



# Convention on the Rights of the Child

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## Committee on the Rights of the Child

### Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 77/2019\* \*\*

<i>Communication submitted by:</i>	F.B. et al. (represented by counsel, M.D.)
<i>Alleged victims:</i>	S.B. et al.
<i>State party:</i>	France
<i>Date of communication:</i>	1 March 2019 (initial submission)
<i>Date of adoption of decision:</i>	4 February 2021
<i>Subject matter:</i>	Repatriation of children whose parents are linked to terrorism activities; protection measures; right to life; unlawful detention
<i>Procedural issues:</i>	Extraterritorial jurisdiction; substantiation of complaints
<i>Articles of the Convention:</i>	2, 3, 6, 19, 20 and 37
<i>Articles of the Optional Protocol:</i>	5 and 7 (e) and (f)

1.1 The authors of the communication are F.B., acting on behalf of her grandchildren (S.B., born in 2015; A.B., born in 2016; and A.S.B., born in 2019), N.S., acting on behalf of her grandchildren (K.A., born in 2015; and M.A., born 2018), S.A., acting on behalf of her grandchildren (H.K., born in 2010; S.K., born in 2013; and H.K., born in 2016), Z.B., acting on behalf of her grandson (S.B., born in 2017), A.D., acting on behalf of her grandchildren (A.S., born in 2015; S.S., born in 2016; A.S., born in 2017; and I.S., born in 2017), A.N.R., acting on behalf of her grandchildren (O.G., born in 2011; A.G., born in 2013; H.G., born in 2014; S.J.G., born in 2015; M.G., born in 2016; and S.G., born in 2018), S.D., acting on behalf of her niece (I.J., born in 2008), M.D., acting on behalf of his niece S.D.,<sup>1</sup> L.L., acting on behalf of his grandchildren (Q.L., born in 2010; H.L., born in 2014; I.L., born in 2016; and A.L., born in 2018), P.D., acting on behalf of her grandchildren (E.C., born in 2009; A.H., born in 2012; I.H., born in 2014; and Y.D., born in 2018), A.E., acting on behalf of his nephews (A.R.E., born in 2015; and H.E., born in 2017), S.G., acting on behalf of her grandson (N.B., born in 2016), Z.I., acting on behalf of her nephew (S.B.,<sup>2</sup> born in 2015),

\* Adopted by the Committee at its eighty-sixth session (18 January–5 February 2021).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

<sup>1</sup> Repatriated on 15 March 2019.

<sup>2</sup> Repatriated on 15 March 2019.



N.B., acting on behalf of her grandson (S.B., born in 2017) and N.B., acting on behalf of her nephews (D.B., A.B. and S.B., whose dates of birth are unknown), all nationals of France; and F.F., a national of Algeria and French resident, acting on behalf of Y.H., whose date of birth is unknown.<sup>3</sup> The children are all nationals of France. The authors are represented by counsel, M.D. The Optional Protocol entered into force for the State party on 7 April 2016.

1.2 On 13 March 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, denied the authors' request for interim measures consisting in the repatriation of the children to France. The Committee requested the State party, however, to take the diplomatic measures necessary to ensure the protection of the right to life and integrity of the children, including access to any medical care that they might need.

### **Facts as submitted by the authors**

2.1 The children who are the subject of the present communication and whose parents allegedly collaborated with Islamic State in Iraq and the Levant were, in the majority, born in Rojava, an autonomous Kurdish territory in the north-east of the Syrian Arab Republic, and are now living in the middle of a war zone, in the Roj, Ayn Isa and Hawl refugee camps. Some are orphans. The children, most of whom are under 6 years of age, lack care, water and food and live in appalling sanitary conditions.

#### *General context*

2.2 Since the beginning of 2018, many French women have fled Islamic State in Iraq and the Levant and surrendered to the Kurdish forces in Rojava, in the hope of returning to France. These women are now detained in the Hawl, Ayn Isa and Roj camps with their children. The authors recall that the mothers and children detained in these camps are not subject to any detention orders and no legal action is being taken against them locally. The authorities of Rojava, which has no judicial institutions, have alerted the French authorities that they will not institute any proceedings or hand down any decisions against the detainees in the camps.

#### *On the question of repatriation*

2.3 At the beginning of 2018, Syrian Kurdish leaders repeatedly expressed their wish to see all foreign nationals being detained in the camps repatriated to their States of nationality.<sup>4</sup> The French authorities announced the repatriation of 70 children and several dozen French mothers in early February 2019 but then "reversed course" without any explanation.

2.4 In March 2018, the Chief of Staff of the President of the Republic of France, Emmanuel Macron, assured some of the families in writing, after having been contacted by their counsel, that French minors in Iraq or the Syrian Arab Republic were entitled to the protection of the French State and could be given support in accordance with the rules concerning the protection of minors and repatriated persons, provided that the local authorities had ruled out any criminal responsibility on their part. Despite these statements, the State party has taken no overt action to protect the children being arbitrarily detained in Rojava and rescue them from a grim fate. No protection or repatriation measures have yet been arranged by the Government for the children and their mothers. The authors allege that the only French children who have returned to France after spending time in the Syrian Arab Republic have done so through non-governmental organizations or smugglers, via Turkey, without any involvement of the French Government.

2.5 The authors note that, despite Mr. Macron's assurances that the situation of the children would be dealt with on a case-by-case basis, the State party has taken no positive steps to protect and repatriate them. The authors add that the silence of the French authorities as to the fate of the children has given them good reason to worry.

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<sup>3</sup> The children's names and dates of birth appear in the authors' comments of 6 September 2019.

<sup>4</sup> See Gwendoline Debono, "Syrie: les Kurdes ne veulent plus garder les djihadistes français de Daech", *Europe 1*, 13 April 2018.

*Humanitarian conditions of the children in the camps*

2.6 The authors emphasize that the children in the prison camps controlled by Kurdish forces in a war zone, many of whom are under 6 years of age, are barely surviving, face inhuman sanitary conditions and lack basic necessities (water, food and health care); they are thus at imminent risk of injury or death.<sup>5</sup> The authors refer to news reports regarding the cases of two orphans, one of whom was wounded by shell or rocket fragments and whose state of health is a cause for concern.

2.7 The authors note that, since November 2018, at least 29 children have died from the winter cold in the Syrian Arab Republic while their families were fleeing from the last remaining compound of Islamic State in Iraq and the Levant. They further note that the World Health Organization has stated that it is extremely concerned about the deteriorating situation in the Hawl camp for displaced persons, pointing out that the 29 children and newborns who died were hypothermic and concluding that the situation in the camp was critical and that its population had tripled in size (from 10,000 to almost 33,000 people).

2.8 The authors indicate that the Kurdish forces have repeatedly stated that they do not have the means to treat, feed and care for the French women and children detained in the camps, who face an imminent risk of starvation and death.

*Exhaustion of domestic remedies*

2.9 The authors note that domestic remedies are unavailable and ineffective in the context of all requests for protection or repatriation of children and their mothers currently detained in Rojava. Courts before whom the matter was brought would declare themselves incompetent, since the Administrative Court of Paris declared itself incompetent in the context of an application for interim measures, considering that the subject matter of the complaint was a diplomatic matter rather than the administrative responsibility of the State party.

2.10 The authors note that the State party's lack of representation and consular presence in the Syrian Arab Republic and, consequently, in Rojava since 2012 has precluded any effective remedy and any accountability on the part of the State party and renders ineffective and moot any actions brought before the administrative courts against the French authorities.

**Complaint**

3.1 The authors argue that, by its inaction, the State party is violating articles 2, 3, 6, 19, 20 and 37 of the Convention on the Rights of the Child. They assert that the State party failed to take positive measures to ensure respect for the rights set forth in article 2 of the Convention and to guarantee that children receive the necessary protection and care in the event that their parents or other legal guardians are unable to provide it, as set out in article 3 of the Convention.

3.2 The authors claim that the State party failed to ensure the right to life and the survival and development of the children, in violation of article 6 of the Convention.

3.3 According to the authors, the State party failed in its obligation to take measures to protect the children from all forms of ill-treatment by any persons who had care of them in Rojava, in violation of article 19 of the Convention, and to provide children deprived of their family environment with special protection, in violation of article 20 of the Convention.

3.4 Lastly, the authors argue that the State party failed to protect the children from unlawful detention, in violation of article 37 of the Convention, as they are being detained without any legal authority, their mothers being subject to no local legal action, according to the information provided by the Kurdish authorities to the State party. Given the particularly harsh conditions prevailing in the three camps, the children are exposed to physical and psychological harm and the risk of imminent death, which constitutes cruel treatment.

<sup>5</sup> See Luc Mathieu and Chloé Pilorget-Rezzouk, "Jihadistes et leurs familles: le défi du retour", *Libération*, 31 January 2019; and Sophie Parmentier, "Enfants de djihadistes en Syrie: 'Il faut les sauver, et il y a urgence!'" demandent leurs familles", *France Inter*, 27 December 2018.

### State party's observations on admissibility

4.1 In its observations dated 22 July 2019, the State party maintains that the communication is inadmissible because the authors lack standing, the State party lacks jurisdiction over the children and the communication is insufficiently substantiated.

4.2 Referring to article 5 (1) of the Optional Protocol, the State party indicates that the authors have failed to produce family record books demonstrating their ties of kinship to the mothers of the children who are the subject of the communication. In addition, it argues that the authors have not established that they are acting with the consent of the children or their mothers. As the mothers remain the children's legal representatives, their consent is necessary, particularly with respect to the request to repatriate the children.

4.3 The State party notes that the authors appear to claim that the communication is admissible because they are nationals of France and live in France. However, article 2 of the Convention and article 5 (1) of the Optional Protocol refer to the rights of children within the jurisdiction of a State party. In the present case, the communication has been submitted on behalf of children held in the north-east of the Syrian Arab Republic who are not under the State party's jurisdiction. The Committee must verify that the children, and not the authors, fall within the jurisdiction of a State party. A reverse analysis would de facto result in giving the Convention universal applicability, contrary to its text. The State party argues that the concept of jurisdiction relates to the exercise by a State of the power to affect persons, property and situations. Consequently, it has agreed to respect the rights set forth in the Convention only in situations that fall within its sovereignty and competence and over which it is likely to have effective control. The State party adds that it may not be held accountable for situations that it did not create, over which it has no effective control and which are the result of actions taken by other States or non-State actors.

4.4 The State party refers to article 29 of the Vienna Convention on the Law of Treaties, to the case of *Banković and others v. Belgium and others*<sup>6</sup> and to the jurisprudence of the Committee against Torture.<sup>7</sup> It argues that, in public international law, the concept of jurisdiction is primarily territorial, unless a different intention appears from the treaty or is otherwise established, and that the extraterritorial jurisdiction of a State stems from the effective control it is likely to exercise outside its borders.<sup>8</sup> The State party refers to the jurisprudence of the European Court of Human Rights,<sup>9</sup> the International Court of Justice<sup>10</sup> and the Inter-American Commission on Human Rights<sup>11</sup> and recalls that, in order for the children to be considered to fall under the jurisdiction of the State party, the authors must demonstrate that the children are under the effective control of France, be it through its agents, through a local authority over which France would have such great control as to cause that authority to in fact be dependent on it, or by virtue of its effective control over a territory.

4.5 In the present instance, the State party notes that the authors have not demonstrated that France exercised effective control over the camps in the north-east of the Syrian Arab Republic. Conversely, the authors themselves acknowledge that the children are being held under the control of Kurdish forces. Firstly, the State party asserts that France does not exercise any control or authority over the children through its agents, as the camps in the north-east of the Syrian Arab Republic are under the sole control of foreign authorities.

<sup>6</sup> European Court of Human Rights, *Banković and others v. Belgium and others*, application No. 52207/99, decision as to admissibility, 12 December 2001, paras. 59 ff.

<sup>7</sup> *Roitman Rosenmann v. Spain* (CAT/C/28/D/176/2000 and Corr.1), para. 6.6. See also *Z. v. Australia* (CAT/C/53/D/511/2012); and *Agiza v. Sweden* (CAT/C/34/D/233/2003).

<sup>8</sup> Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/general comment No. 22 of the Committee on the Rights of the Child (2017), para. 12; general comment No. 31 (2004) of the Human Rights Committee; European Court of Human Rights, *Al-Skeini and others v. United Kingdom*, application No. 55721/07, judgment, 7 July 2011, para. 138; and Inter-American Commission on Human Rights, *Djamel Ameziane v. United States*, petition No. P-900-08, decision on admissibility, 20 March 2012, para. 30.

<sup>9</sup> *Al-Skeini and others v. United Kingdom*, para. 134.

<sup>10</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, at p. 179, paras. 109–111.

<sup>11</sup> *Djamel Ameziane v. United States*, paras. 30–35.

Secondly, it refutes the argument that France exercises any territorial control over the camps in the northern Syrian Arab Republic. The fact that France is one of the members of an international coalition that maintains an operational partnership and contacts with the Syrian Democratic Forces in the fight against Islamic State in Iraq and the Levant does not mean that it has effective control over the camps in the north-east of the Syrian Arab Republic, or that there is a relationship of dependence such as to make the Syrian Democratic Forces a subordinate local administration. The Syrian Democratic Forces are an authority external to France, with which France may enter into negotiations but which is in no way subordinate to it. Indeed, the Council of State noted in its decisions of 23 April 2019 that the repatriation measures sought required the State party to enter into negotiations with foreign authorities or intervene on foreign soil, demonstrating the State party's lack of control over the north-east of the Syrian Arab Republic and the Syrian Democratic Forces. Lastly, the State party points out that Belgian courts hearing requests for the repatriation of Belgian nationals, including children, from the Syrian Arab Republic, ruled that Belgium had no jurisdiction, within the meaning of the human rights conventions, over the children being held in the Syrian Arab Republic.

4.6 The State party argues that the claims made by F.B., N.B., S.D., F.F. and S.G. are insufficiently substantiated. While the authors may be identified, the communication does not provide a list of the names of the minors on whose behalf it was submitted and whose rights the State party is alleged to have failed to uphold. Although the identities of some of these minors can be deduced from the documents attached to the communication, doubts remain as to the identities of several others, either because their names or their parents' names are not mentioned or because neither their names nor their parents' names appear in the documents. Furthermore, the communication states that the minors in question are currently being detained in the Roj, Ayn Isa and Hawl camps in Rojava, without the whereabouts of some of them being known or it being established that they are actually being held by the Syrian Democratic Forces.

4.7 Regarding S.D. and S.B., the State party indicates that they were repatriated in March 2019. Therefore, in respect of these children, the communication is inadmissible because it is manifestly unfounded.

#### **Authors' comments on the State party's observations**

5.1 On 6 September 2019, the authors submitted their comments in response to the State party's observations. The authors provide the names and some personal details of the children who are the subject of the communication and confirm that they are all being held in the three camps, Roj, Hawl and Ayn Isa.

5.2 The authors assert that the State party's intelligence services have conducted a detailed census, which is regularly updated, of the women and children in the three camps in Rojava. In addition, the newspaper *Libération* published an article<sup>12</sup> about the repatriation plan prepared by the intelligence services at the State party's request that listed several hundred men, women and children being held in the camps. The table in question, which was updated in March 2019, lists the civil status of the French adults and minors, the camps in which they are located, the date they entered the camps, the date they were apprehended by the Kurdish forces, the date they departed for the Syrian Arab Republic and the period of time that they have been in the region. According to the article, the State party abandoned the idea of repatriation for fear of the public's reaction. Responding to questions from Agence France-Presse, Christophe Castaner, Minister of the Interior, confirmed that such a list did indeed exist, describing it as a working hypothesis.<sup>13</sup> According to the authors, the identities of the children who are the subject of the present communication were thus known to the Government, as the repatriation plan prepared by the intelligence services at its request was updated in March 2019. Furthermore, the State party has access to the relevant information about the French nationals being held by Kurdish forces, as their families were questioned

<sup>12</sup> Luc Mathieu, Willy Le Devin and Dominique Albertini, "État islamique: un rapatriement programmé, préparé, mais gelé", *Libération*, 4 April 2019.

<sup>13</sup> Agence France-Presse report of 5 April 2019.

after the International Committee of the Red Cross conducted a census at the camps and the authors' counsel sends weekly email messages to the Ministry for Europe and Foreign Affairs.

5.3 The authors indicate that S.D. was one of the 17 French orphans repatriated by the State party on 15 March 2019 following efforts made by the authors' counsel. On the date that the present communication was submitted, she was still being held at the Hawl camp. The authors observe that the communication is now moot in respect of S.D. but remains admissible in respect of the remaining children.

5.4 With respect to the argument that the communication is inadmissible because the authors lack standing, the authors note that the State party has fully established their ties of kinship to their family members being detained in the camps.<sup>14</sup> They add that the grandparents, uncles and aunts of the children detained in Rojava who are living in France are regularly questioned by the intelligence services, either on the basis of letters rogatory from judicial officials involved in counter-terrorism proceedings or in connection with the preliminary inquiries of the national counter-terrorism prosecution service. The authors consequently assert that the State party is certain of the children's family relationships when it summons and interviews their family members. The authors point out that none of the orphans repatriated by the State party since the beginning of the war were given a DNA test to verify their parentage. The genetic tests are performed in France, once the child has been brought back to the country. The information available to the State party about the children who are the subject of the present communication is therefore as precise as the information it had available about the children repatriated at its initiative. Furthermore, the authors' counsel has the express consent of seven of the children's mothers, three of whom have provided written authorization. However, since 1 March 2019, the authors' counsel has had no news from six mothers, who may have since died, or of their children.

5.5 The authors assert that it is dangerous for the mothers being held in the camps to communicate with the authors, as possession and use of a mobile telephone is punishable by at least one month's imprisonment in the "Dark Prison" of Rojava, so called because it is located underground and receives no daylight. They assert that many French women have been imprisoned there with their children after they were found in possession of a mobile telephone.

5.6 Regarding the jurisdiction of the State party, the authors point out that the European Court of Human Rights has recognized that a State may exercise its jurisdiction within the meaning of article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms by means of purely domestic acts that directly affect the situation of individuals located outside the national territory. In other words, the authors note the distinction between acts performed outside the national territory and acts producing effects outside the national territory.<sup>15</sup> The authors argue that the case law cited by the State party is in no way analogous to the case at hand and cannot serve as the basis for the Committee's reasoning, as what is at issue in the present case is not whether agents exercised control over Syrian territory or the children detained in the Syrian camps or whether the Syrian Democratic Forces are subordinate to France, but whether the decisions of the French authorities, taken exclusively on French territory, not to repatriate the French minors and to leave them in the three camps, in the hands of the Kurdish forces, produced effects outside French territory such that these decisions brought the children under the jurisdiction of the State party.

5.7 The authors argue that this interpretation of the concept of jurisdiction is consistent with the understanding of jurisdiction under public international law, which has long recognized a strong link between a State and its nationals, wherever they may be. The fact that the children are being held by authorities whose actions are not attributable to the State party in no way lessens the State party's exercise of its jurisdiction, given that the only reason the children are being detained and kept outside French territory is that the State party decided not to repatriate them.

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<sup>14</sup> The authors have provided copies of identity documents and family record books for some of the authors and children.

<sup>15</sup> European Court of Human Rights, *Ilașcu and others v. Moldova and Russia*, application No. 48787/99, judgment, 8 July 2004, para. 314.

5.8 In comments dated 16 October 2019, the authors indicate that Jean-Yves Le Drian, the Minister for Europe and Foreign Affairs, had announced that day that the State party was considering transferring the French women and children detained in the camps in Rojava to Iraq. They add that the State party is well aware that, in Iraq, torture is practised and sentences of death are handed down after summary trials. In this context, the authors point out that the United Nations put questions to the State party after 12 French jihadists were illegally transferred to Iraq and sentenced to death following sham trials lasting a few minutes.

### Third-party submissions

6.1 At the Committee's invitation, three experts<sup>16</sup> from the ETO Consortium, specializing in States' extraterritorial obligations and a group of 31 experts from different universities submitted a third-party intervention on 10 June 2020 on the issue of extraterritorial human rights obligations.

#### *Submission by the ETO Consortium*

6.2 The experts first referred to principles 4, 8 and 9 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and noted that States have an obligation to respect, protect and fulfil economic, social and cultural rights in situations over which their omissions bring about foreseeable effects on their enjoyment, whether within or outside its territory.<sup>17</sup> According to *The Case of the S.S. "Lotus"*, international law prohibits enforceable extraterritorial jurisdiction unless explicitly permitted by customary law or an international treaty.<sup>18</sup> Under international customary law, States have the right, and perhaps even the duty, to protect their own nationals, and the protection of children is a priority.<sup>19</sup> In addition, the exercise of prescriptive (regulatory) or adjudicative extraterritorial jurisdiction is permitted only to the extent that there is a sufficient connection between the State exercising it and the extraterritorial event being regulated or adjudicated.

6.3 The experts note that in the present case: (a) there is an omission by the State party to adopt measures as soon as possible and up to its maximum available resources to protect and fulfil the children's rights; (b) the damage was foreseeable; (c) the State party is in a position to exercise a decisive influence or to take measures; (d) the State party is entitled to exercise jurisdiction since it can extend its authority; (e) the State party has an obligation to protect the children, ensuring that they enjoy their human rights, which might include rescuing them from the camps; and (f) the State party's obligation to protect the rights of the children should not be left to the will of other States.

6.4 The experts conclude that the Committee should take its decision based on the best interests of the children. Not admitting the case would be to deny the alleged victims access to justice. The experts add that there is no inadmissibility ground concerning jurisdiction of the State party or of the Committee. Finally, the State party could adopt measures based on principles of international cooperation or pursue diplomatic measures that would ensure the respect of international principles on States' sovereignty. The intervening third party thus recommended that the Committee find the communication admissible.

<sup>16</sup> Ana María Suárez Franco, of FIAN International; Mark Gibney, professor of international law at the University of North Carolina at Asheville, United States of America, and researcher affiliated with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, in Lund, Sweden; and Neetu Sharma, of the Centre for Child and the Law, affiliated with the National Law School of India University, in Bangalore.

<sup>17</sup> Olivier De Schutter et al., "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012), pp.1084–1169, at pages 1104 ff.

<sup>18</sup> Permanent Court of International Justice, *The Case of the S.S. Lotus*, judgment, 7 September 1927.

<sup>19</sup> See Andrew W.R. Thomson, "Doctrine of the protection of nationals abroad: rise of the non-combatant evacuation operation", *Washington University Global Studies Law Review*, vol. 11, No. 3 (2012), pp. 627–668.

*Joint submission by a group of 31 academics*<sup>20</sup>

6.5 The experts note that, under the Convention, extraterritorial jurisdiction was not excluded and that in the *travaux préparatoires* it is indicated that territoriality was expressly excluded from the Convention. States parties to the Convention do have obligations in respect of children's rights beyond their territories.<sup>21</sup> In the migration context, the Committee has held that, under the Convention, States should take some extraterritorial responsibility for the protection of children who are their nationals outside their territory by devising child-responsive consular policies and services<sup>22</sup> or even by taking measures "to assist the safe, voluntary and dignified return of Syrian children".<sup>23</sup> The link between the State party and the children through their French nationality is not contested by the State party. Furthermore, there are examples of States extending their jurisdiction in relation to children affected by terrorism.<sup>24</sup> In addition, multiple entities of the United Nations have recommended that Member States enable the return of foreign fighters and their families, including children.<sup>25</sup>

6.6 The question is whether a State's failure to take action to protect the rights of children who are French nationals but outside of French territory can give rise to international legal responsibility for violations of rights enshrined in the Convention, which is de facto a

<sup>20</sup> Authors: Wouter Vandenhoe and Gamze Erdem Türkelli (Law and Development Research Group, University of Antwerp, Belgium); Meda Couzens (Western Sydney University, Australia, and University of KwaZulu-Natal, South Africa); and Ton Liefwaard and Chrisje Sandelowsky-Bosman (Leiden Law School, Leiden University, the Netherlands). Signatories: Karin Arts, International Institute of Social Studies, The Hague, part of Erasmus University Rotterdam, the Netherlands; Warren Binford, Willamette University College of Law, United States; Laura Carpaneto, University of Genoa, Italy; Pablo Ceriani Cernadas, Universidad Nacional de Lanús, Argentina; Aoife Daly, European Children's Rights Unit, University of Liverpool, United Kingdom of Great Britain and Northern Ireland; Bina D'Costa, Department of International Relations, Australian National University, Australia; Ellen Desmet, Ghent University, Belgium; Jaap E. Doek, Vrije Universiteit Amsterdam, the Netherlands; Nicolás Espejo Yaksic, Centro de Estudios Constitucionales of the Supreme Court of Mexico and Exeter College, Oxford University, United Kingdom; Michael Garcia Bochenek, Institute for the Study of Human Rights, Columbia University, United States; Kathryn Hollingsworth, Newcastle University, United Kingdom; Ursula Kilkelly, School of Law, University College Cork, Ireland; Thalia Kruger, University of Antwerp; Sara Lembrechts, University of Antwerp; Jernej Letnar Čerňič, Faculty of Government and European Studies, New University, Slovenia; Laura Lundy, School of Social Sciences, Education and Social Work, Queen's University, Belfast, United Kingdom; Nicholas Munn, University of Waikato, New Zealand; Manfred Nowak, Global Campus of Human Rights, Italy; Noam Peleg, Faculty of Law, University of New South Wales, Australia; Peter R. Rodrigues, Leiden University; Kirsten Sandberg, Department of Public and International Law, University of Oslo, Norway; Julia Sloth-Nielsen, Leiden University and University of the Western Cape, South Africa; Helen Stalford, European Children's Rights Unit, University of Liverpool; Rebecca Thorburn Stern, University of Uppsala, Sweden; Tara Van Ho, School of Law and Human Rights Centre, University of Essex, United Kingdom; and Jinske Verhellen, Department of Interdisciplinary Study of Law, Private Law and Business Law, Ghent University.

<sup>21</sup> See, inter alia, Maarten den Heijer and Rick Lawson, "Extraterritorial human rights and the concept of 'jurisdiction'", in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Malcolm Langford et al., eds., (Cambridge, Cambridge University Press, 2013, pp. 153–195); Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht, Martinus Nijhoff, 1992); and Wouter Vandenhoe, "Economic, social and cultural rights in the CRC: is there a legal obligation to cooperate internationally for development?", *International Journal of Children's Rights*, vol. 17, No. 1 (2009) pp. 23–63.

<sup>22</sup> Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/general comment No. 23 of the Committee on the Rights of the Child (2017), paras. 17 and 19.

<sup>23</sup> CRC/C/SYR/CO/5, para. 47.

<sup>24</sup> See Rik Coolsaet and Thomas Renard, "Foreign fighters and the terrorist threat in Belgium", EGMONT, Royal Institute for International Relations, 10 January 2020; Germany, Higher Administrative Court of Berlin and Brandenburg, decision of 6 November 2019 ordering the State of Germany to repatriate a mother and her children; The New Arab, "Syrian Kurds repatriate Islamic State orphans to Austria", 3 October 2019; and Australia, Counter-Terrorism (Temporary Exclusion Orders) Act 2019, sects. 10 (3)–(4).

<sup>25</sup> A/HRC/40/28, para. 66; and A/HRC/40/52/Add.4, para. 47.



different question from that addressed in the existing jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. Another approach would be to take territoriality out of the question, as Judge Giovanni Bonello suggested in his concurring opinion on *Al-Skeini and others v. United Kingdom*.<sup>26</sup> In summary, Judge Bonello noted that “jurisdiction arises from the mere fact of having assumed [human rights] obligations and from having the capability to fulfil them (or not to fulfil them)”.<sup>27</sup>

6.7 In the view of the experts, the nature of the extraterritorial obligations incumbent upon the State party could be construed as similar to that which characterizes situations where concurrent jurisdiction is being exercised over a territory by multiple States. Thus, although the State party does not have effective control in the area, it has positive obligations to take all appropriate measures and pursue all legal and diplomatic avenues at its disposal to protect the rights of the children.<sup>28</sup>

6.8 The intervening third party concludes that the following contextual aspects should be taken into account: (a) the serious risk of irreparable harm to and the situation of extreme vulnerability of the children; (b) the inability of the parents to ensure their children’s safety; (c) the territorial State’s inability or unwillingness to assume jurisdiction over the children; (d) the State party’s ability to protect its nationals through the exercise of its right to diplomatic protection; and (e) the fact that the elements mentioned prevent an excessive extension of the extraterritorial jurisdiction of the State of nationality by limiting it to exceptional situations. The experts are therefore of the view that the Committee should develop a flexible and child-rights focused approach to the extraterritorial application of the Convention that responds to the increasingly complex contexts, both legal and factual, given the extremely high stakes for the children in question. Such an approach could be based on the pillars formulated by the Committee in its general comment No. 16 (2013), special features of the Convention and contextual factors.

#### **State party’s additional observations**

7.1 In its additional observations of 14 September 2020, the State party argues that the authors misrepresent the jurisprudence of the European Court of Human Rights. It cites the Court’s decision in *M.N. and others v. Belgium*,<sup>29</sup> where the Court recalled that jurisdiction is primarily territorial and that extraterritorial application of the Convention arises only exceptionally, in the following specific situations:

- (a) Where a State exerts effective control over an area outside its national territory;
- (b) Where a State, in an area outside its national territory, exercises public powers such as authority and responsibility in respect of the maintenance of security;
- (c) Where the use of force by a State’s agents operating outside its territory brings, under certain circumstances, persons who find themselves under the control of the State’s authorities into the State’s jurisdiction;
- (d) From the actions or omissions of a State’s diplomatic or consular officials when, in their official capacity, they exercise abroad their authority in respect of that State’s nationals or their property;
- (e) Where there are specific circumstances of a procedural nature.

7.2 The State party points out that the European Court of Human Rights does not include, among the criteria that would allow for a finding of extraterritorial jurisdiction, the extraterritorial effect of a decision taken on national territory. It adds that, in practice, the Court has always rejected such a causal understanding of the concept of jurisdiction. In its decision in *Banković and others v. Belgium and others*, the Court held that “the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its

<sup>26</sup> *Al-Skeini and others v. United Kingdom*, concurring opinion of Judge Bonello, paras. 9–12.

<sup>27</sup> *Ibid.*, para. 13.

<sup>28</sup> See *Ilaşcu and others v. Moldova and Russia*.

<sup>29</sup> European Court of Human Rights, *M.N. and others v. Belgium*, application No. 3599/18, decision, 5 May 2020.

consequences felt, is thereby brought within the jurisdiction of that State for the purpose of article 1 of the Convention. The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to 'jurisdiction'".<sup>30</sup> According to the State party, the Court reaffirmed its refusal to adopt a causal approach to jurisdiction in *M.N. and others v. Belgium*.

7.3 The State party notes that the cases cited by the authors are not relevant to the case at hand because they address a very different situation, specifically, the extraterritorial application of the Convention for the Protection of Human Rights and Fundamental Freedoms stemming from an exercise of authority or control by agents of a State party.

7.4 In terms of public international law, the State party argues that the authors confuse two concepts, that of a State's personal jurisdiction – that is, the State's well-established jurisdiction over its nationals abroad, based on the relationship of nationality – and that of its extraterritorial jurisdiction – that is, the legal conditions required for a State to be held responsible for acts performed, or producing effects, outside its borders. The State party notes that the European Court of Human Rights has never endorsed the interpretation of public international law put forward by the authors.

7.5 The State party notes its disagreement with the third-party interventions. It notes that the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights arose out of the work of specialists, do not reflect customary international law, are not legally binding and do not set out a commonly accepted interpretation of the scope of States' obligations upon ratification of the Convention. The State party notes that it reminded the Human Rights Committee, during the adoption of its general comment No. 36 (2018), that paragraph 36 of the general comment, which took a causal approach to jurisdiction, applied a concept of extraterritoriality that was overly broad and no more consistent with the letter and spirit of the International Covenant on Civil and Political Rights than with the jurisprudence of the European Court of Human Rights.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

8.2 The Committee notes the authors' statement that domestic remedies are unavailable and ineffective in the context of requests for protection and/or repatriation of the children and their mothers. The Committee also notes that this has not been challenged by the State party. Therefore, the Committee considers that there is no obstacle to the admissibility of the communication under article 7 (e) of the Optional Protocol.

8.3 The Committee notes the State party's statement, confirmed by the authors, that S.D. and S.B. were repatriated to France on 15 March 2019. In the light of this information, the Committee considers that the communication in respect of the State party's failure to repatriate these children has become moot and its consideration should therefore be discontinued.

8.4 As regards the remaining children, the Committee takes note of the State party's argument that the authors have not provided family record books demonstrating their ties of kinship to the mothers of the children who are the subject of the communication and that they have not established that they were acting with the consent of the children or their mothers, who remain their legal representatives. However, the Committee notes that the authors have provided identity documents and family record books for some of the children and notes the difficulty in obtaining such documents given the children's current situation. It also notes the authors' argument, undisputed by the State party, that, as relatives of the mothers of the children concerned by the present communication, they are regularly questioned by the intelligence services, either on the basis of letters rogatory from judicial officials involved in

<sup>30</sup> *Banković and others v. Belgium and others*, para. 75.

counter-terrorism proceedings or in connection with the preliminary inquiries of the national counter-terrorism prosecution service, and that this demonstrates the State party's recognition of their family relationship. The Committee notes that the authors have produced the written consent of some of the mothers of the children concerned and that, in the particular circumstances of the present case, it remains extremely difficult, if not dangerous, for them to provide their written consent. Finally, the Committee notes that the communication appears to be submitted in the children's best interests and with the aim of protecting and promoting their rights. Therefore, the Committee considers that article 5 of the Optional Protocol does not constitute an obstacle to the admissibility of the present communications.

8.5 As to the issue of jurisdiction, the Committee notes the State party's argument that it cannot be held accountable for situations that it did not create, over which it has no effective control and that are the result of actions taken by other States or non-State actors, solely on the ground that the victims are its nationals. The State party further argues that the children are not under its jurisdiction because they are not under its effective control, either through its agents or through a local authority over which it has control.

8.6 The Committee is being called upon to determine whether the State party has competence *ratione personae* over the children detained in the camps in the north-east of the Syrian Arab Republic. The Committee recalls that, under the Convention, States have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State's jurisdiction to its "territory".<sup>31</sup> In addition to the effective control that a State may exercise over territory or persons outside its borders, a State may also have jurisdiction in respect of domestic acts that are performed, or that produce direct and foreseeable effects, outside its national borders.<sup>32</sup> In the migration context, the Committee has held that, under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection.<sup>33</sup> In its decision on *C.E. v. Belgium*, the Committee considered that Belgium had jurisdiction to ensure the rights of a child located in Morocco who had been separated from a Belgian-Moroccan couple who had taken her in under the *kafalah* system.<sup>34</sup>

8.7 In the present case, the Committee notes that the State party does not deny having been informed by the authors of the situation of extreme vulnerability of the children, who were detained in refugee camps in a conflict zone. Detention conditions have been internationally reported as deplorable and have been brought to the attention of the State party's authorities through various complaints filed by the authors at the national level.<sup>35</sup> The detention conditions pose an imminent risk of irreparable harm to the children's lives, their physical and mental integrity and their development. The Committee recognizes that the effective control over the camps was held by a non-State actor that had made it publicly known that it did not have the means or the willingness to care for the children and women detained in the camps and that it expected the detainees' countries of nationality to repatriate them. The Committee also notes that the Independent International Commission of Inquiry on the Syrian Arab Republic has recommended that the countries of origin of foreign fighters urgently take steps towards repatriating such children as soon as possible.<sup>36</sup>

<sup>31</sup> Territorial jurisdiction was deliberately left out of article 2 (1) of the Convention. See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. I, document HR/PUB/07/1, pp. 332–333, paras.157–163.

<sup>32</sup> Human Rights Committee, general comment No. 36 (2018), para. 22; A/70/303, para. 33; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and Special Rapporteur on extrajudicial, summary or arbitrary executions, "Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic: legal analysis", para. 8.

<sup>33</sup> Joint general comment No. 4/No. 23 (2017), paras. 17 (e) and 19.

<sup>34</sup> See *C.E. v. Belgium* (CRC/C/79/D/12/2017).

<sup>35</sup> See the conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/43/CRP.6), available on the Commission's website ([www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx](http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx)).

<sup>36</sup> *Ibid.*, para. 99 (c).

8.8 In the circumstances of the present case, the Committee observes that the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. These circumstances include the State party's rapport with the Kurdish authorities, the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Rojava since March 2019, which demonstrates the State party's capacity to conduct such repatriations.

8.9 In the light of the above, the Committee concludes that the State party does exercise jurisdiction over the children who are the subject of the present communication and that the authors' claims under articles 2, 3, 6, 19, 20, 24 and 37 of the Convention have been sufficiently substantiated.

9. The Committee therefore decides:

(a) That consideration of the communication should be discontinued in respect of S.D. and S.B.;

(b) That, in respect of the remaining children, the communication is admissible insofar as it raises issues under articles 2, 3, 6, 19, 20, 24 and 37 of the Convention;

(c) That the present decision shall be transmitted to the authors of the communication and, for information, to the State party.

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