SDF Calls for International Tribunal for ISIL Detainees' (25 March 2019) *Al Jazeera* <www.aljazeera.com/news/2019/03/sdf-calls-international-tribunal-isil-detainees-190325140845893.html>.



children, many of whom are detained on national security-related charges for their alleged association with ISIS.<sup>3</sup>

So far the States most affected by the current situation – including European States – have adopted heterogeneous and even contradictory strategies in relation to the repatriation of FTFs, without ever facing the question of whether they are acting, or not, according to international law. Most States immediately declared their intention to leave FTFs and their family members where they are so that they can face justice locally.<sup>4</sup> In spite of the preponderant view, countries like Russia, Kosovo, Kazakhstan and Indonesia, have proactively sought the repatriation of women and children, the former for security reasons and the latter due to humanitarian concerns.<sup>5</sup> Those efforts, which have been hailed as ‘humanitarian initiatives’ meant to safeguard ‘the rights of vulnerable children and their mothers’,<sup>6</sup> risk being belittled if read merely as gestures of goodwill rather than as actions taken in full compliance with the existing international legal framework. Since the focus of the present article is on the situation of children, and to the extent to which their destinies are entwined also women, affiliated with ISIS, the term ‘family members of FTFs’<sup>7</sup> will be used. This work will not delve into the situation of FTFs – which deserves separate analysis – nonetheless, it is worth stressing that some of the issues analysed in this article, for example in relation to the

<sup>3</sup> ‘Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ UN Doc A/HRC/40/49 (26 December 2018) para 18. According to the Report ‘... as ISIL lost control over most of the territory it had previously held in Iraq and the Syrian Arab Republic, 1,200 children of different foreign nationalities were being held at Rusafa prison in Baghdad’.

<sup>4</sup> R Kennedy, ‘What is Europe’s Approach to Repatriating ISIS Members?’ *Euronews* (7 March 2019) <[www.euronews.com/2019/03/07/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers](http://www.euronews.com/2019/03/07/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers)>.

<sup>5</sup> A Roth, ‘“We aren’t dangerous”: Why Chechnya Has Welcomed Women Who Joined ISIS’ *The Guardian* (2 March 2019) <[www.theguardian.com/world/2019/mar/02/we-arent-dangerous-why-chechnya-has-welcomed-women-who-joined-isis](http://www.theguardian.com/world/2019/mar/02/we-arent-dangerous-why-chechnya-has-welcomed-women-who-joined-isis)>.

<sup>6</sup> ‘Repatriation of Extremist Fighters and Families to Kazakhstan, Welcomed by UN Rights Expert (Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism)’ *UN News* (17 May 2019) <<https://news.un.org/en/story/2019/05/1038711>>.

<sup>7</sup> Notably, whereas most documents on the topic adhere to this terminological choice, others refer to foreign fighters and their families. See ‘Guidance note for National Societies on sharing information related to FFF cases with authorities in European countries in the context of RFL activities’ *ICRC Paris Regional Delegation* (July 2018) 1.



treatment of detainees and the possibility for States of nationality to resort to diplomatic protection, are relevant also to FTFs.<sup>8</sup>

Ever since foreigners started to flock to the Middle East to join the parties involved in the armed conflicts fought in the region, there has been a widespread confusion concerning the use of the terms foreign fighters (FFs) and FTFs. FFs have been defined as ‘individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict’,<sup>9</sup> thus placing the accent on the individuals’ departure from their State of origin in order to support one of the actors, an armed group or a State’s armed forces, engaged in an armed conflict. The term FTFs, instead, refers to ‘individuals who travel 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, including in connection with armed conflict.’<sup>10</sup> This definition, enshrined in a widely commented upon UN Security Council Resolution, calls on Member States to deal specifically with those who travel abroad with a ‘terrorist intent’ as opposed to those who travel abroad only to ‘fight’.<sup>11</sup> Moreover, Resolution 2178

<sup>8</sup> One of the most striking features of the so-called Caliphate – spanning over parts of both Syria and Iraq since its establishment in 2014 – was the ability of ISIS to lure a large number of foreigners. According to the most cited data, in a very short amount of time 41,490 international citizens from more than 80 countries became affiliated with ISIS. Some 5,000 men, women and children travelled from Europe to Syria and Iraq since 2012. An estimated 1,500 individuals have returned to Europe so far, whereas precise information is not always available with regard to those who were born in Syria or Iraq, died, fled elsewhere, have been captured and are currently detained. See J Cook and G Vale, ‘From Daesh to “Diaspora”: Tracing the Women and Minors of Islamic State’ ICSR (2018) 7 <<https://icsr.info/wp-content/uploads/2018/07/ICSR-Report-From-Daesh-to-Diaspora-Tracing-the-Women-and-Minors-of-Islamic-State.pdf>>; T Renard and R Coolsaet (eds), *Returnees: Who are They, Why Are They (Not) Coming back and how Should We Deal with Them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands* (Egmont Paper 2018) 3.

<sup>9</sup> A de Guttry, F Capone, C Paulussen, ‘Introduction’, in A de Guttry, F Capone, C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer/Asser Press 2016) 2. For a detailed overview of the history of the FFs phenomenon and the challenges ahead see D Byman, *Road Warriors. Foreign Fighters in the Armies of Jihad* (OUP 2019).

<sup>10</sup> UN Doc S/RES/2178 (2014) (24 September 2014) preamble.

<sup>11</sup> K Ambos, ‘Our Terrorists, your Terrorists? The United Nations Security Council Urges States to Combat “foreign terrorist fighters”, but Does not Define “Terrorism”’ *EJIL:Talk!* (2 October 2014) <[www.ejiltalk.org/our-terrorists-your-terrorists-the-united-](http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-)



(2014) asks States to criminalize also preparatory acts, a controversial obligation that undermines traditional legal principles such as legal certainty, and passive conducts such as *being recruited* by a terrorist group and *receiving* terrorist training.<sup>12</sup> As a result even individuals – in most instances women and children – who might have been recruited and trained by ISIS, but did not perform combat functions and/or were not directly involved in terrorist activities risk being swiftly labelled as FTFs.

Given the current lack of agreement on the exact meaning of ‘terrorism’ as a legal concept,<sup>13</sup> the definition of FTFs provided in Resolution 2178 (2014) does not offer sufficient guidance to the Member States called to determine whom, exactly, falls within this category. Due to the fact that it is extremely difficult to ascertain whether an individual has committed terrorist offences while in Syria or Iraq, States usually base their initial assessment on the ‘affiliation’ with groups labelled as ‘terrorist’;<sup>14</sup> with 22 States in the EU – and many more around the world – criminalizing *tout court* the membership, participation in or leadership of a terrorist group,<sup>15</sup> or even trying to enter a given territory of a foreign country where certain terrorist groups are active.<sup>16</sup> Therefore, foreigners with ties to ISIS will be – virtually in every case and under every domestic jurisdiction – prosecuted as FTFs and not merely regarded as foreign

nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>; F Capone, ‘Countering “Foreign Terrorist Fighters”: A Critical Appraisal of the Framework Established by the UN Security Council Resolutions’ (2016) 25 *Italian YB Intl L* 227.

<sup>12</sup> L van der Heide, ‘Preventing Terrorism in the Courtroom – The Criminalisation of Preparatory Acts of Terrorism in the Netherlands’ (2015) 26 *Security and Human Rights* 162, 163-164.

<sup>13</sup> Capone (n 11) 237-242.

<sup>14</sup> Ambos, ‘Our Terrorists, your Terrorists?’ (n 11).

<sup>15</sup> B van Ginkel, E Entenmann, ‘The Foreign Fighters Phenomenon in the European Union Profiles, Threats and Policies’ *ICCT* (April 2016) 6 <[www.icct.nl/wp-content/uploads/2016/03/ICCT-Report\\_Foreign-Fighters-Phenomenon-in-the-EU\\_1-April-2016\\_including-AnnexesLinks.pdf](http://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf)>.

<sup>16</sup> For example, the Australian Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 makes it an offence to enter a ‘declared’ area without a legitimate purpose. According to division 119 the Minister for Foreign Affairs may declare such an area in a foreign country when a listed terrorist organization is engaging in a ‘hostile activity’ on that territory. ‘Analysis and Recommendations with regard to the Global Threat from Foreign Terrorist Fighters’, UN Doc S/2015/358 (19 May 2015) para 54. Similarly, France has broadly criminalized ‘having been abroad in a theatre of operations of terrorist groups’, see van Ginkel, Entenmann (n 15) 32.



fighters.<sup>17</sup> Notably, membership in a terrorist organization is a concept that is prone to different (and sometimes questionable) interpretations at the domestic level, and for which no definition is provided at the international or regional levels.<sup>18</sup> With regard to FTFs and their family members, especially young children who most certainly did not choose to become part of ISIS, affiliation with or membership in a terrorist organization cannot constitute legitimate grounds for indefinite deprivation of liberty and conviction without any evidence.<sup>19</sup> In fact, any law that criminalizes and sanctions material support and association with terrorists has to comply with the requirements of legality and judicial guarantees, and, in the case of children, detention and prosecution must always be seen as measures of last resort.<sup>20</sup>

In light of these preliminary considerations, the present article aims at clarifying which specific issues emerge in relation to FTFs' accompanying family members and at investigating the current situation through the lenses of international law. Reference will be made in particular to international humanitarian law, international counter-terrorism law, the law of diplomatic and consular relations and international human rights law, in order to determine, first, whether States of nationality have an

<sup>17</sup> The difference is utterly important, as the present author has explained elsewhere '[i]n most countries fighting abroad does not automatically amount to an offence. Foreigners may face criminal charges for participating in a non-international armed conflict because they do not enjoy combatant status; or they can be charged if a national law makes it illegal to enlist in a foreign army at war with a State at peace with their country of origin'. Capone (n 11) 229.

<sup>18</sup> Council Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6, art 2(3): "'terrorist group" means a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; "structured group" means a group that is not randomly formed for the immediate commission of an offence and that *does not need to have formally defined roles for its members, continuity of its membership or a developed structure*' (emphasis added).

<sup>19</sup> "'Everyone Must Confess". Abuses against Children Suspected of ISIS Affiliation in Iraq' *Human Rights Watch* (6 March 2019) 15-10 <[www.hrw.org/sites/default/files/report\\_pdf/iraq0319\\_web\\_1.pdf](http://www.hrw.org/sites/default/files/report_pdf/iraq0319_web_1.pdf)>.

<sup>20</sup> 'Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Note by the Secretary-General' UN Doc A/64/211 (3 August 2009) para 53. See also N Quénivet, 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 EJIL 433, 451-453; 'UN Standard Minimum Rules for the Administration of Juvenile Justice' (Beijing Rules), UNGA Res 44/33 (29 November 1985).



obligation to repatriate at least the wives and children of foreign ISIS fighters and, second, which are the other obligations, e.g. the obligation to rehabilitate and reintegrate children formerly associated with ISIS, that it is possible to infer from the current international legal framework. Finally, further aspects – e.g. the extent to which non-State armed groups are bound by human rights law, the international responsibility of third States that provide support to the SDF and the possibility to implement measures locally in lieu of repatriation – will not be addressed in the course of the present analysis as, in this author's view, they deserve proper consideration in their own right.

## 2. *Foreign women and children affiliated with ISIS*

In order to lay the groundwork for the discussion about the relevance and applicability of the current international legal framework, the next sections will provide a brief overview of what is known, so far, about the role played by women and children affiliated with ISIS and the responses that States are implementing towards them.

### 2.1. *The role of women in the ranks of ISIS*

In the aftermath of the first two waves of FTFs returnees, respectively in 2013-2014 and in early 2015,<sup>21</sup> a lenient approach has been implemented towards female FTFs, moving from the assumption that they only played ancillary roles and therefore could not pose any significant threat to national security.<sup>22</sup> Nowadays, the evolving understanding of female FTFs shows that the depiction of women as 'jihadi brides' or *Muhajirat*, ie female migrants, is not adequate to grasp the complexity of women's contribution to ISIS and more in general their role as participants in Islamist insurgencies.<sup>23</sup> Recent studies, in fact, present a picture that challenges the narrow-minded narrative of females as hopeless and passive

<sup>21</sup> European Parliamentary Research Service (EPRS), 'The Return of Foreign Fighters to EU Soil Ex-post Evaluation' (5 May 2018) <[www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS\\_STU\(2018\)621811\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf)>.

<sup>22</sup> *ibid* 36.

<sup>23</sup> M Loken, A Zelenz, 'Explaining Extremism: Western Women in Daesh' (2017) 3 *European J Intl Studies* 45, 51.



individuals lured to the Middle East and forced to join ISIS against their will.<sup>24</sup> The proactive role of women and girls has been attributed to a shift in ISIS position on the status of women in combat roles, occurred between 2015 and 2018. It was the group itself – weakened by the armed attacks and the increasing military defeats – that allowed women to perform more active roles by publicly stating that ‘it is obligatory for women to take up arms’.<sup>25</sup>

As is well known, since the establishment of the Caliphate, women became members of the Al-Khansaa brigade and have been actively involved in propaganda and recruitment, grooming other women and girls online. Nowadays, it is also ascertained that women in the ranks of ISIS have often received sniper training, carried Kalashnikovs and worn suicide vests.<sup>26</sup> Girls recruited into ISIS have also been trained in how best to support husbands to whom they may have been married from the age of nine. While they may have not engaged in combat roles, girls have been generally referred to as ‘sisters of the Islamic State’ alongside adult females.<sup>27</sup>

The recent insights into women's increasing involvement in recruitment and other activities have resulted in changing practices in several different countries of origin, also across Europe. A study by the Egmont Institute – featuring analyses of policies for returnees in Belgium, Germany, and the Netherlands by prominent counter-terrorism scholars – confirmed that in these three EU Member States ‘[u]ntil recently, women were treated with more clemency, but this has now come to an end’.<sup>28</sup> For example in Germany for several years male FTFs were automatically subject to criminal investigation upon arrival, whereas evidentiary thresholds were much higher in order for women to be investigated upon return. However, starting from December 2017, Germany’s federal judicial authorities announced a tougher judicial stance on female returnees to remove gender discrepancies in investigation and prosecution practices.<sup>29</sup> This entails that, upon their return or after their repatriation, female

<sup>24</sup> *ibid* 52-53.

<sup>25</sup> Cook, Vale, ‘From Daesh to “Diaspora”’ (n 8) 28.

<sup>26</sup> AJ Gielen, ‘Exit Programmes for Female Jihadists: A Proposal for Conducting Realistic Evaluation of the Dutch Approach’ (2018) 33 *Intl Sociology* 454, 455-456.

<sup>27</sup> EPRS, ‘The Return of Foreign Fighters’ (n 21) 37.

<sup>28</sup> Renard and Coolsaet (n 8) 4.

<sup>29</sup> EPRS, ‘The Return of Foreign Fighters’ (n 21) 46.



FTFs are likely to face criminal investigation – if not already initiated in *absentia* – and administrative and/or criminal measures.

## 2.2. *Children of ISIS as a ‘Ticking Time Bomb’?*

Children in the ranks of ISIS have been often defined as a ‘ticking time bomb’, also by the EU Counter Terrorism Coordinator, who recently warned States about the worrying fate of children detained in Iraq if they – and their mothers – do not have access to effective disengagement and deradicalization processes.<sup>30</sup>

Generally speaking children associated with armed forces or armed groups get there in one of three ways: they are abducted or conscripted through force or serious threats; they present themselves and become enlisted/enrolled; or they are born into armed forces or groups.<sup>31</sup> Unlike other non-State armed groups/terrorist organizations, under the ISIS rule child soldiering affected the whole family unit as many adults who moved to Syria and Iraq brought their next of kin along with them or started a family there.<sup>32</sup> Fighters were encouraged to train their children to become the next generation of jihadists, ‘lion cubs’ (or *ashbal*),<sup>33</sup> allowing ISIS to forge and groom its more loyal members. There is compelling evidence that in the ranks of ISIS children as young as six have been exposed to jihadi indoctrination and that they started to receive military training at the age of nine.<sup>34</sup> As a result, the widespread fear that children

<sup>30</sup> T Kingston, ‘45,000 Children of ISIS “Are Ticking Time Bomb”’ *The Times* (8 May 2019) <[www.thetimes.co.uk/article/45-000-children-of-isis-are-ticking-time-bomb-lp0nq9q2m](http://www.thetimes.co.uk/article/45-000-children-of-isis-are-ticking-time-bomb-lp0nq9q2m)>.

<sup>31</sup> M Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 132; F Capone, *Reparations for Child Victims of Armed Conflict: State of the Field and Current Challenges* (Intersentia 2017) 50-51.

<sup>32</sup> M Bloom, J Horgan, ‘The Rise of the Child Terrorist’ *Foreign Affairs* (9 February 2015) <[www.foreignaffairs.com/articles/middle-east/2015-02-09/rise-child-terrorist](http://www.foreignaffairs.com/articles/middle-east/2015-02-09/rise-child-terrorist)>; F Capone, ‘“Worse” than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL’ (2017) 17 *Intl Criminal L Rev* 161, 175-176.

<sup>33</sup> N Benotman, N Malik, ‘The Children of Islamic State’ Quilliam Foundation (7 March 2016) 25-27 <[www.quilliaminternational.com/quilliam-releases-report-on-children-in-the-caliphate/](http://www.quilliaminternational.com/quilliam-releases-report-on-children-in-the-caliphate/)>.

<sup>34</sup> ‘Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic’ UN Doc S/2018/969 (30 October 2018) para 17. A Almohammad, ‘ISIS Child Soldiers in Syria: The Structural and Predatory Recruitment, Enlistment, Pre-Training Indoctrination, Training, and Deployment’ *ICCT* (19 February 2018) 19-22



could represent a serious security threat has informed all the decisions made so far by their States of nationality. More in detail, even though most States have declared their intention to consider children – at least those under the age of 10 – as victims rather than perpetrators or potential terrorists,<sup>35</sup> in practice only a handful of Governments have proactively sought to bring them back home, alone or alongside their mothers. As international pressure on the matter is mounting, child rights experts insist on the risk of double victimization for the children who, after being abducted, recruited, used and exposed to violence at an early age,<sup>36</sup> continue to live in extremely dire conditions, conducive to further abuses and human rights violations.<sup>37</sup> The repatriation of women and children is widely regarded as the only viable option to ensure their well-being and at the same time neutralize further security threats.<sup>38</sup> The question of whether repatriating the family members of FTFs should be framed as an obligation, rather than as a desirable outcome informed by security and humanitarian considerations, still needs to be examined through the prism of international law.

<https://icct.nl/publication/isis-child-soldiers-in-syria-the-structural-and-predatory-recruitment-enlistment-pre-training-indoctrination-training-and-deployment/>.

<sup>35</sup> Belgium, for example, has openly declared its willingness to readmit to its territory only children under the age of 10 (without actively pursuing their repatriation, but by simply allowing relatives to bring them back), and to treat the older ones on a case-by-case basis. T Renard and R Coolsaet, 'Children in the Levant: Insights from Belgium on the Dilemmas of Repatriation and the Challenges of Reintegration' *Egmont Institute* (11 July 2018) 4-5 <[www.egmontinstitute.be/content/uploads/2018/07/SPB98-Renard-Coolsaet\\_v2.pdf?type=pdf](http://www.egmontinstitute.be/content/uploads/2018/07/SPB98-Renard-Coolsaet_v2.pdf?type=pdf)>.

<sup>36</sup> 'Report of the Special Representative of the Secretary-General for Children and Armed Conflict' (n 3) para 17.

<sup>37</sup> 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq' Statement by UNICEF Executive Director Henrietta Fore (21 May 2019) <[www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq](http://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq)>. According to the statement '[t]hese children are "doubly rejected" – stigmatized by their communities and shunned by their governments. They face massive legal, logistical and political challenges in accessing basic services or returning to their countries of origin.'

<sup>38</sup> F D Ní Aoláin, 'Time to Bring Women and Children Home from Iraq and Syria' *Just Security* (4 June 2019) <[www.justsecurity.org/64402/time-to-bring-women-and-children-home-from-iraq-and-syria/](http://www.justsecurity.org/64402/time-to-bring-women-and-children-home-from-iraq-and-syria/)>.



### 3. *The obligation of States of nationality to repatriate the family members of FTFs*

Prior to delving into the question of whether the current international legal framework imposes on States of nationality an obligation to repatriate the family members of FTFs and which other relevant obligations stem from it, an important caveat is needed as arguing in favour of the adoption of proactive measures to facilitate the return of women and children is not the same thing as claiming that if they are released and somehow succeed in traveling back to their countries of origin they would have to be allowed entry. The latter scenario is rather implausible,<sup>39</sup> but also easier to sort out.<sup>40</sup> As is well known, under both customary international law and human rights law admission to a State primarily depends on nationality.<sup>41</sup> The essence of nationality, which has eloquently been defined as ‘an institution of domestic law [with] consequences in international law’,<sup>42</sup> can be said to lie in the State’s duty to admit its nationals and allow them to reside within its territory. Such a duty exists first and foremost *vis-à-vis* other States, meaning that it is an obligation that is needed to balance States’ sovereign prerogative to regulate the presence of foreigners on their territory.<sup>43</sup>

Under international human rights law the State’s obligation to admit its nationals is mirrored by the individual’s right to enter and reside free from expulsion in his/her country of nationality.<sup>44</sup> Pursuant to Article

<sup>39</sup> T Mehra and C Paulussen, ‘The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking’ *ICCT* (6 March 2019) <<https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>>.

<sup>40</sup> This scenario has been already analysed, although more succinctly, elsewhere see Capone (n 1).

<sup>41</sup> As clarified by the International Court of Justice (ICJ) nationality is determined by one’s social ties to the country of one’s nationality, and when established, gives rise to rights and duties on the part of the State, as well as on the part of the citizen/national. *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep 4.

<sup>42</sup> I Shearer, B Opeskin, ‘Nationality and Statelessness’, in B Opeskin, R Perruchoud, J Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2012) 93.

<sup>43</sup> A Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights’, in A Edwards, L van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 11; A Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012) 16.

<sup>44</sup> *ibid* 17.



13(2) of the Universal Declaration of Human Rights (UDHR), ‘everyone has the right to leave any country, including his own, and to return to his country’,<sup>45</sup> Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) further provides that ‘no one shall be *arbitrarily* deprived of the right to enter his own country’.<sup>46</sup> The Human Rights Committee (HRC) in its General Comment No. 27 clarified that the reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State’s actions and that there are few, if any, circumstances in which restrictions of the right to enter one’s own country could be reasonable.<sup>47</sup> The HRC also explained that States parties must not, by stripping a person of nationality, arbitrarily prevent this person from returning to his or her own country and that they cannot prevent a person from coming to the country of nationality ‘for the first time if he or she was born abroad’.<sup>48</sup> Notably, most States’ nationality laws feature a set of rules – alongside those which elaborate the conditions for acquisition of nationality – which stipulate the grounds upon which a national can lose or be deprived of that nationality. The surge in FTFs mobilizing around the world, and nowadays seeking to return to their countries of origin, has ignited the debate and triggered new questions on denationalization as legitimate policy instruments. As explained by van Waas in her analysis of the extent to which the emerging State practice is conflicting with international human rights standards,<sup>49</sup> revoking nationality as a measure to prevent the return of FTFs is a violation of international law, often combined with the breach of the duty to avoid statelessness<sup>50</sup> and the principle of non-discrimination.<sup>51</sup> Deprivation of

<sup>45</sup> UDHR (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>46</sup> ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (emphasis added).

<sup>47</sup> HRC ‘General Comment No 27: Article 12 (Freedom of Movement)’, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) paras 11-18.

<sup>48</sup> *ibid* para 19.

<sup>49</sup> L van Waas, ‘Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications’, in de Guttry, Capone, Paulussen (eds) (n 9) 469, 476-480.

<sup>50</sup> ‘Under the 1961 UN Convention on the Reduction of Statelessness, deprivation of nationality may only lead to Statelessness in very specific cases which are provided for explicitly by this instrument—and which must be embedded in domestic law in order to be invoked’. *ibid* 481.

<sup>51</sup> S Mantu, ‘“Terrorist” Citizens and the Human Right to Nationality’ (2018) 26 J Contemporary European Studies 31-33.



nationality clearly comes into play also with regard to the repatriation of FTFs and their families as, according to some Governments, resorting to this action ‘releases’ them from the obligation to proactively seek the return of their nationals.<sup>52</sup> As the next sections will show, even though it is not possible to pin down a ‘strict obligation under international law’ to repatriate the family members of FTFs,<sup>53</sup> several other commitments established under different fields of international law – in particular international humanitarian law, international counter-terrorism law, the law of diplomatic and consular relations and human rights law – argue in favour of said obligation and corroborate the argument that States of nationality cannot shrug off responsibility for the fate of children and women still located in Syria and Iraq.

### 3.1. *International humanitarian law*

Since women and children have been deprived of their liberty – ie they are in overcrowded prisons in Iraq and confined indefinitely and without procedural guarantees in camps under the authority of the SDF in Syria – it is utterly important to shed light on the grounds upon which they are currently held as this also contributes to frame the obligations of States of nationality.

Without lingering on the degree to which international law regulates the procedural aspects of security detention or ‘internment’ in armed conflicts – more specifically in those not of an international character – which has already been the subject of extensive scholarly debate,<sup>54</sup> what is worth underscoring here is that the IHL rules applicable to non-international armed conflicts (NIACs) ‘do not constrain States’ detention

<sup>52</sup> Emblematic in this regard is the UK Government’s decision to strip Ms Shamima Begum of her citizenship after she asked to be repatriated to the UK. The highly criticized choice of the UK left Ms Begum *de facto* Stateless as a possible second citizenship was denied by the Bangladeshi Government, and led to the death of her child in the SDF-controlled Al-Hol camp in the Northern part of Syria. See NHB Jørgensen, ‘Children Associated with Terrorist Groups in the Context of the Legal Framework for Child Soldiers’ (2019) 60 *QIL*-Questions Intl L 5, 6.

<sup>53</sup> C Paulussen, ‘The Repatriation of Western Foreign Fighters and their Families’ *ISPI Commentary* (28 June 2019) <[www.ispionline.it/en/publicazione/repatriation-western-foreign-fighters-and-their-families-23409](http://www.ispionline.it/en/publicazione/repatriation-western-foreign-fighters-and-their-families-23409)>; Capone (n 1).

<sup>54</sup> L Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016); R Goodman, ‘The Detention of Civilians in Armed Conflict’ (2009) 103 *AJIL* 48.



power' and States are thus free to act in accordance with their own national law and policy choices.<sup>55</sup> In other words, the legal basis to detain, also preventively,<sup>56</sup> in a NIAC cannot be found in IHL – which is nonetheless relevant as it provides an 'inherent power to detain'<sup>57</sup> and 'conditions the authority to detain on compliance with procedural guarantees and humane treatment of detainees' –<sup>58</sup> but must rest elsewhere, principally in domestic law (either of the State that detains, in the case of Iraq, or of the State on whose territory the detention or internment occur, in the case of Syria). Since in NIACs, all detention issues fall within the sovereign interests of a single State, 'domestic law applies to detention grounds and procedures *as tempered by human rights law obligations*'.<sup>59</sup> Meaning, *inter alia*, that any deprivation of liberty, including internment,<sup>60</sup> must be based on grounds established in law,<sup>61</sup> in addition to being non-arbitrary 'in a broader sense'<sup>62</sup> and in line with existing treatment standards and procedural safeguards.<sup>63</sup> In fact, the relevant rules of IHRL

<sup>55</sup> *ibid* 50. Exceptionally, the authorization to detain may arise out of other branches of international law, eg it may be contained in United Nations Security Council Resolutions authorizing the use of force. See L Hill-Cawthorne, D Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' EJIL: Talk! (7 May 2014) <[www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/](http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/)>; commenting the famous judgment *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

<sup>56</sup> Preventive security detention or 'internment' is defined as a deprivation of liberty ordered by the executive on the basis of future security threat without criminal charge. Hill-Cawthorne (n 54) 2.

<sup>57</sup> *ibid* 107. As famously argued by Goodman 'States have accepted more exacting obligations under IHL in international than in non-international armed conflicts. ... [I]f States have authority to engage in particular practices in an international armed conflict [e.g. detention], they a fortiori possess the authority to undertake those practices in non-international conflict'. Goodman (n 54) 50.

<sup>58</sup> R Goodman, D Jinks, 'International Law, U.S. War Powers, and the Global War on Terror' (2005) 118 *Harvard L Rev* 2653, 2659-61.

<sup>59</sup> G Rona, 'International Law, Targeting, and Detention in the Age of International Terrorism' *Just Security* (16 November 2015) 2 (emphasis added) <[www.justsecurity.org/27674/international-law-targeting-detention-age-international-terrorism/](http://www.justsecurity.org/27674/international-law-targeting-detention-age-international-terrorism/)>.

<sup>60</sup> Hill-Cawthorne (n 54) 120-122.

<sup>61</sup> HRC, 'Concluding Observations: Trinidad and Tobago', UN Doc CCPR/CO/70/TTO (10 November 2000) para 16; *Medvedyev and others v France*, App No 3394/03 (Judgment [GC], 29 March 2010) para 80.

<sup>62</sup> Not to be equated with 'against the law', but interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. See HRC, *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) para 5.8.

<sup>63</sup> Hill-Cawthorne (n 54) 116-133.



provide various procedural and substantive guarantees, including the right of *habeas corpus*, the right to be promptly informed of the reasons of detention, access to a lawyer, and the right to periodic review of the necessity for continued detention, in cases of security detention.<sup>64</sup>

In relation to women and children – who, on the basis of their roles in the ranks of ISIS,<sup>65</sup> could be classified as either ‘indirect participants in hostilities’<sup>66</sup> or ‘non-participant in hostilities’ – their detention and internment in Iraq and Syria is clearly not status-based but grounded, respectively, on Iraqi law (which, notably, does not allow someone’s detention because a spouse or parent was a member of ISIS)<sup>67</sup> or on the claim that they pose a security threat,<sup>68</sup> a condition that would require a specific determination on an individual basis and cannot be assessed collectively on the basis of a connection, tenuous or otherwise, with a terrorist organization.<sup>69</sup> Therefore, both the grounds upon which women and children are currently deprived of their liberty and the (dire) conditions of detention and internment should raise major concerns and have a bearing on the responses and strategies of their States of nationality.

### 3.2. *International counter-terrorism law*

As is well known, a plethora of international norms, institutions, and procedures specifically designed to deal with terrorism has emerged over

<sup>64</sup> Z Mogessie Teferra, ‘National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law’ (2018) 98 *IRRC* 961, 980.

<sup>65</sup> As discussed in paras 2.1 and 2.2 of the present article.

<sup>66</sup> Goodman defines indirect participation in relation to ‘civilians who support the armed forces (or armed groups) by supplying labour, transporting supplies, serving as messengers or disseminating propaganda are not direct participants, but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies’, moreover ‘indirect participation also includes members of organizations whose object is to cause disturbances’. Goodman (n 54) 54.

<sup>67</sup> B Van Esveld, ‘Iraq/KRG: 1,400 Women, Children From ISIS Areas Detained’ *Human Rights Watch* (20 September 2017) <[www.hrw.org/news/2017/09/20/iraq/krg-1400-women-children-isis-areas-detained](http://www.hrw.org/news/2017/09/20/iraq/krg-1400-women-children-isis-areas-detained)>.

<sup>68</sup> M Sassöli, ‘The Concept of Security in International Law Relating to Armed Conflicts’, in CM Bailliet (ed) *Security: A Multidisciplinary Normative Approach* (Martinus Nijhoff Leiden 2009) 7; Mogessie Teferra (n 64) 971-975.

<sup>69</sup> Goodman (n 54) 53-55.



the past 50 years.<sup>70</sup> Without delving in the complexity of the legal framework established to counter terrorism at the international level, the aim of this section is to briefly sketch out which instruments can contribute to outlining States' obligation to repatriate their nationals, in particular women and children. International counter-terrorism law comprises disparate norms stemming from different sources, mainly counter-terrorism treaties and Security Council Resolutions.<sup>71</sup> Notably, the numerous counter-terrorism treaties that have been adopted so far have been described as 'sectoral' as they require States parties to criminalise particular methods of transnational violence commonly used by terrorists, establish extensive jurisdiction over specific offences, and investigate, apprehend and 'prosecute or extradite' individual perpetrators.<sup>72</sup> Furthermore – since sectoral counter-terrorism treaties are generally limited to transnational offences – violence in non-international armed conflicts that are purely domestic is not covered by those instruments.<sup>73</sup>

On the other hand UN Security Council Resolutions – which since 2001 have required broader legislative and enforcement measures to be taken by States against terrorist threats in general – find application also in situation of armed conflicts, international and NIACs, even though their relationship with IHL is only vaguely delineated and no guidance is provided to address potential conflicts of norms between the two areas.<sup>74</sup> With regard to the phenomenon of FTFs, the UN Security Council has expressly recognized and underscored the peculiarities attached to the status of women and children in Resolution 2396 (2017), which has been described as going significantly further than its predecessor, ie Resolution 2178 (2014), in several respects.<sup>75</sup> Resolution 2396 (2017) calls upon

<sup>70</sup> L van den Herik, N Schrijver, 'The Fragmented International Legal Response to Terrorism', in L van den Herik, N Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 20-25; B Saul, 'The Emerging International Law of Terrorism' in B Saul (ed), *Terrorism: Documents in International Law* (Hart 2012) 67; Capone (n 11) 237-242.

<sup>71</sup> B Saul, 'Terrorism and International Humanitarian Law' in B Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 208-231.

<sup>72</sup> A Bianchi, Y Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011).

<sup>73</sup> Saul (n 71) 219.

<sup>74</sup> *ibid.*

<sup>75</sup> H Duffy, *Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework* (OSCE/ODIHR 2019) 17.



Member States to assess and investigate individuals whom they have reasonable grounds to believe are terrorists or foreign terrorist fighters, and also to ‘*distinguish them from other individuals, including their accompanying family members who may not have been engaged in foreign terrorist fighter-related offenses*’.<sup>76</sup> Furthermore, the Resolution underlines that

‘... women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and *require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities.*’<sup>77</sup>

Finally, it is worth stressing that Resolution 2396 (2017) urges Member States to ensure consular access to their own detained nationals, in accordance with applicable domestic and international law, in particular international human rights law.<sup>78</sup> This and the other references to international law present in the text restate the importance of implementing all the obligations identified by the UN Security Council – including the obligations to differentiate between FTFs and their family members and to guarantee access to consular assistance to detained nationals – in a way that is compatible with the wider spectrum of relevant international commitments undertaken by UN Member States.

### 3.3. *The law of diplomatic and consular relations*

The law of diplomatic and consular relations encompasses a set of well-established norms, of which the Vienna Convention on Diplomatic Relations (VCDR)<sup>79</sup> and the Vienna Convention on Consular Relations (VCCR) constitute the core.<sup>80</sup> Both the VCDR and the VCCR (respec-

<sup>76</sup> UN Doc S/RES/2396 (2017) (21 December 2017) para 4.

<sup>77</sup> *ibid* para 31.

<sup>78</sup> *ibid* preamble and para 6.

<sup>79</sup> VCDR (adopted 18 April 1961, entered into force 24 June 1964) 500 UNTS 95.

<sup>80</sup> VCCR (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.



tively under Article 3 and Article 5) list among the basic functions of diplomatic missions and consular posts ‘protecting in the receiving State the interests of the sending State and of its nationals’. Moreover, the VCCR places particular emphasis on States’ duty to safeguard the interests of minors, particularly where any guardianship or trusteeship is required.<sup>81</sup> When foreigners, including FTFs and their family members, are captured and detained, or interned in camps, by a third State or a non-State actor as in the case of the SDF, questions arise with regard to the possible exercise of diplomatic protection in response to violations of the ‘international minimum treatment standard’ of aliens abroad.<sup>82</sup> The expression ‘diplomatic protection’ is used both formally, ie referring to the protection exercised by a State following exhaustion of local remedies by one of its nationals, and informally, ie the ‘protection of nationals’ as practiced by diplomatic missions and consular posts under customary international law and treaty law.<sup>83</sup>

Diplomatic protection in its formal sense is defined by the International Law Commission (ILC) in its Draft Articles as meaning ‘the invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for an injury caused by an internationally wrongful act to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility’.<sup>84</sup> Formal diplomatic protection under customary international law is a right that belongs to the State and each State could choose not only the timing and extent of any action, but first and foremost whether it would take any action at all.<sup>85</sup> Notably, a controversial proposal to impose on States

<sup>81</sup> Art 5(h) VCCR.

<sup>82</sup> On how the ‘international minimum treatment standard’ has been enriched, if not substituted, by human rights law see V Pergantis, ‘Towards a “Humanization” of Diplomatic Protection?’ (2006) 66 *ZaöRV* 351, 356-357; E Milano, ‘Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?’ (2004) 35 *Netherlands YB Intl L* 85, 103, 137-138.

<sup>83</sup> See E Denza, ‘Nationality and Diplomatic Protection’ (2018) 65 *Netherlands Intl L Rev* 463, 473.

<sup>84</sup> *ibid* 466. See ILC, ‘Draft Articles on Diplomatic Protection’ (6 November 2006) UN Doc A/CN.4/L.684.

<sup>85</sup> A Vermeer-Künzli, ‘As If: The Legal Fiction in Diplomatic Protection’ (2007) 18 *European J Intl L* (2007) 37; W Karl Geck, ‘Diplomatic Protection’, in R Bernhardt (ed), *Encyclopedia of Public International Law* vol 1 (North-Holland 1992) 1056; M Bennouna, ‘Preliminary Report on Diplomatic Protection’ (4 February 1998) UN Doc A/CN.4/484, paras 19-20.



a limited duty to exercise diplomatic protection where the fundamental rights of their nationals are violated abroad was rejected by the ILC in 2000,<sup>86</sup> conveying the powerful message that ‘the golden rule of State discretion is alive and well’.<sup>87</sup> This, however, does not remove from the equation the human rights dimension of diplomatic protection and the rise of the individual as a subject of, or rather a participant in, international law.<sup>88</sup> In fact, an examination of the relevant domestic, and in some cases constitutional, provisions and their interpretation by national courts suggests that States’ discretion in deciding the exercise or not of diplomatic protection is not absolute.<sup>89</sup> In interpreting and applying municipal laws the national courts of States such as South Africa, Canada, the United Kingdom and Germany over the years have confirmed a general trend towards the affirmation of the justiciability of executive decisions to exercise diplomatic protection in light of the fact that every citizen has a ‘legitimate expectation’ that he/she will be afforded diplomatic protection, especially when his/her fundamental rights are violated abroad, and that refusals are not exempt from judicial scrutiny.<sup>90</sup> Notably, the standard for claiming that a Government has failed to respond appropriately to a request for diplomatic protection would be, in the words of, respectively, the Constitutional Court of South Africa and the

<sup>86</sup> YB Intl L Commission, 2000, vol II, 215, para 32. See Pergantis (n 82) 371-378; D Russo, ‘The Injured Individual’s Right to Compensation in the Law on Diplomatic Protection’ (2016) 99 *Rivista Diritto Internazionale* 725, 728-730; J Dugard, ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) 24 *Australian YB Intl L* 75, 76-79.

<sup>87</sup> N Karazivan, ‘Diplomatic Protection: Taking Human Rights Extraterritorially’ (2007) 44 *Canadian YB Intl L* 299, 301.

<sup>88</sup> Milano (n 82) 137.

<sup>89</sup> Karazivan (n 87) 300.

<sup>90</sup> For example, in the famous case of *Abbasi v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, the English Court of Appeal confirmed that there was no enforceable right to protection under UK law, but found that the discretion of the UK Government might be judicially reviewed if it could be shown that it had been exercised irrationally or without regard for legitimate expectation. *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598. See Denza (n 83) 467.



Federal Constitutional Court of Germany, the ‘irrationality of the government's decision’<sup>91</sup> or its ‘total incomprehensiveness’.<sup>92</sup> So far the decision not to repatriate FTFs’ family members taken by the Governments of several States, also European, has been challenged on those grounds only before French national courts.

More in detail, France’s top administrative court, ie the *Conseil d’Etat*, on 23 April 2019 rejected the demands for repatriation made by two French nationals for their daughter and her children, currently held in Syria.<sup>93</sup> The claimants asked the court to, *inter alia*, reverse the decision of the lower court, which applied the theory of the *acte de gouvernement* to justify its lack of jurisdiction,<sup>94</sup> and recognize instead France’s obligation to repatriate its nationals who are exposed to severe human rights violations and could not access local remedies whilst in the SDF camp.<sup>95</sup> The *Conseil d’Etat* found that it lacks jurisdiction, as proactively seeking the return of French nationals would require the State’s engagement in negotiations with foreign authorities or even its intervention on a foreign territory. These conducts, according to the Court, fall under the remit of France’s international relations,<sup>96</sup> and – contrary to the domestic developments referred to above – are, thus, exempted from judicial scrutiny.

As anticipated above, the expression ‘diplomatic protection’ is also used informally to mean the assistance given by diplomatic missions and consular posts to their nationals. In furtherance of this objective, missions and consular posts operate facing a number of legal, practical and financial hurdles, and perform a wide range of protective functions. Those functions range from the sensitive political assistance – which may be required by a person unjustly imprisoned or charged – through administrative functions such as renewal of a passport or registration of a birth

<sup>91</sup> Constitutional Court of South Africa, *Kaunda v President of the Republic of South Africa* (2005) 4 South African L Reports 235 (CC), 44 I.L.M. 173, 35.

<sup>92</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) 2 BvR419/80 (16 December 1980) 395-398.

<sup>93</sup> *Conseil d’Etat* Décision No 429668, Ordonnance du 23 avril 2019.

<sup>94</sup> *ibid* 2.

<sup>95</sup> On the exception to the exhaustion of local remedies rule see ILC, ‘Draft Articles on Diplomatic Protection’ (n 84) art 15. See also C F Amerasinghe, *Diplomatic Protection* (OUP 2008) chapter 11.

<sup>96</sup> *Conseil d’Etat* Décision No 429668 (n 93) 5.



or death to practical assistance with return home or following a robbery.<sup>97</sup> At the moment – setting aside the fact that most European States have cut off diplomatic relations with Syria – there is no agreement either on the question of whether a national has a legal right or, again, merely a legitimate expectation, of receiving protection from his own Embassy or consular post, nor is there uniformity amongst States – not even EU Member States – on the extent of protection offered by individual missions or posts.<sup>98</sup>

Remarkably, the question of whether an obligation to provide assistance to the family members of FTFs is incumbent upon the diplomatic and consular services has recently been brought before the Belgian courts. The lower court ordered that Belgium should do everything in its powers to bring back six children and their mothers – the latter tried and convicted *in absentia* by Belgian courts – from the Al-Hol camp in Syria.<sup>99</sup> The court ruled that the best interest of the children should be upheld by all Belgian authorities, including the Belgian diplomatic and consular services, and it further stated that, according to the Code of Consular Affairs, Belgian citizens are entitled to consular assistance when they find themselves in extreme circumstances. Even though the mothers might no longer be entitled to consular assistance in light of the conviction the same cannot be claimed with regard to the children.<sup>100</sup> Therefore, the court ordered Belgium to organize the travel within 40 days after being notified of the decision or pay a daily penalty of 5,000 euros for each child up to a maximum 1 million euros. The decision, immediately appealed by the Belgian Government – worried that it could set a dangerous precedent – has been overturned in February 2019, when the Appeals Court ruled that Belgium has no obligation to bring back the children and their mothers.<sup>101</sup> Notwithstanding the alleged lack of a legal ob-

<sup>97</sup> See Denza (n 83) 474.

<sup>98</sup> *ibid* 475.

<sup>99</sup> Royaume de Belgique, Affaires étrangères, Commerce extérieur et Coopération au Développement, ‘Ordonnance du 26 décembre 2018 dans l’affaire Tatiana Wielandt et Bouchra Abouallal contre l’Etat belge’ (29 January 2019) <[https://diplomatie.belgium.be/fr/newsroom/nouvelles/2019/ordonnance\\_dans\\_affaire\\_tatiana\\_wielandt\\_et\\_bouchra\\_abouallal](https://diplomatie.belgium.be/fr/newsroom/nouvelles/2019/ordonnance_dans_affaire_tatiana_wielandt_et_bouchra_abouallal)>.

<sup>100</sup> Mehra, Paulussen (n 39) 4.

<sup>101</sup> *ibid*.



ligation, the Belgian Government reiterated its commitments to differentiate between the mothers and the children, allowing the latter to enter the country, without, however, admitting responsibility for facilitating and seeking their return.<sup>102</sup> The Belgian lower court's decision, although swiftly reversed, still represents an important milestone and it could act as a wake up call for other national courts across Europe.

### 3.4. *International human rights law*

The widespread set of human rights violations to which foreign women and children are currently exposed in Iraqi prisons as well as in the SDF camps triggers additional and important questions concerning the application of human rights treaties beyond national borders. If, on the one hand, it is true that the States of nationality are not directly responsible for the breaches suffered by their citizens, on the other hand it is undeniable that the extraterritorial reach of human rights treaties is no longer disputed,<sup>103</sup> although the extent to which States parties owe their human rights obligations abroad remains uncertain.<sup>104</sup> With regard to the situation of women and children in Iraq, it is worth underscoring

<sup>102</sup> Notably, Belgium is amongst the European States resorting to DNA test to determine if children of FTFs have a legitimate claim to Belgian citizenship. More in detail '[f]or the children born in the Levant from a Belgian mother, citizenship should be granted automatically if the DNA tests are positive. But for those born of a Belgian father, positive DNA results will be insufficient if the marriage was not recognized by the Belgian administration (which is the case for religious unions celebrated under the caliphate), or if the father did not officially recognize the child.' See Renard and Coolsaet, 'Children in the Levant' (n 35) 5; see also EPRS, 'The Return of Foreign Fighters' (n 21) 49.

<sup>103</sup> T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *AJIL* 78; Y Shany, O Ben-Naftali, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-4) 37 *Israel L Rev* 17; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden J Intl L* 857, 862-868; S Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 *Leiden J Intl L* 49, 53-61.

<sup>104</sup> H King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights L Rev* 521, 522-524; A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European J Intl L* 529, 538-541; R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 *Israel L Rev* 503.



that generally speaking aliens are subject to the jurisdiction of the receiving State as long as they do not merit special treatment as diplomats, as Heads of State, or as military personnel of foreign States.<sup>105</sup> Thus, in the words of the South African Constitutional Court ‘the exercise of jurisdiction beyond a State’s territorial limits would ... constitute an interference with the *exclusive territorial jurisdiction* of another state’.<sup>106</sup>

Nonetheless, the territorial jurisdiction of the receiving State is somewhat tempered by the minimum standard of rights for aliens required under international law. The standard,<sup>107</sup> enlarged by human rights law, consists of certain fundamental rights, such as ‘the recognition of juridical personality and legal capacity, standards of humane treatment, law-abiding procedures in cases of detention, the right of unobstructed access to courts, the protection of life and liberty against criminal actions, and the prohibition of confiscation etc...’<sup>108</sup> Violations of such standard give rise to the State of nationality’s right to exercise diplomatic protection, which, as discussed above, to some extent still represents an expression of the State’s personal sovereignty over its citizens. With respect to the Iraqi context, diplomatic protection – in both its meanings – appears to be the main tool to react to violations of the international minimum treatment standard,<sup>109</sup> whereas the relevance of the extraterritorial obligations owed by the States of nationality to their citizens held in Iraqi prisons and subject to Iraq’s jurisdiction is, in this author’s view, considerably limited.

In relation to the situation of FTFs and their family members in Syria – since the camps are under the authority of the SDF and the Syrian

<sup>105</sup> K Hailbronner, J Gogolin, ‘Aliens’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2013); I Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 521-555.

<sup>106</sup> Constitutional Court of South Africa, *Kaunda v. President of the Republic of South Africa* (n 91) 19.

<sup>107</sup> *The United States of America on Behalf of L.F.H. Neer and Pauline E. Neer (claimants) v The United Mexican States*, decision of 15 October 1926, United States-Mexican Claims Commission, IV UNRIAA/RSA (1952), 61-62.

<sup>108</sup> Hailbronner, J Gogolin (n 105) paras 26-27.

<sup>109</sup> Notably, States like France and Germany are intervening on behalf of their citizens condemned to death in order to commute the sentences. ‘France Opposes Death Penalty for French ISIS Fighters in Iraq’, *The Guardian* (27 May 2019) <[www.theguardian.com/world/2019/may/27/france-opposes-iraq-death-penalty-against-three-french-isis-members](http://www.theguardian.com/world/2019/may/27/france-opposes-iraq-death-penalty-against-three-french-isis-members)>.



Government has showed no interest towards the fate of foreigners on its soil – the role of States of nationality gains more prominence. In particular, with regard to this scenario, it is worth reflecting on the extraterritorial reach of human rights treaties like the European Convention on Human Rights (ECHR),<sup>110</sup> the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>111</sup> the Convention on the Rights of the Child (CRC) and its Optional Protocols,<sup>112</sup> in particular the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC).<sup>113</sup>

So far the European Court of Human Rights (ECtHR), in its seemingly inconsistent case law from *Banković* onwards,<sup>114</sup> confirmed that jurisdiction under Article 1 of the ECHR is ‘primarily territorial’<sup>115</sup> and it also recognized ‘a number of exceptional circumstances’ outside of territorial boundaries, which could give rise to the establishment of jurisdiction.<sup>116</sup> Said exceptional circumstances can be grouped in two categories, ‘state agent authority and control over persons’ and ‘effective control over an area or territory’.<sup>117</sup> Even though the ECtHR jurisprudence regarding jurisdiction, and thus extraterritoriality, is primarily based ‘on facts rather than on a generalizable principle’,<sup>118</sup> it is possible to anticipate that – given the Court’s approach – it would be impossible, or at least very difficult, for the Court to find that any of its States parties is currently

<sup>110</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended.

<sup>111</sup> CAT (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>112</sup> CRC Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>113</sup> OPAC (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

<sup>114</sup> *Banković v Belgium*, App No 52207/99, (ECtHR [GC], 12 December 2001) paras 31-53.

<sup>115</sup> S Miller, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’ (2010) 20 Eur J Intl L 1223, 1226-1230.

<sup>116</sup> Kim (n 103) 53.

<sup>117</sup> *Al-Skeini and Others v United Kingdom*, App No 55721/07 (ECtHR [GC] 7 July 2011) paras 133-140.

<sup>118</sup> M O’Boyle, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life after Bankovic”’, in F Coomans, MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 128.



exercising ‘total’, ‘full’, ‘exclusive’ control or physical power over its nationals stranded or captured in Syria.

Considering the scope of application of human rights treaties other than the ECHR, in relation to the ICCPR the HRC has interpreted Article 2 as requiring States parties to ‘secure the rights under the Covenant for all persons in their territory and all persons under their control’.<sup>119</sup> As a result – and in line with the ECtHR – the HRC has consistently affirmed the extraterritorial application of the Covenant to anyone within the power or effective control of a State Party, even if not situated within the territory of that State.<sup>120</sup> Notably, the HRC has also recognized the extraterritorial reach of the Covenant in cases where a State party has control ‘over the facts and events giving rise to human rights violations’ in breach of its negative obligations,<sup>121</sup> thus opening the door for a wider interpretation of the jurisdiction clause, which could, in principle, find application also in the situation of FTFs and their family members, for example in relation to the refusal to issue identity documents, birth certificates, etc.<sup>122</sup>

With regard to the CAT – assuming, as reported by several sources,<sup>123</sup> that FTFs and their families in Syria and Iraq suffer from, or are exposed to, cruel, inhuman or degrading treatment or punishment, or even torture

<sup>119</sup> HRC, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 12.

<sup>120</sup> King (n 104) 528-529.

<sup>121</sup> M Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’, in Coosmans and Kamminga (eds) (n 118) 76. For example in *Sophie Vidal Martins v Uruguay* the HRC in 1982 found a violation of art 12 (freedom of movement) when Uruguay had refused to issue a passport to its citizen residing in Mexico, ‘thereby preventing her from leaving any country.’ HRC, *Sophie Vidal Martins v Uruguay*, UN Doc CCPR/C/15/D/57/1979 (23 March 1982) para 7-9.

<sup>122</sup> HRC ‘General Comment 31’ (n 119) 6-7.

<sup>123</sup> ‘UN Commission of Inquiry on Syria: Respect for the Rule of Law and Fundamental Rights Must not Be Undermined for Political Expediency or Sacrificed for Security Considerations’ (9 May 2019) <[www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24585&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24585&LangID=E)>; Human Rights Watch, ‘World Report 2018’, (HRW New York 2019) 527-528; UNICEF ‘Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq’ (n 37).



– the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, stressed, consistently with the views expressed by the CAT Committee,<sup>124</sup> that

‘the *jus cogens* non derogable prohibition against torture and ill-treatment cannot be territorially limited and that any jurisdictional references found in the CAT cannot be read to restrict or limit States’ obligations to respect all individuals’ rights to be free from torture and ill-treatment, *anywhere in the world*.’<sup>125</sup>

More specifically, the obligation to take preventive measures under Articles 2(1) and 16(1) of the CAT encompasses actions taken by States ‘*in their own jurisdictions to prevent* torture or other ill-treatment extraterritorially’.<sup>126</sup> A State, hence, may also be responsible for ‘indirectly attributable extraterritorial wrongfulness’ owing to a failure to fulfil its positive human rights obligations.<sup>127</sup> The Special Rapporteur stressed that the Convention obliges States to take positive measures ‘only when they exercise sufficient authority to be able to do so’, meaning that States’ fulfilment of its positive obligations is practicable only in certain situations.<sup>128</sup> Notably, however, ‘practical difficulties’ – often invoked by States of nationality to avoid the repatriation of their nationals held in the SDF camps – encountered in securing the effective enjoyment of relevant rights in some extraterritorial scenarios ‘can never displace States’ positive duties to guarantee and ensure these rights at all times’.<sup>129</sup> As a result, it is possible to infer that the only viable option to fulfil the (positive)

<sup>124</sup> CAT, ‘General Comment No. 2: Implementation of Article 2 by States Parties’, UN Doc CAT/C/GC/2 (23 November 2007) para 16; K da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill 2012) 255-257; M Nowak, E McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008).

<sup>125</sup> ‘Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment’, UN Doc A/70/303 (7 August 2015) para 27 (emphasis added).

<sup>126</sup> *ibid* para 33 (emphasis added).

<sup>127</sup> *ibid* para 35. See V P Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2015) 36 Michigan J Intl L 129, 151-157.

<sup>128</sup> ‘Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment’ (n 125) para 28.

<sup>129</sup> *ibid* para 37.

obligations stemming from the CAT and ensure a 'no-safe-haven approach' to torture worldwide is to remove FTFs and their family members from the camps and bring them back to their countries of origin.

With regard to the Convention on the Rights of the Child, the CRC Committee reiterated on various occasions the extraterritorial reach of the Convention,<sup>130</sup> a position that has been endorsed by the International Court of Justice (ICJ) with respect to both the CRC and the ICCPR.<sup>131</sup> Particularly relevant in this case is the obligation enshrined in Article 39 of the CRC which requires States to promote the physical and psychological recovery and reintegration of 'a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts ... in an environment which fosters the health, self-respect and dignity of the child.' This obligation is mirrored and reinforced by the text of the two principal Resolutions on FTFs, which specifically ask Member States to develop rehabilitation and reintegration strategies, targeting not only returning FTFs but also their family members, especially children.<sup>132</sup> Moreover, the extraterritorial application of the Convention and its OPAC has been emphasised with regard to the recruitment and use of child soldiers. This is relevant also to the case under scrutiny as the defeat of ISIS has not neutralized the risk that children – left without protection – could be recruited by armed forces or groups, including the SDF. Article 4 of the OPAC – by providing that armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years – recognizes that States, as the only parties to the Protocol, are responsible for the implementation

<sup>130</sup> CRC Committee, 'Concluding Observations of the Committee on the Rights of the Child: Israel', UN Doc CRC/C/15/Add.195 (4 October 2002) paras 2, 5, 57–58. CRC Committee, 'General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights', UN Doc CRC/C/GC/16 (April 17, 2013) para 43; CRC Committee, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin', UN Doc CRC/GC/2005/6 (1 September 2005) para 10.

<sup>131</sup> R Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese J Intl Law* 639, 663–665.

<sup>132</sup> UN Doc S/RES/2178 (2014) para 6; UN Doc S/RES/2396 (2017) paras 29–30, 36.



of this and all the other provisions. Consequently, States must take effective measures, ie repatriation, to prevent the recruitment and use of children by non-State armed groups, wherever they are located.<sup>133</sup>

A final consideration concerning the extraterritorial application of human rights treaties is needed given the increasingly likely transfer of prisoners, not repatriated by their States of origin, from Syria to Iraq. This scenario entails that the decision made by the States of nationality of FTFs and their family members will represent the cause for further 'foreseeable violations'.<sup>134</sup> Thus, the inaction of States of nationality will allegedly result in breaches of human rights in another jurisdiction, in violation of the principle of *non-refoulement*,<sup>135</sup> and of international humanitarian law, which prohibits transfer of detainees to countries where they could suffer from torture and ill-treatment.<sup>136</sup>

#### 4. *Concluding remarks*

As emerged from the analysis carried out in the present article, international law does not impose on States of nationality a straightforward obligation to repatriate the family members of FTFs. Nonetheless, several relevant commitments established under the different fields of interna-

<sup>133</sup> TB Begle, 'The Extraterritorial Obligation to Prevent the Use of Child Soldiers' (2012) 27 *American Universities Intl L Rev* 613, 630-633.

<sup>134</sup> On the concept of 'foreseeability' as a condition to establish State's responsibility for the impairment of human rights outside its territory see O De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, 1113-1115; Miller (n 115) 1234-1235.

<sup>135</sup> On the principle of *non-refoulement* under international human rights law see E Lauterpacht, D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E Feller, V Turk, F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 87; ICRC, 'Note on Migration and the Principle of Non-Refoulement' (2017) 99 *Intl Rev Red Cross* 345, 347-349.

<sup>136</sup> In NIACs the fundamental protections contained in Article 3 common to the four Geneva Conventions are to be understood as prohibiting parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer. C Droege, 'Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges' 90 (2008) *Intl Rev Red Cross* 675.

tional law surveyed in the course of this work argue in favour of repatriation, as the best option to act in compliance with the existing international framework.

Since a nebulous approach cloaked by (short-term) security concerns has been prevailing over humanitarian considerations as well as more effective long-term strategies, there is a urgent need to shed light on the obligations that States owe to their nationals abroad – especially women and children – held in Iraqi prisons and in the SDF-controlled camps in Syria. The two different scenarios have been discussed against the backdrop of international humanitarian law, international counter-terrorism law, the law of diplomatic and consular relations and international human rights law in order to provide an overview of the main legal issues at stake. To different extents, all the above mentioned fields of international law contribute to shaping and unfolding the crucial role that States of nationality are called to play to break the cycle of violence to which women and children have been exposed first during the Caliphate and later on after ISIS' defeat.

The grounds upon which individuals – who most likely have not planned nor participated in terrorist activities while associated with ISIS – have been deprived of their liberty as well as the unsafe and appalling circumstances in which they are held,<sup>137</sup> should *per se* trigger a proactive reaction by States of nationality as neither the legal basis of detention nor its conditions appear to be in line with international and domestic standards. Moreover, the risk of indefinite detention of women and children, the summary trials of FTFs' family members and more broadly the wide spectrum of violations of fundamental rights from which they suffer amount to breaches of the international minimum standards of treatment of aliens abroad. On the one hand, and especially in relation to Iraq, this entails that States' of nationality can – and to some extent are expected to – exercise diplomatic protection on behalf of their nationals. On the other hand, the violations perpetrated against women and children raise some questions about the extraterritorial reach of human rights treaties, in particular with regard to the territory under the SDF authority in Syria. Although States of nationality do not bear direct responsibility for those violations and they do not exercise control over persons or territories,

<sup>137</sup> *Ní Aoláin* (n 38).



there is a tendency, predominantly upheld by the monitoring treaty bodies of the core human rights conventions, to recognize also States' extra-territorial positive obligations, for example in relation to the absolute ban on torture and other forms of ill-treatment and the prohibition to recruit and use children in hostilities. Furthermore, the obligation to rehabilitate and reintegrate children affected by all forms of violence, including armed conflicts – which is enshrined in the CRC and in both FTFs Resolutions – requires States to implement effective measures in an environment which, unlike the Iraqi prisons and the SDF camps, 'fosters the health, self-respect and dignity of the child'.<sup>138</sup>

<sup>138</sup> Art 39 CRC.

