



**Between Dystopia and Utopia: The ‘Response-Ability’ of European States to Ensure the Rights of Children of Foreign Terrorist Fighters Held in Syria**

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**Abbreviations**

**ARSIWA** – Articles on the Responsibility of States for Internationally Wrongful Acts

**CRC** – Convention on the Rights of the Child

**ECHR** – European Convention on Human Rights

**EComHR** – European Commission on Human Rights

**ECtHR** – European Court of Human Rights

**EU** – European Union

**FTF** – Foreign Terrorist Fighter

**HRCtee** – Human Rights Committee

**IACHR** – Inter-American Commission on Human Rights

**IACtHR** – Inter-American Court of Human Rights

**ICJ** – International Court of Justice

**ICRC** – International Committee of the Red Cross

**ICRL** – International Children’s Rights Law

**IHL** – International Humanitarian Law

**IHRL** – International Humans Rights Law

**ISIS** – Islamic State of Iraq and Syria

**NCTV** – National Coordinator for Security and Counterterrorism

**SC** – Security Council

**SDF** – Syrian Democratic Forces

**UDHR** – Universal Declaration of Human Rights

**UN** – United Nations

**UNHCR** – United Nations High Commissioner for Refugees

### **Executive Summary and Overview of Main Findings**

The context of the ensuing Thesis is politically toxic, morally disturbing and legally ambiguous: it revolves around the plight of children of Belgian, Dutch, French, and German foreign terrorist fighters being indefinitely held in displacement camps throughout the *de facto* autonomous Rojava region in Northeast Syria and the reaction, or rather lack thereof, of European politics to it. The Thesis approaches this issue and the evident disjuncture between the standards set at the international level and those implemented in practice at the domestic level with a unique frame of reflection, namely the doctrines of State sovereignty and human rights universality. Indeed, the overarching research question that this Thesis purports to explore is: Considering the international children's rights framework through the doctrines of State sovereignty and human rights universality, to what extent are European States justified in falling short of their responsibilities to ensure the rights of children of foreign terrorist fighters held in Syria?

In three substantive Parts, the Thesis provides an exploration into this question. Part I sets the scene in which children of foreign terrorist fighters find themselves through a demographic analysis and factual description (*see Chapter 1*), followed by a discussion on the readily available remedies, or lack thereof (*see Chapter 2*). Part II subsequently presents a legal analysis of the standards incumbent to the relevant international legal framework (*see Chapter 3*) and of the political and judicial reaction of the States under investigation (*see Chapter 4*). Finally, Part III applies the doctrines of State sovereignty and human rights universality to the proceeding analyses (*see Chapter 5*), before concluding with a breath of optimism in looking towards future solutions (*see Chapter 6*).

The research undertaken and discussions provided by the Thesis contribute valuable findings to what is an incredibly prominent issue. Indeed, the Thesis synthesises myriad sources to provide an up-to-date and comparative analysis of demographic data regarding the children of foreign terrorist fighters with links to Belgium, France, Germany, and the Netherlands. Furthermore, it offers an intriguing regional comparison with Central Asian States, which clearly illuminates the passivity plaguing Europe. Given the pertinence of recent international case-law on the topic, the Thesis additionally engages with the legal ambiguity surrounding the existence of extraterritorial State obligations under the Convention on the Rights of the Child and the European Convention of Human Rights, arguing that the former works to uphold State responsibility over the children in question, a stance that is corroborated by international humanitarian law and international counterterrorism law. Moving from the international to domestic level, the Thesis reaches several deductions: to a large extent, the domestic judiciaries under investigation fail to engage with the standards set at the international level; judicial reasoning often times undermines such standards, whether engaging with international law or not; and jurisdiction is a primary justification utilised to mitigate any children's rights responsibilities.

Finally, the Thesis offers a nuanced frame of reflection, arguing that the apparent tensions between international norms and State practice are reflected in and explained by the doctrines of human rights universality and State sovereignty. It is contended that until European States view judgements extending State's obligations extraterritorially as an opportunity to reinforce extant commitment to human rights rather than as an affront to sovereignty, perhaps through a re-consideration of perspectives and national interests, States will remain in the realm between Dystopia and Utopia: Apologia, an environment in which European State 'response-ability' is falling short of the ideal standard in theory but is realistic in practice.

## Introduction

### *A Morally Disturbing, Politically Toxic and Legally Ambiguous Problem Statement*

Constitutional democracies claim to reflect the foundations that they are built on: the inalienable rights of equality and freedom.<sup>1</sup> Yet, they also maintain the sovereign right to develop policy in their own interest.<sup>2</sup> One is not mistaken to find tension in these two narratives; indeed, a poisonous hypocrisy enters the bloodstream of a State which affirms the equal and free rights of all people while simultaneously relying on the principle of sovereignty to privilege those within its interests.<sup>3</sup> It is an uneasiness that is subsequently infused into the veins of international human rights law ('IHL'), a framework which places equal merit on the two seemingly contradictory doctrines: State sovereignty, or the legal capacity and authority of States to regulate matters of internal and foreign policy<sup>4</sup> and human rights universality, or the promotion of universal respect for and observance of indivisible, interdependent and interrelated human rights.<sup>5</sup> This Thesis purports that the tension between these two doctrines can be clearly observed in the context at hand: the plight of children of European foreign terrorist fighters ('FTFs') being indefinitely held in displacement camps throughout Northeast Syria and the reaction, or rather lack thereof, of European politics to it.

In acts of ideological support, naivety, or forceful persuasion, FTFs embody the thousands from across the globe who travelled to territory controlled by the Islamic State of Iraq and Syria ('ISIS'),<sup>6</sup> many of whom subsequently fled, were displaced or captured, as the Syrian Democratic Force ('SDF'), a Kurdish majority non-State armed group, approached the territorial defeat of ISIS, a milestone ultimately reached in March 2019.<sup>7</sup> Many of these individuals and their children currently find themselves in the guarded Roj, Ain Issa and Al-Hol camps for internally displaced persons in the *de facto* autonomous Rojava region in North-eastern Syria.<sup>8</sup> Indeed, it is on these children that the present Thesis shines a much-needed spotlight. Myriad reports depict the range and gravity of the humanitarian concerns underpinning their current predicament, including deplorable camp conditions, widespread human rights violations, and lack of foreseeable remedy if not for the engagement of States which such children have links<sup>9</sup> to.<sup>10</sup> Those very States are, however, continuing to exercise their sovereignty to justify policies of inaction. The currently observable result is a significant group of children whose rights are in a *de facto* vacuum, receiving no protection nor fulfilment; it seems that national interests are prevailing over the universal observance of human rights.

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<sup>1</sup> United Nations, 'democracy'.

<sup>2</sup> Larking, 'Human Rights and The Principle of Sovereignty', 15.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, 20; Hubert and Weis, 'The Responsibility to protect', 6: the ICJ referred to State sovereignty as "the fundamental principle of State sovereignty on which the whole of international law rests".

<sup>5</sup> UDHR, Preamble.

<sup>6</sup> Duffy, 'French Children in Syrian Camps', 3.

<sup>7</sup> Luquerna, 'The Children of ISIS', 150.

<sup>8</sup> Spadaro, 'Repatriation of Family Members', 251.

<sup>9</sup> See section 1.1. for further elaboration as to what is meant by 'links'.

<sup>10</sup> See, e.g., UN Doc A/HRC/Res/31/30, at paras 93-97; Special Rapporteur, 'Legal Analysis', para 2; Save the Children, 'A Children's Crisis'.

It is thus with great significance that the Committee on the Rights of the Child ('The Committee') recently handed down two ground-breaking and provocative admissibility decisions concerning the repatriation of French children currently held in camps in Rojava.<sup>11</sup> Creating waves in what has been a largely stagnant water, the decision tackles the thorny 'jurisdiction question', affirming the applicability of the Convention on the Rights of the Child ('CRC') in decisions taken regarding children overseas. In doing so, The Committee asserted State responsibility over these children, with the ensuing obligations remaining to be seen. Paralleling the case before The Committee is one pending in the hands of the Grand Chamber of the European Court of Human Rights ('ECtHR');<sup>12</sup> with almost identical facts, the much-anticipated admissibility decision has potential to add great force to a brewing European swell, not least because of its legally binding nature as compared to The Committee. Its likeliness of doing so, however, is a question of equal intrigue. Thus, with two ground-breaking cases on the brink of judgement, the time is ripe for discussion.

Alas, the morally disturbing, politically toxic, and legally ambiguous scene for the ensuing analysis has been set. On the one hand, States are drawing on the well-engrained doctrine of State sovereignty to uphold policies born out of considerations of national interest. On the other hand, is a similarly foundational recognition reaffirmed by The Committee, that human rights are universal and therefore beckon far-reaching State obligations. The overarching research question this Thesis purports to explore is thus:

*Considering the international children's rights framework through the doctrines of State sovereignty and human rights universality, to what extent are European States justified in falling short of their responsibilities to ensure the rights of children of FTFs held in Syria?*

Grounded in the above research question, the following investigation and reflection has a threefold aim: it strives to reframe a topic of extreme political, moral, and social controversy through the prism of law, human rights, and responsibility;<sup>13</sup> to clarify the legal ambiguity surrounding the existence of any robust extra-territorial State obligations; and to reflect on the context through the frame of two fundamental human rights doctrines, that of State sovereignty and human rights universality. Much like the complexity of the topic at hand, the significance of the present Thesis is multi-layered.

### *Sculpting the Scope*

To adequately address the above research question, further sculpting of the Thesis' scope is required. Avoiding the impracticality of conducting a universal inquiry given the time and word constraints on the present Thesis, the 'European States' to be analysed were subject to a number of limitations. Europe was first selected as the primary geographical area to investigate, considering the prevalence of the FTF phenomena in the region<sup>14</sup> and its majority passive response to it. Four European States were subsequently selected to become the focus of the research, namely, Belgium, France, Germany, and the Netherlands. The selection of these States was decided following two levels of consideration, one practical and one personal. With regard to the former, the following factors were taken into deliberation: the prevalence of the FTF phenomena in terms of number of nationals involved; the accessibility of domestic sources; the pertinence of domestic case-law; the variation in policy motives; the tensivity of societal

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<sup>11</sup> *L.H. et al. v. France*; Duffy, 'French Children in Syrian Camps'.

<sup>12</sup> ECtHR, 'Grand Chamber to examine two applications'.

<sup>13</sup> Duffy, 'French Children in Syrian Camps', 14.

<sup>14</sup> Capone, 'The Children (and Wives) of Foreign ISIS fighters', at FN 8; Cook and Vale, 'From Daesh to 'Diaspora'', 15; Renard and Coolsaet, 'Returnees', 3.

perspectives; and the recognition that all four States are involved in a non-international armed conflict in Syria due to their membership in the US-led Global Coalition against ISIS, and are thereby bound by international humanitarian law ('IHL') in matters that have a nexus to the conflict. Regarding the personal level of selection, the author noted these four countries as the most intriguing, in large part due to the novelty of studying their domestic policies and societal attitudes.

The 'international children's rights framework' includes, first and foremost, the standards and obligations incumbent to the CRC and the judgements delivered by The Committee thereto. However, given the region of States under investigation, consideration will also be had, albeit to a lesser extent, for the European Convention of Human Rights ('ECHR') and its monitoring body, the ECtHR. The inclusion of both bodies provides not only for a well-substantiated analysis, but also for a comparative one; the binding nature of the ECtHR adds interesting nuances to the research when discussed in parallel with the non-binding Committee. Recognising that the issue is one stretching across multiple fields of law, consideration of IHL, international counterterrorism law, the law of State responsibility, the law of diplomatic and consular relations, and international refugee law will additionally be provided, albeit in a complementary form.

### *Methodology*

Given the nature of the research question at hand, the main methodological tool was the collation and analyses of journal articles, books, online sources, case-law, and grey literature through the means of desk research. Adding some colour, however, is the inclusion of graphical images, whereby quantitative data has been accumulated to form various visual estimates. The primary search engines included the Leiden University Catalogue and Google Scholar, whereby Boolean searches were conducted using, *inter alia*, the keywords: 'foreign terrorist fighter', 'children', 'Syrian democratic force' and 'displacement camp'. A significant number of sources were additionally derived from the bibliographies or references of key journal articles, books and case-law. Given the contemporary nature of the issue at hand, sources were limited primarily by their date of publication; the Thesis strives to include the most updated information. Where sources were in languages other than English, the translation tool 'DeepL'<sup>15</sup> was utilised.

An important, yet more theoretical aspect of the Thesis' methodology is its frame of reflection; the legal analysis of the international children's rights framework will be viewed through a lens of State sovereignty and human rights universality, two foundational doctrines in the IHRL framework and the international children's rights Law ('ICRL') it encompasses. These two schools of thought will be operationalised to reflect on and elucidate the tensions between international legal standards and domestic State practice.

### *Roadmap: From Dystopia to Utopia*

In three substantive Parts, this Thesis will provide an exploration of the aforementioned research question. Part I, 'Dystopia', will clarify the environment in which children of FTFs currently find themselves: a factual description of 'Children of Foreign Terrorist Fighters' in Chapter 1, followed by a consideration of the readily available remedies, or lack thereof, contributing to 'A *De Facto* Rights Vacuum' in Chapter 2, will demonstrate that Dystopia is indeed dystopian in all senses, bar its phantasmal nature.

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<sup>15</sup> DeepL Translator.

From Dystopia, the Thesis flows into Part II, 'Apologia', in which a legal analysis of the 'Relevant International Legal Framework' in Chapter 3, and of the 'Response-Ability'<sup>16</sup> of States' in Chapter 4, demonstrates a significant gap between legal standards and the reality of State practice. In doing so, the reader will be informed of the justifications States employ as an apologia for failing to meet the standards provided by international law.

Finally, readers will find themselves in Part III, 'Utopia', where discussion is one of both reflection and forward thinking. Consideration on 'Sovereignty and Universality: A False Dichotomy' in Chapter 5 will apply the two doctrines to the proceeding analyses, questioning whether the international human rights standards provided are utopic. To conclude with a breath of optimism, the Thesis culminates its substantive analysis with Chapter 6, 'Bridge Building'.

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<sup>16</sup> Mustasaari, 'Finish Children': the term 'response-ability' originated in this source.

## **PART I: DYSTOPIA**

*“Dystopia – An imagined world or society in which people lead wretched, dehumanised, fearful lives”<sup>17</sup>*

The Thesis commences its substantive sections in the realm of Dystopia; an environment infused with suffering, injustice, and conflict. In setting the dystopian scene, Part I will first provide a discussion on children of FTFs in Rojava (*see Chapter 1*), presenting an up-to-date demographic analysis and description of the displacement camps called home. Consideration will subsequently turn to the roads out of dystopia, a critical and comparative analysis which substantiates the perspective that these children’s rights are currently situated in a *de facto* vacuum, without protection nor fulfilment (*see Chapter 2*).

### **Chapter 1: Children of Foreign Terrorist Fighters**

#### **1.1. A Demographic Analysis**

In Syrian territory beset with ongoing international and non-international armed conflict is the *de facto* autonomous region of ‘Rojava’, an area sculpted out by the SDF in their largely successful crusades against the Syrian Arab Republic, ISIS, and several other jihadist factions.<sup>18</sup> Rojava is home to thousands of ISIS-affiliated individuals, including FTFs and their children, who have been shuffled into heavily guarded displacement camps.<sup>19</sup> While estimates are by their very nature unreliable, linked in large part to the difficulties of collecting data during times of armed conflict, it is suggested that an average of 12,000 non-Iraqi and non-Syrian foreigners, 4,000 women and 8,000 children, currently live in three camps throughout Rojava.<sup>20</sup> Al-Hol camp, the largest and most deplorable of the three, holds approximately 75,000 people,<sup>21</sup> 66% of which are under the age of 18, and 7,000 foreign.<sup>22</sup> Of even more moral concern is the statistic that 95% of all of the children in Al-Hol are under the age of 12 and 20,000 are younger than 5.<sup>23</sup>

Of the approximately 8,000 foreign children in Rojava, around 500 have ‘links’ to Belgium, Germany, the Netherlands, or France. It should be noted that this Thesis’ use of the term ‘links’ errs on the side of caution to include more than just the number of children with formally recognised nationalities, but rather those with at least one parent who is a national of the State under investigation or has lived in it for a long-period of time. This is due to the fact that any accurate statistical analysis focused on number of children according to nationality is blurred by the difficulties of establishing these children’s nationality in the first place. While it is possible for a State to monitor children born inside its territory and subsequently taken by their parent(s) to ISIS-controlled regions, the situation is considerably more complicated regarding children born in Syria. Although the provisions pursuant to the attribution of nationality under

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<sup>17</sup> Merriam Webster, ‘dystopia’.

<sup>18</sup> Spadaro, ‘Repatriation of Family Members’, 251.

<sup>19</sup> *Id.*, 252.

<sup>20</sup> CRIN et al., ‘Bringing Children Home’, 1.

<sup>21</sup> Mustasaari, ‘Finish Children’, 22; Spadaro, ‘Repatriation of Family Members’, 252.

<sup>22</sup> Rosand, Ellis. & Weine, ‘Minding the Gap’.

<sup>23</sup> Luquerna, ‘The Children of ISIS’, 150 and 155.

French,<sup>24</sup> German,<sup>25</sup> Dutch<sup>26</sup> and Belgian<sup>27</sup> legislations all recognise the principle of *jus sanguinis*, where a child inherits the nationality of one or both parents, the maintenance and demonstration of the required birth certificates during conflict creates a significant obstacle to proving such filiation. This difficulty is further aggravated for children whose fathers are FTFs from third countries and mothers are from States such as Syria or Libya with long-standing discriminatory laws which deny, or considerably limit, the right of women to transfer their nationality to their children.<sup>28</sup> There is thus a considerable number of foreign children who have claims to a French, Belgian, Dutch, or German citizenship, but no means of proving it, either because of absent birth documents or the inability to obtain their fathers nationality when, as is often the case, they are detained, are in hiding, or have been killed in action.<sup>29</sup>

In light of this terminological clarification, a more specific demographic breakdown according to ‘linked’ children can be provided. In January 2021, reports refreshed a dire French statistic; an estimated 200 children with French links remain in the displacement camps throughout Rojava, half of whom are younger than 6.<sup>30</sup> As of November 2020, the Belgian Government was aware of 38 children in the camps who could potentially claim Belgian citizenship<sup>31</sup> and it is suggested that 150 children of German parents continue to live under the custody of SDF forces in Syria,<sup>32</sup> Finally, 80 children are estimated to have links to the Netherlands, 50% of whom are under the age of three and fewer than 20% older than 10.<sup>33</sup>

## 1.2. A Dystopian Home

Myriad reports paint a harrowing picture of life inside the fences of the overpopulated and under-resourced camps; children’s access to adequate food, water and health care is critically limited, safe play areas and educational opportunities are scarce and threats to one’s physical and psychological security are constant.<sup>34</sup> Furthermore, children are menaced by the multitude of inhabitants who continue to sympathise with ISIS, with accounts detailing the oftentimes deadly attacks by radicalised men and women towards those perceived to be ‘infidels’.<sup>35</sup> A gloomy statistic thus seems inevitable; 390 child deaths throughout the displacement camps were reported in 2019,<sup>36</sup> eight children

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<sup>24</sup> French Civil Code, art 18.

<sup>25</sup> Nationality Act, section 4(1).

<sup>26</sup> Netherlands Nationality Act, art 3(1).

<sup>27</sup> Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, ‘born to a Belgian parent’.

<sup>28</sup> Houry, ‘Children of the Caliphate’.

<sup>29</sup> *Id.*

<sup>30</sup> Aguetant, ‘A Turn of the Tide’, 52.

<sup>31</sup> RSI, ‘Europe’s Guantanamo’, 51.

<sup>32</sup> Kajjo, ‘Germany Repatriates Three IS Women’.

<sup>33</sup> Van der Heide and Geenen, ‘Children of the Caliphate’, 4; Renard and Coolsaet, ‘Returnees’, 55.

<sup>34</sup> UN Doc A/HRC/43/57, at para 64; Luquerna, ‘The Children of ISIS’, 156; Mustassaari, ‘Finish Children’, 22; Yee, ‘Thousands of ISIS Children Suffer’; Aguetant, ‘A Turn of the Tide’, 52; UN Doc A/HRC/Res/31/30, at paras 93-97; Special Rapporteur, ‘Legal Analysis’, para 2; Save the Children, ‘A Children’s Crisis’.

<sup>35</sup> UN Doc A/HRC/43/57, at para 55.

<sup>36</sup> Cumming-Bruce, ‘Horrid Conditions’.

under the age of five died in Al-Hol in August 2020,<sup>37</sup> and 12 child deaths were reported within the camps in the first two weeks of January 2021.<sup>38</sup>

The parlous life of a child inhabitant is subject to further threat in consideration of two compounding factors. The first came to light in October 2019 as the United States withdrew its military forces from the SDF's support, placing pressure on the armed group to turn resources away from monitoring the camps and towards defending its stronghold of the region from a Turkish encroachment.<sup>39</sup> In addition to reduced camp supervision, the hazard of a new "war zone"<sup>40</sup> can reasonably be assumed to contribute a further obstacle impeding international actors from delivering essential aid. The aggravation caused by the American pull-back precedes that of a similarly perilous, yet differently natured culprit: COVID-19. Indeed, the menace of an easily spread and potentially life-threatening infectious disease simply exacerbates an already dismal situation for the children; pressure on inadequate health services is increased, health risks are heightened, the presence of humanitarian aid is dwindled and the number of idle children exasperated.<sup>41</sup> Furthermore, the absence of any accurate and age-appropriate information on the virus reduces the ability of children to understand and adequately respond to the threat it poses.<sup>42</sup>

## **Chapter 2: A De Facto Rights Vacuum**

### **2.1 Children's Rights at Stake**

In an application of the children's rights framework to the facts described above, it is evident that the retention of children in SDF-controlled camps constitutes an infringement to numerous international standards as delineated by the CRC and the ECHR. Indeed, camp conditions certainly contravene children's rights to life, survival and development;<sup>43</sup> the right to be protected from any form of violence;<sup>44</sup> the rights to health<sup>45</sup> and education;<sup>46</sup> the right to an adequate standard of living;<sup>47</sup> the rights to safe leisure and play;<sup>48</sup> and the right to receive a nationality.<sup>49</sup> Moreover, the SDF is neither permitting the exit of camp inhabitants at their own volition nor pursuing the prosecution of women and children; detention not in anticipation of prosecution on a criminal charge presents severe risks to the arbitrary deprivation of liberty,<sup>50</sup> one that is particularly egregious when it includes the detention of family members of an

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<sup>37</sup> Fore, 'Eight Children die in Al Hol'.

<sup>38</sup> Reuters, 'Reports of 12 Murdered'.

<sup>39</sup> Albeck-Ripka, 'Desperate Pleas'.

<sup>40</sup> Borger, Chulov, and McKernan, 'Trump's shock Syria retreat'.

<sup>41</sup> Save the Children, 'A Children's Crisis', 6.

<sup>42</sup> *Id.*

<sup>43</sup> CRC, art 6(2).

<sup>44</sup> *Id.*, art 19(1).

<sup>45</sup> *Id.*, art 24.

<sup>46</sup> *Id.*, art 28.

<sup>47</sup> *Id.* art 27.

<sup>48</sup> *Id.*, art 31.

<sup>49</sup> *Id.*, art 7.

<sup>50</sup> UN Doc CCPR/G/GC/35, at para 15; CRC, art 37(b).

alleged criminal, such as the children of FTFs, who themselves are not accused of any wrongdoing.<sup>51</sup> As regards the ECHR, it has been noted, albeit domestically, that the conditions in the Al-Hol and Roj camps are sufficiently desperate that they meet the threshold of inhuman or degrading treatment for the purposes of Article 3 of the ECHR.<sup>52</sup> Considering Article 41(b) of the CRC,<sup>53</sup> it can thus be assumed that the same threshold would be met for the provision against inhuman treatment delineated in Article 37(a) of the CRC.

However, it is not any State party to the CRC or ECHR that is perpetrating such violations or allowing them to unfold, but rather the non-State armed group, the SDF, on the territory that they control, the *de facto* autonomous Rojava region. As a non-State actor, the SDF is not subject to the legal obligations incumbent to IHRL, never mind the provisions pursuant to children's rights. Thus, if the SDF is not responsible for giving life to the rights of the children under its control, who is?

## 2.2. Roads out of Dystopia

### 2.2.1 The Government of the Syrian Arab Republic

While the Syrian Arab Republic does not recognise the *de jure* autonomy of the Rojava region which the SDF defends, the balance of power in the region is firmly tilted in the latter's favour.<sup>54</sup> Indeed, the Rojava region consists of various self-governing sub-regions united by an overarching constitution and has an official armed defence force in the SDF.<sup>55</sup> As such, while the camps are on *de jure* Syrian Soil, the Syrian Arab Republic lacks the power to protect the rights of children inhabitant in them.

However, even if the Syrian Government did have the capability to assume control of the camps, it is questionable whether they would exercise protection favourably, given widespread allegations of the regime's co-opting of humanitarian aid and reconstructive assistance to Governmental endeavours.<sup>56</sup> The Government has furthermore stated its intention to prosecute those allegedly affiliated with ISIS, including children as young as 10 years old,<sup>57</sup> a worrying outsourcing of justice that has been advocated for by the likes of France<sup>58</sup> despite frequent reports highlighting the system's disregard for legal certainty, judicial independence and fair trial rights.<sup>59</sup> In addition, given the lack of European diplomatic relations with the Government, Syrian control of the camps could result in the whereabouts of inhabitants no longer being known to European States, a potentially life-threatening outcome for children.<sup>60</sup>

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<sup>51</sup> UN Doc CCPR/G/GC/35, at para 16.

<sup>52</sup> *Shamima Begum v the Secretary of State Appeal*, para. 130; Ordonnance, 19/129/C, at section 49.

<sup>53</sup> CRC, art 41(b): "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child, and which may be contained in: (b) international law".

<sup>54</sup> Rojava Information Centre, 'Rojava'.

<sup>55</sup> The New Arab, 'Syria Kurds adopt constitution'.

<sup>56</sup> Human Rights Watch, 'Rigging the System', 2.

<sup>57</sup> CRIN, 'Minimum Ages'.

<sup>58</sup> Luquerna, 'The Children of ISIS', 162.

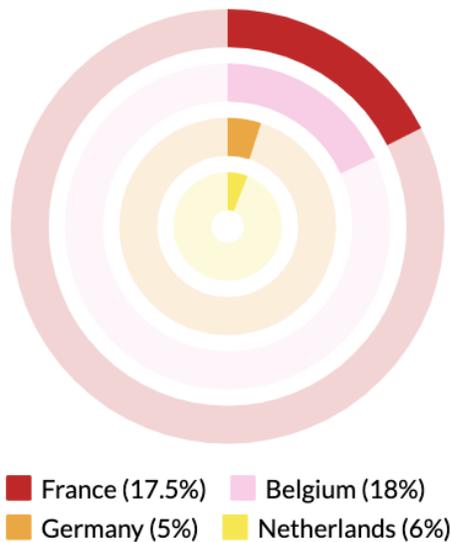
<sup>59</sup> Committee on Legal Affairs and Human Rights, 'Addressing the Issue of Daesh', para 17.

<sup>60</sup> RSI, 'Europe's Guantanamo', 39.

### 2.2.2 'Linked' States

The States with which children have links to are arguably the only other international State actor that have a tenable legal nexus to their rights.<sup>61</sup> In fact, the SDF has made clear that it will *only* release inhabitants to an officially appointed representative of their State of nationality, a process which it has been willing to facilitate<sup>62</sup> and made exceptions to only with explicit prior consent of the State in question.<sup>63</sup> Indeed, in recognising its inability to manage the humanitarian catastrophe it faces, the armed group has repeatedly called on the support of these States,<sup>64</sup> who not only seem to be in the best position to ensure these children's rights<sup>65</sup> but have the sole ability to do so. As such, it is contended that the rights of children of FTFs are in a *de facto* vacuum, without protection nor fulfilment if not for the active engagement of the States to which children have links. Nevertheless, the States under consideration in the present Thesis have largely avoided such call for action with policies of passive inaction; indeed, each have repatriated less than 20% of the children to which they have links since the fall of ISIS in March 2019 (*see Figure 1*).

Figure 1: Estimated Percentage of Children Repatriated by France, Belgium, Germany, and the Netherlands.



<sup>61</sup> UN Special Procedures, Legal 'Analysis', para 35.

<sup>62</sup> *Id.*

<sup>63</sup> RSI, 'Europe's Guantanamo', at FN 72: The French authorities facilitated the repatriation of two Dutch children to the Netherlands in 2019.

<sup>64</sup> UN Special Procedures, 'Legal Analysis', para 35.

<sup>65</sup> *Id.*

*Note.* The sources informing the statistical analysis for France,<sup>66</sup> Belgium,<sup>67</sup> Germany,<sup>68</sup> and the Netherlands<sup>69</sup> provide the most recent demographic data.

While these States have adopted largely inactive policies, this is not to say they are not aware of the severity of the situation. In fact, under the auspices of the US-led Global Coalition to Defeat ISIS, Belgium, France, Germany, and the Netherlands have been cooperating militarily and financially with the SDF to keep any ISIS resurrections at bay.<sup>70</sup> This includes, *inter alia*, supporting the holding of ISIS-affiliated individuals in displacement camps throughout Rojava, within which they also have a military, diplomatic, and/or intelligence presence.<sup>71</sup> Among the European States under consideration, France has gone the furthest in establishing explicit political links with Rojava, with President Macron hosting a senior SDF official to demonstrate French allegiance to the group in 2019.<sup>72</sup> The remaining States have, however, also provided some degree of humanitarian assistance in the region and participated in informal partnerships with the SDF.<sup>73</sup>

Moreover, the reaction of Western Europe lies in stark contradiction to that of its Central Asian counterparts (*see Figure 2*), a region with a population four times smaller, but a roughly equal supply of FTFs.<sup>74</sup> In 2019, Uzbekistan initiated operation ‘kindness’ to repatriate 156 Uzbek citizens from Syria, including 106 children and 50 adults.<sup>75</sup> The same year, Kazakhstan commenced ‘Zhusan’,<sup>76</sup> a mission to return 357 children and 159 adults.<sup>77</sup> Tajikistan soon followed suit, announcing its readiness to repatriate every Tajik citizen from Syria; by December 2020, the Government had arranged for the return of around 200 citizens, mostly women and children.<sup>78</sup> Finally, Kyrgyzstan joined its neighbours in September 2019 as it announced plans to conduct rescue operations to return Kyrgyz children from Iraq.<sup>79</sup>

*Figure 2:* Comparison Between Estimated Number of Children Repatriated by Central Asian States and European States.

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<sup>66</sup> France 24, ‘France repatriates seven’; Aguetant, ‘Turn of the Tide’, 52: France has repatriated an estimated 35 of 200 children.

<sup>67</sup> RSI, ‘Europe’s Guantanamo’, 50: Belgium has repatriated an estimated 7 of 38 children.

<sup>68</sup> *Id.*, 53; Kajjo, ‘Germany Repatriates Three IS Women’: Germany has repatriated an estimated 7 of 150 children.

<sup>69</sup> Van der Heide and Geenen, ‘Children of the Caliphate’, 4; The Associated Press, ‘Dutch woman, three children’; NL Times, ‘Dutch delegation’: the Netherlands has repatriated an estimated 5 of 80 children.

<sup>70</sup> RSI, ‘Europe’s Guantanamo’, para 82.

<sup>71</sup> *Id.*, para 84.

<sup>72</sup> The New Arab, ‘France’s Macron’: President Emmanuel Macron hosted a senior SDF official at the Elysée Palace to show that France ‘stands alongside’ the SDF.

<sup>73</sup> RSI, ‘Europe’s Guantanamo’, at FN 61: the SDF are cooperating with European States by, for instance, allowing their intelligence officials to enter the prisons and camps to speak with their foreign nationals held there.

<sup>74</sup> Zhirukhina, ‘Foreign Fighters from Central Asia’.

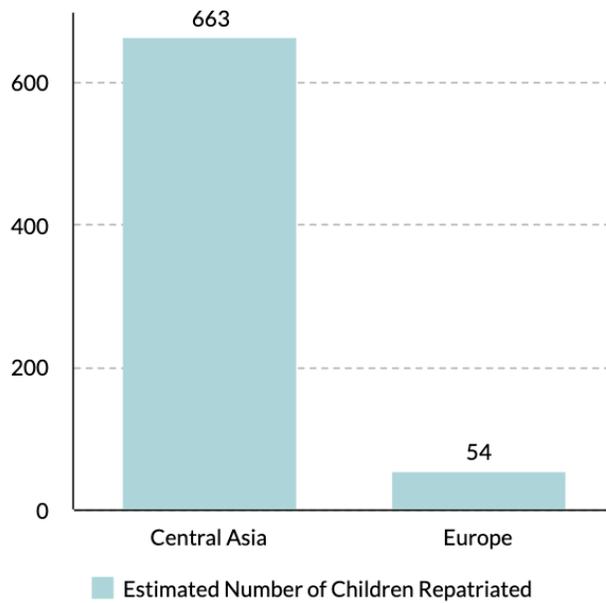
<sup>75</sup> *Id.*

<sup>76</sup> Helf, ‘Central Asia’, 1: “Zhusan translates into ‘sagebrush’ but evokes the unique scent of the Kazakh steppe - something along the lines of the ‘the green, green grass of home’”.

<sup>77</sup> Zhirukhina, ‘Foreign Fighters from Central Asia’.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*



*Note.* Central Asia = Uzbekistan, Kazakhstan, Tajikistan, and Kyrgyzstan; Europe = France, Belgium, The Netherlands, and Germany. This visual comparison is a compilation of the aforementioned statistics, all of which are drawn from sources providing the most recent demographic data.

Consolidating their seemingly coordinated approach, Government officials, caregivers, non-governmental organisations and media platforms from Kazakhstan, Uzbekistan, Tajikistan, and Kyrgyzstan united in a regional conference in 2019 to share best-practice approaches towards the rehabilitation and reintegration of FTFs and their families.<sup>80</sup> It seems that in reaching their policy choices, Central Asian States recognised the long-term security threat of retaining the children in the camps versus that of rehabilitation and re-education mechanisms.<sup>81</sup> Whatever the rationale, the successful efforts of Central Asian States in repatriating their nationals from the squalor of SDF-controlled camps demonstrates the practical and logistical feasibility of this measure and illuminates the passivity of the European States under investigation.

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<sup>80</sup> Helf, 'Central Asia', 2.

<sup>81</sup> *Id.*

### **Resumé**

Myriad reports detail a morally disturbing scene of hundreds of children of French, German, Belgian, and Dutch FTFs in SDF-controlled camps throughout Rojava. While these reports are chilling in themselves, perhaps what aggravates the dystopian nature of the context is a recognition that the European States under analysis have the sole ability to build the road out of Dystopia, ending the *de facto* vacuum that the rights of children with links to them are in. The passivity of these States is particularly visible when compared with their Central Asian counterparts, whose efforts have been hailed as “humanitarian initiatives” to safeguard the rights of vulnerable children and their mothers.<sup>82</sup> However, should such actions be belittled as gestures of mere good-will, or are they taken in full compliance with the existing international legal framework? Indeed, such a question leads into the ensuing Part.

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<sup>82</sup> Capone, ‘The Children (and Wives) of Foreign ISIS fighters’, 70.

## **PART II: APOLOGIA**

*“Apologia - A formal written defence of one’s opinion or conduct”<sup>83</sup>*

Moving from a factual assessment of the context to a legal analysis of State responsibilities, the reader now finds themselves in the second substantive Part of the Thesis: ‘Apologia’. In Part II, discussion will centre around what responsibilities the relevant international legal framework places on States who have links with children held in SDF-controlled camps and the justifications the States under investigation have used as an apologia against such responsibilities. To do so, Part II will first provide a discussion on the relevant international legal framework (*see Chapter 3*), winding its way through the various standards established within ICRL, before addressing those enshrined by complementary fields of law. Analysis will subsequently flow into the domestic level, assessing the Belgian, French, German, and Dutch perspectives towards their ‘response-ability’ over children of FTFs (*see Chapter 4*).

### **Chapter 3. Relevant International Legal Framework**

#### **3.1 International Children’s Rights Law**

As modern thought has developed, so too have the perspectives on the rights of the child and the respect, protection and fulfilment they beckon; recognising that “mankind owes the child the best it has to give”,<sup>84</sup> a series of State obligations towards children are now specifically enshrined in the CRC and afforded indirect acknowledgement through the ECHR. Indeed, these two instruments and their applicability to the actions of Belgium, France, Germany and the Netherlands, who are Party to both Conventions,<sup>85</sup> form the ‘International Children’s Rights Law’ to be discussed. Given the children’s location, the key issue in the present context regards the extraterritorial application of these two treaties, a concept which beckons consideration of the circumstances in which ICRL infers an extraterritorial jurisdiction on States over children of FTFs, and subsequently, any corresponding duties.

##### 3.1.1. A Jurisdictional Conundrum

Article 2(1) of the CRC places an obligation upon States to “respect and ensure” children’s rights “to each child within their jurisdiction”.<sup>86</sup> The purposeful absence of a territorial restriction is telling of the CRC’s intended extraterritoriality,<sup>87</sup> a premeditation that was subsequently reinforced by Articles 4(2)<sup>88</sup> and 5(4)<sup>89</sup> of the Optional

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<sup>83</sup> Merriem Webster, ‘apologia’.

<sup>84</sup> Kilkelly and Liefwaard, *International Human Rights of Children*, 5.

<sup>85</sup> Council of Europe, ‘Map & Members’; OHCHR, ‘Committee’.

<sup>86</sup> CRC, art 2(1).

<sup>87</sup> Den Heijer and Lawson, “Extraterritorial Human Rights”, 161: Revising an earlier draft of the CRC which explicitly linked obligations to the jurisdiction *and* territory of a State party, the Finnish delegation proposed that “in order to cover every possible situation”, the territoriality requirement should be renounced.

<sup>88</sup> OPSC, art 4(2): Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3(1) when (a) the alleged offender is a national of that State or a person who has his habitual residence in its territory; (b) the victim is a national of that State.

<sup>89</sup> OPSC, art 5(4): Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4.

Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, and cemented in General Comment No.16.<sup>90</sup> The same could be said of the ECHR, whose Article 1 obligates High Contracting Parties to secure the rights and freedoms incumbent to the Convention “to everyone within their jurisdiction”,<sup>91</sup> thereby omitting a territorial reference. While alluding to an application beyond State borders, the defining limits of the jurisdictional concept in the CRC and the ECHR remains open to interpretation by their respective monitoring bodies, a task largely guided by the need to find a balance between the powerful forces of universalism and effectiveness.

Indeed, the idea that State’s human rights obligations sometimes do not stop at their territorial borders is reflective of the intended universality of such rights. Mitigating a wholly universalist jurisdictional interpretation, however, is a recognition of effectiveness, or the notion that human rights provisions strive to create State obligations that can be realistically met and effectively implemented. That is to say that a legal framework which is wholly ignorant to the realities of State’s capabilities, international relations and sovereign rights, would serve no useful purpose.<sup>92</sup> While this jurisdictional conundrum and the compromise it necessitates oftentimes results in judgements plagued with methodological and conceptual inconsistencies,<sup>93</sup> an examination of the extant jurisprudence of various human rights bodies can outline general trends and standards, ultimately informing discussion on the jurisdictional links between children in Syria and States in Europe under the CRC and the ECHR.

### 3.1.1.1 Jurisdiction Resulting from Control over Territory

Across IHRL, it is now uncontroversial that jurisdiction extends extra-territorially in certain circumstances, including when a State exercises effective control over an area abroad.<sup>94</sup> In essence, a State has jurisdiction over territory and therefore obligations to persons engulfed in it, when it is the sovereign power with regard to that territory; the underpinning logic entails that any other decision may render persons void of meaningful human rights protections.<sup>95</sup> The ECtHR has affirmed this exception to the ‘primarily territorial’<sup>96</sup> scope of the ECHR, recognising in the case of *Loizidou* that having effective control over an area outside its national territory, whether exercised “directly, through its armed forces or through a subordinate local administration”, enlivens State’s obligations “to secure [...] the rights and freedoms set out in the Convention”.<sup>97</sup>

While supporting the SDF in its efforts via the US-led Coalition Against ISIS, the extent to which Belgium, France, Germany, and the Netherlands qualify the effective control threshold is considerably limited, not least by the region's *de facto* autonomy under the military defence of the SDF. Indeed, interpretation *ratione spatialis* is not one which would establish a jurisdictional link between children of FTFs and their States of nationality under the ECHR nor the CRC.

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<sup>90</sup> UN Doc CRC/C/GC/16., at para 39: Jurisdiction is not limited by the Convention to ‘territory’.

<sup>91</sup> ECHR, art 1.

<sup>92</sup> Milanovic, *Extraterritorial Application*, 55.

<sup>93</sup> *Id.*

<sup>94</sup> *Loizidou v. Turkey*, para 62; *Banković and Others v. Belgium and Others*, para 70; *Ilaşcu and Others v. Moldova and Russia*, paras 314-16.

<sup>95</sup> Den Heijer and Lawson, “Extraterritorial Human Rights”, 167.

<sup>96</sup> *Banković and Others v. Belgium and Others*, paras 61 and 67; *Ilaşcu and Others v. Moldova and Russia*, para 312; *Soering v. the United Kingdom*, para 86.

<sup>97</sup> *Loizidou v. Turkey*, para 62.

### 3.1.1.2. Jurisdiction Resulting from Control over Persons

Attention thus turns to jurisdictional interpretation, *ratione personae*, or the notion that “authorised agents of the State [...] bring other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property” and “in so far as they affect such persons or property by their acts or omissions”.<sup>98</sup> In *Burgos*, the Human Rights Committee (‘HRCtee’) utilised this jurisdictional lens to avoid the “unconscionable” result of permitting “a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”,<sup>99</sup> a notion that has since become a generally recognised principle.

Indeed, this same concept has gradually engraved itself into the jurisprudence of the ECtHR, which, in the cases of *Ocalan*,<sup>100</sup> *Medvedyev*,<sup>101</sup> and *Al-Saadoon*,<sup>102</sup> found no difficulty in accepting that the extraterritorial arrest and deprivation of liberty on behalf of State agents, sufficed to bring the affected applicants within the acting State’s jurisdiction. Digressing from the need of physical force to demonstrate ‘authority’, the ECtHR has furthermore reasoned that the use of mere incidental force serves to bring victims within the jurisdiction of acting States, as was well demonstrated in *Solomou* and *Andreou*.<sup>103</sup> Moreover, there are several cases in which the ECtHR judged jurisdiction affirmatively in the absence of force entirely, particularly with regard to States’ application of adjudicative measures. These include, *inter alia*, where legislative amendments impacted on nationals abroad,<sup>104</sup> with regard to travel sanctions that have exclusive effect abroad,<sup>105</sup> or in respect of defective extradition requests resulting in the detention of an individual abroad.<sup>106</sup> What is pivotal in determining jurisdiction in these cases seems to be the proximity between a State’s acts and the repercussions for the individual; indeed, State “responsibility may [...] be engaged on account of acts which have *sufficiently* proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction”.<sup>107</sup>

In hindsight, the aforementioned Strasbourg case-law is a perplexing turn from the ECtHR’s widely criticised, yet unanimously rendered, *Bankovic* decision. Amongst other contentious points, the judges residing over the *Bankovic* case reasoned that an approach which divides and tailors the ECHR “in accordance with the particular circumstances of the extra-territorial act in question”, would make the words encompassed within Article 1 “superfluous and devoid of any purpose”.<sup>108</sup> Indeed, the Court held that it would equate the jurisdiction requirement with the question of whether a person can be considered to be a victim of a violation of the rights guaranteed by the Convention, no matter where

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<sup>98</sup> *Al-Skeini and Others v. the United Kingdom*, para 121.

<sup>99</sup> *Burgos v. Uruguay*, para 12.3.

<sup>100</sup> *Öcalan v. Turkey*, para 91.

<sup>101</sup> *Medvedyev and Others v. France*, para 67.

<sup>102</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, para 140.

<sup>103</sup> *Solomou and Others v. Turkey*, para 29; *Andreou v. Turkey*, para 25: The Turkish-Cypriot forces’ discharge of gunfire, which was “the direct and immediate cause” of subsequent fatalities, was deemed by the Court as “within the jurisdiction” of Turkey.

<sup>104</sup> *Kovačić and Others v. Slovenia*.

<sup>105</sup> *Nada v. Switzerland*.

<sup>106</sup> *Stephens v. Malta*.

<sup>107</sup> *Illascu and Others v. Moldova and Russia*, para 314.

<sup>108</sup> *Bankovic and Others v. Belgium and Others*, para 75.

in the world an act was allegedly committed or its violations felt.<sup>109</sup> As such, it did not deem every exercise of authority affecting a person's enjoyment of human rights sufficient to bring that person under its 'jurisdiction'. The case of *Al-Skeini*,<sup>110</sup> one recent attempt of the Court to clean its murky jurisdictional interpretation lens, could be read as upholding the *Bankovic* doctrine that the mere exercise of incidental authority over an individual is insufficient to form a jurisdictional link.<sup>111</sup>

It thus seems that the ECtHR is wary to accept that all forms of extraterritorial activity remain covered by human rights standards. Such hesitation is not groundless and perhaps alludes to the discussion in sub-section 3.1.1.; myriad issues arise when State obligations are stretched, not least including States' own practical abilities to effectively undertake them. Nevertheless, alternative human rights bodies, including The Committee, continue to extend jurisdictional limits with what has been recognised as a 'control of rights' approach.

### 3.1.1.3 Jurisdiction Resulting from Control over Rights

The shift from control over persons to control over rights is a subtle yet important one, which has, up until the HRCtee's General Comment No.36, seemed to quietly bubble beneath the surface of the Inter-American system of human rights. Indeed, the Inter-American Commission on Human Rights ('IACHR') and Inter-American Court of Human Rights ('IACtHR') have both considered that, "in principle, the [jurisdiction] inquiry turns [...] on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control".<sup>112</sup> As such, the shooting down of two civilian aircrafts in international space in *Brothers to the Rescue*, was sufficient to consider the aircrafts' passengers to have been under the 'authority' of Cuba, despite the absence of any other special relationship between the two parties.<sup>113</sup> Similarly, the IACtHR's recent advisory opinion on the environment and human rights maintained that "the person whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory".<sup>114</sup>

This Inter-American reasoning is reminiscent of the HRCtee's General Comment No.36, which asserts that State jurisdiction extends to "individuals [...] whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner".<sup>115</sup> The recent case of *A.S et al* provided an apt opportunity for the HRCtee to elucidate and cement this standard in practice, as it found that Italy's failure to rescue a vessel in distress had a "foreseeable consequence" of the loss of life, thereby creating a "special relationship of dependency" and bringing the deceased under Italian jurisdiction.<sup>116</sup> It has been maintained that this jurisdictional lens effectively

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<sup>109</sup> *Id.*

<sup>110</sup> *Al-Skeini and Others v the United Kingdom.*

<sup>111</sup> Den Heijer and Lawson, "Extraterritorial Human Rights", 180.

<sup>112</sup> *Coard et al. v. the United States*, para 37; *Alejandro et al. v. Cuba*, para 23.

<sup>113</sup> *Alejandro et al. v. Cuba*, para 25.

<sup>114</sup> Advisory Opinion OC-23, at para 101.

<sup>115</sup> UN Doc CCPR/C/GC/36, at para 63.

<sup>116</sup> *A.S et al v. Italy*, paras 7.6 and 7.8.

endorses a functional approach, under which the scope of State obligations depends on their capacity to fulfil them.<sup>117</sup> If the State has the capacity to protect a right, premised on its knowledge of a reasonably foreseeable threat, it has the duty to do so, regardless of the person's location or status.<sup>118</sup> In the same vein, "failures to act or omissions that are potentially tantamount to active measures in their directness of causation, significant impact and foreseeability",<sup>119</sup> are similarly engulfed by the functional model.

### 3.1.1.4 Opportunistic Cases (f)or Jurisdictional Backsliding?

It is against this backdrop that The Committee introduced the landmark admissibility decisions regarding the cases of *L.H et al v. France* and *F.B et al v. France*, cementing its positive position towards a functional interpretation of the extraterritorial jurisdiction of the CRC. The cases concern individual communications brought by the relatives of children who the French State refused to repatriate based on their parents alleged ISIS-affiliation.<sup>120</sup> The children are currently being held in the SDF-controlled Rok, Ain Issa and Al-Hol camps,<sup>121</sup> the circumstances of which have been described in Chapter 1. Contrary to the French contention that basing jurisdiction on the grounds that a State party had not acted when it *could* have done would be "tantamount to [...] accepting universal jurisdiction",<sup>122</sup> The Committee concluded that the State had "the capability and the power" to take positive obligations to protect the children's rights.<sup>123</sup> In doing so, it grounded its inquiry firmly in a functional approach, an interpretational lens which it has motioned towards in the past; The Committee's Joint General Comment No.3 asserted that States have jurisdiction over migrant children to whom the State authorities *could* offer a helping hand,<sup>124</sup> a principle which it applied in the case of *C.E* to find Belgium's jurisdiction over the rights of a child located in Morocco.<sup>125</sup>

The admissibility decision in *L.H. et al* and *F.B. et al* is thus not entirely surprising, nevertheless, the ebbs and flows of The Committee's reasoning do beckon further analysis. The monitoring body situates its judgement in the particular circumstances of the case: given the extreme vulnerability of the children; the State's rapport with the Kurdish authorities and the latter's willingness to cooperate; the fact that France already repatriated French children from the camps; and the French nationality of the children, the State had 'power and capability' to protect their rights.<sup>126</sup> While this children's rights friendly outcome is not disputed, The Committee's placement of considerable weight on these factors does leave worrying room for debate.

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<sup>117</sup> See also the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, paras 189 and 429 for an apt point of comparison: The ICJ held that the extent of the duty to prevent genocide, regardless of where the act might be committed, varies with the State's capacity.

<sup>118</sup> Milanovic, 'The Murder of Jamal Khashoggi', 21.

<sup>119</sup> Shany, 'Taking Universality Seriously', 69.

<sup>120</sup> Duffy, 'French Children in Syrian Camps'.

<sup>121</sup> *L.H et al v. France*, para 1.1.

<sup>122</sup> *Id.*, para 4.8.

<sup>123</sup> *Id.*, para 9.7.

<sup>124</sup> UN Doc CMW/C/GC/3-CRC/C/GC/22, at para 12.

<sup>125</sup> *C.E. v. Belgium*.

<sup>126</sup> *L.H et al v. France*, para 9.7.

For instance, by taking into serious consideration the fact that France had repatriated children from Syria before, the Committee's jurisdictional inquiry leads to the perverse consequence uncovered by the dissenting opinions in *AS et al*<sup>127</sup> and maintained by the ECtHR's reasoning in the case of *Hanan*;<sup>128</sup> that it would have perhaps worked in favour of the French Government if they had *not* previously repatriated other children from Syria, thus inadvertently incentivising States to refrain from positive and sometimes critical actions that create relationships of dependency, including, for example, the sending of aid to Rojava. Moreover, emphasis on the children's status of vulnerability risks creating a hierarchy of victimhood, in which a child's apparent helplessness is positively correlated with the argument for their protection;<sup>129</sup> at what point does a child's vulnerability cross the threshold necessitating protection? Furthermore, The Committee's inclusion of nationality as a 'but for' condition in their reasoning does not bode well for the objective of ICRL to eliminate discrimination on the basis of nationality;<sup>130</sup> would France have a duty to protect only a French child and not their German sibling living in the same squalor? Furthermore, the enormous variation between State laws with regard to the acquisition and deprivation of nationality, a particularly contentious topic with regards to FTFs, makes any fair attribution of protection based on children's nationality seemingly impossible.<sup>131</sup>

In what seems to be an increasingly lacklustre judgement with further analysis, The Committee also fails to seriously engage with the standards incumbent to the 'control of rights' approach. For instance, the Committee omits any discussion on the 'direct and foreseeable impact' of State decisions not to intervene on the children's rights and the seriousness of such harm, nor does it provide any discussion on the specific rights over which the French government is apparently exercising control.<sup>132</sup> As such, it opened the door to critiques of normative clarity and legal certainty that have plagued the 'control of rights' model. Such voices assert that the potential over-dilution of jurisdictional conditions renders the approach "essentially limitless"<sup>133</sup> at the risk of over-burdening States with an obligation to act whenever they are capable of doing so;<sup>134</sup> the balance between universality and effectiveness would be critically outweighed in favour of the former. Furthermore, in a similar weakening of jurisdictional conditions, The Committee's judgement permits a situation where a State's decision not to protect human rights triggers their obligation to protect them, an order of reasoning that is logically flipped.<sup>135</sup>

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<sup>127</sup> *A.S. et al v. Italy*, 'Individual Opinion of Andreas Zimmerman', para 4: "State parties [...] might even try to avoid coming close to vessels in distress so as to avoid any impressions of a 'special relationship of dependency'".

<sup>128</sup> *Hanan v Germany*, para 135: "[...] the Court is also mindful [...] that establishing a jurisdictional link merely on the basis of the institution of an investigation may have a chilling effect on instituting investigations at the domestic level into deaths occurring in extraterritorial military operations".

<sup>129</sup> Aguezzant, 'A Turn of the Tide', 52.

<sup>130</sup> Duffy, 'French Children in Syrian Camps', 12; CRC, art 2(1).

<sup>131</sup> Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters'.

<sup>132</sup> Duffy, 'French Children in Syrian Camps', 11.

<sup>133</sup> Milanovic, 'The Murder of Jamal Khashoggi', 21.

<sup>134</sup> Shany, 'Taking Universality Seriously', 52; "it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles".

<sup>135</sup> Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters'; *see also* for a point of comparison, *M.N. and others v. Belgium*, para 112: "The mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside of its territory".

These critiques of a potential jurisdictional backsliding and subsequent overburdening of State obligations are perhaps what the ECtHR alluded to and strived to avoid in its *Bankovic* decision. It is thus with cautious anticipation that this Thesis acknowledges two opportunistic cases that could set international best practice for compliance with human rights standards, namely that of *H.F. and M.F. v France* and *J.D. and A.D. v France*, both pending before the ECtHR's Grand Chamber.<sup>136</sup> The noteworthy facts of the cases are fairly similar: both sets of applicants are French nationals whose daughters travelled to ISIS-controlled territory together with their respective partners in 2014 and early 2015; both daughters subsequently gave birth to their children in Syria; and all mothers and children are currently residing in the SDF controlled Al-Hol camp, as they have allegedly done since 2019.<sup>137</sup> The applicants, and their supporting third-party interveners, ground their jurisdictional argument in an acknowledgement of two foundational principles in the ECtHRs' toolbox: the need to avoid "regrettable vacuums in the system of human-rights protection"<sup>138</sup> and to ensure rights that "are not merely theoretical or illusory but practical and effective".<sup>139</sup> Alluding to the functional model, the applicants suggest that extending jurisdiction based on the State's practical ability to bring the detention and alleged violations to an end through repatriation, is the only way to ensure that the above two principles are upheld.

It is, however, very difficult to predict the reaction of the Grand Chamber, not least because of the lack of clear overarching jurisdictional standards in Strasbourg case-law. Adding quandary to conundrum is the recently delivered judgement in *Georgia v Russia (II)*,<sup>140</sup> a case which "is exemplary only in its arbitrariness".<sup>141</sup> The Court's reasoning on the case's key points of jurisdiction and the applicability of the ECHR in armed conflict signify a retrograde step, underscoring its position as an outlier when compared to other human rights bodies.<sup>142</sup> Indeed, the ECtHR did not even cite, let alone seriously engage with the HRCtee's General Comment No.36 central to the 'control of rights' approach. Therefore, while French 'power and capability' to protect the rights of the children in *H.F. and M.F.* and *J.D. and A.D.* is a normatively appealing argument, one affirmed by The Committee to the CRC, it is unlikely to trigger jurisdiction under the ECtHR's current jurisprudence. Perhaps one could draw on the aforementioned case-law regarding situations where the ECtHR has engaged State jurisdiction on account of acts which have "sufficiently proximate"<sup>143</sup> repercussions on rights guaranteed by the Convention (*see section 3.1.1.2*). However, this line of responsibility is arguably blurred in an acknowledgement that the French Government was not 'acting' *per se*, but rather remaining passive, albeit with the same outcome of creating a situation whereby its nationals are unable to return.

To reach a rather inconclusive conclusion, it is thus incredibly difficult to foresee the outcome of the case pending before the ECtHR. Regarding the existence of State responsibilities under the CRC, however, the picture is clearer: The Committee's judgements provide a decisive basis to uphold the positive obligations of France, and assumedly other States in similar factual positions, to ensure the rights of the children with which they have links to who are currently held in SDF-controlled camps throughout Rojava.

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<sup>136</sup> ECtHR, 'Grand Chamber to examine two applications'.

<sup>137</sup> *Id.*

<sup>138</sup> *Cyprus v. Turkey*, para 78.

<sup>139</sup> UN Special Procedures, 'Legal Analysis', para 10; *Airey v. Ireland*, para 24.

<sup>140</sup> *Georgia v Russia (II)*.

<sup>141</sup> Milanovic, 'Georgia v. Russia No.2'.

<sup>142</sup> *Id.*

<sup>143</sup> *Illascu and Others v. Moldova and Russia*, para 314.

### 3.1.2. A Prediction of Obligations

#### 3.1.2.1. Under the Convention on the Rights of the Child

As the question is not one of whether or not States need to *refrain* from acting, their obligations under the CRC in the context at hand include the latter two positive notions of the Convention's tripartite framework of duties: protect and fulfil.<sup>144</sup> The duty to *fulfil* under the CRC requires States to take actions to ensure the full realisation of the rights of the child, including, for instance, undertaking positive measures that enable and assist children to effectively enjoy their rights.<sup>145</sup> Fulfilling children's rights is inextricably intertwined with duties to *protect* such rights; these refer to the State's positive obligations to take preventative measures to reduce or eliminate violations inflicted by non-State actors.<sup>146</sup> Taken together, it can be asserted that States have positive obligations to take all appropriate legislative, administrative and other measures to protect and fulfil the rights of the children in question.<sup>147</sup>

While States do have discretion regarding *which* measures they take to protect and fulfil children's rights, a multitude of human rights bodies and political authorities have delineated a course of action most compatible with the CRC. The suggestion that actions to improve the conditions in camps or invest in local justice systems may fulfil State positive obligations have been repudiated by concerns of timeliness and adequacy;<sup>148</sup> the extent to which such efforts would achieve, *inter alia*, the optimal development of children<sup>149</sup> or sufficiently protect them from any form of violence,<sup>150</sup> is limited. Furthermore, it certainly would not be compatible with State obligations to take children's best interests into primary consideration<sup>151</sup> when a more protective measure, such as repatriation, is readily available.

Indeed, it has been contended that repatriation of the child out of the squalor of displacement camps is the only legally and morally tenable solution under ICRL. Such action would sufficiently protect children from the violations perpetrated by the SDF, including those to the children's rights to life,<sup>152</sup> health,<sup>153</sup> education,<sup>154</sup> adequate standards of living,<sup>155</sup> safe leisure and play areas,<sup>156</sup> liberty,<sup>157</sup> and security from violence.<sup>158</sup> Furthermore, it would create an

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<sup>144</sup> UN Doc CRC/C/GC/19, at para 27.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; UN Doc CRC/C/GC/16, at para 28.

<sup>147</sup> CRC, art 4.

<sup>148</sup> Sandelowsky-Bsoman and Liefwaard, 'Children Trapped in Camps in Syria', 154.

<sup>149</sup> UN Doc CRC/GC/2003/5, at 4.

<sup>150</sup> CRC, art 19.

<sup>151</sup> *Id.*, art 3.

<sup>152</sup> *Id.*, art 6.

<sup>153</sup> *Id.*, art 24.

<sup>154</sup> *Id.*, art 28.

<sup>155</sup> *Id.*, art 27.

<sup>156</sup> *Id.*, art 31.

<sup>157</sup> *Id.*, art 37(b).

<sup>158</sup> *Id.*, art 19(1).

environment conducive to fulfil State obligations to provide these children with appropriate assistance for physical and psychological recovery<sup>159</sup> and ensure the prevention of any further recruitment of children into armed conflict.<sup>160</sup>

Giving substance to this putative claim are a multitude of voices; calls for States to repatriate their linked children have come from the United Nations ('UN') High Commissioner on human rights,<sup>161</sup> the Special Representative of the Secretary General for Children and Armed Conflict,<sup>162</sup> the Concluding Observations of The Committee,<sup>163</sup> and the Special Rapporteurs on Counter-terrorism and on extrajudicial, summary or arbitrary executions.<sup>164</sup> At the European level, similar advocacy for repatriation efforts have arisen from the Office for Democratic Institutions and Human Rights,<sup>165</sup> the Human Rights Commissioner for the Council of Europe,<sup>166</sup> the Council of Europe Parliamentary Assembly Resolution 2321,<sup>167</sup> and the European Parliament Resolution 2019/2876.<sup>168</sup>

It should be noted that the foundations of this repatriation demand are upheld by the recognition that this action would be the only one to wholly ensure the fulfilment of children's rights, rather than by an argument that children have a right to such repatriation based on their right to return.<sup>169</sup> While the right to return to one's own country is generally considered customary international law in the human rights context,<sup>170</sup> it does not imply an individual right to be actively repatriated by one's State of nationality.<sup>171</sup> Even considering the child's right to reunification with their extended family in their home country, enshrined in Article 10(1) of the CRC,<sup>172</sup> the literal text of this provision does

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<sup>159</sup> *Id.*, art 39; OPAC, art 6(3).

<sup>160</sup> OPAC, art 4(2).

<sup>161</sup> OHCHR, 'Bachelet urges States': "I very much welcome that some countries of origin have started repatriating their nationals – and are showing more openness to repatriating young children and orphans".

<sup>162</sup> UN Doc A/HRC/40/49, at 66: "reintegration of children is crucial to ensuring sustainable peace and security and to break cycles of violence".

<sup>163</sup> UN Doc CRC/C/BEL/CO/5-6, at para 50(b): In response to the Belgian decision to only repatriate Belgian children under the age of 10, the CRC recommended the repatriation of all children, irrespective of age, and where possible also their families.

<sup>164</sup> UN Special Procedures, 'Legal Analysis', para 2: "The urgent return and repatriation of foreign fighters and their families [...] is the only international law-compliant response".

<sup>165</sup> OSCE Office for Democratic Institutions and Human Rights, 'Guidelines', 68: "Recommended that MS enable the return of children who have 'meaningful links' or 'substantial links' to those states".

<sup>166</sup> Council of Europe Commissioner for Human Rights, 'PACE urgent debate': "[...] urgently repatriate their underage nationals stranded in the camp of Al-Hol".

<sup>167</sup> Council of Europe Parliamentary Assembly Resolution 2321, at para 6: "actively repatriating, rehabilitating and reintegrating these children without further delay are human rights obligations and a humanitarian duty".

<sup>168</sup> European Parliament Resolution 2019/2876, at para 61: urged EU member States "to repatriate all European children, taking into account their specific family situations and the best interests of the child as a primary consideration".

<sup>169</sup> CRC, art 10(1).

<sup>170</sup> Luquerna, 'The Children of ISIS', 176.

<sup>171</sup> Spadaro, 'Repatriation of Family Members', 254.

<sup>172</sup> UN Doc CRC/C/GC/14, at para 66.

not imply any duty of active facilitation,<sup>173</sup> but at best entails the right to be issued with travel documents.<sup>174</sup> This is, as is succinctly expressed by Mehra and Paulson, tantamount to “showing a detainee the key to their cell, [...] telling them they are entitled to the key, but keeping it out of grasp”.<sup>175</sup>

In addition to, or in support of repatriation efforts, States are further obliged to enter into international cooperation where necessary to implement children’s rights.<sup>176</sup> Considering the complexity and transregional nature of the challenge at hand, such a need for international collaboration is indeed implied.<sup>177</sup> Furthermore, in consideration of the CRC’s recognition of the role of family as the fundamental unit of society,<sup>178</sup> any positive measure undertaken by States should not infringe on children’s rights to not be separated from their parents, except when in their best interests.<sup>179</sup> At the same time, children should not be adversely discriminated against on the basis of their parents’ religious, political or other opinion.<sup>180</sup> That is to say that State decisions to not repatriate children based on their parents’ alleged belief in ISIS ideology is not compatible with the CRC, nor is the arbitrary separation of children from their parents as a result of repatriation efforts.

In sum, States would have positive obligations under the CRC to take all appropriate administrative, legislative and other measures to fulfil and protect the rights of children with links to them in SDF-controlled camps. While States do have discretion in choosing such measures, it has been contended that repatriation is the most compatible solution; justification for this measure is not rooted in a child’s right to return, but rather in a recognition that this would be the only legally tenable option.

### 3.1.2.2. Under the European Convention on Human Rights

Despite the argumentation throughout section 3.1.1. setting a shaky ground for any affirmative finding of State jurisdiction over children they have links to in SDF-controlled camps under the ECHR, such an outcome would be significantly ground-breaking, not least because of its binding nature as compared to the CRC. If such a judgement was to be seen, State’s positive obligations towards several rights would become applicable, including the rights to life<sup>181</sup> and family life,<sup>182</sup> and the prohibition of inhuman or degrading treatment.<sup>183</sup> While an in-depth discussion on the nature of these obligations goes beyond the scope of the present Thesis, the question under the ECtHR would, in short, be one of whether the State in question had acted with due diligence to protect those under their jurisdiction. Indeed, State obligations to take positive preventative operational measures to protect the right to life,<sup>184</sup> and to take

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<sup>173</sup> Sandelowsky-Bosman and Liefwaard, ‘Children Trapped in Camps in Syria’, 153.

<sup>174</sup> Spadaro, ‘Repatriation of Family Members’, 254.

<sup>175</sup> Mehra and Paulussen, ‘The Repatriation of Foreign Fighters’.

<sup>176</sup> CRC, art 4.

<sup>177</sup> ICRC Position Paper, ‘Humanitarian concerns’, 6.

<sup>178</sup> CRC, Preamble.

<sup>179</sup> *Id.*, art 9.

<sup>180</sup> *Id.*, art 2(1).

<sup>181</sup> ECHR, art 2.

<sup>182</sup> ECHR, art 8.

<sup>183</sup> ECHR, art 3.

<sup>184</sup> *Osman v. the United Kingdom*, para 115.

reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge of,<sup>185</sup> is well substantiated in the case-law of the ECtHR.

### 3.2. Complementary Fields of Law

Recognising that the issue is one stretching beyond a mere consideration of ICRL, discussion is now provided on State responsibilities as delineated by relevant complementary fields of law, namely IHL, international counterterrorism law, the law of State responsibility, and the law of diplomatic and consular relations.

#### 3.2.1 International Humanitarian Law

As members of the US-led ‘Global Coalition to Defeat ISIS’, Belgium, the Netherlands, France and Germany are involved in a non-International Armed Conflict against ISIS and are thus effectively bound by IHL in matters that have a nexus to the conflict.<sup>186</sup>

Of particular significance is Rule 158 of customary IHL requiring States to investigate and prosecute war crimes allegedly committed by their nationals; the International Committee of the Red Cross suggests that repatriation efforts which consider the maintenance of family unity as far as possible,<sup>187</sup> is one solution available to ensure such justice and security.<sup>188</sup> Furthermore, the positive obligations incumbent to Common Article 1 of the Geneva Conventions require State parties to take actions to prevent violations of IHL by other parties to a conflict, within the confines of the UN Charter.<sup>189</sup> This could reasonably include preventing the torture and cruel, inhuman or degrading treatment<sup>190</sup> of children within SDF-controlled camps via repatriation. Furthermore, removing children from displacement camps described as breeding grounds for a second generation of jihadist fighters would,<sup>191</sup> albeit in the long-term, certainly prevent violations of IHL by the Islamic extremist groups incumbent to the conflict.

#### 3.2.2. International Counterterrorism Law

The disparate norms stemming from counterterrorism bodies and Security Council (‘SC’) Resolutions that guide State’s counterterrorism approaches, *can* play a complementary role to ICRL, not least because of the Resolutions’ legally binding nature.

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<sup>185</sup> *A and others v. UK*, para 73.

<sup>186</sup> Geneva Academy, ‘RULAC’.

<sup>187</sup> ICRC Position Paper, ‘Humanitarian concerns’, 4.

<sup>188</sup> *Id.*, 6.

<sup>189</sup> UN Doc A/HRC/34/CRP.3, at para 101; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, ‘Rule 144’ at 509.

<sup>190</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, ‘Rule 90’ at 319.

<sup>191</sup> Broches, ‘What is Happening with Foreign Women and Children’.

The obligation to assume protection over linked children held in SDF-controlled camps is strongly implied in SC Resolutions 2427(2018),<sup>192</sup> 2396(2017),<sup>193</sup> and 2178(2014),<sup>194</sup> which all call for the adoption of age-appropriate and gender-sensitive reintegration and rehabilitation policies for children affected by armed conflict. Indeed, the Resolutions deem the successful implementation of such appeals crucial for the disintegration of conditions conducive to the spread of terrorism and thereby the prevention of further radicalisation.<sup>195</sup> As such, it has been asserted that the repatriation of children out of a life-threatening situation and into rehabilitation programs would amount to a positive implementation of these Resolutions.<sup>196</sup> Demonstrative of the potentially paralleling nature of counterterrorism and IHRL is the Human Rights Council's Resolution 31/30, which substantiates the SC perspective to assert that rehabilitation and reintegration strategies in line with human rights norms, can play an important role in the de-radicalisation of children specifically, and the de-escalation of terrorism more generally.<sup>197</sup> Moreover, the need for psychological and physical recovery measures substantiating rehabilitation, as suggested by SC Resolutions 2427(2018)<sup>198</sup> and 2396(2017),<sup>199</sup> is corroborated by Article 39 of the CRC which places responsibility on States to take appropriate measures to promote the physical and psychological recovery of a child victim to armed conflict.

Nevertheless, it should be briefly noted that the harmonious relationship between counterterrorism law and ICRL has often been called into question, particularly with regard to the SC's overly broad provisions and the potential they create for ensuing national policies that violate children's rights. For instance, despite Resolution 2396(2017) calling upon States to distinguish between FTFs and accompanying family members who may not have been engaged in FTF-related offenses,<sup>200</sup> it simultaneously provides States with a dangerously wide definition of such misdemeanours. By creating a notion of 'FTF-related offenses' that encompasses any person who participates in the financing, planning, preparation, or perpetration of terrorist acts,<sup>201</sup> the SC permits a situation whereby children, who might have been involuntarily recruited and trained by ISIS but did not perform combat functions nor were directly involved in terrorist activities, are swiftly swept under a widely stigmatised label. Therefore, while the legally binding Resolutions do corroborate an argument that places obligations on States to assume protection of their linked children and adequately re-integrate them into society, they can also be considered as a perpetuating factor in children's perceived dangerousness in the first place.

### 3.2.3 The Law of Diplomatic and Consular Relations

Acknowledgment of the 'nationality hinge' in the relationship between the States and children at hand, invites consideration of the law of diplomatic and consular relations. Representing the core of such law, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations list among the basic functions

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<sup>192</sup> UN Doc S/RES/2427(2018), at para 21.

<sup>193</sup> UN Doc S/RES/2396(2017), at para 31.

<sup>194</sup> UN Doc S/RES/2178(2014), at para 4.

<sup>195</sup> UN Doc S/RES/2396(2017), at 5; UN Doc S/RES/2178 (2014), at 2.

<sup>196</sup> UN Special Procedures 'Legal Analysis', para 2; UN Doc A/HRC/43/46/Add.1, at para 9.

<sup>197</sup> UN Doc A/HRC/Res/31/30, at para 9.

<sup>198</sup> UN Doc S/RES/2427(2018), at 2.

<sup>199</sup> UN Doc S/RES/2396(2017), at para 36.

<sup>200</sup> *Id.*, para 4.

<sup>201</sup> *Id.*, para 42.

of State's diplomatic missions and consular posts, the protection of their nationals in receiving States.<sup>202</sup> However, it seems States do have discretion in administering such protection; they are not obliged to exercise such functions if they do not consider them to be in their own political and economic interest.<sup>203</sup> This sentiment was recently re-established with the rejection of a proposal on behalf of the International Law Commission which would have imposed a State duty to exercise diplomatic protection when the fundamental rights of their nationals are violated abroad.<sup>204</sup>

Regional perspectives at the level of European Union (EU) law as to the existence of an individual right to receive consular assistance are, however, more divided. While some suggest that the language of Articles 23 of the Treaty on the Functioning of the European Union<sup>205</sup> and Article 46 of the EU Charter<sup>206</sup> imply an individual entitlement to protection by diplomatic and consular authorities, others maintain that the EU member States did not intend for the provisions to create a right to diplomatic protection, but rather to simply reflect a non-discrimination clause. A 2010 study indicated that such States are roughly equally split between those which did not recognise a right of consular assistance for their nationals and those which recognised it as a matter of domestic law, judicial interpretation, or administrative practice.<sup>207</sup> State discretion in this sense was cemented by the adoption of Directive 2015/637, which stresses the competence of member States to determine the scope of protection to be provided to their own nationals.<sup>208</sup> Further discussion on the trickling down of this discretion into domestic policy will thus be discussed in Chapter 4.

#### 3.2.4. The Law of State Responsibility

A dive deeper into the complementary fields of law which encompass State obligations *vis-à-vis* their relationship with the non-State actor, the SDF, requires consideration of the law of State responsibility. By a radical leap in the morality of international law,<sup>209</sup> Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') provides that a State which actively aids or assists another State in the commission of an internationally wrongful act is itself responsible.<sup>210</sup>

However, the value of Article 16 ARSIWA in the modern world, where States have increasingly been joined by powerful non-State actors with the capacity to inflict violations of international norms, is limited. While there is a putative claim that a *complicit* relationship between the State and a non-State actor is sufficient to attribute the latter's conduct to the former, this has been widely disregarded by legal bodies and academics alike.<sup>211</sup> Furthermore, the triggering of Article 16 ARSIWA requires that the aid or assistance is both *active* and given with the view to *facilitating*

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<sup>202</sup> VCDR, art 3; VCCR, art 5.

<sup>203</sup> *Mavrommatis Palestine Concessions*, para 12.

<sup>204</sup> Capone, 'The children (and wives) of foreign ISIS fighters', FN 86.

<sup>205</sup> TFEU, art 23: "Every citizen of the Union shall [...] be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State".

<sup>206</sup> The Charter of Fundamental Rights of the European Union, art 46: verbatim contents as n205.

<sup>207</sup> Faro, 'Consular and Diplomatic Protection', 608; *see also* Spadaro, 'Repatriation of Family Members', 258.

<sup>208</sup> Council Directive (EU) 2015/637, at para 5.

<sup>209</sup> Jackson, *Complicity in International Law*, 135.

<sup>210</sup> ILC, 'ARSIWA', art 16.

<sup>211</sup> Jackson, *Complicity in International Law*, 176.

the commission of the wrongful act.<sup>212</sup> Although States' lack of action towards linked children are certainly permitting a situation of future perpetrations of international wrongful acts on behalf of non-State actors, such decisions are presumably not taken with the hopes of directly producing this consequence. Therefore, in the absence of any basis for the attribution of conduct of the non-State actor to the States of children's nationality, no obligations for such States arise under the law of State responsibility.

#### **Chapter 4. 'Response-Ability' of States**

Having delineated the various legal standards at the international level, with ICRL, IHL and counterterrorism law contributing to the establishment of State responsibility over their children of FTFs and implying repatriation as the most positive implementation thereto, the question now switches in outlook: with what justifications have European States created an apologia against such responsibilities? Indeed, it is clear from the outset (*see sub-section 2.2.2.*) that there is a gap between international best practice and reality at the domestic level; the ensuing Chapter strives to further explore such gap, examining the various policy initiatives and judicial reactions to calls for responsibility throughout Belgium, France, Germany, and the Netherlands.

#### **4.1. Belgium: Sounding the Alarm**

##### 4.1.1 Belgian Approach to Children of FTFs

As early as 2013, the Belgian Coordination Unit for Threat Analysis sounded an alarm to its European counterparts with regard to an increasing trend of outward travel to Syria, warning that "if some of these individuals come back with training and know-how, they can present a threat to our society".<sup>213</sup> However it was not until a foiled terrorist plot in Verviers in January 2015,<sup>214</sup> followed by a successful one in February 2016,<sup>215</sup> both of which involved Belgian adult FTF returnees,<sup>216</sup> that this threat materialised. Indeed, these two instances act as catalytic events whose cumulative effect raised awareness of the potential dangers of returnees amongst the Belgian society<sup>217</sup> to form a rather concrete popular opinion: "we do not want them back".<sup>218</sup>

Evading the "political suicide"<sup>219</sup> that the repatriation of all FTFs would amount to, the Belgian government has adopted a policy whereby children under the age of 10 with proven Belgian affiliation would automatically be allowed to return.<sup>220</sup> With regard to the remaining children, the State has discretion in exercising protection, one limited slightly by the recognition of a child's right to respect of private and family life encompassed in Articles 22(1) and 22(2) of

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<sup>212</sup> ILC, 'ARSIWA', 66.

<sup>213</sup> De Stoop, 'Des enfants-soldats belges combattent en Syrie'.

<sup>214</sup> Traynor, Borger, and Topping, 'Two dead in Belgium'.

<sup>215</sup> Human Rights Watch, 'Grounds for Concern'.

<sup>216</sup> *Id.*

<sup>217</sup> Renard and Coolsaet, 'Returnees', 24.

<sup>218</sup> Van Ostaeyen, 'State of Terror', 10.

<sup>219</sup> Hassan, 'Repatriating ISIS Foreign Fighters'.

<sup>220</sup> Vansenant and Arnoudt, 'Automatisch terugkeerrecht'.

the Belgian Constitution.<sup>221</sup> While Belgium has left the door for repatriation missions theoretically open, in practice, few have had the opportunity to walk through it, with only seven of an estimated 38 children having been repatriated since 2019.<sup>222</sup>

#### 4.1.2. Domestic Proceedings

Despite The Committee recommending in their Concluding Observations to Belgium that it should expand its policy to the repatriation of all children, irrespective of age,<sup>223</sup> a discussion on the domestic proceedings provides insight into the Belgian rationale resisting what would be a wholly children's rights-friendly approach. Indeed, the domestic jurisprudence appears to centre around two topics of debate: whether Belgium exercises jurisdiction over the children under IHRL and the existence of a subjective right to consular assistance and a subsequent right to repatriation.

Regarding the former, the case of *B.A and T.W* sets a baseline precedent. Relying on Articles 3 and 5 of the ECHR,<sup>224</sup> *B.A and T.W*, two women who had followed their husbands to Syria in 2013, initiated summary proceedings before the Court of First Instance of Brussels requesting the Belgian State to repatriate their, in total, six children.<sup>225</sup> The Court swiftly agreed with the Belgian Government that the latter lacked jurisdiction under the ECHR, a determination that was not swayed in consideration of the children's Belgian nationality<sup>226</sup> nor by an appeal. However, in the following year the same Court adopted a broader jurisdictional lens, one closely resembling that of The Committee in *L.H et al* and *F.B et al*; in the case of *H.S*, the Court of First Instance determined that Belgium had "a certain control and/or power" over the situation of its nationals in the camps, thereby beckoning positive obligations to ensure that the applicants and their children were not subjected to inhumane treatment.<sup>227</sup> Notwithstanding the constraints inherent to an intervention in a conflict area, the Belgian Court maintained that these obligations would not entail an "impossible or disproportionate burden".<sup>228</sup> Nevertheless, this judgement was subsequently quashed by the Court of Appeal which rejected the lower courts jurisdictional analysis, holding instead that it is for the ECtHR to determine whether States have extraterritorial jurisdiction over their nationals in Syrian camps,<sup>229</sup> thereby reiterating the anticipation towards, and significance of, the case against France pending before the ECtHR. Therefore, although pushing the limits of extraterritorial reach at times, the Belgian judiciary has yet to counter the Government's assertion of a lack of jurisdiction over, and therefore obligation to, children with Belgian links held in Syria.

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<sup>221</sup> The Belgian Constitution.

<sup>222</sup> RSI, 'Europe's Guantanamo', 50.

<sup>223</sup> UN Doc CRC/C/BEL/CO/5-6, at para 50(b).

<sup>224</sup> ECtHR, art 3: "Prohibition of Torture"; ECtHR, art 5: "Right to Liberty and Security".

<sup>225</sup> Poecke and Wauters, 'The Repatriation of European Nationals', at FN 19: para 3-4 of the original case file (now unpublished).

<sup>226</sup> *Id.*, at FN 22 : para 9-11 of the original case file (now unpublished).

<sup>227</sup> Ordonnance, 19/129/C, at section 48.

<sup>228</sup> *Id.*, section 48.

<sup>229</sup> Arrêt, 2019/KR/60, at section 31.

Judicial interpretation regarding the existence of a subjective right to consular assistance, on the other hand, has offered a more positive patchwork of jurisprudence. Indeed, the judgements in *A*,<sup>230</sup> *B.A and T.W*,<sup>231</sup> and *NB et al*,<sup>232</sup> coalesce to establish the existence of such a right, rooting it in Article 78 of the Belgian Nationality Code;<sup>233</sup> in the situations of utmost distress in which Belgian children in Syria find themselves, including that of being a victim to serious crimes, detained, and in an extreme emergency, the provision in Article 78 creates a subjective right to consular assistance.

The Court of First Instance in *BA and TW* did not suggest that the relevance of Article 78 to such children formulates a general “duty to repatriate”, which would be one modality of execution of consular assistance,<sup>234</sup> but rather an obligation on the State to allow children to travel to Belgium by using its diplomatic and/or consular authorities, or those of another EU member State; by making arrangements with the SDF authorities; by delivering the necessary documents; and by securing travel. The Court of Appeal in the case of *A*, however, delivered a more expansive judgement to suggest that the ‘possibility’ of repatriation is transformed *prima facie* into an obligation to repatriate,<sup>235</sup> given that the best interests of the child should be a primary consideration.<sup>236</sup> Contrary to the exclusive commitment of the Belgian Government to children under the age of 10, the Court did not distinguish this conclusion by age, suggesting instead that repatriation is the solution in the best interest of *every* child. Nevertheless, *A*’s case was ultimately deemed inadmissible based on an inability to prove filiation of the children with her.<sup>237</sup>

Further analysis of the duty to repatriate enshrined within a child’s subjective right to consular assistance does, however, expose two creeping caveats. Reining in the application of Article 78 is Article 83(2) of the Belgian Nationality Code, a provision which precludes the consular protection established by Article 78 for Belgians who travelled, on their own volition, to a region where an armed conflict is ongoing. Based on Article 83(2), the respective Courts in the cases of *A*,<sup>238</sup> *NB et al*,<sup>239</sup> and *BA and TW*,<sup>240</sup> excluded the adult applicants from consideration of consular protection under Article 78, while affording such benefit to their children. A contradictory outcome thus arises; repatriating a child under Article 78 but disallowing the same for their parent, based on Article 83(2), would conflict with the child’s rights under CRC<sup>241</sup> and the Belgian constitution<sup>242</sup> to family life and to have their best interests taken into primary consideration. Touching on this tension, the summary judge in the case of *A* asserted that the need to

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<sup>230</sup> Cools, ‘Court of Appeal Brussels’.

<sup>231</sup> Poecke and Wauters, ‘The Repatriation of European Nationals’, 7.

<sup>232</sup> Ordonnance, 19/90/C, at section 14-17.

<sup>233</sup> Ordonnance, 19/129/C, at section 40, referencing art 78(6) of the Consular Code.

<sup>234</sup> Cools, ‘Court of Appeal Brussels’.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Ordonnance, 19/90/C, at sections 29-30.

<sup>240</sup> Poecke and Wauters, ‘The Repatriation of European Nationals’, FN 34: section 16-17 of the original case file (now unpublished).

<sup>241</sup> CRC, art 9(1): “State Parties shall ensure that a child shall not be separated from his or her parents against their will [...]”; CRC, art 3(1): “[...] the best interests of the child shall be a primary consideration”.

<sup>242</sup> The Belgian Constitution, art 22.1 and 22.2.

preserve national security does not appear *prima facie* to prevail over the best interest of the child to be separated from their parent during repatriation.<sup>243</sup> Nevertheless, the Belgian State has yet to make a concrete judgement, having only repatriated orphans as of December 2020.<sup>244</sup>

A second downfall to the purported subjective right to consular assistance and repatriation, as was alluded to in the case of *A*, is that its applicability is hinged on the demonstration of Belgian nationality, an assessment of filiation by means of a DNA test which has proved a major, if not insurmountable, obstacle. Indeed, in the cases of *A*<sup>245</sup>, *N.B. et al.*,<sup>246</sup> and *H.S.*,<sup>247</sup> proceedings were halted in the absence of appropriate proof of filiation. Thus, while a subjective right to consular assistance theoretically exists, its use in practice is rather illusory, much like Belgian repatriation efforts in general.

## 4.2. France: A Society of Vigilance

### 4.2.1. French Approach to Children of FTFs

The November 2015 Paris attacks represent a dismal peak in ISIS-related terrorist strikes against French society that have seen more than 250 people murdered in the past six years.<sup>248</sup> The result is a persistent fear of radical Islamism instilled in the national psyche and woven into the daily fabric of French life.<sup>249</sup> The lingering mutual fear and suspicion between France and its large, imperfectly integrated Muslim minority is clear,<sup>250</sup> not least because of President Macron's call for the development of a "society of vigilance", one in which people are united and mobilised to fight the "Hydra" of Islamist extremism.<sup>251</sup> Indeed, the hammer in this 'whack-a-mole' game was made tangible in February 2021, as the French National Assembly approved legislation significantly expanding the Government's powers to tackle the root causes of jihadist violence.<sup>252</sup>

The positive correlation between ISIS-related terrorist offences and stringent policy response has not bided well for the situation of children of French FTFs, who represent the largest number of Western minors' inhabitant in Rojava.<sup>253</sup> While France is among the countries that considers the prolongation of child repatriation to be counter-intuitive to the long-term fight against ISIS-related terrorism,<sup>254</sup> it has employed a largely restrictive policy. The French Government

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<sup>243</sup> Cools, 'Court of Appeal Brussels'.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Ordonnance, 19/90/C, at sections 24-28.

<sup>247</sup> Arrêt, 2019/KR/60, at sections 17-20.

<sup>248</sup> Sky News, 'France'.

<sup>249</sup> Nossiter, 'How ISIS Changed France'.

<sup>250</sup> *Id.*; Europe1, '61% des Français': In a 2019 survey published in the *Journal du Dimanche*, 61% of respondents recorded feeling that Islam was 'incompatible with the values of French society' and nearly 80% suggested that French values of secularism were 'in danger' largely because of Islam.

<sup>251</sup> Reuters, "France needs 'society of vigilance'".

<sup>252</sup> France 24, 'French MPs approve bill'; Cohen, 'French National Assembly'.

<sup>253</sup> Cook and Vale, "From Daesh to 'Diaspora'", 51.

<sup>254</sup> RAN Centre for Excellence, 'Ex Post Paper', 3.

formally adopted a ‘case-by-case’ approach in 2017,<sup>255</sup> a policy that has seen 35 of an estimated 200 children be repatriated since the fall of ISIS in March 2019.<sup>256</sup> Indicative of the vulnerability of these children being a pivotal factor in the French ‘case-by-case’ analysis, the majority of the 35 repatriated children were orphans or those whose mothers consented to be separated considering their need of urgent medical care.<sup>257</sup>

#### 4.2.2 Domestic Proceedings

Despite the Special Rapporteur on Counterterrorism concluding in her 2016 visit to France that “the absence of active engagement with the conditions and status of French nationals constitutes an abrogation of responsibility to citizens”,<sup>258</sup> an outline of French domestic proceedings over the past four years is simply demonstrative of the French judiciaries backing of the above-described political sentiment.

One can find the first attempt to judicially enforce the repatriation of several mothers and children from Syria in a complaint filed with the Office of the French Public Prosecutor in 2018.<sup>259</sup> The grievance suggested that in voluntarily abstaining from intervening in the arbitrary detention of the applicants in Syria, the French authorities had violated Article 432-5 of the French Criminal Code.<sup>260</sup> A dismissal of these complaints led the applicants to file new claims in April 2018, this time as part of a *partie civile*.<sup>261</sup> Contrary to the collective’s slogan, “France must take its responsibilities!”,<sup>262</sup> these complaints have not seemed to lead to any concrete results as of yet.<sup>263</sup>

At least four cases have since been initiated before the Administration Tribunal of Paris, requesting the repatriation of two mothers and three children from Al-Roj camp and one mother and four children from Al-Hol.<sup>264</sup> Relying on Article L521-2 of the French Code of Administrative Justice,<sup>265</sup> the complaints called for the safeguarding of the applicants’ fundamental freedoms which they alleged to have been infringed by the French authorities’ failure to act. However, in decisions rendered in April 2019, the Court ruled that it was not competent to adjudicate the matter as the request required it to consider the Government’s conduct in foreign affairs, a matter over which the Administrative Courts have no authority to judge.<sup>266</sup> Despite the French National Consultative Commission on Human Rights contending that this

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<sup>255</sup> Aguetant, ‘A Turn of the Tide’, 51.

<sup>256</sup> France 24, ‘France repatriates seven’.

<sup>257</sup> Aguetant, ‘A Turn of the Tide’, 52.

<sup>258</sup> UN Doc A/HRC/40/52/Add.4, at para 47.

<sup>259</sup> Bourdon et al. ‘Press release’.

<sup>260</sup> Criminal Procedure Code of the French Republic, art 432-5: “The unlawful deprivation of liberty, the wilful failure either to put an end to such deprivation when he has the power, or the wilful failure to bring about the competent authority [...]”.

<sup>261</sup> Van Poecke and Wauters, ‘The Repatriation of European Nationals’, 43.

<sup>262</sup> Pietraszewski, ‘État islamique’.

<sup>263</sup> Van Poecke and Wauters, ‘The Repatriation of European Nationals’, 43.

<sup>264</sup> *Id.*

<sup>265</sup> Code of Administrative Justice, art L521-2: “[...] the summary judge may order all measures necessary to protect a fundamental freedom to which a legal person governed by public law [...] would have caused, in the exercise of one of its powers”.

<sup>266</sup> No. 1906076/9 and 1906077/9, at paras 3-8. The decisions on appeal make clear that the two other decisions rendered on 10 April 2019, albeit unpublished, were identical.

jurisdictional immunity should be lifted when a fundamental right of constitutional value is endangered,<sup>267</sup> the decision was upheld by the Council of State with the same reasoning in four identical cases.<sup>268</sup>

From July 2019, six complaints were filed with the Court of Justice of the Republic, whose mandate extends to cases concerning offences committed by Government ministers in the exercise of their functions.<sup>269</sup> The complaints were made against the French Minister of Foreign Affairs and the Minister of Justice for gross negligence and abuse of power,<sup>270</sup> considering their “deliberate, voluntary and intentional” refusal to repatriate women and children while they were in “a situation of danger”.<sup>271</sup> The claims were, however, dismissed in December of the same year by the Court’s ‘petitions commission,’ who found that the applicants’ assumption that the persons in question “had the means to act or [...] local contacts [...] to intervene effectively” was incompatible with the fact that Syria is a “foreign territory that does not dispose of any stable and recognised representation”.<sup>272</sup>

Pursuits under the French civil courts have been equally as unsuccessful; an effort to enforce repatriation of a mother and her four children from the Al-Roj camp before the Paris Judicial Court, ended in an assertion of incompetence.<sup>273</sup> Any alternative result would have required the judiciary to examine the relations between the French State and a foreign authority, a relationship which falls under the conduct of foreign affairs and outside the jurisdiction of the court.<sup>274</sup>

Alas, the lack of foreseeably effective remedy at the domestic level is telling of the series of cases filed before the ECtHR and The Committee against France.

### 4.3. The Netherlands: A Neverland

#### 4.3.1. Dutch Approach to Children of FTFs

According to the Dutch National Coordinator for Security and Counterterrorism (‘NCTV’), the current terrorist threat level in the Netherlands is three out of five; “there are individuals in the country who are becoming, or are already, radicalised and could pose a threat to national security”.<sup>275</sup> Such rating is, in fact, considerably more amiable compared to the sentiment of the third largest Dutch political group, the Party for Freedom, who’s leader has identified Islamisation as the “the biggest problem in this country [...] a threat to our identity, our freedom. Who we are”.<sup>276</sup> Given this political climate it is perhaps unsurprising that the general position of the Dutch State towards FTFs and their children is one of passive inaction; it does not actively facilitate the return of its nationals stuck in former ISIS

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<sup>267</sup> UN Doc CRC/C/85/D/79/2019-CRC/C/85/D/109/2019., at para 5.5.

<sup>268</sup> Conseil D’État, ‘Rejection of repatriation requests’.

<sup>269</sup> Court De Cassation, ‘Cour de justice de la République’.

<sup>270</sup> French Criminal Procedure Code, arts 223-6 and 432-1.

<sup>271</sup> Le Monde, ‘Les plaintes de familles d’enfants’.

<sup>272</sup> *Id.*

<sup>273</sup> No RG 20/51405, at para 6.

<sup>274</sup> *Id.*

<sup>275</sup> NCTV, ‘NCTV Terrorist Threat Assessment’.

<sup>276</sup> Damhuis, ‘The biggest problem in the Netherlands’.

territories, minors and adults alike.<sup>277</sup> In fact, despite the anticipated hardship in doing so, the Government will only assist nationals' return home if they present themselves at the Dutch diplomatic posts in the region, such as that in Ankara or Baghdad.<sup>278</sup>

Justifications for such passive policy have been grounded in the notion that the question of Governmental response should be one of reasonable expectation considering international treaty obligations and State interests.<sup>279</sup> With regard to the former, the Minister of Justice and Security has argued that since the Netherlands does not have "effective power or authority" in Syria, it does not have any obligations under the CRC to actively return the children.<sup>280</sup> The various interests of the Netherlands, on the other hand, refer to international relations (the observation that the Dutch government has no diplomatic ties with Syria), the safety of those that wish to return (the concern that individuals may be prosecuted in Syria without fair trial rights should their status become known following the issuing of an arrest warrant) and national security (the recognition that children and their parents may pose a threat to Dutch society).<sup>281</sup> To pause for further reflection on this last point, while the Dutch Government has recognised that the young age of the children mitigates the likeliness that anti-Western indoctrination has taken hold, it asserts that repatriation of children cannot be seen in isolation from their parents, given the "legal complexity" that separation would entail.<sup>282</sup>

The Dutch Ombudsman for Children, amongst others, has criticised the Government's policy, regarding it as a significant departure from the State's obligations to take the children's best interests into primary consideration,<sup>283</sup> given the camps' detrimental impact on child development. Despite such appeals, the recent repatriation of three children and their mother in June 2021 from Rojava, brings the total number of repatriated Dutch children since 2019 to five of an estimated 80.<sup>284</sup> Thus, for the most part, it seems that the Netherlands is a 'Never-land' for children of Dutch FTFs inhabitant in SDF-controlled camps.

#### 4.3.2. Domestic Proceedings

Trickling through the ranks of the Dutch judicial system is one case of significant note. In November 2019, 23 Dutch women initiated summary proceedings before the Court of First Instance of the Hague requesting their repatriation, as well as that of their, in total, 55 children.<sup>285</sup> This Court did not judge the cases on the basis of IHRL, asserting its lack of jurisdiction, nor on the basis of consular assistance, suggesting that it was clear that the State cannot render assistance in Syria given the Netherlands' lack of consular or diplomatic presence,<sup>286</sup> but rather on the general 'standard of care' enshrined in Dutch tort law.<sup>287</sup> According to the Court of First Instance, the question was thus one of the extent to

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<sup>277</sup> Sandelowsky-Bosman and Liefwaard, 'Children Trapped in Camps in Syria', 141.

<sup>278</sup> *Id.*, 142.

<sup>279</sup> Parliamentary Documents II, 29754, No.461, at 2.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*; Sandelowsky-Bosman and Liefwaard, 'Children Trapped in Camps in Syria', 142.

<sup>282</sup> Parliamentary Documents II, 29754, No.461, at 3.

<sup>283</sup> Letter from the Dutch Children's Ombudsman for Children to the Dutch Minister of Justice and Security.

<sup>284</sup> RSI, 'Europe's Guantanamo', 54; NL Times, 'Dutch delegation'.

<sup>285</sup> ECLI:NL:RBDH:2019:11909, at section 4.3.

<sup>286</sup> *Id.*, section 2.2.

<sup>287</sup> Dutch Civil Code, art 6:162.

which this standard, the scope and content of which is influenced to a certain extent by the CRC and the ECHR,<sup>288</sup> requires the Dutch Government to take action.

Given the serious and acute emergency of the children, and the fact that it would be unrealistic to assume that their protection could be guaranteed in any other way, the Court ultimately asserted that the State is required to take all reasonably possible measures to protect the children, with repatriation as the primary goal.<sup>289</sup> Similarly to the French and Belgian decisions, the Court of First Instance furthermore clarified that the mothers did not have a self-standing claim to repatriation, but rather one justified by the *conditio sine qua non* policy of the SDF against separating mothers from their children.<sup>290</sup> Furthermore, the Court of First Instance maintained that neither the children, nor their mothers, could invoke their right to family life to avoid being separated; if the SDF permitted the children to leave without their parents, but the mothers refused separation, the State would no longer have a duty *vis-a-vis* the children.<sup>291</sup>

Nevertheless, the children's rights friendly optimism embodied by this judgement was overturned by the Court of Appeal of the Hague,<sup>292</sup> whose decision was subsequently upheld by the Supreme Court.<sup>293</sup> Both of these Higher Courts agreed that the Netherlands did not have extraterritorial jurisdiction under the CRC, suggesting that any other conclusion would imply an overly-extensive interpretation of jurisdiction.<sup>294</sup> Indeed, unlike the Court of First Instance of Brussels in *HS*, the Dutch Supreme Court held that the mere observation "that the decision of the State has direct consequences for the factual position of the women and children is insufficient" to find jurisdiction.<sup>295</sup>

However, the Higher Courts did assert that the State has a "special responsibility" towards persons with Dutch nationality, even in the absence of jurisdiction; if the human rights of these persons are violated or are under threat, this special responsibility entails that the State is obliged to assess whether, in the circumstances of the case, it can end the violations or deflect any impending violations.<sup>296</sup> It is here, in an assessment of what the Dutch State can reasonably be expected to do, given the circumstances of the case, where the opinion of the Higher Courts departs from that of the Court of First Instance.

The Supreme Court sets a clear stage for the ensuing balancing act; given the fundamental rights of the women and children at stake, a particularly hefty weight must be provided by State interests to reach a decision against the applicants.<sup>297</sup> With dramatic irony, the deliberation commences with an assessment of the validity of national security concerns. The Supreme Court first recognises that the non-retrieval of children poses more risk to national security than retrieving them.<sup>298</sup> However, in rather circular reasoning, it then counter-argues to highlight that the return of

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<sup>288</sup> ECLI:NL:RBDH:2019:11909, at section 4.7.

<sup>289</sup> *Id.*, sections 4.10-4.11.

<sup>290</sup> *Id.*, section 4.20.

<sup>291</sup> Van Poecke and Wauters, 'The Repatriation of European Nationals', 36; ECLI:NL:RBDH:2019:11909, at section 4.21-4.22.

<sup>292</sup> ECLI:NL:GHDHA:2019:3208

<sup>293</sup> ECLI:NL:HR:2020:1148

<sup>294</sup> *Id.*, section 3.6.2. ECLI:NL:GHDHA:2019:3208, at section 6.3.

<sup>295</sup> ECLI:NL:HR:2020:1148, at section 3.5.3.

<sup>296</sup> *Id.*, section 3.13.5.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*, section 2.5

children increases the chance that their parents, who are considered dangerous, will also return.<sup>299</sup> It thus seems as though the question to be answered becomes one of which scenario is *more* threatening than the other; the Supreme Court alludes to a tipping of balance as it states that the “the reasoning that there is a danger of bringing the children back because their dangerous parents will then also come back to the Netherlands cannot be denied a certain strength”.<sup>300</sup> This statement is, however, rather surprising given an NCTV 2018 report stating that although there are risks involved in the repatriation of adult FTFs, these risks are more controllable than those pursuant to leaving children in Syria.<sup>301</sup>

Nevertheless, the Supreme Court continues its judgement to validate the assumption that a significant security risk to Dutch officials collecting the women and children exists, given the precarious environment in Rojava.<sup>302</sup> Finally, the Court touches upon the role of international relations, namely the recognition that the Netherlands would have to coordinate with a Government with which it has no relations, if it were to undertake a repatriation mission of this size.<sup>303</sup>

Thus, in view of the attributed weight to State interests and the fact that the women travelled to the jihadist conflict on their own accord, the Supreme Court held that the Dutch state had not acted unlawfully. In many respects, the judgement is unsurprising as it merely joins the bulk of jurisprudence within Europe regarding the repatriation of FTFs and their children. However, two lingering queries remain: firstly, the Supreme Court suggests that the children may find more luck if their case excluded the request of their mother’s repatriation.<sup>304</sup> However, the Court stops short of fully delineating such a scenario; how would it overcome the pre-established ‘legal complexities’<sup>305</sup> of separating a mother from her child? And if the reluctance to repatriate children hinges on the fact that doing so would entail the repatriation of parents as well, what does this say about the Dutch Government’s adherence to the right of the child not to be discriminated against based on their parent’s beliefs?<sup>306</sup>

#### 4.4. Germany: The Value of Human Dignity

##### 4.4.1. German Approach to Children of FTFs

Unlike the previous three domestic jurisdictions who have, for the most part, “washed their hands”<sup>307</sup> of their nationals in Syria, German authorities have frequently indicated their willingness to offer consular aid.<sup>308</sup> In practice, this has translated into a readiness of the German Government to repatriate children and, while stopping short of repatriation,

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<sup>299</sup> *Id.*

<sup>300</sup> *Id.*, section 3.13.2.

<sup>301</sup> ECLI:NL:GHDHA:2019:3208, at section 7.10

<sup>302</sup> ECLI:NL:HR:2020:1148, at section 2.5.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*, section 3.22.3.

<sup>305</sup> Parliamentary Documents II, 29754, No.461, at 3.

<sup>306</sup> CRC, art 2.

<sup>307</sup> Renard and Coolsaet, ‘Returnees’, 48.

<sup>308</sup> *Id.*

take the necessary measures to protect the life and health of adults.<sup>309</sup> This policy initiative comes despite fears of ISIS-related terrorism among the German population having steadily risen since 2014, with 73% of respondents in a 2016 survey saying they were concerned about an attack.<sup>310</sup>

Perhaps the source of such readiness can be located back to the German *Grundgesetz*, which enshrines the inviolable right of human dignity and its required respect by all public authorities in its first Article.<sup>311</sup> An analysis of the relevant domestic proceedings will, in fact, demonstrate that this German Basic Law, as interpreted by the judiciary, vastly guides and organises Germany's approach to children in Syria. Nevertheless, in a trend first drawn by Belgium, while promising in theory, the German Government's policy approach has offered limited help in practice, with an estimated 7 of 150 German-linked children having been repatriated to date.<sup>312</sup>

#### 4.4.2. Domestic Proceedings

Unlike the proceedings within Belgium, France, and the Netherlands, the relevant German jurisprudence does not centre around obligations relative to jurisdiction or consular assistance, but rather on the responsibilities of the German State flowing from the provisions of its constitution.

In the first of many cases regarding the Al-Hol camp, the Administrative Court of Berlin maintained that the repatriation of German children would be a positive implementation of the State's duty to protect under Article 2(2) of the German constitution.<sup>313</sup> Mitigating any discretion as to the exact measures to be taken in fulfilling this obligation was the Court's recognition that it would be unfeasible to simply provide an appropriate level of care in the camp, given its deplorable conditions.<sup>314</sup> The court further rejected the government's claim that it was impossible to repatriate the applicants, noting instead the availability of willing and able non-governmental organisations in the region that could aid in bringing the children to a country with German consular presence.<sup>315</sup>

While the Courts have left open the question of whether the mothers of such children have self-standing claims to repatriation, they have delineated a two-fold argument against the separation of a child from their parent if the former's repatriation was to be approved. In addition to the *sine qua non* policy of the SDF against separating the two,<sup>316</sup> the Higher Administrative court formulated the standard that any such separation would constitute a violation of the provisions incumbent to the German Constitution protecting the integrity of the family unit.<sup>317</sup> Unlike the Court of First Instance of the Hague, the Higher Court held that this principle applies even if the applicant agreed to an isolated repatriation of the children.<sup>318</sup> Finally, the Lower and Higher Administrative Court dismissed the notion that presumed

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<sup>309</sup> OVG 10S43.19, at para 7; OVG 10S64.19, at para 3.

<sup>310</sup> Thomas, 'Germans' Fears About Terrorism'.

<sup>311</sup> Basic Law for the Federal Republic of Germany, art 1.

<sup>312</sup> RSI, 'Europe's Guantanamo', 53.

<sup>313</sup> VG 34L245.19, at para 13.

<sup>314</sup> *Id.* para 20.

<sup>315</sup> *Id.*, para 17.

<sup>316</sup> *Id.*, paras 18-19.

<sup>317</sup> OVG 10S43.19, at paras 25 and 30-31; Basic Law for the Federal Republic of Germany, art 6(1).

<sup>318</sup> OVG 10S43.19, at para 32.

public safety and domestic and foreign policy concerns related to the return of a mother would outweigh the need for protection of the children.<sup>319</sup>

Moreover, the German Courts have tended towards a lower burden of proof with regards to nationality, as compared to their Belgian counterparts. Indeed, in two cases initiated by applicants on behalf of their children detained in Al-Hol, the Higher Administrative Court rejected the Government's claim that the children's filiation had to be proved by means of a DNA sample, which would, due to the applicant's position, be an arguably insurmountable task.<sup>320</sup>

Interestingly, cases identical in fact but regarding children in the Roj camp, have received substantially fewer favourable judgements as compared to those concerning children in the generally more deplorable Al-Hol camp, thus corroborating the French view that the vulnerability of children is a weighty factor to consider. In 2019, the Administrative Court of Berlin maintained that the humanitarian, medical and security situation in the Roj camp cannot be interpreted so as to limit the Government's discretion to repatriating individuals.<sup>321</sup> Bar one judgement to the contrary,<sup>322</sup> this general view has not changed in the face of the COVID-19 pandemic, whose potential peril has seemingly been outweighed by the facts that no COVID-19 cases had been reported in the camp, that hygiene packages were supplied by the German Government, and that hospital beds throughout Rojava were being installed.<sup>323</sup> However, when compared to the Government's efforts to repatriate around 230,000 German nationals worldwide during the pandemic,<sup>324</sup> the differential treatment towards German linked children in the Roj camp is critically illuminated. Indeed, it is especially visible in a recognition that these 230,000 Germans were in considerably less perilous positions.

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<sup>319</sup> *Id.*, paras 35-42 and 44-46; VG 34L245.19, at paras 21-22.

<sup>320</sup> OVG 10S28/20, at paras 27-28; OVG 10S30/20, at paras 30-31.

<sup>321</sup> OVG 10S64.19, at para 8.

<sup>322</sup> Van Poecke and Wauters, 'The Repatriation of European Nationals', 42.

<sup>323</sup> OVG 10S45/20, at paras 23-45 and 28-53.

<sup>324</sup> Schengenvisainfo news, 'Germany Carries Out the Largest Repatriation process'.

### Resumé

The introductory paragraphs to ‘Apologia’ posed two lines of inquiry: that of the extant State responsibilities over children of FTFs according to the relevant international legal framework and the justifications which States have utilised to create an apologia against such responsibilities. Having explored the application of the relevant international legal framework to the relationship between States and their linked children of FTFs, presented an analysis on the subsequent obligations, and sifted through the policy approaches and domestic case-law of the four States under investigation, the time is now ripe to draw a few preliminary conclusions.

The first is that all four States under investigation are clearly falling short of what they should be doing considering the relevant international legal framework. Indeed, in virtually all fields of law discussed, States’ responsibility over linked children held in SDF-controlled camps is endorsed, carving out repatriation as the most viable option to ensure their rights. Nevertheless, the overall attempts of Belgian, Dutch, German, and French nationals to enforce their repatriation through domestic courts have been rather unsuccessful, with the low number of repatriated children critically telling of a disjuncture in sentiment between the international and domestic levels.

A recognition of this disconnection is reflected in the next precursory conclusion; for the most part, the domestic jurisprudence analysed not only lacks engagement with the relevant international standards, but oftentimes adopts reasoning that contradicts it. Indeed, this is most prominently observed in a total absence of discussion regarding the norms established under IHL or the SC’s counterterrorism Resolutions in the domestic cases, despite all four States being bound to both. Regarding the integration of ICRL into domestic reasoning, the States took varying approaches; the courts in Germany and the Netherlands focused much more on national law, engaging with the CRC to interpret the Dutch ‘standard of care’ and the German Constitution, respectively, while the Belgian courts directly considered the international children’s rights framework alongside their interpretation of the Belgian Consular Code.

It is in such integration, or lack thereof, where one can see the reasoning of domestic judiciaries critically depart from the standards incumbent to ICRL. For instance, the adoption by all four States of case-by-case approaches which place heavy weight on the presumed vulnerability of the child, risks materialising the hierarchy of victimhood alluded to in the critiques of The Committee’s reasoning in *L.H et al* and *F.B et al* (see section 3.1.1.4). Indeed, considering the reality that all of the children necessitate immediate repatriation, case-by-case policies are questionable in the extent to which they abide by the CRC’s non-discrimination clause.<sup>325</sup> Furthermore, by taking into decisive account the role of the child’s parent in the formers case for repatriation, States, particularly the Netherlands and Belgium, are utilising logic that certainly contradicts this same provision; children should not be adversely treated simply because they were born to individuals associated with a terrorist group.

Perhaps this recognition alludes to a larger undermining of the CRC on behalf of the Netherlands and Belgium; they struggle to acknowledging that the children have their own rights and interests independent from that of their parents. This is, in fact, a realisation that sits at the heart of the CRC, which itself was established to recognise children’s inherent dignity and worth as self-standing rights-bearers.<sup>326</sup> Thus, the Dutch assertion that children would no longer be owed a duty of protection if their mothers refused to be separated from them cannot be interpreted in harmony with the ICRL framework. Similarly, Belgian legislation permitting the consular assistance and subsequent repatriation of a child but not that of their parent, based on the perceived dangerousness of the latter, critically rubs against the child’s best interests, namely that to not be separated from their parents.

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<sup>325</sup> CRC, art 2.

<sup>326</sup> Kilkelly and Liefwaard, *International Human Rights of Children*, 12.

A third preliminary conclusion that this Thesis is inclined to draw is that the ground upon which these judgements sit is far from solid. Indeed, a potential upheaval of the current domestic jurisprudence is hinged with great anticipation on two events: the jurisdictional decision in *H.F and M.F* and *J.D and A.D* pending before the ECtHR and the impact of The Committee's recent affirmative jurisdictional judgement in *L.H et al* and *F.B et al*. Concerning the latter, it can be contended that States in a similar factual position to France should also assume they have jurisdiction and ensuing obligations under the CRC with regard to their linked children in Syria. Indeed, The Committee's judgement gives strength to the reasoning of the Belgian Court of First Instance in *H.S* and undermines the Court of Appeals' decision to overturn it. Similarly, it counters the jurisdictional interpretation undertaken by the Dutch courts and speaks directly to the currently observable standstill in French domestic proceedings. While The Committee's decision does shake the ground on which domestic proceedings sit, considerably more suspense lingers around the large question mark that hovers above the case pending before the ECtHR. Indeed, the significance of a ECtHR judgement in favour of a jurisdictional link between States and children in SDF-controlled camps, cannot be overstated; complementing The Committee with a legally binding decision would cause immense disruption in domestic jurisdictional interpretation and a triumph of the same scale for the rights of the children in question. Until such judgement, however, this Thesis purports to further delineate why the disjuncture between international norms and domestic reaction exists and whether or not it is justified, a discussion that takes place in Part III.

### **PART III: UTOPIA**

*“Utopia – A place of ideal perfection, especially in laws, government and social condition”<sup>327</sup>*

Having exposed and legally analysed the critical detachment between international best-practice and domestic ‘real’-practice, the focus in Part III, ‘Utopia’, becomes reflective, explanatory and at least a little bit optimistic. Chapter 5 strives to elucidate European State reactions to international calls through a two-fold frame of reflection: the doctrines of State sovereignty and human rights universality. Indeed, it questions whether universalist approaches such as that adopted by The Committee are utopic or if State sovereignty should outweigh any such ideals. Chapter 6 subsequently looks forward; given the current standstill in State action, whether justified or not, what factors contribute to the building of a bridge between children of FTFs and a safe, rights-fulfilling environment?

#### **Chapter 5. National Sovereignty and Human Rights Universality: A False Dichotomy**

##### **5.1. A Dangerous Friction**

Richard Falk contends that the Universal Declaration of Human Rights (‘UDHR’) would not have won widespread support from leading Governments had it been negotiated as a law-making treaty with the effect of eroding sovereign rights.<sup>328</sup> This assertion starts the ensuing sub-section off with a harsh reality; despite the use of the word ‘human’, the real perception of ‘universal human rights’ remains dependent on national procedures of enforcement, over which States have sovereignty.<sup>329</sup> One is not mistaken to be puzzled by an inherent friction in these opening lines. Indeed, the human rights system is premised on two doctrines with seemingly contradictory values; State sovereignty, or the legal capacity and authority of States to regulate matters of internal and foreign policy<sup>330</sup> and human rights universality, or the promotion of universal respect for and observance of human rights.<sup>331</sup> The present Thesis contends that these two foundational doctrines and the frictions between them, are both a reflection of, and an explanation for, the context at hand. Human rights monitoring bodies are adopting universalist interpretations to push the boundaries of State jurisdiction in order to diffuse rights vacuums, and States are exercising sovereignty to develop policies with an inward focus on their national interests, thereby upholding such vacuums.

Indeed, in affirming the extraterritorial application of the CRC with regards to French responsibility over children in Syria, The Committee adopted a universalist functional approach<sup>332</sup> to reach an outcome which greatly challenges the policies that the Netherlands, France, Belgium, and to a lesser extent, Germany, have established. To a large degree, The Committee’s judgement is consistent with a utopic thought that human rights treaties should be interpreted to avoid vacuums of protection if the rights they enshrine are truly to be inalienable for *every* member of the human family<sup>333</sup> and not just for those within States’ territorial boundaries. Therefore, considering State responsibilities through the lens of universality, the extent to which European State policies are justified in falling short is mitigated.

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<sup>327</sup> Merriam Webster, ‘utopia’.

<sup>328</sup> Polychroniou, ‘Human Rights State Sovereignty, and International Law’.

<sup>329</sup> *Id.*

<sup>330</sup> Larking, ‘Human Rights and The Principle of Sovereignty’, 20.

<sup>331</sup> UDHR, Preamble.

<sup>332</sup> Shany, ‘Taking Universality Seriously’, 67: “Functionalism is universalism”.

<sup>333</sup> UDHR, Preamble.

However, this Thesis argues that there should be resistance to an uncontested acceptance of this conclusion, not least because the human rights project as a whole is upheld by States and the sovereignty they value. Indeed, contemporary concerns expressed by influential States illustrate practical and serious opposition to a wholly universal human rights system that imposes an ever-expanding framework of substance and enforcement, precisely because of the negative effect it can have on States' exercise of sovereignty.<sup>334</sup> This is well-evidenced in the context of treaty ratifications, or rather a lack thereof, by the world's oldest constitutional democratic republic, the US. While the US has ratified two of the CRC's optional protocols, it is the only UN Member State to not have ratified the CRC itself, with justifications stemming from concerns over national sovereignty.<sup>335</sup>

Similarly, the ECtHRs' experience with pushing sovereign boundaries has been widely controversial. For instance, UK opposition to ECtHR judgements that challenged State sovereignty bubbled to a worrying level in 2016, as the Government threatened withdrawal from the ECHR, asserting that it "binds the hands of parliament, adds nothing to our prosperity [and] makes us less secure by preventing the deportation of dangerous foreign nationals".<sup>336</sup> Furthermore, in 2015, Government leaders expressed their ambivalent expectations of the ECHR and the ECtHR at the Brussels Declaration, reiterating "the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities [...] and their margin of appreciation in guaranteeing and protecting human rights at the national level".<sup>337</sup> Thus, as a result of States' strong desire for respect of their national constitutional values and policy choices, the ECtHR is greatly restricted in the extent to which it can adopt maximalist approaches which would strive for the highest possible protection of fundamental rights.<sup>338</sup> Indeed, perhaps the ECtHR's relatively restrictive jurisdictional lens can also be explained by its unwillingness to knock too hard against the walls of State sovereignty on its path between respecting national values and providing for effective protection of individual fundamental rights.<sup>339</sup>

It thus seems that demanding too much of a State will oftentimes yield negative reaction and State push-back, simply reducing support for human rights monitoring bodies and making it more difficult for advocates to help those they seek to help.<sup>340</sup> The problematic nature of a judgement that demands too much of a State is aggravated for a treaty monitoring body such as The Committee, whose success largely depends on the influence that their findings exert on national legal orders.<sup>341</sup> Indeed, without binding power, the force of such impact is born out of the quality and clarity of legal reasoning, membership, and respect for their mandate.<sup>342</sup> Perhaps then, The Committee's decision in *L.H et al* and *F.B et al* is utopic only in the sense that it is unrealistic; stretching State obligations without legal clarity at the expense of sovereignty over a pertinent national interest, will only entice dangerous resistance.

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<sup>334</sup> Donnelly, 'Democracy and Sovereignty', 1436.

<sup>335</sup> Fagan, 'How U.N. Conventions on Women's and Children's Rights'; Mehta, 'There's Only One Country'; Minasyan, 'The United States has not Ratified the UN Convention'.

<sup>336</sup> Asthana and Mason, 'UK Must Leave'.

<sup>337</sup> Gerards, 'Margin of Appreciation and Incrementalism', 496.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*, 497.

<sup>340</sup> Donnelly, 'Democracy and Sovereignty', 1445.

<sup>341</sup> Alebeek and Nollkaemper, "The Legal Status of Decisions", 2.

<sup>342</sup> *Id.*, 81.

Furthermore, considering the ever-globalising world in which we live, where power is being progressively diffused into the hands of non-State actors, it could be predicted that this call for sovereignty will only be re-enforced. Indeed, “the adoption of repressive border control measures and loudly claiming to defend one’s national sovereignty by doing so, is a very obvious way for a Government to demonstrate that it [...] is dutifully looking after the national interest”.<sup>343</sup> Therefore, through the looking hole provided by the doctrine of State sovereignty, perhaps States are justified in falling short of their responsibilities.

## 5.2. A False Dichotomy?

However, it could be contended that the doctrines of State sovereignty and human rights universality do not need to be discussed as contradictory terms, as has been the case so far. This is to say that a more thorough analysis into the role of the two notions demonstrates a falseness to their dichotomy.<sup>344</sup> Such probe starts with the recognition that the sovereign States under investigation are built on democratic constitutions that, by their very nature, recognise the value of human rights. Indeed, Chapter 1 of the Constitution for the Kingdom of the Netherlands enshrines the fundamental rights attributed to all Dutch citizens;<sup>345</sup> shaping the spirit of the Federal Republic of Germany is the German Basic Law which begins with the words “human dignity shall be inviolable”;<sup>346</sup> Article 23 of the Belgian Constitution values an individual’s right to lead a life with human dignity;<sup>347</sup> and perhaps most prominently, French society proclaims their attachment to the Rights of Man as defined by the 1789 Declaration of the Rights of Man and the Citizen, a document which was vastly influential to the drafting of the UDHR.<sup>348</sup> How then, can national sovereignty be threatened by bodies that constitute at least part of that sovereignty?

Furthermore, the promotion of human rights strengthens societies thereby reinforcing sovereignty, and the best defenders of human rights are functional sovereign States.<sup>349</sup> Perhaps then the task is not to find a balance in the tension between State sovereignty and human rights universality, but to overcome the false dichotomy between them. The situation at hand should therefore not be seen as an affront to the State or its sovereignty, but rather as an opportunity to reiterate the country’s extant commitment to children’s rights.

## Chapter 6. Bridge Building

A re-commitment to such rights requires overcoming the protectionism, fear and “all the defensive aspects of the fortress mentality that we currently live with”;<sup>350</sup> in short, it necessitates bridge building.

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<sup>343</sup> Larking, ‘Human Rights and The Principle of Sovereignty’, 26.

<sup>344</sup> Guittard, ‘National Sovereignty vs Human Rights’; United Nations, “Secretary-General Denounces ‘False Dichotomy’”.

<sup>345</sup> The Constitution of the Kingdom of the Netherlands, ch 1.

<sup>346</sup> Basic Law for the Federal Republic of Germany, art 1.

<sup>347</sup> The Belgian Constitution, art 23.

<sup>348</sup> The Declaration of the Rights of Man and the Citizen.

<sup>349</sup> United Nations, “Secretary-General Denounces ‘False Dichotomy’”.

<sup>350</sup> Rudge, ‘Reconciling State Interests with International Responsibilities’, 12.

### 6.1. Reconsidering National Interests

In an open letter to Western Governments issued in 2019, national security professionals affirmed that the ‘hands off’ stance adopted by States towards children of FTFs will only create greater danger in the future.<sup>351</sup> The deplorability of camps and lack of just treatment fuels the jihadist narrative of indignity and revenge that has proven potent in the recruitment of followers into dangerous religious extremism.<sup>352</sup> Indeed, children held in SDF-controlled camps are growing up in “breeding grounds”<sup>353</sup> for terrorism, where they are engulfed by brutal conditions, subjected to persistent indoctrination, and are at significant risk of being radicalized.<sup>354</sup> Furthermore, their inability to return to their home nations on account of the latter refusing aid will bolster their sense of being, in effect, citizens of the Islamic State, potentially preparing them to form the core of a second generation of jihadi fighters.<sup>355</sup>

What is chilling about the current State reaction to children of FTFs, besides from the suffering it perpetuates and the failure to treat all humans as equal it involves,<sup>356</sup> is the fact that the world has seen its detrimental effects before. It was, in fact, a similar context that gave life to the modern Salafi-jihadist movement in the first place; the core membership constituting the Taliban were students at extremist Islamic religious schools in Pakistani refugee camps equally as squalid as al-Hol.<sup>357</sup> In this sense, States certainly are dealing with a group of children described as “ticking time bombs”,<sup>358</sup> the diffuser to which they also hold.

While the trepidation of European States towards repatriation of children is understandable, the retention of them in deplorable camps throughout Rojava is, in fact, more dangerous for national security in the long-term, a recognition that has, rather ironically, been made by State Governments themselves.<sup>359</sup> The repatriation of such children into re-education, rehabilitation and reintegration programs is a considerably safer way for States to control the terrorist threats they fear.

### 6.2. Reconsidering National Perspectives

However, this Thesis furthermore asserts that any apparent ‘trepidation’ can so too be appeased, or at least re-assessed. This is not to say that perceptions of ‘fear’ and ‘threat’ attached to the ISIS-affiliated child are not completely unfounded, with evidence asserting that “cubs of the caliphate”<sup>360</sup> have been assimilated into the ranks of ISIS from as young as six years old, acting as scouts, spies, cooks, fighters, bomb planters and even suicide bombers.<sup>361</sup> Indeed, the

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<sup>351</sup> Open letter, ‘Unless We Act Now’.

<sup>352</sup> *Id.*

<sup>353</sup> Gardner, ‘Islamic State group’.

<sup>354</sup> UN Doc S/2020/53, at para 89.

<sup>355</sup> Open letter, ‘Unless We Act Now’.

<sup>356</sup> Larking, ‘Human rights and the principle of sovereignty’, 24.

<sup>357</sup> Open letter, ‘Unless We Act Now’.

<sup>358</sup> Luquerna, ‘The Children of ISIS’, 157; 32; Kington, ‘45,000 children’.

<sup>359</sup> ECLI:NL:GHDHA:2019:3208, at section 7.10; VG 34L245.19, at para 20.

<sup>360</sup> Mustasaari ‘Finish children’, 22.

<sup>361</sup> Luquerna, ‘The Children of ISIS’, 155.

role of children in ISIS has been confirmed by the armed group itself, which included 89 eulogies of children in their propaganda strategies between 2015 and 2016.<sup>362</sup> Moreover, it has been consistently deduced that children involved in armed conflict are particularly vulnerable to extremist narratives and are more likely to have an increased tolerance of, or affiliation for, the use of violence.<sup>363</sup> What is contended, however, is that the weight attributed to perspectives of ‘threat’ is a considerable torsion of the imagery of children affiliated with armed conflict as provided for by ICRL, which is one that suggests that posing a threat does not exclude being a victim.<sup>364</sup>

In fact, ICRL sees these children first and foremost as victims<sup>365</sup> whose perpetration of crime is attributed to manipulation by adults.<sup>366</sup> As such, it asserts that children should not be prosecuted, punished, or threatened solely for their soldiering.<sup>367</sup> Therefore, the presumption that ISIS-affiliated children may pose security threats should not lessen the fact that they are victims on a par with any other child involved in armed conflict.<sup>368</sup> States that perceive children solely on account of their potential danger thus supersede this legal framework and any recognition of the important nuances in their experiences and characteristics, to rely on one homogenised observation: their affiliation with a terrorist organization.

As acknowledged in the Resumé to Part II, a large impeding factor in the repatriation of children has been the role of the parent; despite conflicting with the founding essence of, and the provisions incumbent to, the CRC, States have found themselves unable to avail the child of the rights they are entitled to independently from the status of their parent. The result has oftentimes been a standstill, where States are reluctant to repatriate a child’s parent and parents are unwilling to be separated from their children. However, this Thesis asserts that much like State perspectives towards ISIS-affiliated children, that of parents, particularly mothers, can also be reconsidered. Indeed, interviews conducted by Rights and Security International with women in SDF-managed camps illuminate their various motives for travelling to ISIS-controlled territories, which in turn, reduce the level of threat they pose. It was found that some women were forced or otherwise manipulated into travelling to Syria by their husbands; some were deceived into thinking they were travelling to the region to undertake humanitarian work; and some were groomed by internet recruiters.<sup>369</sup> Interestingly, several of the interviewees asserted that Islamophobic treatment in their countries of origin influenced their decision to travel to Syria. Not anticipating the consequences of doing so or the true nature of the ISIS regime,<sup>370</sup> the women were simply in search of a region where they could live and practice their religion in peace, with one remarking, “it was difficult in Germany; someone spat on me because I was wearing a veil”.<sup>371</sup>

One unique way in which States could, through the SDF, distinguish between those who still support ISIS and those who are disillusioned by their experiences with the group, is by promoting inhabitants’ freedom to configure their own

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<sup>362</sup> Van der Heide and Geenen, ‘Children of the Caliphate’, 3.

<sup>363</sup> *Id.*, 5; Zhang, Loeber, and Stouthamer-Loeber, ‘Developmental trends of delinquent attitudes’, 181.

<sup>364</sup> Council of the European Union, ‘Member States’ approaches’.

<sup>365</sup> UN Doc CRC/GC/2005/6, at para 56.

<sup>366</sup> UN Doc. A/51/306., at para 24.

<sup>367</sup> Paris Principals, principle 3.6 and 8.6.

<sup>368</sup> Aguetant, ‘A Turn of the Tide’, 56.

<sup>369</sup> RSI, ‘Europe’s Guantanamo’, para 92.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

living spaces.<sup>372</sup> Overturning the current assignment of tents in the camps with a freedom of choice and process of self-selection, has been suggested to illuminate distinct patterns between the radicalized and the disillusioned; the latter of which pose a limited threat to society.<sup>373</sup>

Thus, to build a bridge between States and children held in SDF-controlled camps, perhaps the former could re-consider their perspectives towards ISIS-affiliated children and the potential threat posed by their mothers. In doing so, States would align themselves with the imagery of children involved in armed conflict as drawn by ICRL and aid society in coming to terms with their repatriation. Indeed, this shaping of perspective towards potential returnees, particularly on behalf of the media, was a major topic at the Central Asian Bishkek conference, where discussion centred on the portrayal of children as ‘helpless victims’ rather than ‘terrorists’ and the impact such depiction would have on the general public.<sup>374</sup>

### 6.3. If All Else Fails...

If States continue on the path of passive policy, perhaps attention could turn to an alternative solution offered by international refugee law. Indeed, it could be contended that children of FTFs held in Syria qualify as refugees under the 1951 Refugee Convention when their States of nationality refuse to repatriate them. In applying the definition of a refugee<sup>375</sup> to children of FTFs, it could be maintained that they have a well-founded fear of persecution on account of their being members of a particular social group, specifically that of “children who have lived in the ISIS regime and who do not have the ability to be repatriated to their home country”.<sup>376</sup> This is to argue that home States’ purposeful failure to withdraw their children from the mistreatment of SDF-controlled camps satisfies both the objective and subjective standard of ‘well-founded fear’. Moreover, the acknowledgement that State’s passive policies are, in essence, retaining children in a location where their rights are at stake, contributes compelling evidence for ‘denial of protection’ embodied by the modern understanding of ‘persecution’.<sup>377</sup>

While there is no clear delineation by the international community on what it means to be a member of a ‘particular social group’, relevant courts have interpreted it as a two-fold concept: either individuals share a common immutable characteristic or they “have a distinct identity within their country [...] because they are perceived as being different by that society”.<sup>378</sup> Although ‘former child soldier’ status does qualify as an immutable characteristic, it is controversial as to whether former terrorist group affiliation is included within such categorisation. Nevertheless, scholars do contend that if the former membership was forced then the claim “ought logically to be included within the ambit of the social group because former status is immutable”.<sup>379</sup> Indeed, most, if not all, of the children under consideration did not have any agency in being brought to or remaining within ISIS-controlled territory, thus suggesting that their

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<sup>372</sup> Oehrelrich, Mulroy and McHugh, ‘Jannah or Jahannam’, 10.

<sup>373</sup> *Id.*

<sup>374</sup> Helf, ‘Central Asia’, 3.

<sup>375</sup> The Refugee Convention: “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of [...] membership of a particular social group [...]”.

<sup>376</sup> Luquerna, ‘Children of ISIS’, 178.

<sup>377</sup> Hathway and Foster, *The Law of Refugee Status*, 185: modern understanding is “the sustained or systemic denial of basic human rights demonstrative of a failure in State protection”; Luquerna, ‘Children of ISIS’, 184.

<sup>378</sup> Luquerna, ‘Children of ISIS’, 186.

<sup>379</sup> Hathway and Foster, *The Law of Refugee Status*, 459.

former association should be considered an immutable characteristic, qualifying them for refugee status and the protections thereto. Albeit outside of the scope of the present Thesis, there are further obstacles in attaining such protection, including the exceptions to the Refugee Convention embodied by Articles 1(f)<sup>380</sup> and 33(2),<sup>381</sup> and the Syrian Government's lack of capacity to provide safe refuge.<sup>382</sup>

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<sup>380</sup> The Refugee Convention, art 1(F.a); Luquerna, 'Children of ISIS', 188: The Convention asserts that its provisions will not apply to persons with respect to whom there are serious allegations of terrorist related crimes, except when it cannot be reasonably established that they had the mental capacity to commit the crime.

<sup>381</sup> Hathway and Foster, *The Law of Refugee Status*, 460: A State may "divest itself of protection obligations to a recognised refugee where critical issues of safety and security are demonstrated".

<sup>382</sup> Luquerna, 'Children of ISIS', 182.

## Conclusions

### *Implications of the Research*

The present Thesis has strived to delineate a morally disturbing, politically toxic, legally ambiguous, and incredibly pertinent situation in response to the following research question: considering the international children's rights framework through the doctrines of State sovereignty and human rights universality, to what extent are European States justified in falling short of their responsibilities to ensure the rights of children of FTFs held in Syria? In tackling this question, the Thesis wound its way through three substantive Parts: Dystopia, Apologia and Utopia.

Part I set a dystopian scene, establishing the relationship between European States and the children of FTFs with links to their countries as one of utmost significance; if not for the engagement of these States, children's rights are in a *de facto* vacuum. Nevertheless, the Thesis deduced that Belgium, Germany, the Netherlands, and France have done little to ensure the rights of such children, all repatriating less than 20%. It was further asserted that this passivity is not born out of a lack of logistical feasibility to ensure the children's rights, as was demonstrated by a comparative analysis with Central Asian policies, nor an unawareness of the situation, as was exemplified by accounts of Belgian, Dutch, German, and French engagement with the SDF.

The Thesis subsequently moved into the second substantive Part, 'Apologia', to provide a legal analysis of the extant State responsibilities under the relevant fields of international law before illuminating the domestic jurisprudence upholding apologies for States' current passive policies. It was through a reflection on this discussion that the disjuncture in international standards and domestic practice was scrutinised to reach several deductions: to a large extent, domestic judiciaries fail to engage with the standards set at the international level; judicial reasoning often times undermines such standards, whether engaging with international law or not; and jurisdiction is a primary justification utilised to mitigate any children's rights responsibilities.

While the durability of the latter of these arguments is likely weakened by The Committee's judgement in *L.H et al* and *F.B et al*, and potentially overridden by the pending ECtHRs' judgement in *H.F. and M.F.* and *J.D. and A.D.*, the disjuncture between international and domestic sentiment remains. Part III strived to elucidate such disconnection, suggesting that although State justifications contradict normatively appealing responsibilities which strive towards the universal respect for and observance of human rights, they are doing so in the name of another fundamental doctrine, that of State sovereignty over pertinent national interests. Indeed, the Thesis contends that these two doctrines, and the tensions between them, are clearly reflected in, and act as an explanation for, the situation at hand; States are exercising their sovereignty to act within their interests with regards to an issue where such interests are of great significance, and human rights bodies, namely The Committee, are stretching State obligations to account for rights vacuums where such vacuums are of detrimental impact.

As such, the answer to the overarching research question is conditional; considering the international children's rights framework through the doctrine of human rights universality, States are not justified in their contemporary policies. Through a doctrine of State sovereignty, however, perhaps they are. Enlivening this deduction, the Thesis further purports that given the pertinence of national interests in the context at hand, and the contemporary danger in judgements which push too far in the direction of universality, the doctrine of State sovereignty currently holds more weight. It is contended that until European States view judgements such as The Committee's as an opportunity to reinforce extant commitment to children's rights rather than as an affront to sovereignty, perhaps through a re-consideration of perspectives and national interests, States will remain in the realm between Dystopia and Utopia: Apologia, an environment in which European State 'response-ability' is falling short of the ideal standard in theory but is realistic in practice.

*Future Questions*

Whilst striving to account for the extant gaps and ambiguities surrounding the context under discussion, the Thesis simultaneously exposed room for further research.

Firstly, sub-section 3.1.1.4 uncovered a need of The Committee to provide additional legal clarity and reasoning to their judgements on jurisdiction and State responsibility. This is not to say that the bodies modern jurisdictional lens does not do justice to the CRC as a living instrument<sup>383</sup> in a globalising world, but rather that a lack of clarity leaves it exposed to the dangerous State push-back described in sub-section 5.2, ultimately reducing its impact to hold States accountable for their children's rights responsibilities. The Committee is therefore called on to further explore its interpretational tools towards jurisdiction and establish clear lines of reasoning regarding in which circumstances the extraterritorial application of the CRC is deemed necessary. This Thesis purports that the publishing of a General Comment on the matter would aid in the creation of clear, overarching standards. Indeed, the same could be said of the ECtHR, who's jurisdictional interpretation has been beset with methodological and conceptual inconsistencies; research and discussion on the balancing act between ensuring fundamental rights and satisfying State sovereignty undertaken by the ECtHR in situations of pertinent social debate deserves a Thesis in itself, one which this author would like to see developed.

Moreover, although the Thesis did touch upon the interplay between societal attitude, Government policy, and judicial interpretation, additional research on the relationship between these three levels with regards to the topic at hand and the intense social reaction it entices would be intriguing. In addition, this Thesis calls for further research into the nuanced histories and motives of women and children held in SDF-controlled camps and increased dissemination of this information to European societies, and beyond. Such research would greatly aid Governments and societies in reconsidering their national interests and perspectives towards children and women affiliated with ISIS, a revision in thought that this Thesis deemed critical for future solutions.

Finally, additional discussion on the role of international law would be of great interest; specifically, how can or will the law of State responsibility be expanded to account for the prominent role of non-State actors in the modern-day world? And could the SC do more to push States toward practices which would be a positive implementation of their binding resolutions? In the same light, should the SC adjust its broad definition of 'FTF-related offences' to mitigate any stigmatisation and criminalisation faced by children inadvertently affiliated with, but not directly engaged in, terrorist organisations?

The prominence of the topic at hand and the moral disturbance it entices substantiates the necessity of current and future research, a slice of which this Thesis hopes it has contributed to.

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<sup>383</sup> Sandelowsky-Bosman and Liefwaard, 'Children Trapped in Camps in Syria', 158.

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