

## **Third Party Intervention to the UN Committee on the Rights of the Child in the cases of *H. and A. v. France* and *X. and X. v. France***

### **Executive summary**

The key issue at stake with regard to the admissibility of the communications in the cases of *H. and A. v. France* and *X. and X. v. France* is whether France can be said to have jurisdiction. We believe it is an opportunity for the Committee on the Rights of the Child (CRC Committee) to apply a child rights based approach to the extraterritorial application of the UN Convention on the Rights of the Child (CRC).

Jurisdiction in human rights law is mandatory, rather than permissive as in public international law more generally: it determines whether a State has human rights obligations. As a standard rule, States have obligations toward persons within their own territory. However, the notion of jurisdiction extends beyond territory. Extraterritorial jurisdiction has been accepted in the case law, albeit on a limited number of grounds. Typically, they have to do with a State's *action* (i.e. positive acts) on foreign territory, whereby it exercises control over persons or territory.

The current cases deal with a new factual setting: the *failure* (i.e. omission to act) of a State to take protective action with regard to its citizens who find themselves on foreign soil. Children's rights are not theoretical, they must be effective in practice. To ensure that effectiveness in practice, a further step in the understanding of grounds for extraterritorial jurisdiction must be taken. In the current cases, the CRC Committee is invited to take such a step, which can be firmly grounded in the Committee's own interpretative practice as well as in jurisprudential and scholarly developments. Over the last few years, the jurisprudence of the Committee in relation to the extraterritorial application of the CRC has grown in depth and diversity of pronouncements, in particular in the context of migration and business and children's rights. In general human rights law, extraterritorial jurisdiction has been accepted when States are in a position to act, in particular when there is a clear link to the State.

In this third-party intervention it is submitted that, in the current cases, France is in a position to take protective action, and that there is a clear link with France through the nationality of the children. In our view, the combination of capability to take protective action and a clear link through nationality creates a ground for jurisdiction, i.e. to have a children's rights obligation. The following relevant contextual aspects should be taken into account in the Committee's approach to jurisdiction:

- a. There is a serious risk of irreparable harm for the children living (or who have lived) in the camps, given their situation of extreme vulnerability.
- b. The inability of the parents to secure through their own efforts the protection of their children.
- c. The territorial state is unable or unwilling to assume jurisdiction in relation to these children and secure their protection.

We conclude with some preliminary thoughts on the nature of such an obligation, which is, however, a question to be decided in the merits stage.

## Authors

Gamze Erdem Türkelli, Postdoctoral Fellow Research Foundation (FWO) Flanders, Law & Development Research Group, University of Antwerp

Wouter Vandenhole, Vice-Dean of Research, Faculty of Law and Chair in Human Rights Law, Law & Development Research Group, University of Antwerp

Meda Couzens, Lecturer, Western Sydney University and Honorary Research Fellow, University of KwaZulu-Natal, Durban South Africa

Chrisje Sandelowsky-Bosman, Researcher, Department of Child Law, Leiden Law School, Leiden University

Ton Liefwaard, Vice-Dean of Leiden Law School & Professor of Children's Rights, UNICEF Chair in Children's Rights, Leiden University



## **Signatories**

Karin Arts, Professor of International law and Development, International Institute of Social Studies (The Hague), Erasmus University Rotterdam

Warren Binford, Professor of Law & Director, Clinical Law Program, Willamette University

Laura Carpaneto, Associate Professor of European Union Law, University of Genoa

Pablo Ceriani Cernadas, Director, Specialization on Migration, Asylum, and Human Rights (Universidad Nacional de Lanús) and Former Vice-chair, UN Committee on Migrant Workers

Aoife Daly, Reader in Law and Deputy Director, European Children's Rights Unit, University of Liverpool

Bina D'Costa, Professor, Department of International Relations, The Australian National University

Ellen Desmet, Professor of Migration Law, Ghent University

Jaap E. Doek, Emeritus Professor of Family and Child Law, VU University Amsterdam and Former Chair UN Committee on the Rights of the Child (2001-2007)

Nicolás Espejo Yaksic, Center for Constitutional Studies of the Supreme Court of Mexico; Visiting Fellow, Exeter College, University of Oxford

Michael Garcia Bochenek, Institute for the Study of Human Rights, Columbia University

Kathryn Hollingsworth, Professor, Newcastle University (UK)

Ursula Kilkelly, Professor of Law, School of Law, University College Cork

Thalia Kruger, Professor of Private International Law, University of Antwerp

Sara Lembrechts, University of Antwerp

Jernej Letnar Čerňič, Associate Professor of Human Rights Law, Faculty of Government and European Studies, New University, Slovenia

Laura Lundy, Co-Director of the Centre for Children's Rights and a Professor in the School of Social Sciences, Education and Social Work at Queen's University, Belfast

Nicholas Munn, Senior Lecturer, Philosophy, University of Waikato, New Zealand

Manfred Nowak, Secretary General of the Global Campus of Human Rights and Former Independent UN Expert leading the Global Study on Children Deprived Of Liberty

Noam Peleg, Senior Lecturer, Faculty of Law, University of New South Wales

Peter R. Rodrigues, Professor of Immigration Law, Leiden University

Kirsten Sandberg, Professor, Department of Public and International Law, University of Oslo and Former member and Chair of the Committee on the Rights of the Child

Julia Sloth-Nielsen, Professor of Children's Rights in the Developing World, Leiden University & Professor of Law, University of the Western Cape

Helen Stalford, Professor of Law and Founding Director, European Children's Rights Unit, School of Law and Social Justice, University of Liverpool

Rebecca Thorburn Stern, Senior Lecturer/Associate Professor, University of Uppsala

Tara Van Ho, Lecturer, University of Essex School of Law and Human Rights Centre

Jinske Verhellen, Associate Professor, Department of Interdisciplinary Study of Law, Private Law and Business Law, Ghent University

## 1. Introduction

We believe that these communications present an important opportunity for the Committee on the Rights of the Child to take the lead in devising a contemporary interpretation of jurisdiction in relation to the application of human rights treaties, in line with its General Comments and Concluding Observations and with the important principle that children's rights must be effective in practice.

This third-party intervention focuses **primarily on the question of jurisdiction** under human rights law generally and children's rights law, specifically, as related to the communications. Due to the complex nature of jurisdictional issues in this matter, which are intertwined with issues concerning the nature of state obligations, brief comments are made on the latter in paragraph 5.1.b below.

## 2. State jurisdiction in general human rights law

Jurisdictional clauses are included in some international human rights instruments,<sup>1</sup> but not in others.<sup>2</sup> Jurisdiction in human rights law is mandatory, rather than permissive as it is in public international law more generally.<sup>3</sup> The mandatory exercise of jurisdiction under human rights law requires States to take positive steps towards the protection of human rights. As a standard rule, States have obligations toward persons within their own territory. Extraterritorial jurisdiction is exceptional and accepted on limited grounds. A routine exercise of mandatory extraterritorial jurisdiction of a State with respect to human rights remains contested, but it is endorsed by an increasing number of international bodies.<sup>4</sup>

The European Court of Human Rights (ECtHR) has considered the extraterritorial exercise of jurisdiction exceptional and, as a rule, circumscribed within strict conditions.<sup>5</sup> The broadest exceptional condition to jurisdiction (being mainly territorial) is effective control, determined as effective control over territory or effective control over persons (*Al-Skeini and Others v. the UK*),<sup>6</sup> which applies particularly when the State party in question is found to be exercising elements of public power. These are now referred to as the spatial and personal model of jurisdiction.

---

<sup>1</sup> Article 2.1 of the International Covenant on Civil and Political Rights, 1966/1976 (ICCPR); European Convention on Human Rights and Fundamental Freedoms, 1951/1953 (ECHR); the American Convention on Human Rights, 1969/1978.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, 1966/1976; The African Charter on Human and Peoples' Rights, 1981

<sup>3</sup> Cedric Ryngaert, "The Concept of Jurisdiction in International Law", in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar, 2015, 54; Alex Mills, "Rethinking Jurisdiction in International Law", in *British Yearbook of International Law: 2013*; Vol. 84, Issue 1, 2014, 194, Footnote 22. See also Cedric Ryngaert, *Jurisdiction in International Law* (2nd Edition) (Oxford University Press, 2015).

<sup>4</sup> To name but a few, CRC Committee, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights* CRC/C/GC/16 ('General Comment 16') para 38 onward; CEDAW General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/GC/28, 16 December 2010, para 12; Human Rights Committee *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* CCPR/C/GC/36 para 63.

<sup>5</sup> ECtHR, *Banković and others v. Belgium and others* (Grand Chamber), Application No. 52207/99, 12 December 2001, para 59.

<sup>6</sup> *Al-Skeini and Others v. the UK* ECtHR (Grand Chamber), Application No. 55721/07, 11 July 2011.

The Inter-American Commission on Human Rights too has focused on control over persons as the ground for triggering extraterritorial jurisdiction (*Coard et al. v. United States, Alejandre et al. v. Cuba*). In *Alejandre et al. v. Cuba*, the Commission interpreted the exercise of jurisdiction not in relation to specific nationality or presence in a specific territory but also in relation to whether ‘the state observed the rights of a person subject to its authority and control’.<sup>7</sup> In *Franklin Guillermo Aisalla Molina*, the Inter-American Commission held that ‘although jurisdiction usually refers to the authority over persons that are found in the territory of a State, human rights are inherent to all human beings and are not based on citizenship or residence’.<sup>8</sup> Consequently, the Commission established the extraterritorial jurisdiction of States over individuals abroad that were found to be under the control of that State’s agents. More recently, the Inter-American Court of Human Rights reassessed the question of jurisdiction with respect to transboundary environmental harm and it reaffirmed the exceptional nature of extraterritorial jurisdiction based on a restricted set of criteria.<sup>9</sup> Yet, the Court also opined that the interpretation of extraterritorial jurisdiction linked to human rights obligations ‘must be justified based on the particular circumstances of the specific case’.<sup>10</sup>

The exceptional grounds for extraterritorial jurisdiction as described above seem to be primarily concerned with a physical long arm of the state: effective authority or control exercised by state agents over a territory or person.

### 3. Jurisdiction in the context of the CRC

Unlike the ICCPR or the ECHR, for example, the Convention on the Rights of the Child (CRC) does not have a general jurisdictional clause. The provision containing the general implementation obligations in Article 4 does not refer to jurisdiction,<sup>11</sup> let alone defines it in relation to territory.<sup>12</sup>

Article 2.1 CRC places an obligation upon States Parties to ‘respect and ensure’ children’s rights ‘to each child within their jurisdiction without discrimination of any kind’. The obligation is not expressly circumscribed to the territory of a State Party. On the contrary, the territoriality condition was deliberately left out of the text of Article 2 CRC.<sup>13</sup> In an earlier draft of Article 2 CRC, the applicability of the CRC was explicitly linked to jurisdiction *and* the

---

<sup>7</sup> Inter-American Commission on Human Rights, *Alejandre et al. v. Cuba*, Case 11.589, Report No. 86/99, September 29, 1999, para. 23.

<sup>8</sup> CIDH, *Franklin Guillermo Aisalla Molina (Ecuador Vs. Colombia)*, Informe de admisibilidad No. 112/10 de 21 de octubre de 2011, pra. 91.

<sup>9</sup> *State Obligations in relation to the Environment I the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017), para. 81.

<sup>10</sup> *Ibid* para. 81.

<sup>11</sup> On the other hand, Article 5.1 OPIC refers to jurisdiction as a condition of responsibility: ‘Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party:…’.

<sup>12</sup> Gamze Erdem Türkelli, *Children’s Rights and Business: Governing Obligations and Responsibility* (Cambridge University Press, 2020). This does not, of course, mean that the concept of jurisdiction does not apply in a CRC context, as the Committee has clearly recognised that ‘[u]nder the Convention, States have the obligation to respect and ensure children’s rights within their jurisdiction’ (General Comment 16 part C p 6).

<sup>13</sup> 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).

territory of a State Party.<sup>14</sup> The Finnish delegation proposed that ‘in order to cover every possible situation’, the territoriality requirement be relinquished and that only the concept of jurisdiction be retained.<sup>15</sup> The final version of Article 2.1 reflects only the concept of jurisdiction, an indication that jurisdiction under the CRC was not intended by the drafting parties to be exclusively territorial.

A further indication of extraterritorial jurisdiction with respect to children’s rights obligations is found in Articles 4.2 and 5.4 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC-OPSC), which enjoins states to extend their criminal jurisdiction in relation to certain sexual offences committed against children, outside their territory, either by their nationals or residents, or against a child who is their national.

What these texts show, cumulatively, is that extraterritorial jurisdiction under the CRC and its optional protocols is not excluded. Instead, it is clearly acknowledged: States Parties to the CRC and its optional protocols do have children’s rights obligations beyond their territories.

The CRC Committee has strengthened this approach by recognizing both in its General Comments and in its Concluding Observations that jurisdiction under the CRC is not solely territorial.<sup>16</sup> The CRC Committee has espoused ‘a de facto rather than a de iure approach in order to decide whether someone is subject to a State’s jurisdiction’, and this approach did not exclude extraterritorial jurisdiction under the CRC.<sup>17</sup>

Over the last few years, the jurisprudence of the Committee in relation to the extraterritorial application of the CRC has grown in depth and diversity of pronouncements. The areas where views on the extraterritorial application of the CRC have been expressed most comprehensively are those of migration and business and human rights, as shown below.

In the migration context, the Committee held that under the CRC, states should take some extraterritorial responsibility for the protection of child-nationals outside their territory, through devising child-responsive consular policies and services,<sup>18</sup> or even by taking measures ‘to assist the safe, voluntary and dignified return of Syrian children’.<sup>19</sup> It enjoined destination states to develop family reunification procedures so as to avoid irregular and thus unsafe migration for children who remain in their countries of origin after the migration of their

---

<sup>14</sup> Maarten den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of “Jurisdiction”’ in Vandenhoe et al., *Global justice, state duties: the extraterritorial scope of economic, social, and cultural rights in international law* (Cambridge University Press 2013), 161, with reference to Sharon Detrick, *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”* (Martinus Nijhoff Publishers 1992).

<sup>15</sup> *Ibid.*

<sup>16</sup> 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, International Journal of Children’s Rights* 17 (2009) 23–63.

<sup>17</sup> 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, International Journal of Children’s Rights* 17 (2009) 23–63, p. 48.

<sup>18</sup> *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* CMW/C/GC/4-CRC/C/GC/23 (*General Comment 23*), 16 November 2017, paras 17(e) and 19.

<sup>19</sup> CRC Committee, *Concluding observations on the fifth periodic report of the Syrian Arab Republic* CRC/C/SYR/CO/5, 6 March 2019, para 47.

families.<sup>20</sup> Further, the Committee considered that migrant children are under a State Party's jurisdiction if they have almost reached the border and the state authorities could offer them a helping hand.<sup>21</sup>

The Committee's most elaborated position in relation to extraterritorial jurisdiction is in its General Comment 16 concerning business and children's rights.<sup>22</sup> After reiterating its position that a State's jurisdiction in relation to the application of the CRC may extend beyond its territory,<sup>23</sup> the Committee builds its vision of extraterritoriality on three pillars or conditions: 1) an obligation to engage in international cooperation;<sup>24</sup> 2) a reasonable link with the state that exercises jurisdiction;<sup>25</sup> and 3) respect for international law (including the UN Charter, general international law and the obligations of other states under the CRC).<sup>26</sup> Although formulated in the context of business and human rights, these pillars can provide a workable framework for the development by the Committee of a coherent approach to extraterritorial jurisdiction, infused with a children's rights perspective.

A reasonable link justifying jurisdiction could be assumed in case of nationality or citizenship. We submit that there is clear and therefore reasonable link between the authors and France, which primarily revolves around the nationality of the children and/or their parents. The existence of such a link does not seem to be contested by the French Government. Consequently, it can be argued that, also in light of the obligation formulated in article 4 CRC's obligation to engage in international cooperation in order to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]', the children fall within the jurisdiction of France. This submission finds support in the fact that the children in northern Syria find themselves in a *de facto* legal void, so to speak, with a non-state actor as opposed to the internationally recognized domestic state exercising effective control over the territory. In this *de facto* situation, the one state that has irrefutable legal links to the children who are its nationals is France.

We now turn to the protective obligations of States, which, as was mentioned before, is intertwined with the issue of jurisdiction.

#### **4. Protective obligations and children's rights**

Counter-terrorism measures taken recently by States have raised many questions in relation to the extraterritorial application of human rights treaties, including in relation to the protective responsibilities of States of origin of foreign terrorist fighters and their children. There is some international support for the view that States of origin have some protective responsibilities, some of which having been linked to the CRC.

Upon her visit to France, the Special Rapporteur on Counter-terrorism concluded that 'the absence of active engagement with the conditions and status of these French nationals

---

<sup>20</sup> CRC Committee *General Comment 23*, para 37.

<sup>21</sup> *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, para 12.

<sup>22</sup> CRC Committee, *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16.

<sup>23</sup> *General Comment 16*, para 39.

<sup>24</sup> *General comment 16*, para 41. See Article 4 CRC.

<sup>25</sup> *General comment 16*, para 43.

<sup>26</sup> *Ibid*, paras 43 and 42.



constitutes an abrogation of responsibility to citizens, including minors, being held in extremity, many of whom are owed special obligations due to their age, destitution and vulnerability under international law'.<sup>27</sup> The source of these 'special obligations' was, according to the Special Rapporteur, Articles 3 and 5 of the CRC, and one of the Concluding Observations of the Committee (CRC/C/VAT/CO/2).<sup>28</sup> Although France explicitly rejected some of the findings of the Special Rapporteur,<sup>29</sup> it did not challenge her views in relation to the protective obligations owed by France to the children held in conflict zones.

Support for the extraterritorial protective role of states of origin in relation to the children of foreign fighters has also been expressed by the United Nations High Commissioner for Human Rights,<sup>30</sup> who urged states to provide consular support and assistance, including for the purposes of return to the country of origin or to enter the parents' country of origin.<sup>31</sup> The High Commissioner commended states who repatriated foreign fighters and their children and recommended that others follow that example.<sup>32</sup> The OSCE has also recommended that member states enable the return of children who have 'meaningful links'<sup>33</sup> or 'substantial links'<sup>34</sup> to those states. Going even further, an Office for Democratic Institutions and Human Rights (OSCE) report argued that '[f]or those currently left without protection and support, states should consider when repatriation ... is required on the basis of acting in the best interests of the child'.<sup>35</sup>

The Special Representative of the Secretary-General for Children and Armed Conflict urged the repatriation of children detained in Syrian camps by states of nationality.<sup>36</sup> In its 2019 Concluding Observations in relation to Belgium, the Committee recommended that the state 'promptly facilitate the repatriation of all Belgian children and, wherever possible, their families...'.<sup>37</sup> Paragraph 26 of Resolution 2427 (2018) adopted by the Security Council at its 8305<sup>th</sup> meeting, on 9 July 2018, mentioned by the Committee in the preceding paragraph, encouraged states to facilitate the return of children to their countries of origin. The Special Rapporteur on Counter-terrorism has commended Kazakhstan for enabling the return of

---

<sup>27</sup> Human Rights Council, *Visit to France, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/HRC/40/52/Add.4, 8 May 2019, para 47.

<sup>28</sup> *Ibid*, fn 52.

<sup>29</sup> Rapport de la Rapporteuse spécial sur la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste sur sa visite en France, Commentaires de l'État A/HRC/40/52/Add.9, 20 February 2019.

<sup>30</sup> United Nations High Commissioner for Human Rights 'Protection of human rights and fundamental freedoms while countering terrorism' A/HRC/40/28, 10 January 2019.

<sup>31</sup> A/HRC/40/28, 10 January 2019, para 66 (both quotes).

<sup>32</sup> *Opening statement by UN High Commissioner for Human Rights Michelle Bachelet*, 41st session of the Human Rights Council, 24 June 2019 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24724&LangID=E> Similar views were expressed by Panos Moutzisz, the UN regional coordinator for Syria, quoted by PressTV, 'UN chides EU for refusing to take back its members of Daesh', 18 April 2019 (online, 8 July 2019) <<https://www.presstv.com/Detail/2019/04/18/593758/Syria--alHol-camp-UN-Europe-Britain-US-Panos-Moutzisz>>

<sup>33</sup> OSCE *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework*, 2018 at 68 <https://www.osce.org/odihr/393503?download=true>

<sup>34</sup> *Ibid* at 68.

<sup>35</sup> *Ibid* at 71.

<sup>36</sup> Children and armed conflict, Report of the Special Representative of the Secretary-General for Children and Armed Conflict A/HRC/40/49, Fortieth session Human Rights Council 25 February–22 March 2019, Para 20.

<sup>37</sup> Concluding observations on the combined fifth and sixth periodic reports of Belgium, CRC/C/BEL/CO/5-6, 2019 para 50.

foreign fighters and their families, including children, which it considered a ‘positive implementation of its international obligations...’.<sup>38</sup>

State practice suggests that some states have extended to a certain extent their jurisdiction in relation to children affected by terrorism. In Australia, a temporary exclusion order under the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) can be made against a child aged 14-17 if the child is abroad and the relevant Minister has considered the best interests of the child as a primary consideration.<sup>39</sup> By requiring that the Minister considers the best interests of a child abroad, the Act authorises the extraterritorial application of the best interests of the child. Notably, the requirement that the best interests of the child be considered was introduced in the Act with reference to the country’s obligations under Article 3 of the CRC.<sup>40</sup> At the occasion of the 30<sup>th</sup> Anniversary of the CRC, the European Parliament issued a resolution in which it expressed its ‘gravest concern regarding the humanitarian situation of children of foreign fighters held in north-east Syria’ and it urged EU Member States ‘to repatriate all European children, taking into account their specific family situations and the best interests of the child as a primary consideration, and to provide the necessary support for their rehabilitation and reintegration’.<sup>41</sup> The European Parliament also criticised ‘the lack of action hitherto of EU Member States and the absence of coordination at EU level’.

Courts in Belgium and Germany have ordered the repatriation of some mothers and their children from Syria.<sup>42</sup> A court in Austria reportedly granted the custody of two orphan children held in Al-Hol Camp to their Austrian grandmother, paving the way for the children to be brought home by the Austrian authorities.<sup>43</sup> UK courts used their wardship jurisdiction to make orders concerning children who were removed from the UK by their parents, who were intent on joining or had joined ISIL abroad.<sup>44</sup> In some cases, the courts decided that their inherent protective jurisdiction was exercised on the basis of the nationality of the child.<sup>45</sup> In England, the Children’s Commissioner expressed the view that the state has a ‘duty of care towards British children abroad’ pointing out that ‘this duty has been specifically upheld in relation to children abroad who have been caught up in the Syrian conflict’.<sup>46</sup> A number of European

---

<sup>38</sup> Human Rights Council, *Visit to Kazakhstan, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/HRC/43/46/Add.1, 22 January 2020 para 9.

<sup>39</sup> Sections 10(3) and 10(4) of the Act.

<sup>40</sup> House of Representatives, *Counter-terrorism (Temporary Exclusion Orders) Bill 2019, Explanatory Memorandum* (July 2019) para 69 at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r6361](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6361).

<sup>41</sup> Res. 2019/2876(RSP), para. 61; <[https://www.europarl.europa.eu/doceo/document/TA-9-2019-0066\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0066_EN.html)>

<sup>42</sup> Rik Coolsaet, Thomas Renard ‘Foreign Fighters and the Terrorist Threat in Belgium’, Royal Institute for International Relations, 10 January 2020 < <http://www.egmontinstitute.be/foreign-fighters-and-the-terrorist-threat-in-belgium/> > See also Higher Administrative Court of Berlin and Brandenburg (Germany), ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), ordering the German State to repatriate a mother and her children.

<sup>43</sup> The New Arab ‘Syrian Kurds repatriate Islamic State orphans to Austria’ 3 October 2019 < <https://english.alaraby.co.uk/english/news/2019/10/3/syrian-kurds-repatriate-islamic-state-orphans-to-austria> >.

<sup>44</sup> In the matter of M (Children) [2015] EWHC 1433 (Fam); Re Orphans from Syria [2019] EWHC 3202 (Fam).

<sup>45</sup> In the matter of M (Children) [2015] EWHC 1433 (Fam); In the matter of B (A Child) [2016] UKSC 4 per Lady Hale and Lord Toulson paras 58-62.

<sup>46</sup> Anne Longfield, Children’s Commissioner for England, Letter to the Secretary of State for Foreign and Commonwealth Office, 5 November 2019 < <https://www.childrenscommissioner.gov.uk/2019/11/05/response-to-the-home-and-foreign-secretaries-regarding-british-children-in-syria/> > (both quotes). The Commissioner was responding to a letter from the UK executive, in which the contrary view was held. See Foreign and Commonwealth Office and Home Office (not dated)

countries have incidentally repatriated small numbers of children, including Kosovo, Sweden, Belgium, Norway, Germany, Austria, Finland, Denmark, the UK, the Netherlands and France.<sup>47</sup>

## **5. Intervention with regards to the communications**

We acknowledge that the situation before the Committee on the Rights of the Child is a rather novel situation with respect to jurisdictional questions. The jurisprudence of regional human rights systems has thus far been linked to action taken by States Parties, including military occupation, acts against citizens of one State by agents of another State, and more recently the use of drones. The submission to the Committee, on the other hand, concerns an omission or inaction of the State in question to take protective action with regard to its nationals that are abroad. Thus, the question is whether a State's failure to take action to protect its nationals who are children abroad can give rise to international legal responsibility for violations of rights enshrined in the CRC. This is de facto a different issue to the existing case law from the ECtHR and the IACtHR requiring an assessment of extraterritorial jurisdiction from the ECtHR and the IACtHR. For this reason, a different approach to existing case law may be warranted.

### **5.1. Can this new situation be argued to come within the jurisdiction of a State?**

#### **a. How can jurisdiction be construed beyond the spatial and personal model**

Conceptualisations of human rights jurisdiction beyond the notion of control (over territory or individuals) also exist. For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, are an authoritative scholarly effort on extraterritorial obligations. The Principles define jurisdiction not only in terms of authority or effective control, but also as arising in situations resulting from acts or omissions of a State with foreseeable human rights impacts extraterritorially, or in situations where the state could reasonably "exercise decisive influence" or "take measures" for the realisation of human rights. We are of the opinion that the latter is of particular interest to the Committee in the present communication.

The Maastricht approach finds support in the work of the Human Rights Committee. In its General Comment 36 in relation to the right to life, the Human Rights Committee acknowledged jurisdiction over:

all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.<sup>48</sup>

Another proposal may be to take territoriality out of the equation. The Concurring Opinion of Judge Bonello in *Al-Skeini and Others v. the United Kingdom* (ECtHR) proposed a test of

---

<https://www.childrenscommissioner.gov.uk/2019/11/05/response-to-the-home-and-foreign-secretaries-regarding-british-children-in-syria/> .

<sup>47</sup> Emma Broches, 'What is Happening With the Foreign Women and Children in SDF Custody in Syria?' Lawfareblog (24 March 2020) <<https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria>>

<sup>48</sup> Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* CCPR/C/GC/36, para 63 (fns omitted).

“functional jurisdiction” in lieu of extraterritorial jurisdiction. As Judge Bonello astutely observed in the case of the European Convention:

The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human rights law. In Article 1 they undertook to secure *to everyone within their jurisdiction* the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its Preamble: “the *universal* and effective recognition and observance” of fundamental human rights. “Universal” hardly suggests an observance parcelled off by territory on the checkerboard of geography.<sup>49</sup>

Accordingly, Judge Bonello proposed that a functional jurisdiction test should inquire whether “*the observance or the breach of [minimum human rights] functions is within [a given State’s] authority and control*” where such functions are: 1. Not violating human rights, 2. “having in place systems which prevent breaches of human rights”, 3. “investigating complaints of human rights abuses”, 4. “scourging those of their agents who infringe human rights” and 5. “compensating the victims of breaches of human rights”.<sup>50</sup> In summary, Judge Bonello notes 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>51</sup>

We believe that this case requires the CRC Committee to broadly consider the children’s rights obligations of France with respect to the children subject of this communication and found outside of its territory, who are its nationals.

#### **b. Nature of the obligation**

With respect to the merits of the communication, the nature of the extraterritorial obligations incumbent upon France could be construed similar to situations where concurrent jurisdiction is being exercised over a territory by multiple States. In this respect, although France does not have effective control in the area where the applicants are geographically found, it has positive obligations to take all appropriate measures and pursue all avenues legally and diplomatically to protect the rights of the children in question (ECtHR, *Ilascu v. Moldova*).

The children concerned by the applications *H. and A. v. the Republic of France* and *X. and X. v. France* were found in the territory of Syria, under the effective control of a non-State actor (Kurdish forces). We believe that the nature of the obligation incumbent upon France to take all appropriate measures and pursue all avenues legally and diplomatically to protect the rights of the children in question was not prejudiced by the fact that the geographical location where the children were found was under the effective control of a non-state actor. In fact, some reports have suggested that ‘[i]t is eminently possible to repatriate these families, there is no practical barrier to it, all that is needed at the moment is the political will to do so’.<sup>52</sup>

---

<sup>49</sup> Concurring Opinion of Judge Bonello, *Al-Skeini and Others v. the United Kingdom* (ECtHR), para. 9. (Emphasis in the original)

<sup>50</sup> *Ibid*, paras 11 and 10, respectively. (Emphasis in the original)

<sup>51</sup> *Ibid*, para. 12. (Emphasis in the original)

<sup>52</sup> Save the Children’s director of international programs and policy, Mat Tinkler cited by Ben Doherty ‘Three-year-old Australian girl in Syria’s al-Hawl camp may lose fingers to frostbite’, *The Guardian* 17 February 2020 (online, 17 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/17/three-year-old-australian-girl-in-syrias-al-hawl-camp-may-lose-fingers-to-frostbite>>

France itself has repatriated 17 children,<sup>53</sup> and the Committee recommended the engagement with the Kurdish-led authorities in order to take appropriate protective measures in relation to the children born to non-Syrian mothers, and held in camps for internally displaced persons.<sup>54</sup>

## 6. Conclusion

In developing its approach to the application of the CRC in cases such as the present one, we encourage the Committee to develop a forward-looking approach that considers the important role which extraterritorial jurisdiction can have in ensuring an effective protection for rights included in the CRC. This approach can be based on the pillars formulated by the Committee in General Comment 16, and further developed with a due consideration given to other relevant factors, including the special features of the CRC and contextual factors.

The development of a child-rights focused approach to the extraterritorial application of the CRC aligns with the consistent child-centred interpretation and application of the CRC by the Committee. The Committee has been willing to craft its own child-focused content relating to the rights of children, and should do the same in relation to the extraterritorial application of the Convention. The Convention provides the Committee with tools to give a child-focused imprimatur to its approach to jurisdiction. The best interests of the child provision in article 3(1) has been a central provision on which the Committee has relied on to build its child-centred approach to human rights. This can also provide support for the development of a robust approach to the extraterritorial application of the Convention.

Consideration of the context of the current application is essential and may assist the Committee in developing an approach which is not unduly wide and perceived as unfair by the states parties, but that at the same time is capable of ensuring an adequate protection of the children involved. We support the views espoused by the OSCE that the question as to whether children such as the ones involved in this application come under the jurisdiction of the states under the CRC ‘should be interpreted flexibly, in favour of the child, given the extreme stakes for the children in question’.<sup>55</sup>

The Committee has already acknowledged that in order for the protection of children’s rights to be effective, a dynamic interpretation of the Convention is needed. It is perhaps not a coincidence that this point was strongly emphasized by the Committee in the context of migration, which poses jurisdictional challenges because of its trans-frontier nature.<sup>56</sup>

We are of the view that the following contextual aspects should be taken into account in the Committee’s approach to jurisdiction:

- a. There is a serious risk of irreparable harm in relation to children living in the camps, given their situation of extreme vulnerability.

---

<sup>53</sup> Emma Broches, ‘What is Happening With the Foreign Women and Children in SDF Custody in Syria?’ Lawfareblog (24 March 2020) <<https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria>> accessed 14 May 2020; France repatriated 17 children in 2019.

<sup>54</sup> Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the Syrian Arab Republic* CRC/C/SYR/CO/5, 6 March 2019, para 51(g). The expectation of engagement and dialogue between the government and the Kurdish forces has also been expressed by the Committee in para 44(f).

<sup>55</sup> OSCE Report fn 70.

<sup>56</sup> *Joint General Comment No. 3* para 20.

- b. The inability of the parents to secure through their own efforts the protection of their children.
- c. The territorial state is unable or unwilling to assume jurisdiction in relation to these children and secure their protection. In one of its recent Views, the Committee said:

The evaluation of a risk for a child to be submitted (sic) to an irreversible harmful (sic) practice such as female genital mutilation in the country to which he or she is being returned should be adopted following the principle of precaution, and where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from returning the child.<sup>57</sup>

The Committee suggests that the principle of precaution (i.e. retaining the child within the jurisdiction of a state capable of ensuring protection) should apply when there are reasonable doubts that another state under whose jurisdiction a child is found cannot protect the child. Although the principle of precaution has been formulated in a different context, it can be developed and adapted so as to make it relevant for the situation of French children held in camps for reasons of their association with ISIL.

- d. In a situation such as in the present case, the extra-territorial jurisdiction of the state of nationality is a jurisdiction of a last resort which is engaged as a result of the absence of a reasonable link between the *de jure* sovereign state and the children and their families. The state of nationality would not be entitled to exercise complete jurisdiction if the *de jure* sovereign is able and willing to exercise jurisdiction in relation to children and their families.<sup>58</sup>
- e. Factors such as the ones mentioned above prevent an excessive extension of the extraterritorial jurisdiction of the state of nationality, by limiting it to exceptional situations.

Consideration of the above factors, of the provisions of the CRC and of the existing jurisprudence of the Committee would enable the Committee to develop an approach to extraterritorial jurisdiction that responds to the increasingly complex contexts, legal and factual, in which CRC rights are threatened and infringed upon.

---

<sup>57</sup> Views adopted by the CRC Committee in respect of Communication No. 3/2016 (I.A.M v Denmark), 25 January 2018, para 11.9.

<sup>58</sup> In this case, the state of nationality would be able to protect its nationals through the exercise of its right to diplomatic protection.