

Submission by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on arbitrary, summary and extra-judicial executions in the case of *H.F. and M.F. v. France* (Application no. 24384/19) before the European Court of Human Rights

INTRODUCTION

1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established pursuant to Human Rights Council resolution 40/16 and the United Nations Special Rapporteur on arbitrary, summary and extra-judicial executions established pursuant to Human Rights Council resolution 35/15 have the honour to submit this amicus brief in the case of *H.F. and M.F. v. France* for the consideration of the European Court of Human Rights.
2. The submission of the present amicus brief is provided by the Special Rapporteurs on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.
3. The Special Rapporteur on the promotion and protection of human rights while countering terrorism reports regularly to the UN Human Rights Council and General Assembly. Having consistently addressed issues of return and repatriation of individuals, including women and children, from conflict affected areas, particularly in North East Syria and Iraq¹, this issue relates to the core work and concerns of this mandate.
4. Similarly, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reports regularly to the UN Human Rights Council and the General Assembly. She has worked on the arbitrary deprivations of life and arbitrary killings or the risks of such violations in Iraq and north East Syria, including in relation to members of armed groups

¹ See Statement on repatriation and prosecution of foreign fighters and their families, Joint Regional High-level Conference convened by the OSCE, UNOCT and Switzerland, in cooperation with the Albanian OSCE Chairmanship on “Foreign Terrorist Fighters – Addressing Current Challenges” (11-12 February 2020); Joint Statement on Human Rights and Humanitarian Concerns Related to Conflict Affected Women and Children in Syria and Iraq, 11 November 2019; Position of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Consultation meeting with Experts on the return of “Foreign Fighters” and their families to Europe organised by the Council of Europe Commissioner for Human Rights, 25 September 2019, Paris. These statements are all available at: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx>. See also the Statement on United Nations Security Council Draft Resolution on the Financing of Terrorism: Protecting and Safeguarding Humanitarian Actions, 22 March 2019;

or their families, and communicated with Member States on their responsibilities their nationals held abroad.²

5. As a result, the Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions are in a unique position to assess the broad human rights implications related to a State's refusal to return and repatriate individuals detained in camps in North East Syria to the European Court of Human Rights (ECtHR). This case offers an opportunity for the Court, in addressing this important issue, to set international best practice for compliance with human rights standards.
6. The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on arbitrary, summary and extra-judicial executions take this opportunity to set out their views, a significant portion of which are already in the public domain, concerning the legal status of children and their mothers who are located in camps, prisons, or elsewhere in the northern Syrian Arab Republic, and concurring obligation of their States of origin.
7. The Special Rapporteur on the promotion and protection of human rights while countering terrorism notes her extensive engagement with the French authorities on this issue and her specific recommendations to France following her country visit in 2018.³ She noted that the absence of active engagement with the conditions and status of French nationals detained in camps in Syria 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. She urged France to proactively address through all possible means the deficiencies of courts adjudicating their nationals which do not observe essential rights to fair trial or the humane treatment of prisoners, noting in particular France's relevant positionality to assist women and children associated with foreign fighters who may be victims of terrorism or trafficking.⁴

GENERAL POSITION ON RETURN AND REPATRIATION OF INDIVIDUALS DEPRIVED OF LIBERTY IN NORTH EAST SYRIA

8. The Special Rapporteurs recall their clear and consistent positions that the urgent return and repatriation of foreign fighters and their families from conflict zones is the only international law-compliant response to the increasingly complex and precarious human rights, humanitarian and security situation faced by those women, men and children who are detained in inhumane conditions in overcrowded camps, prisons, or elsewhere in the northern Syrian Arab Republic and Iraq. Such return is a comprehensive response that amounts to a positive implementation of Security Council resolutions 2178 (2014) and 2396 (2017)⁵ and is considerate of a State's long-term security interests.

² FRA 8/2019; CAN 2/2020; IRL 3/2019; AUS 7/2018; ARM 7/3028; TUN 5/2018; FR/10/2018; BEL/05/2020; among others. See also A/HRC/38/44/Add.1; A/74/318 (consular assistance); A/73/314

³ https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/52/Add.4.

⁴ A/HRC/40/52/Add.4, para. 47.

⁵ These resolutions, adopted under chapter VII of the Charter of the United Nations, are binding on all UN Member States.

9. The Special Rapporteurs further stress that an effective return process includes holding individuals accountable⁶ for serious violations of national and international law for the crimes committed in Syria and Iraq.⁷ It is, in fact, the only way to close the gaping impunity gap for which the inadequate and dysfunctional judicial systems in both Iraq and Syria are not an answer.

SPECIFIC POSITION ON THE DUTY TO TAKE STEPS TO PROTECT THE FUNDAMENTAL RIGHTS OF INDIVIDUALS DETAINED IN NORTH EAST SYRIA

10. While the issue of jurisdiction is further elaborated on below, the Special Rapporteurs would like to underscore a few points of relevance to their position on returns, which is rooted in a duty to act with due diligence and take positive steps and effective measures to protect vulnerable individuals, notably women and children, located outside of their territory where they are at risk of serious human rights violations or abuses, and where their actions or omissions can positively impact on these individual's human rights.
11. It is now well established that a state's responsibility may be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.⁸ The Court has also recognized that there can be positive obligations under Article 1 of the ECHR to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the rights guaranteed by the convention.⁹

⁶ See e.g. G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005), underscoring that “international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity” (Preamble) and that “[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.” (Annex, para. 4). See also Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” (Preamble). See also UN S.C. Res. 1373 (2001) requesting all States to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts,” para. 2(e); UN S.C. Res. 2178 (2014) in which the SC decided that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense” (para. 6); UN S.C. Res. 2396 (2017) which similarly referred to prosecution in its Preamble, as well as in paras. 1, 20, 30 and 31.

⁷ <https://news.un.org/en/story/2020/01/1056142>

⁸ On the principle of extraterritorial jurisdiction, see ECtHR, *Soering v. The United Kingdom*, 7 July 1989, app. no. 14038/88; ECtHR, *Drozd and Janousek v. France and Spain*, 26 June 1992, app. no. 12747/87;

⁹ ECtHR, *Ilascu and Others v. Moldova and Russia* (48787/99) (2004), paras. 317 and 330-31. See also Human Rights Committee *Vidal Martins v. Uruguay*, Communication No. [57/1979](#), 23 March 1982, para.

12. This is particularly relevant, in the Special Rapporteurs' view, where a State's actions and omissions can impact on and provide protection to rights that are essential to the preservation of values enshrined in the Convention, human dignity and the rule of law and amount to jus cogens or non-derogable customary law norms.¹⁰ Indeed, such reasoning is inherent to existing prohibitions relating to the transfer of individuals between jurisdictions where the effect of such transfer would be to subject individuals to treatment that is contrary to fundamental human rights, including arbitrary deprivation of life, including a real-risk of being subjected to the death penalty,¹¹ torture, ill-treatment and flagrant denial of justice, however heinous the crimes allegedly committed, or how 'undesirable or dangerous' the activities of the individual.. Similarly, the State's obligation to take positive preventive operational measures to protect the right to life¹², and the State's positive obligation to provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge is well established in the law of the ECtHR.¹³ It is also an inherently relevant aspect to the reasoning of the UN Human Rights Committee in relation to the right to life, namely that a State may exercise control over a person's rights by carrying out activities which impact them in a direct and reasonably foreseeable manner,¹⁴ meaning that a State's responsibility to protect may thus be invoked extra-territorially in circumstances where that particular State has the capacity to protect the right to life against an immediate or foreseeable threat to life. The determination of whether States have acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or

7, concerning State jurisdiction over nationals living abroad in relation to the State's exercise of the power to issue a passport.

¹⁰ Other examples of the link between prevention and obligations beyond the principle of jurisdiction can be found in the exclusionary rule contained in article 15 of the CAT and included in article 3 of the ECHR: judicial and administrative authorities of states parties are prevented from invoking information extracted by torture in any proceedings, irrespective of the facts of where and by whom the respective act of torture was perpetrated. According to Manfred Nowak, "in the age of globalization, these extraterritorial obligations of the CAT become increasingly important and may also serve as a model for other human rights treaties. To some extent, recently adopted UN Conventions on the Protection of All Persons from Enforced Disappearance and on the Rights of Persons with Disabilities have been modelled on the extraterritorial obligations of the CAT and confirm this global trend". Manfred Nowak, 'Obligations of states to prevent and prohibit torture in an extraterritorial perspective' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania Press 2010).

¹¹ ECtHR, *Al-Nashiri v. Poland*, Application 28761/11, 2014.

¹² ECtHR, *Opuz v Turkey*, Application No 33401/02, 2009; ECtHR, *Osman v United Kingdom*, Application No. 23452/94 (1998), *Z and Others v the United Kingdom* [GC], Application no 29392/95 (2001) and *Talpis v. Italy*, 41237/14.

¹³ Article 3 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, 1989; ECtHR, *Saadi v. Italy* [GC], Application no. [37201/06](#), 2008, ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, 2012.

¹⁴ 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. A State's obligation to take positive preventive operational measures to protect the right to life, and the State's positive obligation to provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge is well established in the law of the ECtHR: *Opuz v Turkey*, Application No 33401/02, 2009; *Osman v United Kingdom*, Application No. 23452/94 (1998), *Z and Others v the United Kingdom* [GC], Application no 29392/95 (2001) and *Talpis v. Italy*, 41237/14 (2017).

should have known of the risks; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm.¹⁵

13. Our mandates have been made aware of sustained contact of a number of States with camp authorities and interventions regarding foreign nationals in the camps.¹⁶ These are reflected in the ability to return some nationals to their countries of origin,¹⁷ or to sufficiently impact on camp authorities to allow or deny family members from accessing individuals in the camps. This, in our view, reveals the exercise of de facto, or constructive, jurisdiction¹⁸ over the conditions of their nationals held in camps specifically because they have the practical ability to bring the detention and attendant violations to an end through repatriation.¹⁹ The mandates are also aware that the SDF have expressed their willingness to assist governments in repatriating their citizens from the camp.
14. The sustained reporting and investigation on the situation in the camps – from UN bodies (including the International independent Commission of Inquiry on the Syrian Arab Republic),²⁰ NGOs and the media²¹ renders it impossible for any State – including France²² – to argue convincingly that they do not know the risks to the mental and physical integrity of those individuals held in northern Syrian Arab Republic, the foreseeable harm, and the seriousness of the harm. In August, the Commission of Inquiry reported that it had reasonable grounds to believe that in holding tens of thousands of individuals in Hawl camp and its annex, the majority of them children, for 18 months with no legal recourse, the Syrian Democratic Forces have held these individuals in inhuman conditions and that in many instances, the on-going internment of these individuals continues to amount to unlawful deprivation of liberty.²³ This has recently

¹⁵ ECtHR, *Osman (Abu Qatada) v. the United Kingdom*, Application No. [23452/94](#), 28 October 1998, at para. 32-33.

¹⁶ This information was gathered by RSI in the course of interviews conducted on the ground in the camps in early February 2020. This information will be published in a forthcoming report from RSI, due for release at the end of October 2020. See also Commission Nationale Consultative des Droits de l’Homme: “It should also be noted that in light of certain pieces of evidence – the close relations with the SDF stemming from a military and diplomatic partnership against IS, the specific prohibition as regards family members of French citizens detained in the camps to come into contact with the latter and the cited holding of a woman in a camp by order of the French authorities against the decision of the Kurdish authorities to release her and put her on house arrest within her family – the French authorities would appear to be genuinely exercising effective control over their nationals within the camps. It does not appear unrealistic to think that the European Court of Human Rights could recognise France’s jurisdiction in such a scenario”, *Opinion on the French Under-Age Nationals Detained in Syrian Camps*, 24 September 2019, pp.8-9.

¹⁷ Since the fall of ISIL, France has repatriated 28 children from the camps in North East Syria.

¹⁸ Note also the position of the Commission Nationale Consultative des Droits de l’Homme: “That French nationals are prevented from returning to national soil is the consequence of a decision on the part of the French authorities and not of the SDF. On the other hand, when France has wished to do so, it has been able, in liaison with the SDF, to repatriate a certain number of children in light of the criteria that it itself adopted. The CNCDH thus considers that the French nationals detained in the camps come under France’s jurisdiction in the meaning of Article 1 of the ECHR”, *Opinion on the French Under-Age Nationals Detained in Syrian Camps*, 24 September 2019, p.8.

¹⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to the 75th session of the General Assembly, October 2020. See <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>

²⁰ <https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/pages/independentinternationalcommission.aspx>.

²¹ See e.g. https://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html

²² Commission Nationale Consultative des Droits de l’Homme, *Opinion on the French Under-Age Nationals Detained in Syrian Camps*, 24 September 2019.

²³ A/HRC/45/31, para. 80.

been acknowledged by both the United Kingdom's Special Immigration Appeals Commission and the Court of Appeal of England and Wales, which accepted that the conditions in both Roj and Hawl were sufficient desperate that they met the threshold of inhuman or degrading treatment for the purposes of Article 3 of the ECHR.²⁴

15. Based on these elements, it is our mandates' view that States, including France, have positive obligations to take necessary and reasonable steps to intervene in favour of their nationals abroad, in particular where there are reasonable grounds to believe that they face treatment in serious violation of fundamental international human rights law and amounting to jus cogens or non-derogable customary law norms. This includes torture or cruel, inhuman or degrading treatment, sexual violence, or deprivation of liberty in grave violation of human rights standards, including arbitrary detention, incommunicado detention, detention that fails to comply with the most basic standards of humanity or against living conditions which endanger their physical and mental health or their life. This duty to act with due diligence to ensure that the lives of their nationals are protected from irreparable harm to their life or to their physical integrity also applies where acts of violence and ill-treatment are committed by state actors or armed groups.²⁵ In the Special Rapporteurs' view, as it is increasingly the case that States can directly or indirectly have impact on the rights of individuals to influence and regulate both their access to rights and their level of protection beyond traditional concepts of 'effective control', jurisdiction, too, must go beyond traditional concepts of control. This is the only way to hold States accountable whenever their actions impact the fundamental human rights of vulnerable individuals, and to ensure that the rights protected by the Convention are not merely theoretical or illusionary and the safeguards afforded by the Convention are effective and practical.
16. In practical terms, a number of actions and measures can be taken in order to positively impact on the fundamental rights of the individuals held in the camps, as the Special Rapporteur on the promotion and protection of human rights has, in the context of her country work, seen operationalized first hand. These include returning individuals to their country of origin, either directly or through counterparts (other States, non-State actors, humanitarian actors) present in the camps. Partnerships can be optimized in tracing, identifying and delivering the practical means to extract individuals from territories under the control of non-state actors and ensure their safe return to home countries.²⁶ A number of steps can be taken to ascertain nationality, obtain assistance from state and non-state actors to move individuals from camps and assist in air transport, and to provide humanitarian assistance and medical care before, during and after transit.²⁷

²⁴ United Kingdom Special Immigration Appeals Commission, *Shamima Begum v. the Secretary of State* Appeal No: SC/163/2019, 7 February 2020, para. 130. See also [2020] EWCA Civ 918 Case No: T2/2020/0644, T3/2020/0645 and T3/2020/0708, Court of Appeal on appeal from SIAC (T2/2020/ 0644) (sitting also as a divisional court in CO/798/2020) (T3/2020/0708) and on appeal from the administrative Court (T3/2020/0645) *Shamima Begum v. SIAC and Secretary of State for the Home Department* and (1) the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism and (2) Liberty, 9 July 2020, para. 11.

²⁵ See the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, 20 August 2019, A/74/318: <https://undocs.org/A/74/318>.

²⁶ A/HRC/43/46/Add.1.

²⁷ Preliminary Findings of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to Kazakhstan: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24637&LangID=E>.

17. The provision of consular assistance and the delivery of identity documents, either directly or through counterparts, can also have a positive impact on the rights of those individuals in the camps, bearing in mind nonetheless that the remedial nature of both diplomatic protection and effective consular assistance frequently means that it cannot effectively prevent an irreparable harm from being committed.²⁸ Conversely, withholding essential life-saving protection from an individual on the grounds of their purported crime, or on the grounds of the purported crimes of their spouses or parents, would violate both the State's obligation to protect the right to life and the prohibition against discrimination. As discussed further below, the attribution of criminal behaviour to children, particularly very young children in the camps, underscores the problematic logic of state positioning in this regard.
18. The Special Rapporteurs are cognisant that States may encounter difficulties at a practical level in exercising their authority and duties in the camps where the women and children are detained in North East Syria. These difficulties do not, however, displace the jurisdictional question, but will have to be taken into account when it comes to assessing the proportionality of the acts or omissions complained of.²⁹

INTERNATIONAL GUIDANCE RELATING TO WOMEN AND CHILDREN ASSOCIATED WITH FOREIGN FIGHTERS

19. France has specific obligations under binding UN Security Council resolutions, most notably 2178 (2014)³⁰ and 2396 (2017),³¹ which impose a legal obligation under Chapter VII of the UN Charter to *inter alia* bring terrorists to justice and to develop and implement appropriate prosecution, rehabilitation and reintegration strategies for returning foreign fighters and their families,³² highlighting the potential vulnerability of women and children who can also be victims of terrorism.³³ The General Assembly has also

²⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Visit to France, 8 May 2019, A/HRC/40/52/Add.4, para. 47. “*The Special Rapporteur wishes to emphasize the important role that effective consular assistance plays as a preventive tool when faced with a risk of flagrant violations or abuses of human rights, while also noting that the remedial nature of diplomatic protection proceedings*”.

²⁹ ECtHR, *Sargysan v. Azerbaidjan*, Application No. 40167/06, 2017, para. 150.

³⁰ Member states are under an obligation “[4] ... to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by ... developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.

³¹ Member States are “Obligated, in accordance with resolution 1373, to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, to develop and implement comprehensive and tailored prosecution, rehabilitation, and reintegration strategies and protocols, in accordance with their obligations under international law, including with respect to foreign terrorist fighters and spouses and children accompanying returning and relocating foreign terrorist fighters, as well as their suitability for rehabilitation.”

³² UN S.C. resolution 2396 (2017), Preamble: “*foreign terrorist fighters may be travelling with family members they brought with them to conflict zones, with families they have formed or family members who were born while in conflict zones*”.

³³ UN S.C. resolution 2396 (2017), para. 31 “*Emphasizes that women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities*”. See also specifically on children: “*noting that children may be especially vulnerable to radicalization to violence and in need of*

recognised the particular vulnerability of children, and the need to respects their rights and protects their dignity in accordance with applicable international law.³⁴

20. These counter-terrorism resolutions echo Security Council resolutions on children and armed conflict, which stress the need to pay particular attention to the treatment of children associated or allegedly associated with armed groups who commit terrorist acts³⁵ and on women in armed conflict which express “deep concern at the full range of threats and human rights violations and abuses experienced by women and girls in armed conflict and post-conflict situations, and recognising that women and girls are particularly at risk and are often specifically targeted and at an increased risk of violence in conflict and post-conflict situations.”³⁶
21. These State obligations have been further developed and contextualised through soft law guidance and initiatives. These include:
 - United Nations, Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups (April 2019)
 - UN Counterterrorism Centre, “Handbook on children affected by the Phenomenon” (2019)
 - CTED, Trend report on the Gender Dimensions of the Response to returning Foreign Terrorist Fighters (February 2019)
 - CTED, Trend Report on the Challenge of Returning and Relocating Foreign Terrorist fighters (March 2018)
 - The UN Global Compact/CTITF Working Group on promoting and protecting human rights and the rule of law while countering terrorism, “Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters” (2018)
 - The Security Council Counter-Terrorism Committee Madrid Guiding Principles on stemming the flow of foreign terrorist fighters (S/2015/939) and the 2018 Addendum to the 2015 Guiding Principles on Foreign Terrorist Fighters (S/2018/1177)
 - United Nations Office on Drugs and Crime, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System (2017), complemented by three training manuals to support practitioners and policymakers in designing and implementing effective interventions: (i) Prevention of Child Recruitment by Terrorist and Violent Extremist Groups; (ii) Justice for Children in the Context of Counter-Terrorism; and (iii) Rehabilitation and Reintegration of Child Victims of Recruitment and Exploitation by Terrorist and Violent Extremist Groups
 - UN High Commissioner for Human Rights, Report on Children, A/HRC/40/28 (2019).

particular social support, such as post-trauma counselling, while stressing that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law” (Preamble) and “Recognizes the particular importance of providing, through a whole of government approach, timely and appropriate reintegration and rehabilitation assistance to children associated with foreign terrorist fighters returning or relocating from conflict zones, including through access to health care, psychosocial support and education programs that contribute to the well-being of children and to sustainable peace and security” (para.36).

³⁴ e.g. General Assembly resolution 72/284 (2018).

³⁵ UN Security Council resolution 2427 (2018), para. 19.

³⁶ UNSC resolution 2467 (2019).

22. Key over-arching principles have been identified by the United Nations system as a whole. First and foremost of these is the recognition that “all measures taken by Member States for the protection, prosecution, repatriation, rehabilitation and reintegration of women and children should be in compliance with their obligations under international law, including international human rights law, international humanitarian law, and international refugee law, as well as international standards and relevant Security Council resolutions. Relevant General Assembly resolutions must also be taken into consideration”.³⁷
23. A second key principle is that of Member States’ “primary responsibility for their own nationals”. Member States “should ensure that their citizens suspected of having committed crimes on the territory of another Member State are treated in accordance with international law, including international human rights law, international humanitarian law and international refugee law, including through the provision of consular assistance”.³⁸
24. A third key principle is that “Member States should ensure that their nationals who are family members of suspected foreign terrorist fighters, and who do not face serious charges, are repatriated for the purposes of prosecution, rehabilitation and/or reintegration, as appropriate”.³⁹ The Special Rapporteurs highlight that this principle is applicable to all family members who do not face serious charges. In the present case, this principle would certainly apply to children of a young age, including L’s children, born in 2014 and 2016. For other family members, including as L, the mother of young children and wife of a deceased alleged foreign fighter, the principle should also apply, save for “serious charges” existing. In this respect, the Special Rapporteur notes that should L face ‘serious charges’, her situation would then be covered by the Chapter 7 provisions of UN Security Council resolutions 1373 (2001),⁴⁰ 2178 (2014)⁴¹ and 2396 (2017)⁴² on the prosecution of foreign fighters and individuals who have committed acts of terrorism.
25. The Principles recall that “[i]nternational human rights law provides that everyone has the right to return to his or her country of nationality. Any limitations to that right must be lawful, pursuant to a legitimate aim and necessary and proportionate to achieve that aim”. While concerned States have the primary responsibility to design and carry out

³⁷ UN, “Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups”, April 2019.

³⁸ UN, “Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups”, April 2019.

³⁹ UN, “Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups”, April 2019.

⁴⁰ “Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”.

⁴¹ Paragraph 6: “Recalls its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice, and decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense: (a) their nationals who travel or attempt to travel from their territories to a State other than their State of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”.

⁴² Member States are “obliged, in accordance with resolution 1373, to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice...”.

repatriations in line with international law and in full respect of the principle of non-refoulement, the International Committee of the Red Cross may facilitate repatriations, and the United Nations system through the Office of the Secretary-General,⁴³ and the Office of Counter-Terrorism (OCT) have consistently indicated their willingness to support the requesting Member State in its responsibility to provide such returnees with the necessary rehabilitation and reintegration support.⁴⁴

SPECIFIC PROTECTION OF WOMEN AND CHILDREN DEPRIVED OF THEIR LIBERTY IN THE CAMPS

26. It is the consistent position of the Special Rapporteurs that returning women and children is a humanitarian and human rights imperative.⁴⁵
27. Children throughout the Syrian Arab Republic remain acutely vulnerable to violence and abuse. The overwhelming impact of the conflict on civilians revealed that children remain victimised on multiple grounds and continue to be denied the protection to which they are entitled under international humanitarian and international human rights law. Since the beginning of the conflict, children in Syria have experienced unabated violations of their rights: they continue to be killed, maimed, injured and orphaned, bearing the brunt of violence perpetrated by warring parties.⁴⁶ The impact on the most basic rights of children is particularly severe and complete. Many of these children are currently detained in inhumane conditions, lacking basic care, sufficient food, shelter from the elements, safe water, adequate sanitation medical services and education. They are exposed to risks of harassment, violence, exploitation and sexual and other forms of abuse. As a result of repeated exposure to violence and insecurity, children exhibit signs of trauma, including psychological and behavioural disorders, as well as chronic fatigue and acute stress.⁴⁷
28. More than 500 individuals, mostly children, died in Hawl in 2019 alone. In August 2020, eight children under the age of five died in Hawl camp in less than a week. Four deaths were caused by malnutrition-related complications and the others were due to dehydration from diarrhoea, heart failure, internal bleeding and hypoglycaemia, according to UNICEF. Covid19 has increased these difficulties, with a reduction in the number of humanitarian workers operating in the camp. Children in Hawl suffer from malnutrition, infectious diseases and measles.
29. Most families of foreign ISIL fighters, including children, are being held in a legal limbo, in squalid living conditions and with meagre prospects to return.⁴⁸ Women and children

⁴³ Cf. Secretary-General's Foreword to UN, "Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups", April 2019.

⁴⁴ UN, "Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups", April 2019.

⁴⁵ Noting the joint position of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism with the Special Representative of the UNSG on Children in Armed Conflict <https://childrenandarmedconflict.un.org/2019/11/joint-statement-on-human-rights-and-humanitarian-concerns-related-to-conflict-affected-women-and-children-in-syria-and-iraq/>.

⁴⁶ Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, "They have erased the dreams of my children": children's rights in the Syrian Arab Republic, A/HRC/43/CRP.6, 20 January 2020, para.2.

⁴⁷ A/HRC/43/CRP.6, para. 3.

⁴⁸ A/HRC/43/57, para. 60.

with links to foreign ISIL fighters suffer discrimination on the basis of their perceived affiliation with the group. They face restrictions on their movements and access to (sometimes refusal of) medical facilities, as well as harassment, abuse and looting of tents by camp guards.⁴⁹ Inside camps in areas under the control of the SDF, foreign children with familial links to ISIL fighters “languish in despair while increasingly vulnerable to abuse, years after they were brought into the country”.⁵⁰ The trauma experienced by minors (and adults) didn’t stop with the physical liberation from ISIS: the placement in detention centres has prolonged physical isolation and deprivation and solidified their new identity as ‘IS families’.⁵¹ Many children carry the stigma of association, whether they were involved or not, and face rejection, and reprisals from their home communities, which might lead into re-recruitment by armed groups.⁵²

30. According to the Convention on the rights of the Child (UNCRC)⁵³ and its Optional Protocols, children must always be treated primarily as victims, while the best interest of the child must always be a primary consideration. Under the UNCRC, children have the right to life (Article 6); physical and mental wellbeing, care and protection (Articles 3, 19, 36); birth registration, name and nationality (Article 7); identity (Article 8); play, leisure and culture (Article 31); and an adequate standard of living (Article 27), all of which are severely impaired in the camps. States must ensure that the rights provided for in the CRC are respected and that appropriate measures are taken to protect and care for the child (article 3). According to Article 4, these measures need to be undertaken to the maximum extent of the available resources and, where needed, within the framework of international co-operation. States also have an obligation to take all appropriate legislative and administrative measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mistreatment or exploitation, including sexual abuse (Article 19).
31. State reluctance to apply the law governing the treatment of children associated with armed groups (cf. child soldiers) to children in ‘terrorism’ contexts is in direct contravention with the special protection to which they are entitled in accordance with international human rights law and international humanitarian law, including the important legal obligations articulated by States such as France on support to children in situations of armed conflict.⁵⁴ In particular, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires special protection for children including unaccompanied, orphaned, or separated children.

⁴⁹ A/HRC/43/57, para. 61.

⁵⁰ A/HRC/43/57, para.96-97

⁵¹ Joana cook and Gina Vale, ‘From Daesh to Diapora: Tracing the women and Minors of Islamic State’, ICSR, 2018, p.53, quoted in the Study, p. 606.

⁵² Study p. 607.

⁵³ Under the UNCRC, children have the right to life (Article 6); physical and mental wellbeing, care and protection (Articles 3, 19, 36); birth registration, name and nationality (Article 7); identity (Article 8); play, leisure and culture (Article 31); and an adequate standard of living (Article 27), all of which are severely impaired in the camps. States must ensure that the rights provided for in the CRC are respected and that appropriate measures are taken to protect and care for the child (article 3). According to Article 4, these measures need to be undertaken to the maximum extent of the available resources and, where needed, within the framework of international co-operation. States also have an obligation to take all appropriate legislative and administrative measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mistreatment or exploitation, including sexual abuse (Article 19).

⁵⁴ Belgium UN Security Council Working Group on Children and Armed Conflict

<https://www.un.org/securitycouncil/subsidiary/wgcaac>.

32. Children should not have to carry the terrible burden of simply being born to individuals related to or associated with designated terrorist groups. Article 2 of the UNCRC protects the right of children to be free from discrimination, including on the basis of the activities or status of their parents. In this regard, the Special Rapporteurs wish to highlight the fundamentally discriminatory nature of returns on a “case by case” basis in the case of children. Where returns are feasible, all children should be repatriated without qualification or exception, and in line with other fundamental aspects of child protection, including the fundamental right to a child’s family life, to not be arbitrarily separated from their parents and to maintain contact with their parents if separation occurs, are protected by article 9 UNCRC. Policy responses that lead to a lowering of children’s human rights protection because their parents or other family members were related to or associated with ISIL violate this key principle of international law.
33. In line with UN Security Council Resolution 2427 (2018), States should recognise that children who are detained for association with armed groups are first and foremost victims of grave abuses of human rights and international humanitarian law, including when devising counter-terrorism responses.⁵⁵ In all cases, detention should be used as a measure of last resort and for the shortest amount of time possible, in line with the best interest of the child. In line with UN Security Council resolution 2427, States should adopt and implement standard operating procedures for the immediate and direct handover of children from military custody to appropriate child protection agencies. States and other parties to the armed conflict must not detain children illegally, or arbitrarily, including for preventive purposes.⁵⁶
34. The Convention on the Rights of the Child provides that States shall take all feasible measures to ensure the protection and care of children affected by armed conflict, and all appropriate measures to promote the physical and psychological recovery and social reintegration of child victims of armed conflict⁵⁷. States, including France, have a very fundamental duty always to take measures in the best interest of the child, and to respect, protect and fulfil the rights of children that are immediately impacted, particularly the right to life, and the right to be free of inhumane and ill treatment and all forms of physical and mental violence, neglect, and exploitation. The European Court of Human Rights has concluded that the measures applied by the State to protect children, who are particularly vulnerable, against acts of violence falling within the scope of Articles 3 and 8 ECHR should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity.⁵⁸ Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child.
35. Turning to the situation of women and girls deprived of their liberty in the camps, the Special Rapporteurs are particularly mindful of the critical need to understand that women’s and girls’ association with terrorist groups can be highly complex, notably regarding the distinction between victims and perpetrators. States must be mindful of the potential for coercion, co-option, enslavement, sexual exploitation and harm on joining or being associated with non-state armed groups, on-line grooming and recruitment for

⁵⁵ See United Nations Office on Drugs and Crime (UNODC), Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System (Vienna, 2017), chap. 2.

⁵⁶ Study, p. 615.

⁵⁷ UNCRC articles 38-39.

⁵⁸ *Söderman v. Sweden* [GC], no. [5786/08](#), § 81, ECHR 2013

marriage, sexual or household services or labour for the organization. States must always undertake individualised assessments pertaining to the specific situation of women and girls,⁵⁹ taking into consideration the various traumas that they can experience, as well as the various human rights violations that they are subjected to in their current situation. Maternal responsibilities should on their own never qualify as ‘material support’ to terrorism.

36. The Special Rapporteurs are particularly concerned at the continued detention, on unclear security grounds, of many women in camps in the Northern Syrian Arab Republic. The prohibition of arbitrary detention has been recognised both in times of peace and armed conflict and, together with habeas corpus, are non-derogable under treaty and international customary law.⁶⁰ Arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations that a State may invoke pursuant to derogation are already factored into the arbitrariness standard itself. Thus, a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.⁶¹
37. The Special Rapporteurs are mindful of the particular circumstances of the detention in the camps, but are deeply concerned that in the present case, none of the conditions which reflect customary law and are absolute and as such remain applicable in the most extreme situations, appear to be respected, and that no steps towards assessing individual risk or terminating or reviewing the legality of detention, have been taken, despite continued detention since 4 February 2019.

LEGAL POSITION OF THE SPECIAL RAPPORTEURS ON JURISDICTION

38. In this context, the Special Rapporteurs would like to now address their legal position on the exercise of jurisdiction. They set out their assessment below based on a broad analysis of applicable international law including but not limited to human rights law.
39. A State’s jurisdiction under human rights law is primarily territorial.⁶² However, it is well established that a State may also have jurisdiction in respect of acts which are performed, or which produce effects, outside its national borders.⁶³ A guiding principle when considering extra-territorial jurisdiction is the need to avoid allowing a State to perpetrate

⁵⁹ See in particular CTED Trends Report on the Gender Dimensions of the Response to Returning Foreign Terrorist Fighters (2019) and UNDP/ICAN, *Invisible Women* (2019).

⁶⁰ Human Rights Committee, general comment No 29 (2001) on derogation during a state of emergency, paras. 11 and 16.

⁶¹ Working Group on Arbitrary Detention, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, A/HRC/22/44, 24 December 2012.

⁶² *Al-Skeini and Others v. United Kingdom*, Application No. [55721/07](#), 7 July 2011, para. 131; *Soering v. United Kingdom*, Application No. [14038/88](#), 7 July 1989, para. 86. This analysis draws primarily from jurisprudence of the ECtHR and jurisprudence construing other comparable jurisdiction provisions, in particular Article 2(1) International Covenant on Civil and Political Rights (ICCPR): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.

In relation to UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the clause “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” has been interpreted to also include extra-territorial obligations (see Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/70/303, 7 August 2015, para. 33.

⁶³ *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 131.

violations on the territory of another State, which it could not perpetrate on its own.⁶⁴

40. At the European Court of Human Rights (ECtHR), a State's jurisdiction outside its border is primarily established on the basis of (i) the control that the State exercises over foreign territory (*ratione loci*) or (ii) the control that is exercised by the state over a person (*ratione personae*).⁶⁵
41. The acts (and omissions) of States in relation to their nationals currently held in camps in the northern Syrian Arab Republic are most likely to engage their jurisdiction *ratione personae*.⁶⁶ Should any State assume additional territorial or effective control over the camps that position might change and should be kept under review.
42. International human rights law recognises a number of ways in which states may assume extra-territorial jurisdiction, including cases involving detention overseas,⁶⁷ use of force by state agents abroad,⁶⁸ consular and diplomatic agents acting abroad,⁶⁹ and the exercise of law enforcement and other legislative and administrative powers, including the issuance of passports.⁷⁰ The consistent theme in cases before the ECtHR and other international human rights bodies is to examine the extent of the state's control over the applicant⁷¹ – or over some of their rights.⁷²
43. When a State exercises authority and control over some but not all of an individual's rights, the State will have jurisdiction over just those rights over which it has control – in this way, Convention rights can be “divided and tailored”.⁷³ When assessing a State's jurisdiction a court must therefore consider the *extent* of the State's control in order to assess what extra-territorial obligations it owes. In relation to the situation of a child held in the camps in the northern Syrian Arab Republic, a State might, for example, have sufficient control over the child's right to enter their own country in order to have jurisdiction in respect of that right, but not have sufficient control over their right to property to have an obligation to guarantee that right while they remain in the camp. When a state is in the position to ensure that one of its child nationals will not be subjected to torture, inhuman and degrading treatment by providing repatriation and able to activate with significant international support the practical elements to carry through repatriation, it would seem entirely artificial to negate the obligation in these circumstances.
44. The closer the connection between a State's acts and the repercussions for the individual, the more likely it is that the State will be considered to be exercising jurisdiction. In *Ilaşcu and Others v. Moldova and Russia* the Court considered that “A State's responsibility may [...] be engaged on account of acts which have *sufficiently proximate* repercussions

⁶⁴ *Lopez Burgos v. Uruguay*, Communication No. [052/1979](#), 29 July 1981, para. 12.3.

⁶⁵ *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 131.

⁶⁶ See, e.g., *Drozdz and Janousek v. France and Spain*, Application No. [12747/87](#), 26 June 1992, para. 91.

⁶⁷ See, e.g., *Al-Skeini and Others v. United Kingdom* (op. cit.).

⁶⁸ See, e.g., *Isaak v. Turkey*, Application No. [44587/98](#), 28 September 2006; *Andreou v. Turkey*, Application No. [45653/99](#), Admissibility Decision, 3 June 2008.

⁶⁹ See paragraph 21ff below.

⁷⁰ See paragraph 27ff below; paragraph 32 on passports.

⁷¹ See, inter alia, at the Human Rights Committee: *Lopez Burgos v. Uruguay*, (op.cit.) para. 12.3; at the Inter American Commission on Human Rights: *Coard v. United States*, Report No. [109/99](#), Case 10.951, 29 September 1999, para. 37 and *Armando Alejandro Jr and Others v. Republica de Cuba*, Report No [86/99](#), Case No 11.589, 29 September 1999, para. 25.

⁷² See paragraph 12 below.

⁷³ *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 137.

on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction” (emphasis added).⁷⁴ Similarly, in the context of armed forces operating outside a State’s national territory, the ECtHR recognises that acts of a State which impact on the Convention rights of an individual outside that State’s national territory may fall under the jurisdiction of the Convention, even when the person is not in the custody of the State, provided that the rights violations flow directly from the State’s acts.⁷⁵

45. The Human Rights Committee has affirmed in its General Comment No. 36 that a State may exercise control over a person’s rights by carrying out activities which impact them in a direct and reasonably foreseeable manner. In relation to the right to life, the Committee considers that:⁷⁶

“In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of 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.”⁷⁷

46. A State’s responsibility to protect may thus be invoked extra-territorially in circumstances where that particular State has the capacity to protect the right to life against an immediate or foreseeable threat to life. The determination of whether States have acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or should have known of the risks; (b) the risks or

⁷⁴ See for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. [48787/99](#), para. 317. In *Ilaşcu and Others v. Moldova and Russia* the Court had to consider whether detainees in the region of Transnistria, a break-away region of Moldova which had declared its independence from Moldova but failed to get international recognition, could be considered to fall under the jurisdiction of Moldova. The Court held that irrespective of Moldova’s lack of effective control over the territory it retained positive obligations to take those measures “in its power” in order to “secure to the applicants the rights guaranteed in the Convention”.

⁷⁵ See, for example *Andreou v. Turkey*, Application No. [45653/99](#), Admissibility Decision, 3 June 2008, in which the applicant was shot by a bullet fired by Turkish troops based in a Turkish controlled area, but while she was standing outside of that area. The Court found that Turkey had jurisdiction, repeating that “*in exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention*”. Turkey had jurisdiction because its acts were the “direct and immediate cause” of the applicant’s injuries. See also *Issa & others v. Turkey*, Application No. [31821/96](#), Admissibility Decision, 16 November 2004, para. 71 and *Pad v. Turkey*, Application No. [60167/00](#), Admissibility Decision, 28 June 2007, para. 54 – 55.

See also, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 19 December 2005, I.C.J., para. 216-17. In *Armed Activities on the Territory of the Congo*, the Court interpreted Article 2(1) of the ICCPR and concluded that the provisions in the ICCPR and those of other human rights instruments, such as the Convention on the Rights of the Child and the African Charter of People’s Rights, should be applicable extra-territorially. The Court adopted similar reasoning to that which it had previously articulated in *Advisory Opinion on the Legal Consequence on the Construction of a Wall in the Occupied Palestinian Territory*, where it found that Israel had human rights obligations both within and outside its territory (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 9 July 2004, para. 107-08.).

⁷⁶ 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.

⁷⁷ Para. 63, (footnotes omitted).

likelihood of foreseeable harm; and (c) the seriousness of the harm.⁷⁸

47. States may be said to have jurisdiction over their nationals detained abroad or held in camps abroad because they have the capacity to directly influence their right to life, through their actions or indeed failure to act or intervene.
48. Such a duty of protection,⁷⁹ implemented extra-territorially, applies to the circumstances of the children, women and men detained or held in the northern Syrian Arab Republic. States with nationals there must act with due diligence to ensure that the lives of their nationals are protected, including against acts of violence committed by state actors or armed groups, against torture, ill-treatment, or against living conditions which fundamentally endanger their physical and mental health or their life.⁸⁰
49. It goes without saying that the obligation to protect the right to life, must not be subject to discrimination, including on the grounds of religion or political or other opinions. The Human Rights Committee has understood the term “discrimination” to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁸¹ We particularly caution that that action (or inaction) in respect of persons situated in these camps, impinging upon the grounds of sex, political or other status including (primarily perceived or actual religious) religious belief demands the utmost scrutiny from the Court.
50. Should a State party to the ECHR decide to withhold essential life-saving protection from an individual on the grounds of their purported crime, or on the grounds of the purported crimes of their spouses or parents this would violate both the State’s obligation to protect the right to life and the prohibition against discrimination.⁸² The Special Rapporteurs suggest that the “other status” reference in the ECHR anti-discrimination provision should cover the alleged crimes committed by foreign nationals since “[a] flexible approach to the ground of “other status” is needed to capture other forms of differential treatment”.⁸³
51. Examples of extra-territorial jurisdiction relevant to State acts and omissions in camps,

⁷⁸ *Osman v. The United Kingdom*, Application No. [23452/94](#), 28 October 1998, at para. 32-33.

⁷⁹ 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 6 and 7 in particular the language concerning ‘due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State’.

⁸⁰ See the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, 20 August 2019, A/74/318: <https://undocs.org/A/74/318>.

⁸¹ Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 7.

⁸² On the complementary relationship between article 14 and substantive provisions in the Convention see *inter alia*, *Molla Sali v. Greece* [GC], 2018, § 123; *Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 47; *Marckx v. Belgium*, 1979, §32.

⁸³ UN Committee on Economic, Social and Cultural rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, E/C.12/GC/20, para. 27. See also the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, op. cit. See also ECtHR, *Clift v. the United Kingdom*, 7205/07 (2010), § 55-56.

prisons and elsewhere in the northern Syrian Arab Republic:

52. The ECtHR has long recognised that the acts of diplomatic and consular agents outside the State's territory may amount to an exercise of jurisdiction where those agents exercise authority and control over others.⁸⁴ The Special Rapporteur on the promotion and protection of human rights while countering terrorism is directly aware of ongoing diplomatic/political engagement by a number of States with the non-state actors responsible for the administration of camps in the northern Syrian Arab Republic. While this occurs outside of formal recognition of the status of these authorities, it points to a degree and substance of capacity and influence on the lives of those under their control which ought not to be ignored by Courts in the context of protection of fundamental non-derogable and derogable rights.⁸⁵
53. In the European Commission case of *X v. Federal Republic of Germany* the Commission concluded that Germany had jurisdiction over the applicant in relation to acts carried out by German consular agents in Morocco, explaining that: "in certain respects, the nationals of a Contracting State are within its "jurisdiction" even when domiciled or resident abroad [...] in particular, the diplomatic and consular representative of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention".⁸⁶
54. This applies to both acts and omissions of consular agents. In *Cyprus v. Turkey*, the Commission recognised that:

*"authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged."*⁸⁷

⁸⁴ *Banković and Others v. Belgium and Others* [GC], Application No. [52207/99](#), 12 December 2001, at para. 73; *Al-Skeini and Others v. United Kingdom*, (op. cit.) para. 131.

See also the Committee on the Rights of the Child's *Concluding Observations on the second periodic report of the Holy See* (25 February 2014) CRC/C/VAT/CO/2, and the Committee against Torture's, *Concluding observations on the initial report of the Holy See* (17 June 2014) CAT/C/VAT/CO/1, which discussed the obligations of States in the context of allegations of abuse of children by the Catholic Church. The CAT affirmed that "*the State party's obligations under the Convention concern all public officials of the State party and other persons acting in an official capacity or under colour of law. These obligations concern the actions and omissions of such persons wherever they exercise effective control over persons or territory.*" (*Concluding observations on the initial report of the Holy See*, (17 June 2014) para. 8).

⁸⁵ As to the existence of a right of a national abroad to consular assistance, it is well established that a State has the right to exercise diplomatic protection on behalf of a national. In contemporary State practice, there is also significant support in domestic legislation and judicial decisions for the view that there is an obligation, either under national or international law, for the State to protect its nationals abroad when they have been subjected to serious human rights violations. See for example *Kaunda v. President of the Republic of South Africa*, 2004(10) BCLR 1009 (CC), 2 August 2004, at para. 29-33, 25-29, 51-66, 60-81 (S. Afr.). In *Kaunda*, the Court found that various international human rights treaties ratified by the South African Government, including the ICCPR, obliged the government to make use of the remedies provided in the international instruments when the rights contained had been violated or threatened. At para. 169.

⁸⁶ *X v. Germany*, Application No. [1611/62](#), Commission Decision, 25 September 1965, Yearbook 8, p. 158, at p.168.

⁸⁷ *Cyprus v. Turkey*, Application No. [6780/74 and 6950/75](#), 26 May 1975, p. 136.

55. In *X v. United Kingdom*, a British national living in the UK, whose daughter had been taken to Jordan by the child's father, complained that the British consular authorities in Jordan were not doing enough to restore her custody of the child. The Commission agreed that the alleged omissions of the British consular authorities in Jordan triggered the application of Article 1, even though they were outside UK territory:⁸⁸

“The applicant’s complaints are directed mainly against the British consular authorities - in Jordan. It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged Icf. Applications No. 1611/62, Yearbook 8, p. 158 (168); Nos. 6780/74, 6950/75, Cyprus v. Turkey, Decisions and Reports 2, p. 125 11371). Therefore, in the present case the Commission is satisfied that even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still “within the jurisdiction” within the meaning of Article I of the Convention”.

56. Similarly, in *M v. Denmark*, a case brought by a German national against Denmark, arising from the conduct of the Danish ambassador towards the Applicant in the Danish Embassy in the former German Democratic Republic, the Commission concluded that the Applicant was under Danish jurisdiction because of the activities of the ambassador, despite not being in Danish territory.⁸⁹
57. Thus, to the extent that a State is conducting consular activities – or failing to do so – in respect of individuals in the camps in the northern Syrian Arab Republic those individuals may fall under the jurisdiction of the State in relation to the rights affected by the State's conduct.
58. The ECtHR has also recognised that in some circumstances, jurisdiction can arise from a State exercising authority and control over a person through law enforcement or legislative powers that produce effects in a different state, with the consent of that second state.⁹⁰
59. In *Stephens v. Malta*,⁹¹ the Court found that Malta had jurisdiction in relation to the Article 5 rights of a UK national who was detained in Spain pursuant to a defective extradition request made by Malta to Spain. Despite the applicant being physically under the authority and control of Spain during the period of his detention, the Court found that “the applicant’s deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities” and that “Accordingly, the act complained of by Mr Stephens,

⁸⁸ *X v. United Kingdom*, no. [7547/76](#), Commission Decision, 15 December 1977, DR 12, p. 73

⁸⁹ *M v. Denmark*, Application No. [17392/90](#), 14 October 1992.

⁹⁰ See also, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, African Commission on Human and Peoples' Rights, Communication No. [157/96](#), 29 May 2003, which considered an embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire, Ethiopia and Zambia. The Commission ultimately found that there had not been a breach of the African Charter on Human and Peoples' Rights, however it proceeded on the basis that the States had extra-territorial duties – reasoning that there was no breach because the embargo was proportionate: “[t]he critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose” (para. 75). In this case there was no State consent to the measure.

⁹¹ *Stephens v. Malta (No. 1)*, Application No. [11956/07](#), 21 April 2009.

having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain.”⁹²

60. Similarly, where a State commences criminal proceedings against a person not in that State, the State will have jurisdiction over the person in relation to those proceedings, despite them not being physically present in the territory. Thus, a Contracting State has jurisdiction over the Article 6 rights of a person subject to trial in absentia, regardless of whether they are physically present in the state.⁹³ Moreover, a state will have a clear interest to ensure fair trial of its nationals in proceedings overseas, including its nationals who may be tried for offences committed on the territories of Iraq and Syria, particularly where the death penalty may be charged for security or terrorism-related offences.⁹⁴
61. As to a State’s domestic legislation which has effects outside the State’s national borders, in *X. and Y. v. Switzerland*⁹⁵ the Commission found that a German national prevented from entering Lichtenstein (at a time not a party to the ECHR) by Swiss law, could bring a claim against Switzerland for breaches of his Convention rights (Articles 3 and 8) caused by the refusal to enter: “Acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention.”⁹⁶ We underscore the importance established in these cases of maintaining the state of nationality’s responsibility for the treatment of its citizens in other territories, and stress that this responsibility becomes all the more compelling when non-derogable jus cogens norms are being unequivocally breached, and the state of nationality is *the only state* with the legal capacity to provide relief.
62. The Human Rights Committee has adopted similar reasoning. In *Ibrahima Gueye et al v. France*, which concerned the underpayment of retired Senegalese soldiers in Senegal by the French State, the Committee found that France had jurisdiction, despite the fact that the soldiers were not within French territory, because their right to a pension derived from French law.⁹⁷
63. The Human Rights Committee has also consistently found states to have jurisdiction over their nationals living abroad in relation to the State’s exercise of the power to issue a passport. In *Martins v. Uruguay*,⁹⁸ the Uruguayan authorities refused to issue a passport

⁹² *Stephens v. Malta (No. 1)*, (op. cit.), para. 51 – 52. See also *Soering v. United Kingdom* in which the Court found that the UK’s decision to extradite a German national resident in the UK to the US fell under UK jurisdiction even though the repercussions of the decision (real risk of torture or inhuman or degrading treatment) would be felt outside the UK (*Soering v. United Kingdom*, (op. cit.), para. 86 - 91).

⁹³ See for example *Sejdovic v. Italy*, Application No. [56581/00](#), 1 March 2006, in which a national of the former Federal Republic of Yugoslavia was tried in Italy in absentia, having absconded to Germany. The Court did not question that the Applicant was entitled to the protections of Article 6, despite the fact that he was outside the territory of Italy.

⁹⁴ France for example has made clear it is opposed to the use of the death penalty against its citizens including for offences allegedly committed by citizens who were members of Dash <https://www.diplomatie.gouv.fr/en/country-files/iraq/news/article/iraq-sentencing-french-citizens-to-the-death-penalty-27-05-19>

⁹⁵ *X. and Y. v. Switzerland*, Application No. [7289/75 and 7349/76](#), 14 July 1977, Admissibility Decision, at p.73.

⁹⁶ *X. and Y. v. Switzerland*, (op. cit.) at p.73.

⁹⁷ *Ibrahima Gueye et al v. France*, Communication No. [196/1985](#), 3 April 1989, para. 9.4.

⁹⁸ *Vidal Martins v. Uruguay*, Communication No. [57/1979](#), 23 March 1982, para. 7

to a Uruguayan national residing outside of Uruguay and the Human Rights Committee found that the applicant was within Uruguay's jurisdiction:

*“Article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is “subject to the jurisdiction” of Uruguay for that purpose.”*⁹⁹

64. The Committee has adopted the same reasoning in a number of subsequent cases relating to the refusal to issue passports.¹⁰⁰
65. To the extent that a State directly impacts the rights of an individual in the camps, for example through law enforcement, or the issue or refusal of identification documents, or giving consent and capacity by allowing medical staff to ascertain parentage, that individual may fall under the jurisdiction of the State in relation to the rights affected by the State's conduct. We painfully emphasise the legal black hole that emerges if the state of nationality is absolved of all meaningful obligations in respect of vindicating the rights of their citizens, including most particularly child nationals, who are experiencing sustained and egregious violations of their non-derogable rights under international law. It would seem to entirely go against the spirit of the Convention to condemn children to a life of undulating torture under international law, when their state of nationality has the legal capacity to end the systemic violations in question by enabling by the issuance of passports and other documents of legal identity their return to France.

CONCLUSION

66. The Special Rapporteurs point out that European states such as France are in the best position to ensure the protection of human rights for children and their guardians in camps in the northern Syrian Arab Republic. In the absence of their engagement and acceptance of legal responsibility, French children face death, starvation, and extreme physical and emotional harm, as do their mothers. In this context, they note that in the very specific circumstances of these camps in the northern Syrian Arab Republic it is undeniable that the state of nationality for European citizens have the only tenable legal claim to protect their citizens, and the capacity to make such claims materialize. The Special Rapporteurs also underscores that the relevant Kurdish authorities have made consistently clear their willingness and capacity to support returns to European and other states and their inability to manage the humanitarian catastrophe they face, a fact that is demonstrated by multiple successful return processes.¹⁰¹

⁹⁹ The Committee continued: *“Moreover, a passport is a means of enabling him “to leave any country, including his own”, as required by article 12(2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality. Consequently, article 2(1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.”* (para. 7).

¹⁰⁰ *Lichtensztejn v. Uruguay*, Communication No. [77/1980](#), 31 March 1983, at para. 6.1; *Mabel Pereira Montera v. Uruguay*, Communication No. [106/1981](#), 31 March 1983, para 5; *Varela Nunez v. Uruguay*, Communication No. [108/1981](#), 22 July 1983, para. 6.1; *Loubna El Ghar v. Libya*, Communication No. [1107/2002](#), 15 November 2004, (concerning the refusal of the Libyan consular authorities in Morocco to issue a passport to a Libyan national residing in Morocco).

¹⁰¹ <https://www.urdupoint.com/en/world/romania-returns-15-nationals-from-syria-via-t-686284.html>; <https://www.arabnews.com/node/1545586/middle-east>; <https://www.reuters.com/article/us-germany-syria/germany-takes-back-four-islamic-state-children-from-syria-idUSKCN1VA0UY>. Noting also the

67. States that have jurisdiction extra territorially over the realization of human rights protection for their children and their guardians in camps in the northern Syrian Arab Republic have positive obligations to prevent violations of those rights. Whether a State has such jurisdiction is a question of fact. Relevant factors are likely to include the proximity between the acts of the State and the alleged violation, the degree and extent of cooperation, engagement and communications with the authorities detaining children and their guardians, the extent to which the home State is able to put an end to the violation of the individual's rights by exercising positive interventions to protect and promote the rights of their nationals, and the extent to which another State or non-state actor is positively prepared to enable and support the state of nationality to prevent and end such violations.

applicability of Protocol 4, European Convention on Human Rights, Art. 3: “No one shall be deprived of the right to enter the territory of the State of which he is a national.” (the Special Rapporteurs stress that there is no limitation clause to this provision unlike art. 12 ICCPR).