



# The Legal Treatment Problem of French and Georgian Nationals Who Joined the Islamic in Iraq and/or Syria

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## ABSTRACT

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With the weakening of the Islamic State, many French and Georgians who had joined the organization, were arrested by the Syrian Democratic Forces (SDF) in Syria and by the Iraqi authorities. These people have been placed either in detention in Iraq or in camps in Syria with catastrophic health and security conditions. Even if France and Georgia are unambiguously reluctant to repatriate their nationals who have joined Daesh in order to try them on their territory, it is appropriate to ask whether this policy is consistent with international law. This article aims to provide a legal response to the political and security issues surrounding the repatriation and trial of French and Georgian nationals who have joined Daesh. Firstly, the legal dilemma of the trial of adults who joined Daesh will be studied in the light of international law and the domestic law of Iraq, France and Georgia, including the thorny issue of the application of the death penalty in Iraq and the recognition of crimes against humanity. Secondly, the legal possibility of repatriation of French and Georgian minors interned in camps in northern Syria will be analyzed.

## INTRODUCTION

In recent years, a significant number of French and Georgian nationals have voluntarily left their home countries to fight alongside Islamist terrorists affiliated with the Islamic State, causing chaos in the Levant region and posing a threat to Europe. As this entity has weakened and many of its members have been apprehended, the issue arises regarding the jurisdiction for the trial of these French and Georgian nationals.

It is important to first recall that the Islamic State, also known as Daesh, is a politico-military terrorist organization that established a caliphate in Iraq and Syria from 2014 to 2019. The alliance between Al-Qaeda in Iraq and Ba'athist leaders ousted from the Iraqi government led to the establishment of a formidable totalitarian system. This organization is accused by the United Nations, the Arab League, the United States, and the European Union of war crimes, crimes against humanity, ethnic cleansing, genocide, as well as the destruction of millennia-old archaeological sites.

This entity recruited foreigners from more than 80 states, including a significant number of Europeans. The French constituted one of the largest groups of European recruits within the ranks of the Islamic State, with approximately 1,300 nationals<sup>1</sup>. Regarding Georgia, it is estimated that between 100 to 300<sup>2</sup> Georgians joined Daesh, predominantly from the Kists of Pankisi, and to a lesser extent, from the regions of Adjara and Guria<sup>3</sup>. While this number may seem low compared to France, it is crucial to note that Georgia has a population of fewer than four million inhabitants<sup>4</sup>, representing approximately 7.5 per thousand inhabitants who joined Daesh com-

pared to 1.9 per thousand on the French side.

Due to the operations of the international coalition and various factions opposing Daesh, the Islamic State lost numerous territories between 2014 and 2019. Thousands of people living in these previously Daesh-controlled territories were placed in camps in Syrian Kurdistan, controlled by the Syrian Democratic Forces (SDF), a group mainly composed of Kurds<sup>5</sup> and allied with the international coalition against the Islamic State. In 2019, it was estimated that around 12,000 foreigners, including 4,000 women and 8,000 children from 30 to 40 different countries, were interned in camps in northeast Syria<sup>6</sup>. The situation in these camps has been described as "apocalyptic" by the International Committee of the Red Cross (ICRC)<sup>7</sup>.

A number of individuals, particularly men suspected of belonging to the Islamic State, have been transferred from northern Syria to Iraq for trial. Between May 26 and June 3, 2019, eleven French nationals were sentenced to death by hanging by the Central Criminal Court of Baghdad on charges of belonging to Daesh and acts of terrorism<sup>8</sup>. Many other French nationals and potential Georgians also risk being transferred and judged in Iraq, where they face the death penalty.

European states, including France<sup>9</sup> and Georgia<sup>10</sup>, remain reluctant to repatriate their nationals.

1 CNCDH. (2019, October 11<sup>th</sup>). Opinion on French minors held in Syrian camps. Journal officiel de la République française (JORF) No. 0237. Text No. 78. NOR: CDHX1929060V. <https://www.legifrance.gouv.fr/jorf/id/JORF-TEXT000039202746> [Last accessed 2022, August 5<sup>th</sup>]

2 33rd ISIS fighter from Georgia's Pankisi Gorge dead in Syrian war. (2019, March 9<sup>th</sup>). *Democracy & Freedom Watch*. <https://dfwatch.net/33rd-isis-fighter-from-georgias-pankisi-gorge-dead-in-syrian-war-52956> [Last accessed 2022, August 5<sup>th</sup>]

3 Russian-Origin Muslims in Georgia. (2021, July 30<sup>th</sup>). *International Crisis Group*. <https://www.crisisgroup.org/russian-origin-muslims-georgia> [Last accessed 2022, August 5<sup>th</sup>]

4 Georgia Population (LIVE). *Worldometer*. <https://www.worldometers.info/world-population/georgia-population/> [Last accessed 2022, August 5<sup>th</sup>]

5 CNCDH. (2020, February 2<sup>nd</sup>). Opinion on French nationals sentenced to death or facing the death penalty in Iraq. Journal officiel de la République française (JORF) n°0028. Text n° 57. NOR : CDHX2003042V. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041515060> [Last accessed 2022, August 5<sup>th</sup>]

6 Abu Bakr Al-Baghdadi calls for 'rescue' of detained jihadists and their families. (2019, September 16<sup>th</sup>). *Le Monde*. [https://www.lemonde.fr/international/article/2019/09/16/abou-bakr-al-baghdadi-appelle-a-sauver-les-djihadistes-detenus-et-leurs-familles\\_5511143\\_3210.html](https://www.lemonde.fr/international/article/2019/09/16/abou-bakr-al-baghdadi-appelle-a-sauver-les-djihadistes-detenus-et-leurs-familles_5511143_3210.html) [Last accessed 2022, August 5<sup>th</sup>]

7 *Ibid.*

8 Iraq: 5 Iraqi nationals executed for terrorism. (2021, February 12<sup>th</sup>). ECPM. <https://www.ecpm.org/irak-5-resortissants-irakiens-executes-pour-terrorisme/> [Last accessed 2022, August 5<sup>th</sup>]; Iraq: 21 Iraqi nationals executed for terrorism. (2020, November 19<sup>th</sup>). ECPM. <https://www.ecpm.org/irak-21-ressortissants-irakiens-executes-pour-terrorisme/> [Last accessed 2022, August 5<sup>th</sup>]

9 Collongette, A. (2022, July 5<sup>th</sup>). Has France changed its policy regarding the repatriation of children detained in Syria? *Nice-Matin*. <https://www.nicematin.com/faits-de-societe/la-france-a-t-elle-change-de-politique-concernant-le-rapatriement-des-enfants-detenus-en-syrie-779247> [Last accessed 2022, August 5<sup>th</sup>]

10 Russian-Origin Muslims in Georgia. *Op.cit.*

This status quo leaves children and many adults in the hands of the SDF in camps in northeast Syria under conditions seriously endangering their lives. Moreover, a significant number of transfers of European nationals from Syrian camps to Iraq are carried out to be judged under Iraqi law, raising serious questions about the respect for their fundamental rights. To address these legal infringements, specialized jurisdictions could be established to judge the crimes committed by Daesh members. It could also be considered to transfer and repatriate French and Georgian nationals to be tried in their home countries.

Given these sensitive political and social circumstances, it is essential to provide a legal perspective to address this situation, which constitutes a ticking time bomb for European countries such as France and Georgia. This article aims to offer a concise legal solution to this issue. Its purpose is not to doctrinally develop legal concepts, further exploration of which can be found in the provided bibliography.

## 1. UNDERMINING INTERNATIONAL LAW THROUGH THE IRAQI JUDGMENT OF ISIS MEMBERS

### 1.1. Questionable Iraqi Territorial Jurisdiction and Violation of the Non-Refoulement Principle

French policy has established the principle<sup>11</sup> that its nationals would be tried not in France but

in Iraq, based on Iraq's territorial jurisdiction to adjudicate crimes committed on its soil. This French stance, likely endorsed by Georgia as well, is legally contentious. According to lawyers consulted by the National Consultative Commission on Human Rights (CNC DH), more than half of French nationals may never have set foot on Iraqi territory<sup>12</sup> (a situation likely applicable to Georgian nationals). Thus, if proven, this fact would render Iraq's territorial jurisdiction inadmissible<sup>13</sup>.

Moreover, there seems to be no legal basis justifying the transfer of French and Georgian nationals from Syria to Iraq<sup>14</sup>. This transfer, politically authorized by France and probably tolerated by Georgia, contravenes the principle of non-refoulement<sup>15</sup> to a country practicing torture and the death penalty. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>16</sup>, ratified by both France and Georgia, states in Article 3 that “no State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This approach has been consistently upheld since 1989 by the European Court of Human Rights, recognized by both France and Georgia, which interprets Article 3, particularly concerning individuals at risk of being sent to a state where they could face the death penalty<sup>17</sup>.

It is confirmed that confessions of ISIS affiliation are obtained through torture<sup>18</sup>, a fact corroborated by the testimony of French nationals sentenced to death<sup>19</sup>. Thus, the practice of torture renders the con-

11 Paris challenges UN rapporteur's comments on transfer of French jihadists to Iraq. (2019, August 12<sup>th</sup>). *France Info*. [https://www.francetvinfo.fr/monde/proche-orient/francais-condamnes-a-mort-en-irak/paris-recuse-les-observations-d-unerapporteure-de-l-onu-sur-le-transfert-de-jihadistes-francais-en-irak\\_3574541.html](https://www.francetvinfo.fr/monde/proche-orient/francais-condamnes-a-mort-en-irak/paris-recuse-les-observations-d-unerapporteure-de-l-onu-sur-le-transfert-de-jihadistes-francais-en-irak_3574541.html) [Last accessed 2022, August 5<sup>th</sup>]; Paris responds curtly to a UN expert who called for the repatriation of jihadists. (2019, August 13<sup>th</sup>). *Huffington Post*. [https://www.huffingtonpost.fr/politique/article/paris-repond-sechement-a-une-experte-de-l-onu-qui-demandait-le-rapatriement-des-jihadistes\\_150071.html](https://www.huffingtonpost.fr/politique/article/paris-repond-sechement-a-une-experte-de-l-onu-qui-demandait-le-rapatriement-des-jihadistes_150071.html) [Last accessed 2022, August 5<sup>th</sup>]; French jihadists sentenced to death in Iraq: France again rules out repatriating them. (2019, August 13<sup>th</sup>). *LCI*. <https://www.lci.fr/terrorisme/djihadistes-francais-condamnes-a-mort-en-irak-la-france-exclut-a-nouveau-de-les-rapatrier-une-experte-de-l-onu-appelle-a-le-faire-2129420.html> [Last accessed 2022, August 5<sup>th</sup>]

12 CNC DH. (2020, February 2<sup>nd</sup>). Opinion on French nationals sentenced to death or facing the death penalty in Iraq. *Op.cit.*

13 *Ibid.*

14 *Ibid.*

15 To go further, see : Delas, O. (2010). *The Principle of Non-Refoulement in International Human Rights Jurisprudence: From Consecration to Challenge*. [Doctoral thesis in International Law, University of Paris 2] <https://www.theses.fr/2010PA020067> [Last accessed 2022, August 5<sup>th</sup>]

16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (1987, June 26<sup>th</sup>)

17 ECtHR, Soering v. The United Kingdom, July 7, 1989, application n° 14038/88

18 Human Rights Watch. (2017). Flawed Justice: Accountability for ISIS Crimes in Iraq. Pp. 49-52. <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq> [Last accessed 2022, August 5<sup>th</sup>]

19 Sallon, H. (2019, July 6<sup>th</sup>). French jihadists sentenced to death in Iraq blame Paris. *Le Monde*. <https://www.lemonde.fr>

sensual transfers of French and Georgian nationals from Syria to Iraq illegal, subjecting them to trials raising concerns about their fairness.

## 1.2. Lack of Fair Trials in Iraq

On May 29, 2019, Mr. Jean-Yves Le Drian, the Minister for Europe and Foreign Affairs, described as "fair"<sup>20</sup> the trials that led to the death sentences of eleven French nationals. However, numerous elements contradict the French minister's position.

Firstly, the right to a fair trial is a fundamental right enshrined in various international texts, such as the Universal Declaration of Human Rights<sup>21</sup> (Article 10) and the European Convention on Human Rights<sup>22</sup> (Article 6), both ratified by Georgia and France. The International Covenant on Civil and Political Rights<sup>23</sup> (Article 14), ratified by Georgia, France, and Iraq, is also a binding instrument protecting this right.

The right to a fair trial is based on various principles such as the presumption of innocence, the impartiality and independence of judges, and the

conduct of a adversarial hearing<sup>24</sup>. This right also guarantees respect for the right to defense, including access to a lawyer at all stages of the proceedings<sup>25</sup>.

Concerning the Iraqi trials of ISIS members, numerous elements indicate that access to the right to defense is restricted, with expedited trials lacking the presentation of all defense elements and arguments<sup>26</sup>.

Defense lawyers face numerous threats and are often assigned under coercion. They are present only at the trial, with no opportunity to consult with their clients or access their case file, except a few minutes before the hearing, hindering adequate defense preparation<sup>27</sup>. They can only plead briefly, if at all<sup>28</sup>.

Accused individuals are deprived of legal representation during arrest and investigation, have limited speaking rights, and face significant challenges due to their lack of knowledge of Arabic.

Judges lack independence, living in fear of reprisals if the verdict is deemed inadequate by the population<sup>29</sup>.

[fr/international/article/2019/07/06/des-djihadistes-francais-condamnes-a-mort-en-irak-mettent-encause-par-is-5486227\\_3210.html](https://www.fr/international/article/2019/07/06/des-djihadistes-francais-condamnes-a-mort-en-irak-mettent-encause-par-is-5486227_3210.html) [Last accessed 2022, August 5<sup>th</sup>]; Olivier, P. (2019, July 10<sup>th</sup>). Family of French man sentenced to death in Iraq cries out in anger. *RFI*. <http://www.rfi.fr/france/20190710-rfi-rencontre-famille-francais-condamne-mort-irak> [Last accessed 2022, August 5<sup>th</sup>]; Le Devin, W. (2019, July 4<sup>th</sup>). Jihadists in Iraq: "Will we eradicate evil by applying the death penalty? No!". *Liberation*. [https://www.liberation.fr/france/2019/07/04/jihadistes-en-irak-est-ce-qu-on-eradiquera-le-mal-en-appliquant-la-peine-de-mort-non\\_1738006/](https://www.liberation.fr/france/2019/07/04/jihadistes-en-irak-est-ce-qu-on-eradiquera-le-mal-en-appliquant-la-peine-de-mort-non_1738006/) [Last accessed 2022, August 5<sup>th</sup>]; Zamouri, A. (2019, June 21<sup>st</sup>). The family of a French jihadist sentenced to death breaks the silence. *Le Point*. [https://www.lepoint.fr/justice/exclusif-la-famille-d-un-djihadiste-francais-condamne-a-mort-brise-lesilence-21-06-2019-2320318\\_2386.php](https://www.lepoint.fr/justice/exclusif-la-famille-d-un-djihadiste-francais-condamne-a-mort-brise-lesilence-21-06-2019-2320318_2386.php) [Last accessed August 5, 2022]

20 Mr. Jean-Yves Le Drian, Minister of Europe and Foreign Affairs. (2019, May 29<sup>th</sup>). Statement in response to a question about the trials in Iraq against the jihadist. <https://www.vie-publique.fr/discours/271659-jean-yves-le-drian-29052019-les-proces-en-irak-contre-le-djihadistes> [Last accessed 2022, August 5<sup>th</sup>]

21 Universal Declaration of Human Rights. (1948, December 10<sup>th</sup>)

22 European Convention for the Protection of Human Rights and Fundamental Freedoms. (1953, September 3<sup>rd</sup>)

23 International Covenant on Civil and Political Rights. (1976, March 23<sup>rd</sup>)

24 European Court of Human Rights (2022, April 30<sup>th</sup>). Guide to Article 6 of the European Convention on Human Rights, Right to a Fair Trial (criminal aspect). [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_fra.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_fra.pdf) [Last accessed 2022, August 5<sup>th</sup>]

25 *Ibid*.

26 Foltyn, S. (2019, June 2<sup>nd</sup>). Inside the Iraqi courts sentencing foreign Isis fighters to death. *The Guardian*. <https://www.theguardian.com/world/2019/jun/02/inside-the-iraqi-courts-sentencing-foreign-isis-fighters-to-death> [Last accessed 2022, August 5<sup>th</sup>]; Rubin A.J. (2019, May 29<sup>th</sup>). France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang. *The New York Times*. <https://www.nytimes.com/2019/05/29/world/middleeast/france-iraq-isis-trials.html> [Last accessed 2022, August 5<sup>th</sup>]; Iraq : French Citizens Allege Torture, Coercion. (2019, May 31<sup>st</sup>). Human Rights Watch <https://www.hrw.org/news/2019/05/31/iraq-french-citizens-allege-torture-coercion> [Last accessed 2022, August 5<sup>th</sup>]; Callamard, A. Special Rapporteur on extrajudicial, summary or arbitrary executions. (2019, August 8<sup>th</sup>). Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions. AU ENG 5/2019 [Last accessed 2022, August 5<sup>th</sup>]

27 Bouvier, P. (2019, June 6<sup>th</sup>). French jihadists' trials highlight flaws in Iraqi justice system. *Le Monde*. [https://www.lemonde.fr/international/article/2019/06/04/les-proces-des-djihadistes-francais-soulignent-les-faillissements-judiciaires-irakiens\\_5471351\\_3210.html](https://www.lemonde.fr/international/article/2019/06/04/les-proces-des-djihadistes-francais-soulignent-les-faillissements-judiciaires-irakiens_5471351_3210.html) [Last accessed 2022, August 5<sup>th</sup>]

28 CNCDH. (2020, February 2<sup>nd</sup>). Opinion on French nationals sentenced to death or facing the death penalty in Iraq. *Op. cit*.

29 Bouvier, P. (2019, June 6<sup>th</sup>). French jihadists' trials high-



Lack of prior instructions results in sentences based on confessions, generally obtained through torture<sup>30</sup>, rather than corroborating evidence. These trials take place in the absence of victims and without any supporting testimonies from the prosecution.

All these elements indicate the lack of a fair trial in Iraq, a deficiency highlighted by the third Universal Periodic Review (UPR) in November 2019<sup>31</sup>, which raised concerns about violations of the right to a fair trial in Iraq and emphasized the need to strengthen the independence and impartiality of the judiciary. Additionally, according to the UN High Commissioner for Human Rights, Michelle Bachelet, over 150 men and women have been sentenced to death in Iraq under the anti-terrorism law “*following trials which have not afforded adequate due process guarantees*”<sup>32</sup>. Numerous reports from NGOs<sup>33</sup>, the UN, and lawyers<sup>34</sup> document human rights violations and violations of the right to a fair trial during trials for affiliation with ISIS.

All these elements demonstrate that trials conducted on the grounds of ISIS affiliation in Iraq

are unfair, thus violating international law. France and Georgia should therefore make every effort to ensure that their nationals, for whom they are responsible, are treated in accordance with international law if accused of serious crimes in another country<sup>35</sup>, including repatriating them for trial in their own territory.

### 1.3. Non-Individualized Iraqi Judgment and Lack of Recognition of Crimes against Humanity

The Iraqi anti-terrorism law of 2005<sup>36</sup> classifies as terrorists anyone who belonged to a terrorist organization, regardless of the individual's role or position. The law, in its Article 2, paragraph 3, considers “*The following acts are considered acts of terrorism [...] Anyone who organized, chaired or participated in an armed terrorist gang that practices and plans for terrorism and also contributes and participates in this act.*”<sup>37</sup>. Thus, both an ISIS fighter and a doctor who treated ISIS members could be sentenced to death under this anti-terrorism law<sup>38</sup>. Therefore, despite claims of non-participation in combat, several French nationals have been sentenced to death based on this anti-terrorism law. The vagueness of the law means that individuals are not judged for their specific crimes<sup>39</sup>, violating the principle of individualization of sentences.

Furthermore, the 2005 law contains no reference to crimes against humanity. It appears that judges in Iraqi counter-terrorism consider genocide and terrorism as a single crime<sup>40</sup>. During an

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light flaws in Iraqi justice system. *Op. cit.*

- 30 Human Rights Watch. (2017). Flawed Justice: Accountability for ISIS Crimes in Iraq. p.49-5. *Op. cit.*; Sallon, H. (2019, July 6<sup>th</sup>). French jihadists sentenced to death in Iraq blame Paris. *Op.cit.*; Olivier, P. (2019, July 10<sup>th</sup>). Family of French man sentenced to death in Iraq cries out in anger. *Op.cit.*; Le Devin, W. (2019, July 4<sup>th</sup>). Jihadists in Iraq: "Will we eradicate evil by applying the death penalty? No!". *Op.cit.*; Zamouri, A. (2019, June 21<sup>st</sup>). The family of a French jihadist sentenced to death breaks the silence. *Op.cit.*
- 31 Summary of stakeholder submissions on Iraq (2019, November 8<sup>th</sup>). United Nations. Human Rights Council. Universal Periodic Review - Iraq. Third cycle. <https://www.ohchr.org/fr/hr-bodies/upr/iq-index> [Last accessed 2022, August 5<sup>th</sup>]
- 32 Michelle Bachelet, United Nations High Commissioner for Human Rights. (2019, June 24<sup>th</sup>). Opening statement by Michelle Bachelet, United Nations High Commissioner for Human Rights. Forty-first session of the Human Rights Council. United Nations, Human Rights. <https://www.ohchr.org/en/statements/2019/06/41st-session-human-rights-council>. [Last accessed 2022, August 5<sup>th</sup>]
- 33 Human Rights Watch. (2017). Flawed Justice: Accountability for ISIS Crimes in Iraq. *Op. cit.*; Report 2017/18, The State of the World's Human Rights (2018, February 22<sup>nd</sup>). Amnesty International. <https://www.amnesty.org/fr/documents/pol10/6700/2018/fr/> [Last accessed 2022, August 5<sup>th</sup>]
- 34 Bouvier, P. (2019, June 6<sup>th</sup>). French jihadists' trials highlight flaws in Iraqi justice system. *Op.cit.*

- 35 Michelle Bachelet, United Nations High Commissioner for Human Rights. (2019, June 24<sup>th</sup>). *Op.cit.*
- 36 Iraqi Anti-Terrorism Law No. 13 of November 7, 2005. <https://www.refworld.org/docid/5bd093414.html> [Last accessed 2022, August 5<sup>th</sup>]
- 37 *Ibid.* Article 2 §3..
- 38 Human Rights Council.(2016, June 15<sup>th</sup>). "They came to destroy": ISIS Crimes Against the Yazidis. pp 49-52. [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf) [Last accessed 2022, August 5<sup>th</sup>];
- Sallon, H. (2019, July 6<sup>th</sup>). French jihadists sentenced to death in Iraq blame Paris. *Op.cit.*
- 39 Rubin, A.J. (2019, May 29<sup>th</sup>). France Hands ISIS Suspects to Iraq, Which Sentences Them to Hang. *Op. cit.*
- 40 Human Rights Watch. (2017). Flawed Justice: Accountability for ISIS Crimes in Iraq. p.31. *Op. cit.*

interview with Human Rights Watch, Iraqi judges reportedly stated, "*Genocide and terrorism are the same crime, so why would we need a separate charge for genocide?*"<sup>41</sup> This omission and conflation prevent the establishment of the legal truth of the facts. Indeed, numerous UN investigation reports have demonstrated that many crimes against humanity, including genocides, have been committed by ISIS in Iraq and Syria<sup>42</sup>. Reducing judicial proceedings to mere affiliation with a terrorist group obscures the gravity of crimes against humanity committed by ISIS. This legal omission hinders victims' access to the right to reparations for damages suffered and the right to truth regarding the blatant human rights violations committed<sup>43</sup>.

Given this observation, referral to the French justice system, competent in both terrorism acts and crimes against humanity, should be favored, as opposed to the Iraqi judiciary, which lacks legal basis and will to judge crimes against humanity and genocide<sup>44</sup>. This legal reasoning could also be applied to potential Georgians judged in Iraq, as Georgia also has legal provisions to judge crimes against humanity<sup>45</sup> and terrorism<sup>46</sup>.

## 2. THE ISSUE OF THE DEATH PENALTY IN IRAQ IN THE CASE OF FRENCH AND GEORGIAN CONVICTS

### 2.1. A Death Penalty Imposed "by Proxy"

As of today, Iraq is one of the five countries in the world that executes the highest number of death-row convicts<sup>47</sup>, with the majority facing charges related to terrorism<sup>48</sup>. While French nationals sentenced to death have not been executed so far, and French authorities have requested their non-execution, there is no guarantee that Iraqi authorities will comply with these requests. In fact, they have denied any such agreement with France on this matter<sup>49</sup>. Additionally, the Iraqi government lacks the authority to modify, confirm, or annul sentences pronounced in the courts; these prerogatives lie exclusively within the jurisdiction of the Iraqi Court of Cassation<sup>50</sup>, which has not yet rendered its verdict concerning the eleven French nationals sentenced to death.

In light of the imminent risk of executions of French nationals, France's hesitancy in taking effective measures to prevent executions or repatriate its citizens appears paradoxical and illegal in view of its international commitments on this issue. Since the abolition of the death penalty in 1981, France has unambiguously expressed its commitment to this prohibition within international institutions. It has pledged, on various occasions, to provide technical assistance to Iraq for the abolition of the death

41 Human Rights Watch.(2017, July 19). Interview with Judge Riadh Jafar and Judge Jabar Hussein. in Human Rights Watch. (2017). *Flawed Justice : Accountability for ISIS Crimes in Iraq*. p.31. Op.cit.

42 Human Rights Council.(2016, June 15<sup>th</sup>). "They came to destroy: ISIS Crimes Against the Yazidis.;" Human Rights Council (2015, March 27<sup>th</sup>). Report of the Office of the United Nations High Commissioner for Human Rights on the situation of human rights in Iraq in light of violations committed by the so-called "Islamic State of Iraq and the Levant" and associated groups. A/HRC/28/18.

43 Office of the United Nations High Commissioner for Human Rights. (2006, February 8). Study on the right to truth. E/CN.4/2006/91

44 Callamard, A. Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to Iraq. (2018, June 20<sup>th</sup>). Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Iraq A/HRC/38/44/Add.1, § 48.

45 Chapter XLVII - Crime against Humanity, Peace and Security and International Humanitarian Law, of the Criminal Code of Georgia

46 Chapter XXXVIII - Terrorism, of the Criminal Code of Georgia.

47 Amnesty International. (2019, April 10<sup>th</sup>). Death sentences and executions 2018: Global report. ACT 50/9870/2019. <https://www.amnesty.org/download/Documents/ACT-5098702019FRENCH.PDF> [Last accessed 2022, August 5<sup>th</sup>]

48 United Nations Assistance Mission in Iraq, Office of the United Nations High Commissioner for Human Rights (2014, October). Report on the Death Penalty in Iraq. UN-AMI/OHCHR. p.26

49 Iraq: judiciary denies agreement with Paris to ease death penalty. (2019 June 11<sup>th</sup>). *L'Orient-Le Jour*. <https://www.lorientlejour.com/article/1174268/irak-la-justice-de-ment-un-accord-avec-paris-pour-alleger-la-peine-descondamnes-a-mort.html> [Last accessed 2022, August 5<sup>th</sup>]

50 Iraq's prime minister says he cannot ease sentences for jihadists. (2019, August 9<sup>th</sup>). *Le Nouvel Observateur*. <https://www.nouvelobs.com/monde/20190809.AFP2211/le-premier-ministre-d-irak-affirme-ne-pouvoir-alleger-les-peines-des-jihadistes.html> [Last accessed 2022, August 5<sup>th</sup>]

penalty<sup>51</sup>. France has ratified numerous international and regional binding commitments prohibiting the death penalty<sup>52</sup>. This prohibition must be understood "universally, including for their nationals abroad,"<sup>53</sup> according to Agnès Callamard, the Special Rapporteur of the Human Rights Council on extrajudicial, summary, or arbitrary executions. It is noteworthy that France does not comply with any extradition requests when there is a risk of the death penalty, regardless of the person's nationality, in accordance with the jurisprudence of the European Court of Human Rights (ECHR)<sup>54</sup>.

It appears paradoxical and illegal for France to accept, or even assist in, the transfer<sup>55</sup> of its nationals from Syria to Iraq, where they will face the death penalty. According to Agnès Callamard, a UN Special Rapporteur, strongly abolitionist states give the impression of imposing "*the death penalty by proxy, subcontracting its use for some of their nationals who are deemed to be unworthy of equal human rights protection.*"<sup>56</sup>

51 Ensemble contre la peine de mort. 10 questions to better understand the situation of French citizens sentenced to death in Iraq. p.14 <https://www.ecpm.org/wp-content/uploads/10-questions-confe%CC%81rence-Irak-061021-GRIS-MD2.pdf> [Last accessed 2022, August 5<sup>th</sup>]

52 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. (1991, July 11<sup>th</sup>); European Convention for the Protection of Human Rights and Fundamental Freedoms. (1953, September 3); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. (2003, July 1<sup>st</sup>)

53 Human Rights Council. (2019, August 20<sup>th</sup>). Application of the death penalty to foreign nationals and provision of consular assistance by the State of origin. A/74/318, § 108..

54 European Court of Human Rights (2022, June). Fact sheet - Abolition of the death penalty. [https://www.echr.coe.int/Documents/FS\\_Death\\_penalty\\_FRA.pdf](https://www.echr.coe.int/Documents/FS_Death_penalty_FRA.pdf) [Last accessed 2022, August 5<sup>th</sup>]

55 Sallon, H. and Kaval, A. (2019, August 12<sup>th</sup>). UN questions France over 'illegal' transfer of French jihadists to Iraq. *Le Monde*. [https://www.lemonde.fr/international/article/2019/08/12/l-onu-interpelle-la-france-sur-le-transfert-illegal-de-djihadistes-francais-en-irak\\_5498726\\_3210.html](https://www.lemonde.fr/international/article/2019/08/12/l-onu-interpelle-la-france-sur-le-transfert-illegal-de-djihadistes-francais-en-irak_5498726_3210.html) [Last accessed 2022, August 5<sup>th</sup>]; The transfer of jihadists from Syria to Iraq has begun (2019, October 30<sup>th</sup>). *France culture*. <https://www.radiofrance.fr/franceculture/podcasts/les-enjeux-internationaux/le-transfert-des-djihadistes-de-la-syrie-vers-l-irak-a-commence-1066322> [Last accessed 2022, August 5<sup>th</sup>]

56 Callamard, A. Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions.

It should be noted that even though Georgia is not at the forefront of the international fight against the death penalty, the analysis concerning France can also be applied to Georgia since the country abolished the death penalty on November 11, 1997, and signed various binding international and regional treaties to that effect<sup>57</sup>.

In the face of these death sentences, France and Georgia should consider transferring their nationals to remain in accordance with the international treaties they have ratified.

## 2.2. Possible Transfer of French and Georgian Detainees and Death Row Convicts to Their Home Countries

Contrary to what the facts might indicate, Iraq is not opposed to the transfer of foreign nationals. Indeed, during the Universal Periodic Review (UPR) in November 2019, Iraq accepted Georgia's recommendation to "*strengthen bilateral and multilateral judicial cooperation in criminal matters, particularly with agreements on the issue of the transfer of detainees, ensuring a balance between combating transnational crime and humanitarian goals.*"<sup>58</sup>

The transfer of detainees<sup>59</sup> is a procedure allowing a foreign national to serve their prison sentence, for which they were convicted abroad, in their home country. Its implementation is possible under various conditions. Firstly, both

(2019, August 20<sup>th</sup>). Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions - Application of the death penalty to foreign nationals and provision of consular assistance by the State of origin. A/74/318. §107.

57 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. (1991, July 11<sup>th</sup>); European Convention for the Protection of Human Rights and Fundamental Freedoms. (1953, September 3); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. (2003, July 1<sup>st</sup>)

58 Ensemble contre la peine de mort. *Op. cit.* p. 4.

59 Rebut, D. (2018, June 4<sup>th</sup>). Conviction of a French national abroad: what are the conditions for a transfer? Club des juristes. <https://blog.leclubdesjuristes.com/condamnation-pour-actes-terroristes-a-letranger-quelles-sont-les-conditions-dun-transfert/> [Last accessed 2022, August 5<sup>th</sup>]

states must have ratified a bilateral or multilateral transfer convention. Alternatively, an ad hoc agreement between the two states may be sufficient. Moreover, for the transfer to take place, the conviction must result from a final decision of the foreign court or no appeal has been filed. Thus, without an agreement between the two parties and without a final decision, it will be difficult to transfer the French and potential Georgian individuals detained in Iraq. The transfer decision is a political matter and not a judicial one, as it is decided by the Minister of Justice. However, the French and Georgian governments are still very reluctant to transfer and repatriate their nationals due to unfavorable public opinion<sup>60</sup>. This is despite recommendations published by the National Consultative Commission on Human Rights (CNCDH)<sup>61</sup> in 2020 urging France to repatriate its nationals through transfers, including those sentenced to death in Iraq or facing this penalty.

It should be noted that in the case of transfer, the sentence to be executed is, in principle, not modifiable. However, since the death penalty is prohibited in France and Georgia, it would be up to national courts to replace the foreign sentence with a domestic sentence corresponding to the initial penalty. This transfer would thus allow France and Georgia not to impose the death penalty "by proxy" on their nationals.

### 3. POSSIBLE SOLUTIONS FOR JUDGING ISIS MEMBERS IN ACCORDANCE WITH INTERNATIONAL LAW

#### 3.1. The Fleeting Idea of a Specialized Jurisdiction

Members of ISIS have committed almost all the crimes against humanity listed in the Rome Statute of the International Criminal Court (ICC)<sup>62</sup>. Therefore, it is essential for victims, their families, as well as for truth and memory, to combat impunity for these crimes. For this purpose, various options for the international trial of these crimes have been considered.

The ICC could be recognized as having jurisdiction to prosecute individuals accused of crimes against humanity, war crimes, and genocide. However, neither Syria nor Iraq has ratified the Rome Statute. The ICC would, however, have jurisdiction to prosecute nationals of states that have ratified the Rome Statute, such as France and Georgia. Nevertheless, the Court generally only pursues high-ranking officials and has jurisdiction only to judge serious international crimes, such as crimes against humanity, war crimes, and genocide. The ICC appears limited in judging all ISIS members, as these charges do not apply to all individuals who joined the Islamic State.

The possibility of creating a specialized international tribunal has also been discussed, similar to several international criminal courts created in the past to judge war crimes, crimes against humanity, genocide, and even terrorism.

In this case, it would be more of a "hybrid"<sup>63</sup> jurisdiction, with national judges sitting to judge their nationals and international judges to judge foreign nationals and support local judges. This

60 The French overwhelmingly approve of Iraq's trial of jihadists and do not want to see their children return. (2019, February). Odoxa. <http://www.odoxa.fr/sondage/djihadistes-francais-approuvent-massivement-jugement-irak-ne-veulent-voir-leurs-enfants-revenir/> [Last accessed 2022, August 5<sup>th</sup>]; Godwin, M. (2021, October 14<sup>th</sup>). Does ISIS still Pose a Threat to the Region? Georgia Today. <https://georgiaday.ge/does-isis-still-pose-a-threat-to-the-region/> [Last accessed 2022, August 5<sup>th</sup>]

61 CNCDH. (2020, January 28). Opinion on French nationals sentenced to death or facing the death penalty in Iraq. Op. cit.; CNCDH. (2020, December 21<sup>st</sup>). France Must Repatriate French Children Held in Syria and French Sentenced to Death in Iraq. <https://www.cncdh.fr/fr/publications/la-france-doit-rapatrier-les-enfants-francais-retenus-en-syrie-et-les-francais> [Last accessed 2022, August 5<sup>th</sup>]

62 Office of the United Nations High Commissioner for Human Rights. (2021, March 11<sup>th</sup>). In Syria, the warring parties have cumulatively committed almost all the crimes against humanity listed in the ICC's Rome Statute, Pinheiro says. <https://www.ohchr.org/fr/2021/03/after-decade-civilians-bearing-brunt-conflict-syria-it-time-put-them-first-and-support#:~:text=In%20cons%C3%A9quence%2C%20the%20parties%20belligerent%C3%A9rantes,Pinheiro> [Last accessed 2022, August 5<sup>th</sup>]

63 Could EI jihadists be tried in Syria? (2019, July 16<sup>th</sup>). AFP. July 16, 2019. <https://www.peinedemort.org/document/10603/jihadistes-I-EI-pourraient-ils-etre-juges-Syrie> [Last accessed 2022, August 5<sup>th</sup>]



idea, difficult to implement financially, poses a problem in terms of location. It would be necessary to establish this jurisdiction as close as possible to the victims and witnesses, in the Levant region, which is still very unstable. Moreover, there is no international consensus on a precise definition of terrorism<sup>64</sup>, posing a real issue regarding the legal qualification of facts for judgment. Furthermore, the establishment of such a jurisdiction would require several years, which is a challenge given the instability of the region, the living conditions of detainees in Iraq, and the families in camps in Syria.

At present, these options seem less likely to be considered by states, making their establishment in the future unlikely. European countries have leaned more towards the principle of universal jurisdiction and active personal jurisdiction of foreign nationals who have committed serious international crimes<sup>65</sup>.

### 3.2. The Competence of States to Judge Their Nationals who Joined ISIS

Various legal tools allow France and Georgia to judge on their own territory their nationals who joined ISIS. These tools are applicable to both detainees in Iraq and those interned in camps in Syria.

Firstly, a portion of the offenses started on French or Georgian soil, making the territorial jurisdiction of France<sup>66</sup> and Georgia<sup>67</sup> applicable to their nationals abroad.

Additionally, French, Georgian, and international law provide for active personal jurisdiction<sup>68</sup>,

allowing French and Georgian courts to address crimes committed by their nationals abroad. Moreover, French and Georgian laws stipulate that their courts have full jurisdiction to judge acts of terrorism committed by their nationals abroad<sup>69</sup>. Furthermore, UN Security Council resolutions related to counterterrorism urge member states to bring to justice anyone suspected of committing or financing acts of terrorism<sup>70</sup>. The prosecution of French and Georgian nationals in their home countries would ensure "long-term justice"<sup>71</sup> by establishing criminal responsibility for crimes against humanity and genocide. It is likely that French magistrates, in particular, possess more evidence than their Iraqi counterparts to support the defendants' cases<sup>72</sup>.

In addition, concerning crimes against humanity, France could also rely on the principle of universal jurisdiction<sup>73</sup>, applicable to crimes of international law as established by the Charter of the Nuremberg Tribunal<sup>74</sup>.

The eleven French nationals and potential Georgians judged and sentenced to death in Iraq cannot be tried again for crimes already judged, namely membership in a terrorist group. However, an opportunity is left for France and Georgia to repatriate them and judge them on other grounds, such as committing war crimes or genocide, respecting their fundamental rights through a fair trial. As for nationals interned in Syrian camps,

64 Dubuisson, F. (2017). The definition of "terrorism": debates, issues and functions in the legal discourse. *Confluences Méditerranée*, 102, 29-45. <https://doi.org/10.3917/come.102.0029> [Last accessed 2022, August 5<sup>th</sup>]

65 J. Triscone (2021, September 6<sup>th</sup>). Universal jurisdiction, the only hope for judging crimes committed in Syria? Trial International. <https://trialinternational.org/fr/latest-post/la-competence-universelle-seul-espoir-pour-juger-les-crimes-commis-en-syrie/> [Last accessed 2022, August 5<sup>th</sup>]

66 Article 113-2 of the Criminal Code of France

67 Article 4 § 2 of the Criminal Code of Georgia; Article 113-6 of the Criminal Code of France

68 Article 113-6 of the French Criminal Code; Article 4 of the Criminal Code of Georgia; P.C.I.J. (1927, September 7). Lotus case (France v.Turkey). Series A. No. 10.

69 Article 2 of the Law No. 2012-1432 of December 21, 2012, on security and the fight against terrorism. Journal officiel de la République française n°0298. (2012, December 22nd). NOR : INTX1232040L ;

Article 113-13 of the French Criminal Code; Article 689 of the Code of Criminal Procedure of France; Article 323 of the Criminal Code of Georgia

70 Council of Europe, Parliamentary Assembly. (2020). International obligations concerning the repatriation of children from war and conflict zones. Resolution 2321. <https://pace.coe.int/en/files/28581/html> [Last accessed 2022, August 5<sup>th</sup>]

71 CNCDH. (2020, February 2<sup>nd</sup>). Opinion on French nationals sentenced to death or facing the death penalty in Iraq. *Op.cit.*

72 Bouvier, P. (2019, June 6<sup>th</sup>). French jihadists' trials highlight flaws in Iraqi justice system. *Op.cit.*

73 Blanco Cordero, I. (2008). Universal jurisdiction: General report. *Revue internationale de droit pénal*, 79, 13-57. <https://doi.org/10.3917/ridp.791.0013> [Last accessed 2022, August 5<sup>th</sup>]

74 Principle 6 of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. (1950)

whom the Syrian Democratic Forces (SDF) call for repatriation to their respective countries<sup>75</sup>, they can also be judged for membership in a terrorist organization and potential crimes against humanity.

## 4. TREATMENT OF ISIS CHILDREN

### 4.1. Findings and International Condemnations

Since 2016, 161<sup>76</sup> children have been repatriated to France (as of 2022), and three to Georgia<sup>77</sup> (as of 2020). One Georgian child<sup>78</sup> (as of 2020) and 165<sup>79</sup> French children<sup>80</sup> (as of 2022) are reportedly still in the camps of Al-Hol, Roj, and Aïn Issa, controlled by the SDF, in northeastern Syria. Some children in these camps were born under the Islamic State, while others were brought into the organization at a very young age, accompanied by a parent, either orphaned or isolated. Most of these children are under seven years old and have lived in these camps for three to five years, described by some NGOs as "apocalyptic"<sup>81</sup> and a "desertic hell."<sup>82</sup>

While Georgia has repatriated most of its children, France, on the contrary, adopts a lengthy and uncertain repatriation procedure, following a "case-by-case" policy (although recently this policy seems to have been put on hold with the latest repatriation in July 2022)<sup>83</sup>.

Various binding texts have been ratified by France and Georgia concerning the rights of children, including the Convention on the Rights of the Child (CRC)<sup>84</sup>, which emphasizes the child's best interests<sup>85</sup>, the right to life<sup>86</sup>, the right to nationality<sup>87</sup>, the right to the highest attainable standard of health<sup>88</sup>, and the right to be protected from violence<sup>89</sup>. Even though the UN Committee on the Rights of the Child, responsible for monitoring the Convention's implementation, lacks enforcement powers, France has acknowledged the applicability of several articles of this convention before its national courts, including Article 3 concerning the best interests of the child, a notion elevated to constitutional status in 2019<sup>90</sup>.

On February 8, 2021, UN experts urged 57 countries, including France and Georgia<sup>91</sup>, to repatriate children and their mothers from Syrian

75 CNCDH. (2019, October 11<sup>th</sup>). Opinion on French minors held in Syrian camps. Op. cit.

76 France repatriates 35 children and 16 mothers held in camps in Syria. (2022, July 5<sup>th</sup>). France 24. <https://www.france24.com/fr/moyen-orient/20220705-la-france-a-rapatri%C3%A9-35-enfants-et-16-m%C3%A8res-d%C3%A9tenu-dans-des-camps-en-syrie> [Last accessed 2022, August 5<sup>th</sup>]

77 Steering Committee for the Rights of the Child (CDENF). (2021, February 2<sup>nd</sup>). 1st thematic exchange on the treatment of child welfare and protection challenges related to repatriated children. Council of Europe. 4th meeting of the Bureau. Item 4.5 of the agenda. <https://rm.coe.int/cdenf-bu-2021-02-cdenf-fr-thematic-exchange-child-returnees/1680a13b5a> [Last accessed 2022, August 5<sup>th</sup>]

78 *Ibid.*

79 Savage, C. (2022, July 20<sup>th</sup>). ISIS Fighters' Children Are Growing Up in a Desert Camp. What Will They Become? *The New York Times*. <https://www.nytimes.com/2022/07/19/us/politics/syria-isis-women-children.html> [Last accessed 2022, August 5<sup>th</sup>]

80 Should Islamic State's children and mothers be repatriated? (2022, May 24<sup>th</sup>). *Sud Radio*. <https://www.sudradio.fr/monde/faut-il-rapatrier-enfants-et-meres-etat-islamique> [Last accessed 2022, August 5<sup>th</sup>]

81 Aftret Mortvedt, M. (2019, July 26<sup>th</sup>). Syria: a camp teeming with children. International Committee of the Red Cross. <https://www.icrc.org/fr/document/syrie-un-camp-qui-fourmille-denfants> [Last accessed 2022, August 5<sup>th</sup>]

82 Syria: Families of suspected EI members held in deplor-

able conditions. (2019, July 23<sup>rd</sup>). Human Rights Watch. <https://www.hrw.org/fr/news/2019/07/23/syrie-les-familles-des-membres-presumes-de-lei-sont-detenu-dans-des-conditions> [Last accessed 2022, August 5<sup>th</sup>]

83 Sauvage, G. (2022, July 5<sup>th</sup>). Repatriation of children of jihadists: the end of the French doctrine of "case by case"? *France 24*. <https://www.france24.com/fr/france/20220705-rapatriement-d-enfants-de-jihadistes-la-fin-de-la-doctrine-fran%C3%A7aise-du-cas-par-cas> [Last accessed 2022, August 5<sup>th</sup>]

84 Convention on the Rights of the Child, New York, (1989, 20 November)

85 Article 3 of the Convention on the Rights of the Child, *Op. cit.*

86 Article 6 of the Convention on the Rights of the Child, *Op. cit.*

87 Article 7 of the Convention on the Rights of the Child, *Op. cit.*

88 Article 24 of the Convention on the Rights of the Child, *Op. cit.*

89 Article 19 of the Convention on the Rights of the Child, *Op. cit.*

90 Constitutional Council. 21 March 2019. Decision No. 2018-768 QPC

91 Syria: UN experts urge 57 States to repatriate women and children from squalid camps (2021, February 8<sup>th</sup>). United Nations, Human Rights. <https://www.ohchr.org/en/press-releases/2021/02/syria-un-experts-urge-57-states-repatriate-women-and-children-squalid-camps> [Last accessed 2022, August 5<sup>th</sup>]

camps. Specifically concerning France, with one of the largest numbers of European children in these camps<sup>92</sup>, the Committee on the Rights of the Child, in a decision dated February 23, 2022<sup>93</sup>, found France in violation of the right to life of French children held in these camps, their right not to be subjected to cruel, inhuman, or degrading treatment, and their best interests. The Committee also recommended that France urgently provide an official response to each repatriation request from the victims' children and take positive measures to carry out this repatriation. This condemnatory position towards France had already been asserted by various international<sup>94</sup> and national<sup>95</sup> institutions.

## 4.2. Legal Challenges Regarding the Repatriation of Children

### 4.2.1 The Issue of the Applicability of the European Convention on Human Rights

France and Georgia argue that they cannot intervene with Kurdish authorities in Syrian camps because these camps are outside their jurisdiction, and they do not have diplomatic representation on-site<sup>96</sup>. Both France (since 2012)<sup>97</sup> and Georgia (since 2018)<sup>98</sup> have severed diplomatic relations with Syria and do not recognize its institutions, thereby denying it the capacity and legitimacy to judge French and Georgian nationals. However, this lack of jurisdictional control does not exempt these countries from their previously stated obligations, some of which have been constitutionally elevated in the case of France<sup>99</sup>.

In an exception to the principle of territoriality of the European Convention on Human Rights (ECHR), Article 1 of the treaty is applicable to acts of its organs having effects outside its territory (extraterritorial effect of the ECHR) or due to effective control exercised by the State outside its borders, over a territory or person (extraterritorial application of the ECHR)<sup>100</sup>.

Regarding the extraterritorial effect of the ECHR, the refusal to repatriate French and Georgian children is a political decision of France and Georgia. The SDF has repeatedly called on states to repatriate their nationals<sup>101</sup>, posing no obstacle to this procedure. France has cooperated with the

92 Steering Committee for the Rights of the Child (SCRC). (2021, February 2<sup>nd</sup>). 1st Thematic Exchange on Addressing Child Welfare and Protection Challenges Related to Returning Children. *Op.cit.*

93 Committee on the Rights of the Child. (2022, February 23<sup>rd</sup>). Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child establishing a communications procedure, concerning communications No. 77/2019, 79/2019 and 109/2019. United Nations, Human Rights. [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=21221](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=21221) [Last accessed 2022, August 5<sup>th</sup>]

94 Commissioner for Human Rights (2021, September 30<sup>th</sup>). Hearing of the Grand Chamber of the European Court of Human Rights in the cases of H.F. and M.F. v. France and J.D. and A.D. v. France. Council of Europe. [https://www.coe.int/en/web/commissioner/news/-/asset\\_publisher/easZQ4kHrFrE/content/hearing-of-the-grand-chamber-of-the-european-court-of-human-rights-in-the-cases-of-h-f-and-m-f-v-france-and-j-d-and-a-d-v-france?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fnews%3Fp\\_p\\_id%3D101\\_INSTANCE\\_easZQ4kHrFrE%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_count%3D1](https://www.coe.int/en/web/commissioner/news/-/asset_publisher/easZQ4kHrFrE/content/hearing-of-the-grand-chamber-of-the-european-court-of-human-rights-in-the-cases-of-h-f-and-m-f-v-france-and-j-d-and-a-d-v-france?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fnews%3Fp_p_id%3D101_INSTANCE_easZQ4kHrFrE%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1) [Last accessed 2022, August 5<sup>th</sup>]

95 National Consultative Commission on Human Rights (2021, December 16). Adoption of the Opinion on the repatriation of French minors detained in camps in Northeast Syria (A-2021 - 12). <<https://www.cncdh.fr/actualite/adoption-de-lavis-sur-le-rapatriement-des-mineurs-francais-detenus-dans-les-camps-du-nord>> [Last accessed: August 5, 2022]; Rights Defender calls on government to repatriate, as soon as possible, all French children held in camps in north-eastern Syria. (2022, April 29). Rights Defender. <<https://www.defenseurdesdroits.fr/fr/communiquede-presse/2022/04/la-defenseure-des-droits-demande-au-gouvernement-le-rapatriement-dans>> [Last accessed August 5, 2022]

96 The endless night of detained children in Syria. (2022, April 8<sup>th</sup>). Amnesty International. <https://www.amnesty.fr/actualites/syrie-enfants-de-daech-rapatriement-la-chronique> [Last accessed 2022, August 5<sup>th</sup>]

97 Feuerstoss, I. (2014). Some insights into Franco-Syrian relations. *Les Cahiers de l'Orient*, 116, 95-108. <https://doi.org/10.3917/lcdlo.116.0095> [Last accessed 2022, August 5<sup>th</sup>]

98 Georgia cutting diplomatic relations with Syria. (2018, May 29<sup>th</sup>). Agenda.ge. <https://agenda.ge/en/news/2018/1152> [Last accessed 2022, August 5<sup>th</sup>]

99 Constitutional Council. March 21, 2019. Decision No. 2018-768 QPC, § 6.

100 ECtHR Soering v. RU, June 7, 1989, application n° 14038/88;

ECtHR, Drozd and Janousek v. France and Spain, June 26, 1992, application n° 12747/87;

ECtHR, Ilascu and others v. Moldova and Russia, July 8, 2004, application no. 48787/99

101 CNCDH. (2019, October 11). Opinion on French minors held in Syrian camps. *Op. cit.*

SDF to repatriate 161 French children since 2016 based on criteria it had sovereignly adopted. This suggests that these children fall under the jurisdiction of France or Georgia within the meaning of Article 1 of the ECHR.

Regarding the extraterritorial application of the ECHR, several indicators suggest the existence of effective control by French authorities over their nationals in the camps. It is evident that France has significant influence over the SDF, such as blocking access to camps for French parliamentarians and lawyers, close military and diplomatic relations against the Islamic State, prohibition for French families to contact French individuals in the camps, etc<sup>102</sup>. It seems realistic that the European Court of Human Rights could recognize the jurisdiction of France in this scenario.

#### 4.2.2 The Dilemma of the Right to Family Life and the Best Interests of the Child

The right of children to live in a family<sup>103</sup>, enshrined in the CRC, poses a legal challenge to their repatriation. To address this right, the French government regularly requests mothers' authorization to repatriate their children separately<sup>104</sup>. However, most mothers refuse to be separated from their children<sup>105</sup>. It is highly likely that the Georgian government would face similar refusals from mothers. This refusal creates a legal dilemma between the right to family life and the best interests of the child. Nevertheless, given the challenging political question of repatriating adults to French or Georgian soil and the dire living conditions in the camps, the best interests of the child could justify repatriation without the accompanying parents' agreement<sup>106</sup>, according to Article 9(1) of the CRC, stating that "*States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to*

*judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*"<sup>107</sup> This view is also advocated by the Parliamentary Assembly of the Council of Europe<sup>108</sup>. Thus, France and Georgia could repatriate their children in the name of their best interests<sup>109</sup> without necessarily obtaining their parents' agreement.

#### 4.2.3 Treatment of Children Associated with the Islamic State

Repatriating children associated with Daech poses a significant difficulty regarding their potential dangerousness. These children have witnessed and participated in acts of great violence, such as executions, torture, and involvement in armed conflict<sup>110</sup>. The "cubs of Daech" have undergone significant indoctrination, considered one of the pillars of the organization's long-term development.

There is a real issue regarding the legal qualification of these child soldier<sup>111</sup>. Can they be classified as victims or war criminals?<sup>112</sup> In the phenomenon of child soldiers, not all are forcibly abducted and recruited. Some volunteer, and not all are

102 The endless night of children detained in Syria. *Op. cit.*

103 Article 9 of the Convention on the Rights of the Child. *Op. cit.*

104 The endless night of child detainees in Syria. *Op. cit.*

105 Uncle of French children in Syria files complaint against France with EU. (2019, June 13<sup>th</sup>). Le Figaro. <https://www.lefigaro.fr/flash-actu/l-oncle-d-enfants-francais-en-syrie-porte-plainte-contre-la-france-devant-l-ue-20190613> [Last accessed 2022, August 5<sup>th</sup>]

106 CNCDH. (2019, October 11). Opinion on French minors held in Syrian camps. *Op. cit.*

107 Article 9 §1 of the Convention on the Rights of the Child, *Op. cit.*

108 International obligations concerning the repatriation of children from war and conflict zones. (2020). Council of Europe, Parliamentary Assembly. Resolution 2321. §4. <https://pace.coe.int/en/files/28581/html> [Last accessed August 5, 2022]

109 Fierens, J. (2017). Alpha ursae minoris – The North Star and the best interests of the child among competing interests. In: Council of Europe ed., Best interests of the child - A dialogue between theory and practice (pp. 38-41). Strasbourg: Council of Europe. <https://www.cairn.info/l-interet-superieur-de-l-enfant-un-dialogue--9789287183972-page-38.htm> [Last accessed 2022, August 5<sup>th</sup>]

110 What will become of the Western children of Daech? (2016, June 12<sup>th</sup>). Atlas.infos.fr. [https://atlasinfo.fr/Que-vont-devenir-les-enfants-occidentaux-de-Daech\\_a72460.html](https://atlasinfo.fr/Que-vont-devenir-les-enfants-occidentaux-de-Daech_a72460.html) [Last accessed 2022, August 5<sup>th</sup>]

111 "Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage." UNICEF. (1997, April). The Cape Town Principles and best practice on the prevention of recruitment of children into the armed forces and demobilization and social reintegration of child soldiers in Africa.

112 Chappleau, P. Child Soldiers, Victims or Criminals of War? (2007, April 5<sup>th</sup>). Ed. Rocher.



threatened or drugged to fight. Some even have a genuine motivation for combat. However, despite this significant issue, legal doctrine and Western jurisprudence systematically classify a child associated with a force or armed group as a victim<sup>113</sup>. Indeed, to prove someone guilty of war crimes, two elements must be present: a material element and a moral element of committing the criminal act. While the material element is present in the case of children associated with a force or armed group, the moral element is more challenging to justify. Children under 18 are considered too young to have independent moral values, making them not responsible for their crimes<sup>114</sup>.

Thus, as emphasized by the Council of Europe, Daech's children should be considered victims, "neither responsible for the actions of their parents nor for the circumstances in which they find themselves"<sup>115</sup>. Daech's children should be cared for and reintegrated, as outlined in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, ratified by France<sup>116</sup>. Once repatriated, it would be up to French justice to decide on any potential prosecution against these child soldiers, considering non-judicial measures focusing on the rehabilitation and reintegration of children, as a substitute for prosecution and detention<sup>117</sup>.

#### 4.2.4 The Difficult Proof of the Child's Nationality

The difficult issue of proving a child's nationality poses a genuine legal problem. Many children were born during the years of conflict under the Islamic State. However, few reliable filiations can be established, notably due to the absence of official documents proving the child's nationality, often separated from their father. Fathers, through whom filiation is established under Daech, were known

by their nicknames rather than their birth names, making proving filiation difficult for the children. If France and Georgia were to grant nationality to presumed children of their nationals without real evidence, this could set a potentially harmful precedent for these states in the future. The question is whether one can offer nationality to children and the consequences of such a decision on granting nationality to foreigners in the future.

This difficulty in proving nationality is compounded by the adoption by some states like France of the revocation of nationality for individuals involved in terrorism threatening national security<sup>118</sup>. This legal prerogative would not only render parents stateless but also their children. This practice is considered by the UN High Commissioner for Human Rights, Michelle Bachelet, as an "act of irresponsible cruelty"<sup>119</sup>. Indeed, stateless children are often deprived of education, access to healthcare, and other fundamental elements of dignity. Thus, without nationality, there would be no legal obligation to repatriate these children, leaving them in a legal vacuum within the Syrian camps.

In conclusion, these analyses suggest that France and Georgia possess legal tools to repatriate their children legally, in the name of their best interests, even concerning children associated with a force or armed group, considered as victims. The major legal obstacles would thus lie in proving filiation and the potential loss of a parent's nationality.

## CONCLUSION

It is clear that Iraq cannot guarantee a fair trial covering all possible charges, including crimes against humanity. The death penalty is in perfect contradiction with the common values and treaties of Georgia and France. Even if Iraq accedes to requests for commutation of death sentences to

113 Grappe, M. (2014). Child soldiers, victims of war. *Perspectives Psy*, 53, 158-165. <https://doi.org/10.1051/psy/2014532158> [Last accessed 2022, August 5<sup>th</sup>]

114 Happold, M. (2005). *Child Soldiers in International Law*. Manchester University Press. pp.183.

115 International obligations concerning the repatriation of children from war and conflict zones. (2020). *Neither responsible for the actions of their parents nor for the circumstances in which they find themselves*. *Op. cit.*

116 Optional Protocol on the Involvement of Children in Armed Conflict. (2000, May 25<sup>th</sup>)

117 Article 6.3. *Ibid.*

118 Article 25 of the French Civil Code.

119 Michelle Bachelet, United Nations High Commissioner for Human Rights. (2019, June 24<sup>th</sup>). Opening statement by Michelle Bachelet, United Nations High Commissioner for Human Rights. Forty-first session of the Human Rights Council. United Nations, Human Rights. <https://www.ohchr.org/fr/2019/06/41st-session-human-rights-council> [Last accessed 2022, August 5<sup>th</sup>]

life imprisonment, there is no guarantee for the future. Such a life sentence would pose a significant financial cost problem. Moreover, Iraqi prisons are overcrowded, and corruption is rampant, facilitating mistreatment and escapes<sup>120</sup>.

Regarding those interned in camps in Syria, it would be appropriate to repatriate the children promptly in the name of their best interests, given their living conditions in these camps. Their parents should also be repatriated. Leaving them in these camps does not seem a viable option, both legally and security-wise. These interned adults are at risk of being transferred to Iraq and sentenced to death or continuing to live in very precarious camps with a high risk of escape.

The situation in this geographical area is as volatile as it is concerning. Daech is far from eradicated and is regaining more and more ground<sup>121</sup>, launching operations to free its fighters and their families from Syrian prisons and camps. The organization, for example, initiated an operation on January 20, 2022, involving 200 fighters to try to free about 3,500 of its members from a prison controlled by the SDF in Hassaké, northeastern Syria<sup>122</sup>. Even though this attempt was thwarted, it

demonstrates how significant the risk of escape is.

Beyond the threat of Daech, it is noteworthy that the Kurds are in strategic precariousness with Turkey and the United States, which could increase with the Russo-Ukrainian conflict and tensions in the Pacific, threatening to reshape the geopolitical landscape of the Middle East. If the United States ceases its support to the Kurds, they will have to quickly abandon the camps and prisons they control<sup>123</sup>, letting fighters and their families escape. This happened during the Turkish offensive on October 9, 2019, against the Kurds in northeastern Syria, leading to the abandonment of certain jihadist camps by the Kurds fleeing northern Syria.

The risk of seeing detained jihadists regaining freedom to commit new acts of terrorism is a reality, especially since neither Iraq, Syria, the Kurds, nor Turkey have expressed a desire to keep and judge on their territories presumed jihadists from foreign states. The lack of national legal responsibility for this problem could lead to the return of these nationals without any secure control, posing a risk to the Levant region and the home countries of incarcerated foreign fighters<sup>124</sup>.

Thus, in terms of respecting international law and the imperative of major security, it would be incumbent on France and Georgia to repatriate and transfer their nationals as soon as possible.

120 Ensemble contre la peine de mort. *Op. cit.* p. 14.

121 Mazel, Z. (2022, March 18<sup>th</sup>). The risks of an ISIS return. *GIS*. <https://www.gisreportsonline.com/r/isis-return/> [Last accessed 2022, August 5<sup>th</sup>]

122 Merz, F. (2022, March). The Islamic State in 2022. Center for Security Studies. N°299. <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-security-studies/pdfs/CSSAnalyse299-FR.pdf> [Last accessed 2022, August 5<sup>th</sup>]

123 The endless night of child detainees in Syria. *Op. cit.*

124 Merz, F. (2022, March). The Islamic state in 2022. *Op. cit.*

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