



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 communications No. 79/2019 and No. 109/2019*, **

<i>Communications submitted by:</i>	L.H., L.H., D.A., C.D. and A.F. (represented by counsel, Mr. Pradel)
<i>Alleged victims:</i>	S.H., M.A., A.A., J.A., A.A., R.A., L.F., A.F., S.F., N.F. and A.A.
<i>State party:</i>	France
<i>Dates of communications:</i>	13 March and 25 November 2019 (initial submissions)
<i>Date of adoption of decision:</i>	30 September 2020
<i>Subject matters:</i>	Repatriation of children whose parents are linked to terrorism activities; protection measures; right to life; access to medical care; unlawful detention
<i>Procedural issue:</i>	Extraterritorial jurisdiction
<i>Articles of the Convention:</i>	2, 3, 6, 20, 24 and 37
<i>Articles of the Optional Protocol:</i>	5 (1)–(2) and 7 (e)–(f)

1.1 The authors of the communications are L.H., L.H. and D.A., acting on behalf of their grandchildren (S.H., born in 2017; M.A., born in 2013; A.A., born in 2014; J.A., born in 2016; A.A., born in 2017; R.A., born in 2018) and C.D. and A.F., acting on behalf of L.F., born in 2003; A.F., born in 2006; S.F., born in 2011; N.F., born in 2014; and A.A., born in 2017. All the children are nationals of France whose parents allegedly collaborated with the so-called Islamic State in Iraq and the Levant (ISIL). Some of the children were born in the Syrian Arab Republic while others travelled there with their parents at a young age. They are currently held in the Roj, Ain Issa and Al-Hol camps in Syrian Kurdistan, which are under the control of Kurdish forces. The authors allege that the Government of France did not take the measures necessary to repatriate the children to France, which they claim constitutes a violation of articles 2, 3, 6, 20, 24 and 37 of the Convention. The

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

** The following members of the Committee participated in the examination of the communications: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.



authors are represented by counsel. The Optional Protocol entered into force for the State party on 7 January 2016.

1.2 On 27 March and 4 December 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 may need.

Facts as submitted by the authors

Communication No. 79/2019

2.1 According to the authors, S.H.'s parents left France for the Syrian Arab Republic in April 2016 in order to join the jihad. On 14 November 2017, S.H. was born in the Syrian Arab Republic. On 21 January 2018, the family attempted to leave the Syrian Arab Republic but was arrested by Kurdish militiamen. S.H. and his mother were separated from the father and have been held at Ain Issa camp, which is under the control of Kurdish forces, since then. The mother managed to contact her parents in France and described the deplorable sanitary conditions in which she and S.H. had been living.

2.2 On 7 January 2013, M.A. was born in France. On 17 May 2014, M.A. and her parents left France for the Syrian Arab Republic. In the Syrian Arab Republic, M.A.'s mother gave birth to four other children: A.A., born on 7 June 2014; J.A., born on 7 February 2016; A.A., born on 5 April 2017; and R.A., born on 30 October 2018. On 30 October 2017, M.A.'s grandmother lost contact with her daughter and grandchildren. At the end of November 2018, M.A.'s mother managed to regain contact with the grandmother and informed her that she had been imprisoned by Kurdish forces for seven and a half months, along with her five children, and that they were now being held at Roj camp. She also informed her of the very difficult conditions of detention in the camp and the lack of medical care. J.A. suffers from asthma attacks and A.A. from violent stomach aches.

Communication No. 109/2019

2.3 L.F., A.F. and S.F. were born in France in 2003, 2006 and 2011 respectively. According to the authors, the parents of the children were progressively radicalized and left France with the children, going first to Jordan, in August 2012, then to Egypt, in May 2013, and then to the Syrian Arab Republic, on 23 November 2013. In the Syrian Arab Republic, the fourth sibling, N.F., was born on 2 May 2014. After the death of their father, their mother married a national of the Syrian Arab Republic who subsequently also passed away. A.A. was born from this second union on 18 January 2017. On 31 May 2019, the children's mother informed her parents that she was in the Syrian Arab Republic, in the Roj camp, with her youngest son, A.A. Her four other children had first been accommodated in the family of her second husband, before being transferred to the Roj camp in August 2019. The children's mother had suffered a serious injury to her right ear during bombing raids, causing total deafness in that ear. A.F. suffers injuries to his left foot, requiring rehabilitation. Neither have received the necessary medical care, as it is not available in the camp. The authors are in regular contact with their daughter (the children's mother) and granddaughter L.A. by telephone and through social media. The authors fear that 16-year-old L.A. may be married to a man against her will.

Both communications

2.4 The authors stress that they have kept the State party informed of developments regarding the situation of their children and grandchildren and of their location in the Syrian Arab Republic.

General context as provided by the authors

2.5 The authors submit that, since the beginning of 2018, a number of nationals of France have fled ISIL and surrendered to the Kurdish forces in Rojava, an autonomous

Kurdish territory in north-eastern Syrian Arab Republic, in the hope of returning to France. Among these individuals are parents who are now detained in Al-Hol, Ain Issa and Roj camps with their children. The children detained in the camps have no detention documents and are not subject to any local legal proceedings, as Syrian Kurdistan is not a State. The authorities of Syrian Kurdistan have alerted the French authorities that they will not issue any proceedings or orders against the detainees in the camps.

2.6 On 9 October 2019, the Government of Turkey launched a military offensive against the Kurdish forces in Rojava following the withdrawal of United States military troops. Fighting, air raids and artillery fire in north-eastern Syrian Arab Republic resulted in the death of several dozen civilians, as well as the displacement of thousands more to areas adjacent to the Syrian border. According to the Kurdish authorities, 785 members of ISIL, including French women and children, escaped from the then unguarded Ain Issa camp.¹ On 13 October, Kurdish forces concluded an agreement with the government of Bashar Al-Assad on the deployment of its armed forces near the Turkish border in order to repel the offensive.² On 22 October, Turkey pledged not to resume its military offensive in northern Syrian Arab Republic in return for a commitment from the Russian Federation to ensure the withdrawal of Kurdish forces along the border.³ On 30 October, the full withdrawal of Kurdish forces from the northern Syrian border with Turkey was announced.⁴ However, the question of control over the Kurdish camps was not raised. Thus, while the camps in northern Syrian Arab Republic are currently under the control of Kurdish forces, this situation is likely to change, rendering the fate of all French nationals, including children (of whom it is estimated there are between 270 and 320),⁵ uncertain.

On the question of repatriation

2.7 At the beginning of 2018, Syrian Kurdish leaders repeatedly expressed their wish to see all foreign nationals detained in the camps repatriated to their States of nationality.⁶ As at the date of the initial communication, States such as Canada, the Netherlands, Portugal and the Russian Federation were organizing the repatriation of their nationals. The head of the Kurdish judiciary system, Abdalbasset Ausso, stressed that foreign jihadists should be tried in their own countries and that States of origin should take responsibility for their nationals. Human Rights Watch also recalled that women who had returned to Iraq and the Syrian Arab Republic had not been officially charged with any crime by the Kurdish authorities, who were keeping them on the understanding that their States of origin would repatriate them.

2.8 In March 2018, the Chief of Staff of the President of France, Emmanuel Macron, replied to the authors that, as regards French minors in Iraq or the Syrian Arab Republic, they were entitled to the protection of the State and may be cared for in accordance with the rules concerning the protection of minors and repatriated persons, provided that their criminal responsibility had been ruled out by the local authorities. In addition, early in 2018, the President gave assurances that the situation of those children would be dealt with on a case-by-case basis. Despite those statements, no explicit measures of protection or repatriation have been taken by the State party to protect French children arbitrarily detained in Syrian Kurdistan. By a letter dated 26 February 2019, the President's Chief of Staff refused to grant the repatriation of the children represented by the authors. The authors stress that the State party nevertheless maintains regular contact with representatives of the Kurdish forces in Rojava, which, although not a State, has a

¹ Le Nouvel Observateur and Agence France Presse, "Syrie: près de 800 proches de membres de l'EI ont fui un camps de déplacés", 13 October 2019.

² Radio France International, "Syrie: accord entre les Kurdes et Damas contre l'offensive turque", 13 October 2019.

³ Ibid., "Syrie: ce que prévoit l'accord conclu par Poutine et Erdogan", 22 October 2019.

⁴ L'Express and Agence France Presse, "Les Kurdes ont achevé leur retrait du nord de la Syrie", 30 October 2019.

⁵ Anne-Bénédicte Hoffner, "En Syrie, l'avenir incertain des djihadistes français", La Croix, 29 October 2019.

⁶ Gwendoline Debono, "Syrie: les Kurdes ne veulent plus garder les djihadistes français de Daech", *Europe1*, 13 April 2018.

permanent representation in Paris. The Kurdish authorities have already made it clear that they do not have the means to feed and care for the French women and children detained in the Roj, Ain Issa and Al-Hol camps in Syrian Kurdistan.

Humanitarian conditions of the children in the camps

2.9 The authors emphasize that the children in the prison camps controlled by Kurdish forces, many of whom are under 6 years of age, are barely surviving, are in a war zone, face inhuman sanitary conditions and lack basic needs (water, food and health care), putting them at imminent risk of injury or death.⁷ They live in extremely precarious conditions, confined in tents. The authors point out that, according to the World Health Organization, at least 29 children in Al-Hol camp died of hypothermia during the winter of 2018–2019, as their families fled from the last remaining ISIL compound.⁸

Exhaustion of domestic remedies

2.10 The authors note that they have made several formal requests for the State party to repatriate the children, without success.

2.11 The authors argue that the State party's domestic remedies are unavailable and ineffective in the context of all requests for protection and/or repatriation of children and their mothers. The courts 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 subjects of the complaint were a diplomatic matter rather than the administrative responsibility of the State party. The decision to implement the protection measures was thus described by the Administrative Court as an "act of government" that was beyond the control of the administrative judge. Hence, no French court would have jurisdiction to rule on the position of France towards French children detained in Kurdish camps.

State party's jurisdiction

2.12 In communication No. 109/2019, the authors argue that the continued presence of children in the camps under the control of the Kurdish forces has its "unique origin" in the decision of France not to repatriate them. The authors also argue that the State party may exercise its jurisdiction extraterritorially in some circumstances. This possibility has been confirmed by a significant number of cases before the European Court of Human Rights where two situations can be distinguished:

(a) Acts performed outside the national territory: when individuals located outside the national territory benefit from the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as a result of an "extraterritorial act of the State", such as in the case of military intervention on foreign territory;

(b) Acts producing effects outside the national territory: when individuals situated outside the national territory benefit from the rights guaranteed by the European Convention on Human Rights as a result of a purely national act of the State aimed at them and which directly affects their legal situation.⁹

⁷ Luc Mathieu and Chloé Pilorget-Rezzouk, "Jihadistes et leurs familles: le défi du retour", *Libération*, 31 January 2019; Sophie Parmentier, "Enfants de djihadistes en Syrie: 'Il faut les sauver, et il y a urgence!'", 27 December 2018.

⁸ Le Figaro and Agence France Presse, "Syrie, le froid hivernal a tué 29 enfants (ONU)", 31 January 2019.

⁹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011), p. 8: "extraterritorial application does not require an extraterritorial state act but solely that the individual concerned is located outside the state territory, while the injury to his rights may as well take place inside it."

2.13 The authors contend that this distinction is anchored in the case law of the European Court of Human Rights.¹⁰ Furthermore, the European Court of Human Rights has held that the application of extradition formulated by one State to the authorities of another State created a jurisdictional link between the State that issued the request and the individual who was the subject of the request. Thus, an act performed exclusively on national territory could be regarded as an exercise of jurisdiction within the meaning of article 1 of the European Convention on Human Rights.¹¹ In *Nada v. Switzerland*, decisions by administrative authorities not to authorize the entry of an individual into a national territory gave rise to a jurisdictional link with that individual. Consequently, a State may exercise its jurisdiction within the meaning of article 1 of the European Convention on Human Rights when, through acts taken on its territory, it directly affects the situation of individuals outside its national territory.¹² This interpretation is in compliance with public international law, since it recognizes the existence of a specific legal bond between a State and its nationals. State jurisdiction is defined as “its lawful power to act and hence to its power to decide whether and, if so, how to act, whether by legislative, executive or judicial means” and a State is deemed to have jurisdiction over its nationals wherever they may be.¹³ The authors add that such an analysis is in line with the very broad jurisdiction that the French authorities have to prosecute alleged perpetrators of criminal offences committed abroad,¹⁴ which is driven by the objective of protecting French nationals.

2.14 The authors add that the decision not to grant their requests has not been justified by any material or legal impossibility to carry out the repatriations. The authors emphasize that the children have not been detained as a direct consequence of the control of the authorities in north-eastern Syrian Arab Republic over the camps and individuals in question, but, rather, that their detention has its “unique origin” in the measures taken by the State party, namely the decision not to repatriate the children and their mothers. Yet, the State party has repatriated at least 17 French children, including 15 orphans, from the Syrian Arab Republic since March 2019.¹⁵

2.15 The authors also recall that the established jurisprudence of the European Court of Human Rights on extraterritoriality retains the “link of responsibility” for the fate of the nationals of States parties by virtue of the “decisive influence” they have over the authority detaining or holding them, even outside the limits of their national territory in a part of another State.¹⁶ Thus, the European Court of Human Rights does not require the direct participation of the agents of the State party but verifies, among other things, whether the State “did not act to prevent the violations allegedly committed”.¹⁷ With regard to the conflict in Iraq and the Syrian Arab Republic, the State party has been intervening in

¹⁰ European Court of Human Rights, *Ilascu and others v. Moldova and Russia*, application No. 48787/99, judgment of 8 July 2004, para. 314; *Drozd and Janousek v. France and Spain*, application No. 12747/8726, judgment of 26 June 1992, para. 91; *Sejdovic v. Italy*, application No. 56581/001, judgment of 1 March 2006.

¹¹ The authors cite European Court of Human Rights, *Stephens v. Malta (No. 1)*, application No. 11956/07, judgment of 21 April 2009.

¹² European Court of Human Rights, *Nada v. Switzerland*, application No. 10593/08, judgment of 12 September 2012, paras. 121–122.

¹³ Bernard H. Oxman, “jurisdiction of States”, entry in *Max Planck Encyclopedia of Public International Law*; European Court of Human Rights, *Cyprus v. Turkey*, application No. 25781/94, judgment of 10 May 2001.

¹⁴ See articles 689–693 of the Code of Criminal Procedure. See also Court of Cassation, Criminal Chamber, case No. 17-86.640 of 12 June 2018, according to which the extraterritorial jurisdiction rules of French criminal law allowing direct victims, of French nationality, to obtain in France the prosecution of the perpetrators of an offence committed abroad and compensation for any harm resulting from the said offence, are explained by the principle that France is obliged to ensure the protection of its nationals (see www.courdecassation.fr/jurisprudence_2/qpc_3396/1598_12_39336.html).

¹⁵ See <https://uk.ambafrance.org/Rapatriement-de-12-enfants-mineurs-orphelins-ou-isoles>. See also Elise Vincent and Nathalie Guibert, “La France a rapatrié de Syrie 5 enfants orphelins de djihadistes”, *Le Monde*, 15 March 2019.

¹⁶ European Court of Human Rights, *Ilascu and others v. Moldova and Russia* and *Sargsyan v. Azerbaijan*, application No. 40167/06, judgment of 16 June 2015, para. 128.

¹⁷ *Ibid.*, *Ilascu and others v. Moldova and Russia*, para. 393.

northern Syrian Arab Republic as part of the Chammal military operation since 2015.¹⁸ The State party therefore works to stabilize areas freed from the control of ISIL in northern Syrian Arab Republic¹⁹ and for the structuring of “governance” in that area. To this end, France has established a military and diplomatic partnership with the Syrian Democratic Forces, in particular in the establishment of a dialogue with Turkey²⁰ within the framework of a “common fight” against terrorism. In this context, the State party was also able to repatriate the French children (see para. 5.5 below), thanking the Syrian Democratic Forces for their cooperation, which made that outcome possible.²¹ In addition, the State party has supported a certain number of opposition groups, particularly Kurdish groups, as they have been deemed reliable partners in the fight against ISIL.²² Therefore, the authors argue that the State party exercises a military and political influence – not merely support – in this area with regard to the control of the situation of French children and their mothers detained by the Syrian Democratic Forces, which results from the treaty obligations binding France.²³

Complaint

3.1 The authors argue that, by its inaction, the State party is violating articles 2, 3, 6, 20, 24 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 the Convention (art. 2); to guarantee that children receive the necessary protection and care in the event that their parents or other legal guardians are unable to do so (art. 3); to ensure the right to life and the survival and development of children (art. 6); to provide them with special protection in the context of deprivation of their family environment (art. 20); to ensure access to medical care (art. 24); and to protect them from unlawful detention (art. 37).

3.2 The authors stress that the State party was well informed of the deplorable sanitary conditions in which the children found themselves. The State party was also aware that the children were detained in an area of armed conflict and that they were exposed to the risk of death and serious injury, including by virtue of the fact that the camps did not benefit from any medical support, raising the risk of disease and illness, in addition to the injuries from which some of them already suffered. The authors argue that, in spite of all this, the State party refused to implement any necessary measures.

3.3 The authors request that the State party: (a) identify, as soon as possible, children born in France or of French parents present in the Al-Hol, Ain Issa and Roj camps; (b) provide the children with food, water and medical care; (c) repatriate them to French territory; (d) assist the children through child protection services upon their arrival on French territory; and (e) when appropriate, provide any other measures to protect them.

State party’s observations on admissibility

4.1 In its submissions of 28 May 2019 and 5 February 2020, the State party considers that both communications are inadmissible for lack of standing and because of the State party’s lack of jurisdiction over the children.

4.2 The State party refers to article 5 of the Optional Protocol and argues that the authors have not established that they are acting with the consent of the children or their mothers. According to the State party, the mothers remain the children’s legal guardians

¹⁸ See www.defense.gouv.fr/layout/set/print/content/download/523399/8773207/version/1/file/20170713+Dossier+de+presse+op%C3%A9ration+Chammal+FEV+18+VF.pdf. See also Security Council resolution 2249 (2015).

¹⁹ Defender of Rights decision No. 2019-129 of 22 May 2019 concerning the retention of French children and their mothers in the camps under the control of the Syrian Democratic Forces in northern Syrian Arab Republic.

²⁰ See www.elysee.fr/emmanuel-macron/2018/03/30/entretien-du-president-de-la-republique-avec-une-delegation-syrienne.

²¹ See www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/evenements/actualites-2019/article/communique-du-ministere-de-l-europe-et-des-affaires-etrangeres-15-03-19.

²² See www.senat.fr/compte-rendu-commissions/affaires-etrangeres_archives.html#Session2019.

²³ Defender of Rights decision No. 2019-129 of 22 May 2019.

and their consent is therefore required, especially in light of the request for the repatriation of the children. Regarding communication No. 79/2019, the State party adds that the authors did not produce any family records attesting to their relationship to the subjects of the communication.

4.3 The State party recalls that the Committee must verify that the children, and not the authors, fall within the jurisdiction of a State party. A reverse analysis would lead, de facto, to giving the Convention universal applicability, contrary to its text. The State party argues that it has only agreed to respect the rights set forth in the Convention 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 actions of 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 decision of the European Court of Human Rights in *Banković and others v. Belgium*²⁴ and to the jurisprudence of the Committee against Torture.²⁵ 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.²⁶ The State party refers to the jurisprudence of the European Court of Human Rights,²⁷ the International Court of Justice²⁸ and the Inter-American Commission on Human Rights²⁹ and recalls that, in order for children to come under the jurisdiction of the State party, the authors must demonstrate that they are under the effective control of France, either through its agents or through a local authority over which France would have such great control as to cause that authority to in fact be dependent on it.

4.5 In the present instance, the State party notes that the authors have not provided any evidence that France exercised effective control over the camps in north-eastern Syrian Arab Republic. Conversely, the authors themselves acknowledge that the children are being held by and are under the control of Kurdish forces. The State party notes that, firstly, France does not exercise any control or authority over the children through its agents, as the camps in north-eastern Syrian Arab Republic are under the sole control of foreign authorities. Secondly, the State party refutes the argument that France exercises any territorial control over the camps in northern Syrian Arab Republic. Although 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 ISIL, it does not mean that it has effective control over the camps in north-eastern Syrian Arab Republic. Nor does it mean that there is a relationship of dependence such as to make the Syrian Democratic Forces a subordinate local administration. Such an interpretation would amount to extending the jurisdiction of France to any territory controlled by a State with which it maintains relations or a military partnership.

4.6 Regarding communication No. 109/2019, the State party further argues that, on the question of the extraterritorial effect of a domestic decision, the jurisprudence cited by the authors is irrelevant as it concerns different situations and does not demonstrate the existence of a new criterion for the exercise of the State's extraterritorial jurisdiction. According to the State party, it is wrong for the authors to assume that there is a well-

²⁴ Application No. 52207/99, decision of 12 December 2001, paras. 59 and ff.

²⁵ *Roitman Rosenmann v. Spain* (CAT/C/28/D/176/2000 and Corr.1), para. 6.6; *Z. v. Australia* (CAT/C/53/D/511/2012); *Agiza v. Sweden* (CAT/C/34/D/233/2003).

²⁶ The State party refers to joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/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 of 7 July 2011, para. 138; Inter-American Commission on Human Rights, *Djamel Ameziane v. United States*, 20 March 2012, para. 30.

²⁷ *Al Skeini and others v. United Kingdom*, para. 134.

²⁸ *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.

²⁹ *Djamel Ameziane v. United States*, paras. 30–35.

established distinction between acts performed outside the national territory and acts producing effects outside the national territory. The latter acts would, according to the authors, be likely to bring under the jurisdiction of a State party all individuals outside the territory of that State on whom they would have an effect. The State party therefore contests the argument that the Convention is intended to apply to the children because of the alleged decision of the Government of France not to repatriate them. Thus, the State party emphasizes that the European Court of Human Rights has never affirmed the principle that individuals located outside the territory of a State party would come under the latter's jurisdiction merely and solely as a consequence of a national decision.

4.7 Regarding the authors' arguments on the existence of a jurisdictional link, the State party argues that the authors confuse two concepts: according to the jurisprudence of the European Court of Human Rights, the jurisdictional link between the applicants and the State whose responsibility is sought is not based on the nationality of the applicants but on the initiation of civil or criminal proceedings under domestic law. Moreover, it is not apparent from the principles of public international law, the provisions and jurisprudence of the European Court of Human Rights, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights or any other treaty that a link has been established between jurisdiction and nationality. In this connection, the State party notes that the authors confuse the notion of personal jurisdiction of the State – i.e., the well-established powers that the State exercises over its nationals abroad by reason of the link of nationality – and that of extraterritorial jurisdiction of the State – i.e., the legal conditions under which a State may be held responsible for acts performed or producing effects outside its borders. The authors are therefore not justified in asserting that the children detained in north-eastern Syrian Arab Republic fall under the jurisdiction of the State party solely on the ground that they have French nationality. Furthermore, the State party notes that this approach would introduce discrimination because it would afford enhanced protection for nationals of a State party located abroad, a protection not afforded to non-nationals. Such a situation would be contrary to the logic of the Convention system, which is to protect all individuals against violations of the Convention by States parties, regardless of their nationality.

4.8 The State party emphasizes that to accept the reasoning put forward by the authors would be tantamount, *de facto*, to accepting universal State jurisdiction, as the mere fact that the State party had not acted on their request for repatriation would have the effect of extending the jurisdiction of France over the children detained in north-eastern Syrian Arab Republic and making the French authorities responsible for the ill-treatment they allegedly suffered there. According to the State party, this argument would thus mean that any citizen could request the intervention of his or her State of nationality, on account of the situation he or she is experiencing in the territory of another sovereign State, for the first State to become responsible, by reason of its refusal to intervene, for potential violations of the Convention committed in or by the second State. This conception signifies that a State would be exercising jurisdiction over a situation taking place abroad, over which it has no control, on the sole ground that the violation persists by its alleged inaction. Under this approach, States would have positive obligations to intervene and put end to all violations of children's rights committed in other States, when requested to do so, including through the use of military means. Such an approach would pose serious problems under international law, since it would be likely to contradict the principle of sovereignty of the State in which the alleged violation was committed. Furthermore, it would potentially extend the jurisdiction of States parties beyond what they have undertaken to do by ratifying the Convention.

Authors' comments on the State party's observations

5.1 On 28 August 2019 and 5 March 2020, the authors submitted their comments in response to the State party's observations. The authors recall that, to date, the three camps in northern Syrian Arab Republic remain under the control of Syrian Kurdish forces. They also reiterate that domestic remedies have been exhausted as there is no available and effective remedy that would compel the State party to implement the necessary protective measures.

5.2 The authors recall that, in accordance with article 5 of the Optional Protocol, communications may be submitted by or on behalf of an individual or group of individuals. The authors are direct ascendants of the children (grandparents). The consent invoked by the State party is not a criterion that is apparent either from the Committee's jurisprudence or from any provision in the Convention. This would make the Convention practically impossible to apply to separated children in a conflict zone. On the contrary, article 5 (2) of the Optional Protocol specifies that communications submitted on behalf of individuals shall be with their consent unless the author can justify acting on their behalf without such consent. In the present case, the communications concern children aged between 2 and 16 years who are unable to understand what is at stake and could not, in any way, express an opinion or give consent. In addition, the lack of means of communication (smartphone, computer or even paper) makes it impossible for a consent to be materially presented in front of the Committee. The mothers did, however, through telephone calls, give their consent to the authors for the communications to be presented. Finally, the admissibility must be assessed primarily on the basis of the best interest of the child, and these communications clearly serve the best interests of the children as the aim is to end their detention in deplorable and life-threatening conditions.

5.3 Concerning communication No. 79/2019, the authors recall that the need for a family record book to certify filiation with the children's mothers is not a formal requirement for the means of proving filiation between the children and their parents. Nonetheless, the authors submit the family records attesting to their relationship with M.A., A.A., J.A., A.A., R.A. and S.H.

5.4 Regarding the jurisdiction of the State party, the authors emphasize that not only did the State party deny the repatriation request but it also refused to put an end to a situation – to which only it could decide to put an end – of serious violations of the fundamental rights of French minors, despite multiple alerts on the matter.

5.5 On 26 September 2019, the authors of communication No. 79/2019 submitted a report adopted by the National Consultative Commission on Human Rights in plenary assembly. The Commission concluded that the continued refusal to repatriate all the children of French nationality detained in the Rojava camps would be a clear violation of fundamental rights and a serious attack on the values of the French Republic, including its Constitution, and to the best interests of the children. The Commission therefore called upon the State party to return the children and the parents currently with them to French soil as soon as possible.

State party's additional observations

6. In its submission of 17 December 2019, regarding communication No. 79/2019, the State party informed the Committee that, on 9 December 2019, S.H. and his mother were subjected to an administrative expulsion by the Turkish authorities to France. On his arrival in France, S.H. was placed by the competent judicial authority, the Children's Social Welfare Office, into care. As a result, S.H. was no longer being held in a camp controlled by the Syrian Democratic Forces and is no longer being subjected to alleged violations of the rights enshrined in the Convention. The State party therefore requests the Committee to declare the communication inadmissible concerning S.H. as manifestly ill-founded under article 7 (f) of the Optional Protocol to the Convention.

Authors' additional observations

7. In their submission of 20 July 2020 regarding communication No. 79/2019, the authors argue that the communication should not be declared inadmissible with regard to S.H. They argue that S.H. had been arbitrarily detained for almost two years in Ain Issa camp, in conditions that affected his psychological and physical integrity, without any measures of protection taken by the State party, despite multiple requests from his family. S.H. and his mother were then expelled by the Kurdish forces from the Ain Issa camp and had to hide from other armed groups. They eventually managed to flee to Turkey. It was only then that the State party accepted their repatriation to France, in line with the "Cazeneuve protocol", according to which French nationals arrested in Turkey on their return from the Syrian Arab Republic must be handed over to the French authorities.

According to the authors, the State party cannot argue the inadmissibility of the communication in that regard since France was forced by the Turkish authorities to repatriate S.H. The effects produced by the violations of the Convention remain and the authors request the Committee to declare articles 2, 3, 6, 20, 24 and 37 admissible in respect of S.H.

Third-party submissions

8.1 At the Committee's invitation, three experts³⁰ from the Consortium on 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 Consortium on Extraterritorial Obligations

8.2 The experts first referred to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and noted that a State has obligations to respect, protect and fulfil economic, social and cultural rights in situations over which its acts or omissions bring about foreseeable effects on their enjoyment, whether within or outside their territory.³¹ They added that international law prohibits enforceable extraterritorial jurisdiction unless explicitly permitted by customary law or an international treaty.³² 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.³³ 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.

8.3 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 decisive influence or to take measures; (d) the State party is entitled to exercise jurisdiction in the present case since it can extend its authority; (e) the State party has the 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.

8.4 The experts concluded that the Committee had to decide based on the best interests of the children. Not admitting the case would lead to the alleged victims not having access to justice. The experts added that there was 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 case admissible.

³⁰ Ana María Suárez Franco (FIAN International), Mark Gibney (University of North Carolina at Asheville, United States of America, and Raoul Wallenberg Institute in Lund, Sweden) and Neetu Sharma (Centre for Child and the Law at the National Law School of India University, India).

³¹ See www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf.

³² Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, judgment of 7 September 1927.

³³ 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).

*Joint submission by a group of 31 academics*³⁴

8.5 The experts noted that, under the Convention on the Rights of the Child, extraterritorial jurisdiction was not excluded and that in the *travaux préparatoires* it is indicated that territoriality was expressly excluded from the Convention.³⁵ States parties to the Convention do have obligations in respect of children's rights beyond their territories.³⁶ In the migration context, the Committee held that, under the Convention, States should take some extraterritorial responsibility for the protection of children who were their nationals outside their territory by devising child-responsive consular policies and services³⁷ or even by taking measures "to assist the safe, voluntary and dignified return of Syrian children".³⁸ 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.³⁹ In addition, multiple entities of

³⁴ Authors: Wouter Vandenhoele 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 at 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 (Center for Constitutional Studies 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, Belgium), Sara Lembrechts (University of Antwerp, Belgium), 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, Venice, Italy), Noam Peleg (Faculty of Law, University of New South Wales, Australia), Peter R. Rodrigues (Leiden University, the Netherlands), Kirsten Sandberg (Department of Public and International Law, University of Oslo, Norway), Julia Sloth-Nielsen (Leiden University, the Netherlands, University of the Western Cape, South Africa), Helen Stalford (European Children's Rights Unit, University of Liverpool, United Kingdom), 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, Belgium).

³⁵ In an early draft of article 2 (1), the applicability of the Convention on the Rights of the Child was explicitly linked to jurisdiction and the territory of a State. The territoriality condition was eventually deliberately left out of the text of article 2 and its final version only reflects the concept of jurisdiction, indicating that jurisdiction under the Convention was not intended by the drafting parties to be exclusively territorial. Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child. Article 2: The Right of Non-Discrimination* (Martinus Nijhoff Publishers, 2008); 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 and others, eds., (Cambridge University Press, 2013); Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, 1992).

³⁶ See, among others, Den Heijer and Lawson, "Extraterritorial human rights and the concept of 'jurisdiction'"; Detrick, *The United Nations Convention on the Rights of the Child*; and Wouter Vandenhoele, "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.

³⁷ Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child, paras. 17 (e) and 19.

³⁸ CRC/C/SYR/CO/5, para. 47.

³⁹ Rik Coolsaet and Thomas Renard, "Foreign fighters and the terrorist threat in Belgium", Royal Institute for International Relations, 10 January 2020; Germany, Higher Administrative Court of Berlin and Brandenburg, decision of 6 November 2019 on the repatriation of German members of ISIL; The New Arab, "Syrian Kurds repatriate Islamic State orphans to Austria", 3 October 2019; Australia, Counter-Terrorism (Temporary Exclusion Orders) Act 2019, sects. 10 (3)–(4).

the United Nations have recommended that Member States enable the return of foreign fighters and their families, including children.⁴⁰

8.6 The question is whether a State's failure to take action to protect the rights of its nationals who are children abroad can give rise to international legal responsibility for violations of rights enshrined in the Convention, which is de facto a different issue from the issue of the existing jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. An 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*. 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)".

8.7 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 characterize 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.⁴¹

8.8 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 protect their children; (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 factors 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, legal and factual, and that takes into account the extreme 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.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 The Committee notes the authors' statement that domestic remedies are unavailable and ineffective in the context of all requests for protection and/or repatriation of 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.

9.3 The Committee notes the State party's uncontested statement that S.H. and his mother were repatriated from Turkey to France on 9 December 2019. In light of this information, the Committee considers that the communication based on the State party's failure to repatriate S.H. has become moot and its consideration should therefore be discontinued.

9.4 The Committee notes the State party's argument that the authors have not established that they acted with either the children's or their mothers' consent, contrary to the requirements of article 5 of the Optional Protocol. The Committee notes the authors' argument that: (a) the communications concern children aged between 2 and 16 years who are unable to understand what is at stake and have been unable to give consent; (b) the lack

⁴⁰ A/HRC/40/28, para. 66; A/HRC/40/52/Add.4, para. 47.

⁴¹ European Court of Human Rights, *Ilascu and others v. Moldova and Russia*.

of means of communication makes it impossible for consent to be materially presented to the Committee; (c) the mothers did, through a telephone call, give their consent to the authors for the communications to be presented; and (d) the communications clearly serve the best interests of the children as the aim is to end their detention in deplorable and life-threatening conditions. The Committee recalls that, pursuant to article 5 (2) of the Optional Protocol, where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.” The Committee does not endorse the authors’ assessment that the children’s age would not allow them to give consent for the authors to act on their behalf before the Committee. Except for the youngest children, all other children should be presumed to be able to form an opinion and provide their consent in that regard. However, the Committee notes that, in the particular circumstances of the present cases, the children have limited communication with the authors, through their mothers, who have also as guardians, provided consent telephonically. There is no realistic possibility for them to provide written consent, and the communications appear to be submitted in their 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.

9.5 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 actions of other States or non-State actors, solely on the ground that the children are its nationals. The State party further argues that the children are not under the jurisdiction of the State party because they are not under the effective control of the State party, either through its agents or through a local authority over which the State party has control.

9.6 The Committee is being called upon to determine if the State party has competence *ratione personae* over the children detained in the camps in north-eastern 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 “territory”.⁴² A State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders.⁴³ 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.⁴⁴ 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 that had taken her in under the *kafalah* system.⁴⁵

9.7 In the present case, the Committee notes that it is uncontested that the State party was 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 the various complaints filed by the authors at the national level.⁴⁶ 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

⁴² 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: Volume 1*, (New York, United Nations, 2007), pp. 332–333.

⁴³ A/70/303, para. 33; www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf, para. 8.

⁴⁴ Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), paras. 17 (e) and 19.

⁴⁵ CRC/C/79/D/12/2017.

⁴⁶ See the conference room paper submitted by the Independent International Commission of Inquiry on the Syrian Arab Republic to the Human Rights Council at its forty-third session. Available at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session43/Pages/ListReports.aspx.

publicly known that it did not have the means or the will 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 countries of origin of foreign fighters take immediate steps towards repatriating such children as soon as possible.⁴⁷ 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 Syrian Kurdistan since March 2019.

10. In light of the above, the Committee concludes that the State party does exercise jurisdiction over the children who are the subject of communications No. 79/2019 and No. 109/2019 and that the authors' claims under articles 2, 3, 6, 20, 24 and 37 of the Convention have been sufficiently substantiated. The Committee declares the communications admissible.

11. The Committee therefore decides:

(a) That consideration of communication No. 79/2019 should be discontinued in respect of S.H.;

(b) That communications No. 79/2019 and No. 109/2019, filed on behalf of the remaining children, are admissible insofar as they raise issues under articles 2, 3, 6, 20, 24 and 37 of the Convention;

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

⁴⁷ Ibid., para. 99 (c).