



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## GRAND CHAMBER

### CASE OF H.F. AND OTHERS v. FRANCE

*(Applications nos. 24384/19 and 44234/20)*

#### JUDGMENT

Art 1 • Jurisdiction of States • Refusal to repatriate nationals held with their children in Kurd-run camps after the fall of “Islamic State” • Lack of effective “control” by respondent State over the area and the applicants’ family members • Repatriation proceedings and criminal investigation for involvement in terrorism abroad insufficient to trigger extraterritorial jurisdictional link • Nationality, albeit a relevant factor, not constituting *per se* an autonomous basis of jurisdiction • Jurisdiction not established in respect of the complaint about ill-treatment • Jurisdiction established in respect of the alleged breach of the right to enter own State in view of special features relating to situation in the camps

Art 3 § 2 P4 • Enter own country • Lack of review with safeguards against arbitrariness for refusal to repatriate nationals held with their children in Kurd-run camps after the fall of “Islamic State” they had joined • No general right to repatriation (notably for those unable to reach State border as a result of material situation) • Positive procedural obligations in this context triggered in exceptional circumstances (such as extraterritorial factors directly threatening life and physical well-being of a child in a situation of extreme vulnerability) • Obligation to ensure that decision-making process is surrounded by appropriate safeguards against arbitrariness and is subject to an independent review

Art 46 • Individual measures • Prompt examination required of repatriation requests with appropriate safeguards against any arbitrariness

STRASBOURG

14 September 2022

*This judgment is final but it may be subject to editorial revision.*



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**In the case of H.F. and Others v. France,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano,  
Jon Fridrik Kjølbro,  
Siofra O’Leary,  
Georges Ravarani,  
Ksenija Turković,  
Ganna Yudkivska,  
Krzysztof Wojtyczek,  
Yonko Grozev,  
Mārtiņš Mits,  
Stéphanie Mourou-Vikström,  
Arnfinn Bårdsen,  
Darian Pavli,  
Erik Wennerström,  
Lorraine Schembri Orland,  
Peeter Roosma,  
Mattias Guyomar,  
Ioannis Ktistakis, *Judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 29 September 2021, 18 May 2022 and 30 June 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in two applications (nos. 24384/19 and 44234/20) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four French nationals, H.F. and M.F., and J.D. and A.D. (“the applicants”), on 6 May 2019 and 7 October 2020 respectively. The President of the Grand Chamber acceded to the applicants’ request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Ms M. Dosé, a lawyer practising in Paris. The French Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

3. The applicants alleged that the refusal by the respondent State to repatriate their daughters and grandchildren, who were being held in camps in north-eastern Syria, exposed those family members to inhuman and degrading treatment prohibited by Article 3 of the Convention, and breached their right to enter the territory of the State of which they were nationals as

guaranteed by Article 3 § 2 of Protocol No. 4, also interfering with their right to respect for their family life under Article 8 of the Convention (only application no. 44234/20 as regards the latter provision). They further complained, under Article 13 taken together with Article 3 § 2 of Protocol No. 4, that they had no effective domestic remedy by which to challenge the decision not to carry out the requested repatriations.

4. The applications were allocated to the Fifth Section of the Court (Rule 52 § 1). On 23 January 2020 and 16 February 2021, notice of the applications was given to the Government, without the parties in application no. 44234/40 being asked to make observations at that stage. On 16 March 2021 a Chamber of the Fifth Section, composed of Síofra O’Leary, Mārtiņš Mits, Ganna Yudkivska, Stéphanie Mourou-Vikström, Ivana Jelić, Arnfinn Bårdsen, Mattias Guyomar, judges, and Victor Soloveytschik, Section Registrar, decided to relinquish these applications in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was decided in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicants and the Government each filed written observations on the admissibility and merits of the case (Rule 59 § 1).

7. The Council of Europe Commissioner for Human Rights exercised her right under Article 36 § 3 of the Convention to intervene in the proceedings before the Grand Chamber and submitted written comments.

8. Observations were also received from the Belgian, British, Danish, Dutch, Norwegian, Spanish and Swedish Governments, the United Nations Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism, on extrajudicial, summary or arbitrary executions, and on trafficking in persons, particularly women and children, Reprieve, Rights and Security International, *Avocats sans frontières* (ASF), the National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l’homme – CNCDH*), the *Défenseur des droits*, the *Clinique des droits de l’homme* and Ghent University Human Rights Centre, the President of the Grand Chamber having granted them leave to submit written comments as third parties (Article 36 § 2 of the Convention and Rules 71 § 1 and 44 § 3). The parties replied to the third-party observations in the course of their oral submissions at the hearing (Rules 71 § 1 and 44 § 6).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 September 2021.

There appeared before the Court:

(a) for the Government

Mr F. ALABRUNE,  
Mr B. CHAMOULARD,

*Agent,*  
*Co-Agent,*



Mr J.B. DESPREZ,  
Mr A. LE COUR GRANDMAISON,  
Ms C. FAURE,  
Ms F. DIANA-MARTINEZ,  
Ms A. ROUX,  
Ms L. NELIAZ, *Advisers;*

(b) for the applicants  
Ms M. DOSÉ, lawyer *Counsel,*  
Mr L. PETTITI, lawyer *Adviser;*  
Professor S. VAN DROOGHENBROECK,

(c) for the office of the Commissioner for Human Rights, third party,  
Ms D. MIJATOVIĆ, *the Commissioner for Human Rights,*  
Mr G. CARDINALE,  
Mr M. BIRKER, *Advisers;*

(d) for the Belgian, British, Danish, Dutch, Norwegian, Spanish and  
Swedish Governments, third parties,  
Ms B. KOOPMAN, *Agent,*  
Sir JAMES EADIE QC, *Counsel.*

The Court heard addresses by Mr Alabrune, Ms Dosé, Mr Pettiti, Ms Mijatović, Sir James Eadie and Ms Koopman, and the replies given by Mr Alabrune, Ms Dosé, Mr Pettiti and Professor Van Drooghenbroeck to questions from judges.

## THE FACTS

### I. BACKGROUND TO THE CASE

10. The applicants H.F. and M.F. were born in 1958 and 1954 respectively. The applicants J.D. and A.D. were both born in 1955.

11. In 2014 and 2015 the applicants' daughters travelled to Syria on their own initiative with their respective partners (see paragraphs 30 and 38 below). Their decision to leave was part of a broader movement in which nationals from several European States went to Iraq or Syria to join "Daesh" (the so-called "Islamic State in Iraq and the Levant" or "ISIL", also known as "ISIS").

#### A. The conflict in north-eastern Syria

12. By the time of the applicants' daughters' departure, Daesh was reaching its maximum territorial expansion in Iraq and Syria and was announcing the foundation of a "caliphate" under the leadership of Abu Bakr

al-Baghdadi. In 2014 an international coalition of seventy-six States (Operation Inherent Resolve), with the participation of France – which mainly provided air support –, was mobilised to provide military support to local forces engaged in the fight against Daesh, including the Syrian Democratic Forces (the “SDF”) dominated by the Kurdish militia of the People’s Protection Units (*Yekîneyên Parastina Gel* – the “YPG”), the armed wing of the Democratic Union Party. The latter established itself as the *de facto* political and administrative authority over a territory that gradually extended to the whole of north-eastern Syria as Daesh retreated. The SDF mainly comprises the YPG together with the Women’s Protection Units (the “YPJ”), Arab fighters and the Syriac Military Council.

13. Since 2013, Syrian Kurdistan, a *de facto* autonomous region, has had its own administration. In early 2014 a “Democratic Autonomous Administration of Rojava” was proclaimed. In 2018 it was strengthened and renamed the “Autonomous Administration of North and East Syria” (the “AANES”).

14. In 2017 Daesh lost control of the city of Raqqa, its capital, to the SDF. From March 2019 onwards, following the fall of the last territorial retreat in al-Baghuz, on the eastern fringe of Syria, the SDF controlled all Syrian territory east of the Euphrates River. The SDF offensive caused tens of thousands of men, women and children to flee, the majority of them families of Daesh fighters. Most of them, including the applicants’ daughters, were reportedly arrested by the SDF during and following the final battle, and taken to al-Hol camp between December 2018 and March 2019.

15. Following the announcement of the withdrawal of US forces, the Turkish military took control in October 2019 of a border region in north-eastern Syria. This led the SDF to reach some local security arrangements with the Syrian regime but also with Russia. Clandestine cells of Daesh remain active in the region.

## **B. Camps of al-Hol and Roj**

16. The al-Hol and Roj camps were placed under the military control of the SDF and are run by the AANES.

17. According to the International Committee of the Red Cross (ICRC), 70,000 people were living in al-Hol camp as of July 2019. At that time the ICRC regional director described the situation in the camps as “apocalyptic”. According to a press release issued on 29 March 2021, following a visit by its president, this figure was reduced to 62,000, “two thirds [of whom] [were] children, many of them orphaned or separated from family”. The press release further stated that those children were growing up in harsh and often very dangerous conditions.

18. The majority of the people held in al-Hol camp were Syrian or Iraqi. More than 10,000 people from other countries, of fifty-seven different

nationalities, are reported to be, still today, in an area of the camp known as the “Annex”.

19. According to the Government, the area of the camp set aside for foreign families, “in which French nationals are held”, is exclusively inhabited by members of Daesh who perpetuate that group’s threats “on the spot and outside”.

20. By the start of 2021 the activity of the humanitarian organisations had been greatly reduced owing to the critical security situation in the camp. According to the Government, this situation led the SDF to carry out a security operation in the camp (from 27 March to 2 April 2021), outside the Annex reserved for foreigners, leading to the arrest of about one hundred members of Daesh. This situation explains, according to them, why SDF representatives have difficulties accessing certain areas of the camp and why it is difficult for them to identify and locate precisely the persons held in the foreigners’ Annex.

21. Roj camp, located to the north of al-Hol and surrounded by oil fields, is significantly smaller. In order to address the overcrowding of al-Hol camp, transfers of people held in the Annex took place during the year 2020. According to the report by the non-governmental organisation (NGO) REACH, published in October 2020, 2,376 individuals were being held in Roj camp, of whom 64% were children, 17% of them aged 4 or under. According to the NGO Rights and Security International (RSI, see paragraphs 24 and 25 below), it is more difficult to obtain information about this camp, as it is reported to be under tighter control and its occupants are virtually unable to communicate with the outside world.

22. In decision no. 2019-129 of 22 May 2019, the *Défenseur des droits* described the living conditions of children in the camps as follows:

“The extreme conditions in which French children are held in camps under the control of the Syrian Democratic Forces in northern Syria are notorious and the health situation in these camps has been widely reported. These children are not safe: a French child aged one and a half died in Roj camp in mid-September 2018, hit by a military vehicle; on 8 March 2019, an 18-day-old infant died of pneumonia. In a statement on 31 January 2019, the World Health Organization (WHO) reported the deaths of twenty-nine children and newborns in al-Hol camp in two months, most of whom were suffering from hypothermia.”

23. In its “Opinion on French children held in Syrian camps” of 24 September 2019, the National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l’homme*) stressed the “extreme vulnerability” of the children in the camps of the Rojava region, “most of whom [were] under five years of age”, and who were “particularly exposed to unhealthy living conditions”, also having “severe physical and mental health problems”.

24. According to the RSI report published on 25 November 2020 entitled “Europe’s Guantanamo: The indefinite detention of European women and

children in North East Syria”, 250 children and 80 women of French nationality were being held in the camps of al-Hol and Roj. Of the 517 people who died in 2019 in al-Hol camp, 371 were children. In August 2020 aid workers had indicated that the death rate of children had tripled, with eight children dying between 6 and 10 August 2020. According to the report: children held in both camps suffered from malnutrition, dehydration, sometimes war injuries and post-traumatic stress and were reportedly at risk of violence and sexual exploitation; the weather conditions were extreme; the detention conditions were inhumane and degrading; there was an atmosphere of violence, caused by tensions between women still adhering to ISIL and others, as well as by the violent conduct of the camp guards (see also paragraph 238 below).

25. In its report of 13 October 2021, “Abandoned to Torture: Dehumanising rights violations against children and women in northeast Syria”, RSI concluded that the conditions endured by women and children of foreign nationalities in the al-Hol and Roj camps were exposing them to treatment that could be characterised as torture. It noted that those women and children were constantly threatened with serious injury or death and faced a real risk of sexual or other physical violence, comparing their detention to that of prisoners on death row. It referred to a report by the NGO Save the Children, which had established that about two children had died every week in al-Hol camp between January and September 2021, and that seventy-nine individuals had been murdered, including three children, who had been shot. RSI further pointed out that the women and children were being held arbitrarily and for an indefinite duration, often on the sole basis of their presumed links with members of ISIL, and in many cases incommunicado, with no possibility of communicating with the outside world, not even with their families or with lawyers, leaving them in legal limbo.

### **C. Repatriations by France**

26. Between March 2019 and January 2021 France organised the repatriation of children from camps in north-eastern Syria on a “case-by-case” basis (on the practice of other States, see paragraphs 138 to 142 and 236 and 237 below). It sent five missions to Syria and repatriated thirty-five French minors, “orphans, unaccompanied minors or humanitarian cases”. In a press release of 15 March 2019, the Ministry for European and Foreign Affairs (“the Foreign Ministry”) stated that France had repatriated several orphaned minors under the age of five from the camps in north-eastern Syria:

“These children are undergoing special medical and psychological monitoring and have been entrusted to the judicial authorities.

The relatives concerned, who were in contact with the Ministry, have been informed.

France thanks the Syrian Democratic Forces for their cooperation, which made this outcome possible.

The decision was taken in view of the situation of these very young and particularly vulnerable children.

As regards adult nationals – fighters and jihadists who followed Daesh in the Levant – France’s position has not changed: they must be tried on the territory where they committed their crimes. It is a question of both justice and security.”

27. In subsequent press releases, dated 10 June 2019, 22 June 2020 and 13 January 2021, it was stated that France was “grateful to local officials in north-eastern Syria for their cooperation, which made this outcome possible” and that “these particularly vulnerable minors were able to be collected in accordance with the authorisations given by local officials”.

28. In a press release of 5 July 2022, the Foreign Ministry announced that France had organised the return to national territory of thirty-five minors of French nationality and sixteen mothers. In a letter of 13 July 2022, the applicants’ lawyer informed the Court that their daughters and grandchildren were not among the French nationals repatriated, as confirmed by the Government in a letter of 28 July 2022.

#### **D. AANES statement of 18 March 2021 concerning repatriation of foreign nationals**

29. Prior to the above development, in 2021, the AANES published a statement which read as follows:

“After the liberation of Al-Baghouz and the military fall of ISIS, the war effort against ISIS entered a new phase. Thousands of ISIS detainees and their families as well as the sleeper cells have posed serious challenges for the Autonomous Administration of North and East Syria (AANES).

We, as AANES believe that the children need to get out of the radical atmosphere in the camps, and receive proper rehabilitation to live a normal life. Therefore, we handed over orphaned children to official bodies from their countries based on our humanitarian approach. However, the number of repatriation cases is still low.

As for women and their children, we, from the very beginning, have followed and abided by the relevant laws that do not permit separating the mothers from their children, except in some very special humanitarian cases, and at the request of some mothers after getting their written consent. We have called on the international community on several occasions to repatriate women who were victims of ISIS and who we do not have any proof against. The response was insufficient, and some countries insisted to repatriate the children without the mothers.

With regard to ISIS fighters, who belong to more than 50 countries, the AANES submitted a request, on March 25, 2019, to the international community and the countries that have ISIS members in our custody, to establish an international tribunal or hybrid domestic-international tribunal to try them in accordance with international laws. Until now, we have not received enough cooperation and response. As for the Syrians, they are being tried according to the local laws procedures, but the foreigners

constitute a burden, and we need the cooperation of their countries and the international community.

The AANES suffer from huge difficulties to accommodate ISIS fighters and their families. This file constitutes a great burden on us, which we cannot bear on our own, and the international community should assume its responsibilities to help us address this file. Also, ISIS is still organized in terms of ideology in our region, and there is clear support for ISIS through the cells who receive support from the Turkish occupied regions.

The AANES rejects the claims that ISIS fighters are illegally detained in our region, as we repeatedly called on establishing a tribunal to prosecute them. The AANES welcomes the cooperation with the international community on the issues of repatriating the children, solving the issue of women, and making reparation for the victims.

In conclusion, we affirm that we welcome legal cooperation and international expertise in order to provide support for the tribunal, which we want to be hybrid domestic-international. We request international cooperation with us to resolve this issue, which does not concern us only, but is the responsibility of the entire world. We reiterate that our appeals did not receive the necessary response, and there is an exacerbation of the situation, especially in the camps, which creates huge difficulties for us.”

## II. SITUATION OF THE APPLICANTS’ DAUGHTERS AND GRANDCHILDREN SINCE LEAVING FOR SYRIA

### A. Application no. 24384/19

30. The applicants’ daughter, L., who was born in 1991 in Paris, left France on 1 July 2014 together with her partner to travel to the territory in Syria then controlled by ISIL. On 16 December 2016 a judicial investigation was opened against her on the charge of criminal conspiracy to commit acts of terrorism (see paragraph 70 below) by a judge of the Paris *tribunal de grande instance* and a warrant was issued. The Government did not specify the nature of the warrant or the status of the proceedings, invoking the confidentiality of the investigation.

31. L. and her partner, who died in February 2018 in circumstances which the applicants have not specified, had two children in Syria, born on 14 December 2014 and 24 February 2016.

32. According to the applicants, L. and her two children were arrested on 4 February 2019 and were initially held in al-Hol camp. In their submission, on the day that the application was lodged with the Court, the state of health of L. and her two children was distressing. L. was very thin and had been suffering from severe typhoid fever which had not been treated. One of her children had untreated shrapnel wounds and the other was in a state of serious psychological instability, traumatised by the burning of several tents in the camp.

33. Since 2016 L. had informed the applicants of her wish to return to France with her two children. The applicants provided a copy of a message

from L. written on a sheet of paper that she had apparently photographed and sent by telephone. The message read:

“I, the undersigned L. born on 16/07/91 in Paris 18, currently in al-Hol camp in Hassaka in Syria, request to be repatriated to France with my 2 children, [S] 3 years old and [S] 4 years old, both born in Syria. Dated 16/04/2019.”

34. On 21 May 2019 counsel for the applicants sent the Court a copy of a text written by L. “who [had] photographed it using a mobile phone, that [did] not appear to be hers, for the purpose of giving [the said counsel] authority to represent her to obtain her repatriation to France”:

“I, the undersigned, [L.] born on 16/07/1991 ... hereby give authority to Maître Dosé to represent my interests with a view to my repatriation to France.

On 6/5/2019

In Hassaka.”

35. On 8 June 2019 counsel for the applicants, having been informed of the transfer of L. and her two children from al-Hol camp to a prison or another camp, sent an e-mail to the Foreign Ministry calling for urgent action regarding their situation and to obtain information about their “request for repatriation ... registered by the Foreign Ministry”.

36. The applicants stated that they had not received news of L. since June 2020. She was thought to be held in one of the two camps or with her two minor children in the “underground prison”.

37. For their part, the Government stated that they were unable to confirm to the Court that L. and her children were still in al-Hol camp for the reasons given in paragraph 20 above. They explained that the information available to the Foreign Ministry had been received from the applicants.

## **B. Application no. 44234/20**

38. The applicants’ daughter M., who was born in 1989 in Angers, left France in early July 2015 with her partner to travel to Mosul in Iraq and then, a year later, to Syria. A preliminary police investigation was apparently opened against her on 18 January 2016, but the Government did not provide any information about it.

39. M. gave birth to a child on 28 January 2019. Mother and child were thought to have been held in al-Hol camp from March 2019 onwards then transferred in 2020 to Roj (see paragraph 41 below). M. had lost touch with the child’s father, who had reportedly been held in a Kurdish prison. The applicants said that she was very thin, had lost more than 30 kilos in weight, was malnourished and, together with her child, was suffering from numerous war-related traumatic disorders. At the hearing the applicants stated that the child suffered from heart disorders.

40. On 26 June 2020 the applicants’ counsel sent an urgent e-mail to the justice adviser of the French President and to the Foreign Ministry, without

receiving any reply, in which she expressed the concern of the families, including the applicants, following the transfer of several French nationals and their children by the guards of al-Hol camp to an unknown location.

41. In a message dated 3 October 2020, the applicants wrote to their counsel to inform him of their wish, and that of their daughter, to lodge an application with the Court:

“As you know, I was able to speak very briefly with my daughter who, like me, would like you to bring a case, on behalf of her and her son, before the European Court of Human Rights. The difficulty is that: she was taken from al-Hol camp to Qamishli prison by the Kurds on 11 June last, with her son; she was transferred to the new Roj camp on 4 August; and lastly, she no longer has a mobile phone, [it] was confiscated by the Kurds when she left al-Hol, and there is no longer any way for her to send me anything in writing. The only thing she is allowed to do is to send me a short audio message of barely one minute, under the surveillance of the guards, once every two or three weeks. She cannot formalise her wishes, this is a case of *force majeure*.”

42. The applicants stated that they had received little news of their daughter, in view of the restrictions on her access to a telephone provided by the Kurdish administration in Roj camp. They produced a bailiff’s report dated 23 April 2021 which recorded two voice messages from M. left on their voice-mail, the first of which reads as follows: “My name is M. I leave it to my parents to handle my appeal to the European Court of Justice [*sic*] with Marie Dosé. I agree with the intervention”; while in the second, M. expressed her hopes that the first would suffice and gave news of the dental treatment she had received and the progress being made by her son.

43. For their part, the Government stated that they were not in a position to confirm or deny the presence of M. and her child in Roj camp.

### III. PROCEEDINGS BROUGHT TO SEEK REPATRIATION

#### A. Application no. 24384/19

44. In an e-mail sent on 31 October 2018 to the Foreign Ministry, which remained unanswered, the applicants requested the repatriation of their daughter, who was “very weak”, together with their grandchildren, drawing attention to her reiterated wish to return to France – “she could not [return] because she was alone with two small children and had no money” – and to the danger for the life of the grandchildren in view of their state of health. They stated that their daughter “had done nothing wrong” and had been “manipulated” in 2014 by the now deceased father of her children.

45. In an application registered on 5 April 2019 they called upon the urgent applications judge of the Paris Administrative Court, on the basis of Article L. 521-2 of the Administrative Courts Code (see paragraph 59 below), to enjoin the Foreign Ministry to organise the repatriation of their daughter and grandchildren to France, arguing that their family members were exposed to inhuman and degrading treatment and to a serious and manifestly unlawful



infringement of their right to life. They stated that the repatriation of the children was justified on obvious humanitarian grounds, as the inhuman conditions of detention in the camp had been documented by numerous international organisations. They claimed that the State had a responsibility, as part of its positive obligations, to protect individuals under its jurisdiction, stating that “the responsibility of the State concern[ed] both individuals on its territory and its nationals present in an area outside the national territory over which it exercise[d] control in practice. The repatriation of five orphaned children held in this camp on 15 March [had] highlighted the decision-making and operational capacity of the [Foreign Ministry] to organise and carry out the repatriation [of the] children”. In support of their application they produced their request for repatriation of 31 October 2018 and the requests submitted to the French President a few months earlier by their counsel, on behalf of several women and children who were held in the camps in north-eastern Syria, together with the response of the President’s chief of staff.

46. This response stated that the individuals concerned had deliberately left to join a terrorist organisation at war with the coalition in which France was participating, and that it was up to the local authorities to decide whether they were liable for any offences. It explained that if no liability on their part were to be found, France would take steps appropriate to their situation in the light of the warrant issued against them. It contained the French Government’s position, as set out in a note entitled “Requests for the repatriation of French nationals held in the Levant”, as follows:

“(1) By way of reminder: these individuals left of their own volition to join a terrorist organisation that has committed acts of unprecedented violence against the local population in this area. This terrorist organisation has committed and is still planning attacks in France which have already caused numerous victims.

(2) The issue of the repatriation of these people who, after having joined DAESH, are now being held by the authorities and military forces that have liberated the territories formerly controlled by the terrorist organisation, cannot be separated from the context of the war in the region, in which they took part. In Syria, this war is not even over, as fighting continues and the institutional situation has not been stabilised.

(3) Their situation must be assessed in line with international lawfulness and in the context of relations with the States in which they are held and, lastly, of the legal proceedings already underway, or likely to be brought, whether abroad or in France. ...

(4) With regard to French nationals arrested in Turkey, the Government have negotiated a protocol that makes it possible to obtain the expulsion of these individuals (adults or minors) to France, where they are dealt with by the judicial authority as soon as they arrive.

(5) With regard to French adults detained in Iraq, they are first and foremost the responsibility of the Iraqi authorities, who have the discretion to decide whether they should be subject to legal proceedings in that country. These individuals are entitled to ordinary consular protection. This protection includes the exercise of visiting rights and, in particular, verification that the persons in question are not subjected to inhuman or degrading treatment within the meaning of the European Convention on Human Rights. Our diplomatic network stands ready for that purpose.

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(6) With regard to the French adults detained in Syria, France does not have diplomatic relations with this country, which is still a war zone in many places. This is why our intervention is carried out first and foremost through the international organisations that are present in such situations, and in particular via the ICRC. It is up to the local authorities to decide on any liability of these French adults for offences committed in this territory on account of their membership of a terrorist organisation.

(7) Concerning the possible imposition of the death penalty: France, which is opposed to the death penalty, intervenes to systematically remind the authorities concerned of this position, in the context of the exercise of consular protection. This protection, as provided for by the Vienna Convention of 24 April 1963, can be provided to any French national detained, arrested or imprisoned abroad who so wishes, and where it is materially possible.

(8) With regard to the right to a fair trial, it goes without saying that France is committed to respecting the safeguards afforded by a fair trial. It will provide all support to its nationals in the context of consular protection in this connection, within the limits allowed by international law, as provided for in the Vienna Conventions of 18 April 1961 and 24 April 1963. France may not, however, interfere in the internal affairs of a State or take any coercive action on foreign territory.

(9) French minors in Iraq or Syria are entitled to the protection of France and may be taken care of, according to the rules concerning the protection of minors, and repatriated, provided that their criminal liability has been ruled out by the local authorities.

(10) When adults return to France, they are of course systematically dealt with, as soon as they arrive in France, by the judicial authority, which determines their criminal liability. As regards minors returning to France, if the judicial authority rules out any criminal liability, they are systematically subjected to special monitoring, particularly of a medical and psychological nature, under the supervision of a juvenile judge.”

47. In a decision of 10 April 2019 the urgent applications judge dismissed the applicants’ case:

“The requested repatriation of French nationals held outside France, in a zone under the control of foreign forces, would necessitate measures which are indissociable from France’s external action. It thus constitutes, as does any refusal to carry it out, an act which falls outside the jurisdiction of the administrative courts.”

48. In two letters dated 11 April 2019, counsel for the applicants again wrote to the French President and to the Foreign Ministry seeking the repatriation of L. and her two children. In a letter of 23 April 2019 the President’s chief of staff acknowledged receipt thereof.

49. The applicants appealed against the decision of 10 April 2019 before the *Conseil d’État*. They pointed out that the condition of urgency was satisfied and acknowledged by the French authorities, which had already repatriated five children on 15 March 2019. They emphasised the worsening health and safety conditions in the camps and complained that there was no judicial review of the French authorities’ refusal to put an end to the inhuman and degrading treatment or risk of death to which L. and her two children were exposed. In addition to relying on the State’s obligations under Articles 2 and 3 of the Convention, they alleged that the State’s inaction had

deprived their family members of their right to return to France in breach of Article 3 § 2 of Protocol No. 4 to the Convention.

50. In written observations before the *Conseil d'État*, by way of principal argument the Foreign Ministry raised the objection that the requested measure fell within the category of acts of State (see paragraphs 60 et seq. below) that could not be adjudicated upon by the courts. It stated that the requested repatriation would require the negotiation of an agreement between the French State and the foreign authorities which exercised control over the French nationals, together with the deployment of material and human resources, generally of a military nature, in the territory concerned. It concluded that “the implementation of an assistance measure such as the requested repatriation [was] indissociable from the conduct of foreign relations and [could] not be ordered by a court of law”.

51. By way of alternative argument, the Ministry submitted that, since France had no “jurisdiction” over its nationals held in Syria, the applicants could not validly claim that the State had breached its Convention obligations. Emphasising the essentially territorial application of the Convention, it stated that the factual circumstances under examination were not such as to engage the State’s responsibility, as France did not exercise any control over the nationals concerned through its agents, or any territorial control over the camps, not having any decisive political or military control over north-eastern Syria. In that connection it indicated that France’s participation in the international coalition did not suffice for it to be considered that it exercised decisive influence over the territory. Nor did it exercise control through any subordinate local administration. The Ministry explained, lastly, that the previous repatriation of a number of unaccompanied minors did not indicate any effective control over the zone, pointing out that this operation had been the result of an agreement with the SDF following a negotiation process.

52. In the further alternative, the Ministry asserted that the applicants’ allegation that there was a positive obligation to repatriate had no basis in international law. It explained that the previous repatriation of a number of minors had been decided in the light of humanitarian considerations and that the situation of children was examined on a case-by-case basis according to their interests.

53. In a decision of 23 April 2019 (no. 429701), the *Conseil d'État* dismissed the applicants’ case as follows:

“The aim of the application ... was to secure the State’s intervention *vis-à-vis* foreign authorities in a foreign territory in order to organise the repatriation to France of its nationals, i.e. by endeavouring itself to take measures to ensure their return from a territory outside its sovereignty. The measures thus requested with a view to the said repatriation, which cannot be arranged solely by issuing a permit to cross the French border, as was requested at the hearing, would require negotiations to be opened with foreign authorities or an intervention on foreign territory. They cannot be dissociated from the conduct of France’s international relations. Consequently, a court of law has no jurisdiction to hear the case.”

**B. Application no. 44234/20**

54. In two letters of 29 April 2019, which remained unanswered, to the Foreign Ministry and the French President, the applicants' lawyer sought the urgent repatriation of M. and her child to France. They submitted an application to that effect to the urgent applications judge of the Paris Administrative Court, arguing that the urgency was established in view of the proven risk of death and inhuman or degrading treatment to which adults and children were exposed in al-Hol camp.

55. In a decision of 7 May 2020 the urgent applications judge dismissed their request on the grounds that he did not have jurisdiction to examine it, as the requested measure was indissociable from France's international relations in Syria.

56. In a decision of 25 May 2020 he gave a similar ruling on the request to set aside the Ministry's tacit decision to refuse the repatriation. The case was similarly dismissed on the merits by a decision of the same date.

57. In a decision of 15 September 2020 the *Conseil d'État* declared inadmissible an appeal on points of law lodged by the applicants against the decision of 7 May 2020, in accordance with Article R. 822-5 of the Administrative Courts Code (manifestly ill-founded appeal), following a procedure which required neither an adversarial investigation nor a public hearing. The following reasons were given for its decision:

“First, ... while the applicants maintain that the urgent applications judge should have, at the very least, examined their argument that their application did not fall within the category of measures that were indissociable from the conduct of France's international relations in so far as the French State had already repatriated eighteen children held in Syrian camps since March 2019 and that it had even intervened urgently in April 2020 to repatriate a child whose life was in danger as a result of the health crisis caused by the Covid-19 epidemic, the circumstances thus alleged could not be appropriately invoked before the urgent applications judge to argue that the administrative courts would have jurisdiction to hear their application. Consequently, the urgent applications judge of the Administrative Court, who was not required to take account of the applicants' arguments in listing the relevant documents in his decision, or, having regard to the content of the arguments, to respond to the claim that the Administrative Court had jurisdiction to hear the application, did not render his decision unlawful. ...

Third, ... the urgent applications judge of the [Administrative Court] did not commit a mistake of law or fail in his duty in holding that the [applicants'] application sought to enjoin the State to take a measure which was indissociable from the conduct of France's international relations in Syria, and in thus rejecting that application on the ground that it was manifest that the Administrative Court did not have jurisdiction to examine it.”

58. In parallel the applicants brought an action before the Paris *tribunal judiciaire* (general first-instance court) to establish the existence of an illegal administrative act, on the grounds that the French authorities had wilfully omitted to put an end to the arbitrariness of the detention of their daughter and grandson and had refused to arrange their repatriation. They argued that

the unlawful detention was ongoing, putting their family members in mortal danger, but that the State had not attempted to act in any way to resolve the situation. In a judgment of 18 May 2020 the court declared that it had no jurisdiction in the following terms:

“While the French State has a duty to protect its nationals, this being related to the right of all persons not to be subjected to inhuman and degrading treatment, and to the need to uphold the best interests of the child, the constitutional principle of the separation of powers enshrined in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, implies, according to settled case-law, that certain acts of the administration fall outside any judicial supervision of either an administrative or a general court, including in respect of an illegal administrative act or a violation of a fundamental right protected by the Constitution or the Convention.

The repatriation of French nationals held abroad is in itself a matter for diplomatic action by France, and all the more so in this particular case since it cannot be seen from the evidence in the case file that France exercises effective control over the territory in which al-Hol camp is located, thus implying that the French State would have to enter into negotiations that cannot be imposed by an ordinary court of law.

Accordingly, this court has no jurisdiction to rule on the application.

This conclusion does not entail any denial of justice or any infringement of the right to a fair hearing or the right to an effective remedy, as guaranteed in particular by Articles 6 and 13 of the Convention, in so far as the limitation on judicial review of administrative acts pursues a legitimate aim, namely to ensure the separation of governmental and judicial powers, concerns only a limited number of acts, the classification of which may, moreover, give rise to judicial review, and does not preclude other forms of supervision, in particular political and civic supervision, of the said acts.”

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

### I. DOMESTIC LAW AND PRACTICE

#### A. Administrative law

##### 1. *Article L. 521-2 of the Administrative Courts Code*

59. This provision provides as follows:

“Where such an application is submitted to him or her as an urgent matter, the urgent-applications judge may order whatever measures are necessary to protect a fundamental freedom which has been breached in a serious and manifestly unlawful manner by a public-law entity or an organisation under private law responsible for managing a public service, in the exercise of their powers. The urgent applications judge shall make a ruling within forty-eight hours.”

##### 2. *The acts of State doctrine*

###### (a) **Concept of acts of State**

60. The acts of State doctrine is of jurisprudential origin. An act of State is one that is regarded as falling outside the jurisdiction of the courts, which

have no power to review its legality or to assess any defects. While no general or theoretical definition of this concept emerges from the case-law of the administrative courts, it can be seen that it covers acts which involve relations between public authorities, in particular the government's relations with Parliament, and those involving relations with a foreign State or an international organisation, more generally concerning the State's international relations.

61. As to the latter category, the jurisdictional immunity can be explained by the courts' concern not to become involved in diplomatic or international action, as it is regarded as falling outside the supervision of the courts. Acts of State thus include acts which are directly associated with the conduct of international relations such as measures affecting the protection of individuals and property abroad (CE (*Conseil d'État*), 22 May 1953, Rec. (Reports) 184; CE, 2 March 1966, Rec. 157; CE, 4 October 1968, no. 71894; and TC (Jurisdiction Disputes Court), 11 March 2019, C 4153), measures related to defence or acts of war (CE, ass. (judicial assembly), 29 September 1995, no. 92381; CE, 30 December 2003, Rec. 707), the choice of French candidate for election to the International Criminal Court (CE, 28 March 2014, no. 373064) or reservations defining the scope of an international undertaking by France (CE, ass., 12 October 2019, no. 408567).

62. Case-law has, however, tended to limit the scope of jurisdictional immunity in international relations. In particular, the courts have assumed jurisdiction to adjudicate upon acts and measures that they regard as dissociable from the State's diplomatic or international relations. The courts have thus extended their jurisdiction to, among other matters, extradition (CE, ass. 28 May 1937, Rec. 534; CE, 21 July 1972, Rec. 554; and CE 15 October 1993, Rec. 267) and situations where international cooperation is organised by treaty (see the opinion of the public rapporteur, paragraph 63 below) such as consular protection under the Vienna Convention of 24 April 1963 (CE, 29 January 1993, no. 111946), and certain actions under the Hague Convention on the civil aspects of international child abduction (CE, 30 June 1999, no. 191232, and CE 4 February 2005, no. 261029).

63. In a case concerning a request for the annulment of a decision by the French President, as reported by the press on 13 March 2019, to organise the repatriation of French children in camps of north-eastern Syria on a case-by-case basis (CE, no. 439520, see paragraph 66 below), the public rapporteur addressed as follows the question whether or not the matter was dissociable from diplomatic relations:

“It is your task to examine any shortcomings in public administration, including the diplomatic or consular services, when the matter concerns merely the relations between France and its nationals, even where the decision has a military or diplomatic background.

However, it is not your task to hear disputes which are directly associated with inter-State relations and which would mean passing judgment on and interfering with

France's foreign policy. The test is whether France may act, or has acted, alone, by means of administrative action, even at the cost of certain diplomatic tensions, or if the criticism against it concerns its attitude or inaction with regard to a foreign authority. In the latter case you can entertain jurisdiction only if the act is part of an international cooperation provided for by treaty, thus obliging France to take action, as if an administrative public service had been instituted and its conditions of operation were bound to fall within your remit.”

**(b) Relevant case-law**

64. In a decision of 30 December 2015 (no. 384321) the *Conseil d'État* held that the Minister's decision to recognise the diplomatic status of a foreign institution fell outside the jurisdiction of the administrative courts, without infringing the right to a remedy guaranteed by Article 13 of the Convention. In her submissions, the public rapporteur relied on *Markovic and Others v. Italy* ([GC], no. 1398/03, ECHR 2006-XIV) in emphasising that acts of State were compatible with the Convention.

65. In two decisions of 9 April 2019 (nos. 1906076/9 and 1906077/9), upheld by decisions of the *Conseil d'État* of 23 April 2019 (nos. 429668 and 429669) delivered on the same day as that concerning application no. 24384/19, the urgent applications judge dismissed applications for the repatriation of two mothers and their children held in Roj camp as follows:

“ ... 4. It is incumbent on the State, as guarantor of the constitutional principle of the right to the protection of human dignity, to ensure that the right of every person not to be subjected to inhuman or degrading treatment is guaranteed. The same applies to the principle of respect for the best interests of the child, as pointed out by the Constitutional Council in its decision no. 2018-768 QPC of 21 March 2019. Such obligations are imposed on the State as part of its general duty to protect its nationals on French territory, but also outside its borders.

5. However, the repatriation of French nationals held in a foreign territory is subject to prior negotiations between the French State and the authorities controlling that territory, with the deployment of specific, possibly military, resources in the territory concerned.

6. In the present case, it is clear from the investigation that Roj camp in north-eastern Syria, where the individuals whose repatriation is requested are being held, is governed by foreign armed groups. The production of press articles and a list of names of persons held in this camp, containing information of little relevance, have failed to establish that France exercises control over this territory, particularly through the presence of ‘State agents’.

7. Consequently, the organisation or lack of organisation of the repatriation of the individuals concerned cannot be dissociated from the conduct of France's foreign relations. ...”

66. In a decision of 9 September 2020 (no. 439520), in an appeal on points of law against a decision of the president of the Paris Administrative Court of Appeal confirming the rejection of a request to annul the decision of the President of the Republic to organise “on a case-by-case basis” the repatriation of French children in camps in north-eastern Syria, the *Conseil*

*d'État* examined a request for referral of a priority question of constitutionality (QPC) as to whether the administrative courts' finding that they had no jurisdiction to adjudicate upon diplomatic acts was compatible with the right to an effective judicial remedy, as guaranteed by Article 16 of the Declaration of the Rights of Man and of the Citizen. It found that there was no cause to refer the question to the Constitutional Council, as there were no legislative provisions applicable to the dispute, and considered that the appellants' arguments were not such as to allow the appeal to be admitted. In his opinion on this case, the public rapporteur set out the following response to the question whether the *Conseil d'État* should have jurisdiction to adjudicate upon the above-mentioned decision:

“As the urgent applications judge of the *Conseil d'État* noted in decisions of 23 April 2019 (429668, 429669, 429674 and 429701), in order to repatriate a French national it is not sufficient to authorise his or her return to France. France must also negotiate the principle and conditions of repatriation with the foreign authorities of the country concerned – or, as in the present case, with the ‘*de facto*’ authorities’ exercising control over part of the country – or intervene directly, i.e. militarily, in this territory outside its sovereignty, as would seem to be accepted, to a certain extent, by international law. No international convention specifically provides for such operations. The actions requested by the applicants cannot therefore be dissociated from the conduct of international relations.

It is true that, prior to any approach that might be made to foreign authorities, repatriation presupposes that France is willing to take back its nationals. The idea, criticised in the present case, of selective repatriation of French minors in Syria, seems to be informed at least as much by considerations of ‘domestic policy’, in particular public security, as by foreign policy. You could thus consider analysing the decision of the President of the Republic as a refusal to envisage full repatriation, independently of any diplomatic or military considerations on which its implementation would depend, then reviewing that refusal autonomously and, if necessary, annulling it on the grounds that it reflects a disregard for the obligation to protect French nationals or fundamental rights. The negative nature of the decision would make it easier to dissociate. But such ‘dissociation’ would be completely artificial and, above all, completely futile from a judicial standpoint, because you would not be entitled to order the State to carry out the repatriation, or even to contact any foreign authority to organise it, without stepping outside your jurisdiction.”

**(c) Private member’s bill for the creation of a right to judicial review of acts of State as regards the protection of fundamental rights (no. 2604)**

67. This private member’s bill was filed on 21 January 2020 in the National Assembly but was not taken further. The explanatory memorandum indicated that the question of the repatriation of children of Jihadists held in Syria raised the issue of the protection of fundamental rights in relation to decisions of the French State. It argued that a political regime in which acts of the executive could not be subject to judicial review was incompatible with the concept of the rule of law. The addition of an Article in the Administrative Courts Code was proposed so that the jurisdiction of the *Conseil d'État* would be recognised, at first and last instances, to adjudicate upon complaints



against acts of the government or the President of the Republic relating to diplomatic or international relations and having consequences for the situation of those individuals concerned by such acts as regards the protection of fundamental rights guaranteed by the Constitution, [the European Convention on Human Rights], and international treaties.

## **B. Criminal law**

### *1. Criminal court jurisdiction in respect of acts committed abroad*

68. Article 113-6 of the Criminal Code provides for the principle of jurisdiction on the basis of an individual's nationality (where an act is committed by a French national):

“French criminal law shall be applicable to any serious offences (*crimes*) committed by a French national outside the territory of the Republic.

It shall be applicable to lesser offences (*délits*) committed by a French national outside the territory of the Republic where the act is punishable under the laws of the country in which it is committed.”

69. Article 113-13 of the Criminal Code provides for the application of French law to offences (*crimes* or *délits*) characterised as acts of terrorism committed abroad by a French national or an individual habitually residing in France.

### *2. Offence of complicity to commit a terrorist act*

70. Article 421-2-1 of Chapter 1 (Acts of terrorism) of Title 2 (Terrorism) of the Criminal Code reads as follows:

“An act of terrorism shall also be constituted by the fact of participating in any group formed or association established with a view to the preparation, marked by one or more actions, of any of the acts of terrorism provided for under the previous Articles.”

### *3. Provisions to be made for minors on their return from areas of terrorist group operations*

71. Minors returning from Syria or Iraq are systematically processed by the justice system, under the supervision of the public prosecutor's office. Inter-ministerial instruction no. 5995/SG of 23 February 2018 on “Provisions to be made for minors on their return from areas of terrorist group operations (in particular the Syria-Iraq border area)”, superseding the previous instruction of 23 March 2017, indicates the arrangements made for minors on their return, stating as follows in the introduction:

“These children may have witnessed abuse and it can be assumed that all these minors, whatever their age, have grown up in a climate of extreme violence.

Faced with this exceptional situation, it is necessary to put in place specific measures of care and support for these minors, adapted to their age and individual situations, to

provide for the coordination and implementation of ordinary protection mechanisms, and to take into account the need for training and support for the staff who will be responsible for them.”

72. The arrangements concern all French minors, or those presumed to be so by the consular authorities abroad, as well as all foreign minors who are present on French territory after having spent time in the Iraqi-Syrian zone or other areas of operation of terrorist groups. For those who are apprehended with their families before their return to France, the instruction indicates that the consular post is to provide consular protection within the usual framework of the Vienna Convention on Consular Relations adopted on 24 April 1963 (the “Vienna Convention”, see paragraph 93 below), allowing in particular for visits to family members held in prisons or administrative detention centres. The French authorities are notified and the entire family can be apprehended immediately upon arrival in France. Prior to their return, the consular authorities request information on the child’s state of health and living conditions (I. point 1).

73. According to the instruction, “in the case of a scheduled return, the Paris public prosecutor’s office is informed in advance of the arrival of the family ... in connection with a removal decision decided independently by the foreign authority” and is responsible for informing the local public prosecutor’s office of the most recent address. The latter office communicates information on the family situation to the local authorities (*conseil départemental*) and refers the matter to the juvenile judge, who will decide on child protection measures (I., points 2 and 3). The instruction provides for a somatic, medico-psychological or psychotherapeutic assessment of the minor on arrival in France (I., point 4) and his/her schooling (I., point 5). It also sets out the arrangements for dealing with parents, training of professionals and coordination of the system (II, III and IV).

74. The links between the various stakeholders in this system are set out in the circular of the Minister of Justice of 8 June 2018 (CRIM/2018 -7 - GI / 08.06.2018) on the follow-up of minors returning from areas in which terrorist groups operate.

#### *4. Policy of judicial processing of adults*

75. According to the information provided by the Government, the national prosecutor’s office for counter-terrorism has adopted a policy of systematic judicial processing of French nationals held in north-eastern Syria, so judicial provisions are made for them on their arrival in France. When there is no State control over the said region, it is impossible to request the extradition of those who are wanted under an arrest warrant or an indictment to stand trial in the Assize Court. As of 6 April 2021, out of 234 individuals who had returned to France, 91 had criminal proceedings pending against them and 143 had stood trial (excluding those tried *in absentia*).

### C. The right to enter and remain in France

76. No constitutional text expressly enshrines the freedom to come and go, including the right to enter or remain on national territory and the right to leave it. Nevertheless, the Constitutional Council has recognised that the freedom to come and go is one of the constitutionally guaranteed freedoms (Decision No. 2003-467 DC of 13 March 2003). In the context of the Covid-19 pandemic, the urgent applications judge of the *Conseil d'État* emphasised that the right of French citizens to enter France constituted a “fundamental right” which could only be infringed “in the event of a compelling need to safeguard public order, in particular to prevent, temporarily, a serious and imminent danger” (CE, decision, 12 March 2021, no. 449743). He explained that any restrictions imposed on French nationals travelling from abroad by any means of transport could not, in any event, have the effect of permanently preventing the person from returning to France. In another case the same judge stated that “the right to enter French territory constitute[d], for a French national, a fundamental freedom within the meaning of Article L. 521-2 of the [Administrative Courts Code]” (CE, decision, 18 August 2020, no. 442581). Also in the context of the Covid-19 pandemic, the Joint Chambers of the *Conseil d'État*, ruling on the merits of a case, confirmed the existence of a “fundamental right” of French nationals to return to France (no. 454927, 28 January 2022).

77. The right to enter national territory, with the exception of the laws on exile which affected monarchs and their descendants, and the sanction of banishment, which was abolished at the time of the new Criminal Code (1994), is a general and absolute right for nationals, as opposed to foreigners. In its decision of 12-13 August 1993 (no. 93-325 DC, Law on immigration and the conditions of entry, reception and residence of aliens in France), the Constitutional Council stated the following:

“... No principle and no rule of constitutional value secure to aliens any general and absolute right of access to and residence on national territory. The conditions of their entry and residence may be restricted by administrative measures conferring extensive powers on the public authority and based on specific rules. The legislature may thus implement the objectives of general interest that it has set for itself. In this legal context aliens are placed in a different situation from that of nationals. ...”

78. The Law of 3 June 2016 strengthening the combat against organised crime, terrorism and the financing thereof, and improving the effectiveness and safeguards of criminal procedure, introduced administrative supervision of returnees. Under Article L. 225-1 of the National Security Code:

“Any person who has left the national territory, where there are serious reasons for believing that the destination is an area of operation of terrorist groups and that he or she may represent a threat to public security on his or her return to France, may be subjected to administrative supervision upon his or her return.”

Decisions taken by the Minister of the Interior on the basis of that provision must be reasoned and can be appealed against (Article L. 225-4 of that Code). Any failure to comply with these obligations constitutes a major offence (*délit*) punishable by three years' imprisonment and a fine of 45,000 euros (EUR) (Article L. 225-7).

79. Deprivation of nationality, potentially rendering the right to enter national territory ineffective, is a sanction imposed, unless it would render them stateless, when individuals who have acquired French nationality have been convicted of the offences listed in Article 25 of the Civil Code (offences against the fundamental interests of the Nation, in particular acts of terrorism) or when they have “engaged for the benefit of a foreign State in acts that are incompatible with the status of French national and prejudicial to the interests of France” (see *Ghoumid and Others v. France*, nos. 52273/16 and 4 others, § 19, 25 June 2020).

#### **D. Consular protection**

80. The Vienna Convention entered into force in France on 30 January 1971. French law does not bring together in a single text the provisions relating to consular protection.

81. Under Article 11 of Decree no. 76-548 of 16 June 1976 on consuls general, consuls and honorary vice-consuls and consular agents, consuls “must ensure the protection of French nationals and their interests”. According to the guide entitled “Consular Action” and the page “Assisting prisoners abroad” published on the Foreign Ministry’s website (November 2020), the consulate can “provide administrative services to”, “protect”, and “inform and accompany” French nationals in the following ways. As regards administration, the consulate can issue a laissez-passer in the event of loss or theft of identity documents and provide a new passport or civil status documents. As regards protection, in the event of illness, accident or assault, it can put the person concerned in touch with the competent local bodies and, if the conditions are satisfied, organise repatriation. In the event of arrest, the French prisoner can request a visit from a consular officer, who will “verify the conditions of detention” and “ensure that the individual’s rights are respected”. Lastly, according to the guide, for “Families in difficulty” the Ministry is a focal point of contact for families facing difficult situations involving an international aspect: “illegal child abduction, obstruction of visiting rights, forced marriages conducted abroad, international recovery of maintenance payments”.

82. Decree no. 2018-336 of 4 May 2018 on the consular protection of European Union citizens in third countries (JORF (Official Gazette) no. 0105 of 6 May 2018) incorporates the provisions of Council Directive (EU) 2015/637 of 20 April 2015 on the consular protection of European citizens (paragraphs 134 and 135 below).

83. In a judgment of 29 January 1993 (cited in paragraph 62 above), the *Conseil d'État* held that while “nationals of signatory States [were] entitled to expect protection and assistance from the consular authorities of the States of which they [were] nationals” under Article 5 of the above-mentioned Vienna Convention, a refusal by the French State to make an application for free legal aid from a foreign State for the benefit of one of its nationals and to represent him or her in court did not breach the State’s duties under that provision.

## II. INTERNATIONAL LAW AND MATERIAL

### A. Nationality

84. The concept of nationality was examined by the International Court of Justice in its judgment in *Nottebohm (Liechtenstein v. Guatemala)*, judgment of 6 April 1955, ICJ Reports 1955, where it was defined as follows:

“Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”

85. The State’s personal jurisdiction abroad is exclusively related to nationality. The bond of nationality justifies the exercise by the State of its jurisdiction in respect of individuals when they are abroad, as illustrated by the principle of jurisdiction on the basis of nationality in French criminal law, known as the active personality principle (see paragraph 68 above).

86. In terms of rights and duties, the two key legal consequences of nationality under international law, from the State’s perspective, are the right of the State to exercise diplomatic protection for the benefit of its nationals and the duty to (re)admit them to its territory. For the individual, duties associated with being a national may include the performance of military service or the payment of taxes, while the rights include the right to enter, reside in and leave the territory of the State of nationality, the right to consular assistance and the right to vote.

### B. Diplomatic and consular protection

#### 1. Diplomatic protection

##### (a) Case-law of the International Court of Justice (ICJ)

87. Diplomatic protection has long been regarded as an exclusive right of the State because the individual, in the early years of international law, had no place in the international legal order or any associated rights (see draft

Articles on diplomatic protection adopted by the International Law Commission in 2006 with commentaries, commentary on Article 1, §§ 3 and 4). To cite the *Mavrommatis* judgment of the Permanent Court of International Justice:

“ ... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.”

88. The ICJ subsequently took account of the evolution of international law concerning the international legal personality of the individual. In its judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary objections), judgment of 24 May 2007 § 39), the ICJ observed as follows:

“39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the ‘ILC’), ‘diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility’ (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.”

89. In the *Barcelona Traction* case, the ICJ took the view that the exercise of diplomatic protection was a discretionary power of the State of nationality (*Belgium v. Spain*, judgment of 5 February 1970):

“78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of

attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.”

**(b) International Law Commission (ILC) draft Articles on Diplomatic Protection**

90. Article 2 of the draft Articles on Diplomatic Protection, as adopted by the ILC in 2006, confirms that the State has no obligation or duty to exercise diplomatic protection on behalf of its nationals. It reads:

“[a] State has the right to exercise diplomatic protection in accordance with the present draft articles.”

91. Article 19 of the draft Articles reads:

**“Recommended practice”**

“A State entitled to exercise diplomatic protection according to the present draft articles should:

(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; ...”

92. In its commentary to Article 19 the ILC explains as follows (footnotes omitted):

“(1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection that add strength to diplomatic protection as a means for the protection of human rights ...

(3) ... The discretionary nature of the State’s right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice and national courts, as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad, which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection ... on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.”

*2. Consular assistance and protection*

93. Under Article 5 of the Vienna Convention, consular functions include (a) “protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits

permitted by international law” and (e) “helping and assisting nationals, both individuals and bodies corporate, of the sending State”. Article 36 of that convention defines more precisely the consular protection afforded to nationals arrested or detained in the receiving State. Consular assistance may include repatriation (see Draft Articles on Consular Relations, with Commentaries, *Yearbook of the International Law Commission* (1961) II, commentary to Article 5, para. 10 (p. 96)).

94. The ICJ has recognised that the Vienna Convention creates individual rights of foreign detainees in relation to, and corresponding obligations of, the receiving State (i.e. where the persons are detained) (see *LaGrand (Germany v. United States of America)*, judgment of 27 June 2001, ICJ Reports 2001, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, judgment of 31 March 2004, ICJ Reports 2004, p. 12; and *Jadhav (India v. Pakistan)*, judgment of 17 July 2019, ICJ Reports 2019, p. 418).

### **C. International protection of the right to enter one’s own country**

95. The right to enter one’s own country is enshrined in several international and regional human rights instruments. Article 13 § 2 of the Universal Declaration of Human Rights, 10 December 1948, provides that “[e]veryone has the right to leave any country, including his own, and to return to his country”. Article 22 § 5 of the American Convention on Human Rights provides that “[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it”. Article 12 § 2 of the African Charter on Human and Peoples’ Rights provides:

“Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

96. The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 by the United Nations General Assembly and ratified by France on 4 November 1980. Articles 2 and 12 read as follows:

#### **Article 2**

“1. 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 ...”

#### **Article 12**

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order



(ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.”

97. In its General Comment no. 27 on the Freedom of Movement under Article 12 of the ICCPR, adopted on 1 November 1999 (UN Documents CCPR/C/21/Rev.1/Add.9), the United Nations Human Rights Committee (UNCCPR) stated as follows:

“Freedom to leave any country, including one’s own (paragraph 2)

...

In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport.

The right to enter one’s own country (paragraph 4)

19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one’s own country. It includes not only the right to return after having left one’s own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (e.g. if that country is the person’s state of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (‘no one’). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase ‘his own country’. The scope of ‘his own country’ is broader than the concept ‘country of his nationality’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it

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guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."

98. In the case of *Vidal Martins v. Uruguay* (communication no. 57/1979, 23 March 1982), the UNCCPR stated:

"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. 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."

99. In *Mukong v. Cameroon* (communication 458/1991, 21 July 1994), it found:

"9.10 Finally, as to the claim under article 12, paragraph 4, the Committee notes that the author was not forced into exile by the State party's authorities in the summer of 1990 but left the country voluntarily, and that no laws or regulations or State practice prevented him from returning to Cameroon. As the author himself concedes, he was able to return to his country in April 1992; even if it may be that his return was made possible, or facilitated, by diplomatic intervention, this does not change the Committee's conclusion that there has been no violation of article 12, paragraph 4, in this case."

100. In *Jiménez Vaca v. Colombia* (communication 859/1999, 25 March 2002) the UNCCPR found:

"7.4 .... considering the Committee's view that the right to security of person (art. 9, para. 1) was violated and that there were no effective domestic remedies allowing the author to return from involuntary exile in safety, the Committee concludes that the State party has not ensured to the author his right to remain in, return to and reside in his own country. Paragraphs 1 and 4 of article 12 of the Covenant were therefore violated. This violation necessarily has a negative impact on the author's enjoyment of the other rights ensured under the Covenant.

...

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Luis Asdrúbal Jiménez Vaca with an effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country."

101. In the case of *Deepan Budlakoti v. Canada* (communication no. 2264/2013, 6 April 2018), the UNCCPR found as follows:

"9.4 ... The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. [T]here are few, if any, circumstances in which

deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country ...”

102. In the case of *Comunidad Moiwana Community v. Suriname* (judgment of 15 June 2005, series C no. 124), the Inter-American Court of Human Rights ruled as follows on the “right to enter one's own country”, as guaranteed by Article 22 § 5 of the American Convention on Human Rights, of part of the Moiwana community (Suriname nationals) forcibly exiled to French Guiana after an armed attack:

“120. Thus, the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special dependency and attachment – as there is objectively no guarantee that their human rights, particularly their rights to life and to personal integrity, will be secure. By not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence. Furthermore, the State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to remain there.”

#### **D. United Nations Convention on the rights of the child**

103. The International Convention on the Rights of the Child (CRC), adopted on 20 November 1989 and ratified by almost all the member States of the United Nations, seeks to secure and protect the specific rights of children, extending to children the concept of human rights as provided for in the Universal Declaration of Human Rights.

104. Articles 2 and 3 of the CRC read as follows:

##### **Article 2**

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction ...”

##### **Article 3**

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

105. The 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 (CMW/C/GC/3-CRC/C.GC/22) reads as follows:

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“12. The obligations of States parties under the Conventions apply to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory.”

106. In decisions of 2 November 2020 and 4 February 2021 (CRC/C/85/D/79/2019, CRC/C/85/D/109/2019, CRC/C/86/D/R.77/2019), the Committee on the Rights of the Child declared admissible several communications concerning requests for the repatriation to France of children of French nationality, whose parents had allegedly collaborated with ISIL and who were being held in the Roj, Ain Issa and al-Hol camps. The authors of the communications alleged that the French Government had not taken the measures necessary to repatriate the children to France and, by its inaction, was violating several Articles of the CRC: Articles 2 and 3 (see paragraph 104 above), together with Articles 6, 19, 20, 24 and 37 (a) and (b) (right to life, protection against all forms of ill-treatment, special protection of children in the context of deprivation of their family environment, access to medical care, and protection from cruel, inhuman and degrading punishment or treatment and from unlawful detention). The Committee found that France exercised jurisdiction over the children (decision of 4 February 2021, footnotes omitted) for the following reasons:

“8.6 The Committee [must] determine if the State party has competence *ratione personae* over the children detained in the camps in north-eastern Syrian Arab Republic. The Committee recalls that, under the Convention, States have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State’s jurisdiction to ‘territory’. A State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders. In the migration context, the Committee has held that under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection. In its decision on *Y.B. & N.S. v. Belgium*, the Committee considered that Belgium had jurisdiction to ensure the rights of a child located in Morocco who had been separated from a Belgian-Moroccan couple that had taken her in under the kafalah system.

8.7 In the present case, the Committee notes that it is uncontested that the State party was informed by the authors of the situation of extreme vulnerability of the children, who were detained in refugee camps in a conflict zone. Detention conditions have been internationally reported as deplorable and have been brought to the attention of the State party’s authorities through the various complaints filed by the authors at the national level. The detention conditions pose an imminent risk of irreparable harm to the children’s lives, their physical and mental integrity and their development. The Committee recognizes that the effective control over the camps was held by a non-State actor that had made it publicly known that it did not have the means or the will to care for the children and women detained in the camps and that it expected the detainees’ countries of nationality to repatriate them. The Committee also notes that the

Independent International Commission of Inquiry on the Syrian Arab Republic has recommended that countries of origin of foreign fighters take immediate steps towards repatriating such children as soon as possible.

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

8.9 In light of the above, the Committee concludes that the State party does exercise jurisdiction over the children ..."

107. In a decision of 8 February 2022 the Committee ruled on the merits of the above-mentioned communications. It found that "the fact that the State party [had] not protected the child victims constitute[d] a violation of their rights under Articles 3 and 37 (a) of the [CRC] [see paragraph 106 above] and the failure of the State party to protect the child victims against an imminent and foreseeable threat to their lives constitute[d] a violation of Article 6 § 1 of the [CRC]" (point 6.11). It recommended that France should (point 8):

"(a) urgently give an official reply to any request for repatriation ...; (b) ensure that the child's best interests are taken into account, as a primary consideration, in examining requests for repatriation; (c) take positive and urgent measures, acting in good faith, to repatriate child victims; (d) support the rehabilitation and reintegration of each repatriated child; and (e) in the meantime take any additional measures in order to mitigate the risks to the life, survival and development of child victims while they remain in north-eastern Syria."

108. Article 10 of the CRC, on family reunification, reads:

"1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

109. The 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) contains the following passages:

“17. ... in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:

a) Access to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards;

...

e) Have effective access to communication with consular officials and consular assistance, and to receive child-sensitive rights-based consular protection;

...

27. Protection of the right to a family environment frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including the reunion of separated family members. The Committee on the Rights of the Child, in its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, states that the term ‘parents’ must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom.”

## **E. UN Security Council Resolutions**

110. Since the attacks of 11 September 2001, the UN Security Council has adopted a large number of resolutions concerning terrorism under Chapter VII of the UN Charter. A number of these resolutions emphasise the obligation of States to facilitate the prosecution, rehabilitation and reintegration of foreign terrorist fighters and the need for enhanced international judicial cooperation in this area.

111. In Resolution 1373 (2001), the Security Council decided that all States were required to “[e]nsure that any person who participate[d] in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts [was] brought to justice ...”.

112. In Resolution 2178 (2014), adopted on 24 September 2014, paragraphs 4 and 6, the Security Council:

“4. *Calls upon* all Member States, in accordance with their obligations under international law, 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;

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 or in supporting 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 [their nationals who travel or attempt to travel to a State for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or who provide or collect funds or organise the travel of individuals for such purpose].”

113. In Resolution 2396 (2017) adopted on 21 December 2017 the Security Council called on States to step up their efforts to counter the threat posed by foreign terrorist fighters (border control measures, criminal justice, and pooling of information, in particular) and asked them to take the necessary measures against terrorist suspects and family members accompanying them, when they returned to their country, by providing in particular for prosecution, rehabilitation and reintegration in compliance with domestic and international law. Paragraph 31 reads:

“*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; ...”

**F. UN Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Groups (UN Secretary General, April 2019)**

114. In April 2019 the counter-terrorism office developed a series of key UN system-wide principles to ensure the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to terrorist groups. The text provides in particular that States should ensure that their nationals who are family members of suspected foreign terrorist fighters and do not face serious charges are repatriated for the purposes of prosecution, rehabilitation and/or reintegration, as appropriate.

**G. Other international law material**

115. In a pending case before the United Nations Committee against Torture (UNCAT) concerning the same facts as the present applications, the Committee asked France to take “the necessary consular measures to provide those concerned, women and children, with any administrative authorisation or identity and travel necessary documents for their repatriation, organised by the government or a humanitarian organisation”, and that “any other measure useful and reasonably within its powers to protect their physical and psychological integrity be taken, including access to the medical care that they need” (Communication 922/2019, (24 March 2020), G/SO 229/31 FRA

(35)). UNCAT decided that similar measures should be taken by Belgium (Communication 993/2020 (6 March 2020) G/SO 229/31 BEL(3)).

116. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following her visit to France from 14 to 23 May 2018, published a report (A/HRC/40/52/Add.4, 8 May 2019) in which she indicated as follows:

“47. ... the absence of active engagement with the conditions and status of these French nationals 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. The Special Rapporteur reminds France of the standards established in the 2018 addendum to the guiding principles on foreign terrorist fighters (Madrid Guiding Principles), which affirms the need to address gender, age and the best interest of the child as well as ensuring respect for human rights in addressing the challenge of foreign fighters. ... France is also in a strong position to assist women and children associated with foreign fighters who may be victims of terrorism or trafficking. She affirms 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 the circumscribed remedial nature of diplomatic protection proceedings. ...

61. The Government is strongly encouraged to activate positive legal and diplomatic protection for French citizens in conflict zones overseas, particularly children. This includes taking positive steps to support nationality determination and interventions where French nationals face serious human rights violations in detention, including but not limited to torture, extrajudicial execution, sexual violence and the imposition of the death penalty. Meaningful action towards rehabilitating and reintegrating returning foreign fighters and, if applicable, family members is consistent with the spirit of international solidarity and cooperation as required by Security Council resolutions 2178 (2014) and 2396 (2017) and is in the long-term interest of international peace and security.

62. The Special Rapporteur urges the Government to prioritize the modalities of repatriating children as a matter of priority, ...”

117. In a statement of 22 June 2020, as she had done at the 41st session of the UN Human Rights Council in June 2019, the UN High Commissioner for Human Rights urged States “to help their nationals stranded in Syrian camps”, to take measures of rehabilitation and reintegration, as well as investigation and – if appropriate – prosecution. She regretted that thousands of people, mostly women and children, were unable to return to their own countries of nationality or origin. Calling on States to assume responsibility, she noted that some States had instead taken actions to deprive individuals of their nationality and that others had been slow to offer consular services to their own nationals.

118. At the Security Council meeting of 24 August 2020 the United Nations Secretary General called upon States to apply international law and repatriate their nationals being held in Syria in order to avoid the risk of a terrorist threat in their own countries. He reiterated this appeal in his report on Activities of the United Nations system in implementing the United



Nations Global Counter-Terrorism Strategy (A/75/729, 29 January 2021, § 74). In a speech of 29 January 2021 the Under-Secretary General to the United Nations Office against terrorism reported that nearly a thousand children had been repatriated from the camps without any evidence that fears of a security risk were founded (S/2021/192, annex, p. 4).

119. In statements of 29 March 2021, 21 May 2019 (UNICEF/UN029014) and 4 November 2019, the Director General of UNICEF stated that children were victims of absolutely tragic circumstances and flagrant violations of their rights in the camps. She called on States to assume their responsibilities to protect minors, in particular to ensure their return to and resettlement in their country of origin.

120. In a statement of 8 February 2021, independent UN human rights experts called on the fifty-seven States whose nationals were held in camps to repatriate them immediately, expressing concern about the worsening of the security and humanitarian situation. They said that the holding, on unclear grounds, of women and children in camps was a serious concern and that thousands of detainees were exposed to violence, exploitation, abuse and deprivation in conditions and with treatment that was tantamount to torture or other degrading treatment.

121. At a press conference on 1 March 2021, the Chairman of the UN Commission of Inquiry on Syria stated that the situation of children in the camps was unacceptable and asked member States, while acknowledging that it was complicated, to repatriate children with EU citizenship.

#### **H. Relevant provisions of international humanitarian law (IHL)**

122. The Syrian conflict is generally characterised as a non-international armed conflict to which Article 3 common to the four Geneva Conventions is applicable. This provision is binding on non-State armed groups such as the SDF (see ICRC, Commentary on the First Geneva Convention, Article 3, paragraph 505, 2020). It requires humane treatment for all persons who are not directly participating in the hostilities or who have been disarmed. It specifically prohibits, in all places and at all times, violence to life and person and outrages upon personal dignity, in particular humiliating and degrading treatment (Article 3 § 1 (a) and (c)). It requires that the wounded and sick be collected and cared for (Article 3 paragraph 2, see also paragraphs 550 et seq. of above-cited Commentary on the fundamental obligations under Article 3).

123. The Geneva Conventions contain a common Article 1 under which the High Contracting Parties “undertake to respect and to ensure respect for the Convention [and its Protocols] in all circumstances”. In its advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, the ICJ emphasised that “every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the

instruments in question are complied with” (§ 158). The nature of the obligation to ensure respect for IHL has not been expressly defined to date. According to the Commentary on Article 1, this obligation also has an external dimension: “... States, whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict” (paragraph 153). This entails a negative obligation, not to “encourage, nor aid or assist in violations of the Conventions by Parties to a conflict”, and a positive obligation, “to do everything reasonably in their power to prevent and bring such violations to an end” (paragraph 154).

124. Under Rule 144 of the ICRC study on Customary International Humanitarian Law:

“States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.”

The commentary on this provision explains that State practice shows an overwhelming use of diplomatic protest and collective measures through which States exert their influence to try and stop violations of international humanitarian law. It refers to a publication in which other possible measures to ensure respect for IHL are enumerated, including political pressure, coercive measures, measures taken in cooperation with international organisations and contributions to humanitarian actions.

### III. COUNCIL OF EUROPE

#### **A. Preparatory work on Protocol No. 4 and Explanatory Report (STE no. 46)**

125. Article 3 of Protocol No. 4, headed “Prohibition of expulsion of nationals” prohibits the expulsion of an individual from the territory of which he or she is a national (paragraph 1) and guarantees the right to enter that State (paragraph 2). It is indicated as follows in the *Collected Edition of the “Travaux Préparatoires” of Protocol No. 4* (Strasbourg, 1976, p. 128):

“The draft Second Protocol ... adds to the list of rights protected by the Convention and existing Protocol certain civil and political rights not yet included, but whose recognition is proposed in the draft International Covenant ... concerning civil and political rights. These rights are: ...

– prohibition of arbitrary exile; and the right to enter one’s own country (Article 12 para. 2 of the draft Covenant) ...”

126. As regards the first paragraph of the Article, the Explanatory Report indicates that the prohibition concerns the expulsion of nationals, the term expulsion, “to be understood here in the generic meaning, in current use (to drive away from a place)” having been preferred to “exile”, which was open to various difficulties of interpretation (§ 21). The preparatory work shows

that the prohibition of “exile” was supposed to be absolute in the Council of Europe framework, unlike the wider UN context, and that the same was therefore true of the right to enter one’s country, as the possibility of exile not being arbitrary was not admitted (see *Collected Edition of the “Travaux Préparatoires” of Protocol No. 4*, cited above, p. 129).

127. The Explanatory Report stated that Article 3 § 1 did not prohibit extradition (§ 21). It was also understood that an individual could not invoke this paragraph in order to avoid certain obligations such as obligations concerning military service (*ibid.*). The report shows that it had been proposed, by the Committee of Experts responsible for drafting the Protocol, to insert a provision to the effect that a State would be forbidden to deprive a national of his nationality for the purpose of expelling him, but it had been thought inadvisable to touch on the delicate question of the legitimacy of measures depriving individuals of nationality (§ 23). A proposal to replace the words “State of which he is a national” in paragraphs 1 and 2 by “his own country” had not been accepted, because the former expression had a more precise legal meaning (*ibid.*) and to avoid confusion between the “exile” of nationals and the expulsion of aliens (see *Collected Edition of the “Travaux Préparatoires” of Protocol No. 4*, cited above, pp. 129-30).

128. As regards the second paragraph, the Explanatory Report reads as follows:

“25. The Committee made two amendments to the text proposed by the Assembly.

26. The first amendment concerns the words ‘Everyone shall be free to’ which were replaced by ‘No-one shall be deprived of the right to’.

This phrase was suggested by the wording of Article 12, paragraph 4 of the draft International Covenant adopted by the Third Committee of the United Nations General Assembly.

This wording seemed a better solution than the other to a matter of twofold concern to the Committee:

a) On the one hand, paragraph 2 should not relieve persons who wish to enter the territory of the State of which they were nationals, of the obligation to prove their nationality if so required. (A State is not obliged to admit an individual who claims to be a national unless he can make good his claim.)

b) On the other hand, such temporary measures as quarantine should not be interpreted as a refusal of entry.

27. The second change is purely a drafting one. The expression ‘enter the territory of the State’ was found preferable to ‘enter the State’.

28. The Committee considered that this paragraph should not contain the word ‘arbitrarily’, which appears in Article 12, paragraph 4, of the United Nations’ draft.

It was understood, however, that an individual’s right to enter the territory of the State of which he was a national could not be interpreted as conferring on him an absolute right to remain in that territory. For example, a criminal who, having been extradited by the State of which he was a national, then escaped from prison in the other State, would not have an unconditional right to seek refuge in his own country. Similarly, a

soldier serving on the territory of a State other than that of which he is a national, would not have a right to repatriation in order to remain in his own country.

29. The Committee agreed that the terms of paragraph 2 could be invoked only in relation to the State of which the victim of any violation of this provision was a national.”

## **B. Material from the Council of Europe Parliamentary Assembly and Committee of Ministers (PACE and CM)**

129. The relevant passages of PACE Recommendation 2169 (2020), entitled “International obligations concerning the repatriation of children from war and conflict zones”, adopted on 30 January 2020, reads as follows:

“1. The Assembly stresses the gravity of the situation of children in Syria and Iraq whose parents, believed to be affiliated to the Daesh, are citizens of Council of Europe member States. It deplores the living conditions these children are confronted with: stranded in squalid camps and detention centres; insufficient food, shelter from the elements, access to clean water, medical services and education; exposure to violence, abuse, trafficking and exploitation; and high rates of illness and mortality.

2. The Assembly considers that the human rights-based approach of the Council of Europe is essential for effectively combating terrorism. Abandoning the children stranded in Syria and Iraq, in zones characterised by war, conflict and their aftermath, leaves these children exposed to grave violations of their rights as well as the risk of radicalisation. Their repatriation, recovery and (re-)integration is an investment in building prosperous and resilient societies. ...

4. In this urgent situation, the Assembly calls on the Committee of Ministers to:

4.1 ensure that Council of Europe action against terrorism, when dealing with child-related issues, is focused on the best interest of the child, ...”

130. In the Reply to Recommendation 2169, adopted by the Committee of Ministers on 8 December 2020 (at the 1391st meeting of the Ministers’ Deputies) the CM shared PACE’s concerns about the situation of the children who “should prima facie be considered as victims” (§ 2).

131. In Resolution 2321 (2020), also adopted on 30 January 2020, PACE was convinced that actively repatriating, rehabilitating and (re-)integrating the children detained in camps in Iraq and Syria were human rights obligations and a humanitarian duty and that it also constituted an essential contribution towards the national security of the countries concerned (§ 6). It thus urged States to take all necessary measures to ensure immediate repatriation of all children whose parents, believed to be affiliated to Daesh, were citizens of their State; to repatriate children together with their mothers or primary care givers, unless it was not in the best interests of the child; to provide urgent assistance to all children in the camps; and to raise public awareness of the situation of the children concerned, with a view to alleviating public concerns related to national security.

132. In a Declaration adopted on 16 March 2021, the PACE Committee on Social Affairs, Health and Sustainable Development took the view that the

member States were “able to exercise their jurisdiction over the Syrian camps and must ensure that these European children in Syria and Iraq are treated and protected in accordance with international commitments”. It stated that PACE had “a moral responsibility to ensure that these children [were] not forgotten” and called on member States to deploy, as a matter of urgency, the necessary means to return them.

#### IV. EUROPEAN UNION LAW

##### A. Consular protection of EU citizens

133. Pursuant to Articles 20 § 2 (c) and 23 of the Treaty on the Functioning of the European Union (TFEU), EU citizens enjoy, in the territory of a third country in which the member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any member State on the same conditions as the nationals of that State. Article 46 of Title V “Citizenship” of the EU Charter of Fundamental Rights (the “Charter”) also provides for this right:

##### **Article 46 – Diplomatic and consular protection**

“Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.”

134. EU Directive 2015/637 of the Council on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC seeks to guarantee the effectiveness of the above-mentioned provisions of the TFEU and the Charter. It lays down the conditions of the consular protection of the citizens concerned and measures of coordination and cooperation between the diplomatic and consular authorities of the member States and with the EU.

135. The preamble emphasises that the fundamental right under Article 46 of the Charter is “an expression of European solidarity” and “provides an external dimension to the concept of citizenship of the Union and strengthens the identity of the Union in third countries”. The Directive provides that the consular protection provided by embassies and consulates of other member States may include assistance in situations of arrest or detention; being a victim of crime; a serious accident or serious illness; death; relief and repatriation in case of an emergency; and a need for emergency travel documents (Article 9). It lays down the procedure to be followed when a member State receives a request for consular protection from an unrepresented citizen, setting out the role of Union delegations and the European External Action Service (EEAS), which must cooperate with

member States' embassies and consulates to help with the local coordination in a crisis situation, and clarifies the financial contributions relating to the assistance provided (Articles 10 to 15).

136. In the *Van Duyn* judgment, 4 December 1974 (C-41/74), the CJEC found in paragraph 22 as follows:

“... it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.”

## **B. Resolutions of the European Parliament**

137. In its Resolution on the rights of the child (2019/2876 (RSP)), adopted on 26 November 2019, the European Parliament expressed its gravest concern regarding the humanitarian situation of children of foreign fighters held in north-east Syria and urged the member States to repatriate all European children, taking into account their specific family situations and the best interests of the child, and to provide the necessary support for their rehabilitation and reintegration; it deplored the lack of action of EU member States and the absence of coordination at EU level. In its Resolution on the Syrian conflict – 10 years after the uprising (2021/2576 (RSP)), adopted on 11 March 2021, the European Parliament said that it was extremely concerned by the deteriorating humanitarian, sanitary and security situation at camps in north-east Syria, “notably Al-Hol and Roj camps, which remain[ed] breeding grounds for radicalisation”. It expressed the belief that EU nationals suspected of belonging to terrorist organisations and detained in those camps should be tried in a court of law and called on member States to repatriate all European children, taking into account their specific family situations and the best interests of the child.

## **V. COMPARATIVE LAW AND PRACTICE**

138. According to the above-mentioned comparative law report concerning policies and court decisions on the subject of the repatriation of nationals from ten Council of Europe member States (Belgium, Bosnia and Herzegovina, Denmark, Finland, Germany, the Netherlands, Norway, the Russian Federation, Türkiye and the United Kingdom), these States have varied approaches. The domestic courts dealing with this issue have taken the view that international law and international humanitarian law (personal jurisdiction, consular protection, right to enter the State of nationality, humanitarian assistance) do not create an obligation for States to repatriate their nationals. However, some courts have held that their domestic law secures a right to return to children and persons in situations of extreme distress, although this must be assessed in the light of the wide margin of

appreciation of States in matters of national security and the conduct of international relations.

139. On 6 November 2019 the Higher Administrative Court of Berlin-Brandenburg upheld a decision ordering the national authorities to grant consular protection to a woman and her three minor children held in al-Hol camp and to repatriate them. It took into account the dire humanitarian situation in the camp and based its decision on the rights to respect for life and physical integrity guaranteed by the Basic Law combined with the State's duty deriving from these rights to provide protection. It stated that the right to such protection would be breached if the authorities did not take any measures or if the measures they did take were manifestly inadequate to achieve this objective of protection. It also stated that the children should be repatriated with their mother, and that the right to enter the national territory guaranteed by Article 3 § 2 of Protocol No. 4 might imply that the State should issue travel documents to the persons seeking return. In similar cases, however, the same court has rejected requests for the return of women and children detained in Roj camp on the grounds that their lives or physical integrity were not threatened in the camp.

140. In several first-instance decisions of 2019, the Belgian courts considered that Article 78-6° of the Consular Code, guaranteeing consular assistance to persons in situations of extreme distress, created a subjective right of protection for children. They took into account the unilateral commitment made by the Belgian government in 2017 to repatriate children under the age of ten. For children over that age, they indicated that the Belgian State must take into account the best interests of the child when exercising its discretion under the Consular Code. They also ordered the repatriation of the mothers of these minors, in spite of the fact that Article 83-2 of the Consular Code excluded persons who had travelled to a region of armed conflict from any protection, on the grounds of the best interests of the child and the right to respect for family life. However, those first-instance decisions were overturned on appeal.

141. Ruling on an application for the return of twenty-three women held with their children in al-Hol and Roj camps, the Dutch civil courts, and ultimately the Supreme Court, in a judgment of 26 June 2020, held that the State might owe a duty of care to the children, who were not responsible for the situation in which they found themselves, given the deplorable living conditions in the camps. As regards their mothers, the courts considered that it was up to the local Kurdish authorities to decide whether their return with their children was desirable. However, the courts found that the State had not exceeded its wide margin of appreciation by failing to actively pursue the repatriation of the women and children. The Hague Court of Appeal thus stated that a civil court should show a considerable degree of deference towards the balancing by the State of national security interests on the one hand against the applicants' interests on the other; it was only entitled to

assess policy in cases where the State had not reached its decision in a reasonable manner. Furthermore, in a judgment of 8 January 2019, the Rotterdam Regional Court ordered the Dutch authorities to take all necessary measures to ensure that the arrest warrant issued for a woman held in Ain Issa camp was brought to the attention of the local authorities so that she could be transferred to Iraqi Kurdistan, taken into the care of the Dutch consular authorities there and transferred to the Netherlands to stand trial; this woman was repatriated with her child.

142. Decisions to repatriate have also been taken by Bosnia and Herzegovina, Denmark, Finland and Norway. These States, together with Germany, Belgium, the Netherlands and Russia, have organised repatriations and continue to do so (see on this point the intervention by the *Clinique des droits de l'homme*, paragraph 236 below). By contrast, the United Kingdom has refused to repatriate its nationals, except for a few children, stripping several individuals who had aligned themselves with Daesh of their British nationality; in the case of *R (Begum) (on the application of Begum)*, the Supreme Court refused to allow the woman concerned to enter the UK in order to challenge the decision to deprive her of nationality (see [2021] UKSC 7; see also, on the laws of Council of Europe member States concerning the withdrawal of nationality from individuals who have been convicted of terrorist offences and/or are suspected of conducting terrorist activities, PACE Resolution 2263 (2019) adopted on 25 January 2019, entitled “Withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?”, point 5).

## THE LAW

### I. JOINDER OF THE APPLICATIONS

143. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

### II. *LOCUS STANDI* AND WHETHER THE APPLICANTS ARE VICTIMS

144. In their application forms, the applicants explained that they were acting in the name and on behalf of their respective daughters and grandchildren because those family members had found it materially impossible to lodge an application with the Court themselves.

145. The Government maintained that the applicants had no standing to act on behalf of their daughters and grandchildren in respect of their complaints under Article 3 of the Convention and Article 3 § 2 of Protocol No. 4 or to lodge applications with the Court in that regard. The applications were therefore, in their view, partly inadmissible as being



incompatible *ratione personae* with Article 34 of the Convention, which reads:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

146. The Government contended that the applicants had not received precise and explicit instructions from their daughters, who claimed to be victims for the purposes of Article 34, and on whose behalf they were seeking to act before the Court. In addition to the fact of their uncertain whereabouts, it was unclear whether it was their genuine desire to be repatriated. The lack of any recent contact with them and the strong influence that was likely to be held over them by the remaining Daesh members in the region, who were hostile to the return of mothers, prevented any wish to return from being fulfilled at the present time.

147. The applicants replied that, as admitted by the Court’s case-law in exceptional situations, they were entitled to act in the name and on behalf of their daughters and grandchildren, who were direct victims of an alleged violation of the Convention and of Protocol No. 4 thereto. They pointed out that their family members were being held in a foreign country, without being able to communicate freely with the outside world or to have access to a lawyer. At the hearing, the applicants’ lawyer explained that she had visited the area in question on two occasions, in August 2020 and February 2021, but had not been allowed into the camps. The applicants added that, as parents and grandparents of direct victims they shared the same interests and that their daughters had been able, as far as possible, to express this convergence of interests. Lastly, they pointed out that the domestic courts had unreservedly accepted their *locus standi*.

148. The Court reiterates that a third party may, in exceptional circumstances, act in the name and on behalf of a vulnerable person, where there is a risk that the direct victim will be deprived of effective protection of his or her rights and where there is no conflict of interest between the victim and the applicant (see *Lambert and Others v. France* ([GC], no. 46043/14, §102, ECHR 2015 (extracts)).

149. It further reiterates that, in the area of legal representation, if the application is not lodged by the victim himself or herself, Rule 45 § 3 requires the production of a duly signed written authority to act (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 52 and 53, ECHR 2012). It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim on whose behalf they purport to act before the Court. However, the Court has held that, in the case of victims of alleged breaches of Articles 2, 3 and 8 at the hands of the national authorities, applications lodged by individuals on their behalf, even though

no valid form of authority has been presented, may be declared admissible. In such situations, particular consideration has been shown for factors relating to the victims' vulnerability, which rendered them unable to lodge a complaint with the Court, due regard also being paid to the connections between the person lodging the application and the victim (see *Lambert and Others*, cited above, §§ 91 and 92; see also *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, §§ 102 and 103, ECHR 2014).

150. In the present case, the Court considers that the applicants J.D. and A.D. can claim to be the victims, within the meaning of Article 34 of the Convention, of the alleged violation of Article 8 (see paragraph 3 above). However, neither they nor the applicants H.F. and M.F. can claim victim status in respect of the other violations alleged before the Court. There is no doubt that the applicants' daughters and grandchildren are the direct victims of the circumstances which form the gravamen of the main complaints before the Court, namely those under Article 3 and Article 3 § 2 of Protocol No. 4, it being noted, moreover, that the complaint under Article 13 of the Convention is raised in conjunction with the latter provision.

151. Without prejudging the question of France's jurisdiction under Article 1 of the Convention, or that of the admissibility and merits of the applications, and applying the criteria set forth in the above-cited *Lambert* judgment, the Court finds that the applicants' daughters and grandchildren are currently in a situation which prevents them from lodging applications directly with the Court. The risk of being deprived of the effective protection of their rights under the Convention and Protocol No. 4 thereto is thus established in the circumstances of the case. Moreover, there is no conflict of interest between the applicants and the direct victims. In addition to having close family ties they all share the same objective: repatriation to France. Lastly, since the exact circumstances in which L. and M. are being held in the camps remain unknown (see paragraphs 36, 42 and 147 above), they may be regarded as having expressed, as far as possible, their wish to return to France with their children, and as having agreed that the applicants can act on their behalf (see paragraphs 33 34, 41 and 42 above).

152. Having regard to the foregoing, and noting that the applicants' standing to act on behalf of their daughters and grandchildren has never been questioned by the domestic courts (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 110, and *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, § 130, 4 June 2020), the Court finds that there are exceptional circumstances which enable it to conclude that the applicants have *locus standi* to raise, as representatives of their daughters and grandchildren, the complaints under Article 3 of the Convention and under Article 3 § 2 of Protocol No. 4 taken separately and in conjunction with

Article 13. Consequently, the Government's objection that the applicants lack *locus standi* must be rejected.

### III. SCOPE OF THE CASE AND CHARACTERISATION OF THE COMPLAINTS

153. The Court finds it necessary to clarify the contours and scope of the case together with the provisions under which the complaints are to be examined.

154. In their applications, relying on Articles 3 and 8 and Article 3 § 2 of Protocol No. 4, taken separately and in conjunction with Article 13 of the Convention, the applicants alleged that the refusal to repatriate their family members had exposed the latter to inhuman treatment, had breached their right to enter France, without any effective remedy being available to them in this connection, and had interfered with their right to respect for their family life.

155. In the Court's view, and without prejudice to its assessment of whether the applicants' family members fall within the jurisdiction of the respondent State, the present applications must be examined solely under Article 3 of the Convention and Article 3 § 2 of Protocol No. 4. This approach will allow all the questions raised by the applicants to be addressed. The Court finds it appropriate to take the opportunity afforded by the present case to examine the scope of Article 3 § 2 of Protocol No. 4, including with regard to the procedural rights of those concerned and/or any corresponding procedural obligations of the State in the context of a refusal to repatriate. The complaint about the lack of an effective remedy, within the meaning of Article 13, being encompassed in this analysis, there is no need to examine it separately.

### IV. THE ISSUE OF JURISDICTION UNDER ARTICLE 1 OF THE CONVENTION

#### **A. The parties' submissions**

##### *1. The Government*

156 The Government argued that the applicants' family members did not fall within France's jurisdiction within the meaning of Article 1 of the Convention. In their view the facts at issue did not relate to any of the special circumstances that could give rise to a finding that the State was exercising its jurisdiction, unless a new basis of jurisdiction were to be created and the scope of the Convention thereby broadened in a manner that its drafters never intended (they referred to *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 64 and 65, ECHR 2001-XII).

**(a) Whether France exercises extraterritorial jurisdiction in north-eastern Syria**

157. Relying on the principles reiterated by the Court in the *Georgia v. Russia (II)* judgment ([GC] (merits), no. 38263/08, § 136, 21 January 2021), the Government submitted that France did not exercise any effective control over north-eastern Syria since the camps there were outside the “legal space” (*espace juridique*) of the Convention and the authorities running them were not dependent on France. France was only one of the members of the international coalition which had entered into a partnership with the SDF, without either the objective or the consequence of occupying the region; it therefore exercised no military control over the region. Furthermore, neither this partnership nor the very occasional contacts it had with the SDF in the context of combating Daesh would have the effect of making the SDF a “subordinate local administration”. Nor were the Kurdish authorities in the region dependent on French economic, diplomatic or political support, and their political, judicial or legislative apparatus were not integrated in any way with France.

**(b) Whether a jurisdictional link stems from the domestic proceedings**

158. The Government argued that the situations at issue did not reveal any special procedural circumstances, such as those referred to by the Court in *M.N. and Others v. Belgium* ((dec.) [GC], no. 3599/18, §§ 107 and 108, 5 May 2020), and *Hanan v. Germany* ([GC], no. 4871/16, §§ 133-142, 16 February 2021), which might justify the application of the Convention on account of events which took place outside the territory of a Contracting State. The proceedings before the urgent applications judge did not fit into any of the hypotheses that had been envisaged by the Court and in any event they could give rise to a jurisdictional link only if the rights guaranteed by Article 6 or Article 2 were at stake (the Government referred to *Markovic and Others*, cited above, and *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019). The same argument was made in respect of the criminal proceedings against L. and M., which were not connected with the violations alleged before the Court. A finding to the contrary would be tantamount, as regards the proceedings before the domestic courts, to establishing a form of universal jurisdiction artificially by the mere fact of bringing a case or, as regards investigations or proceedings opened by those courts, might have a chilling effect on the opening of investigations at domestic level into serious crimes committed abroad, based on provisions relating to universal jurisdiction or the principle of active or passive personality jurisdiction (they referred to *Hanan*, cited above, § 135).

**(c) Whether other circumstances were capable of establishing France's jurisdiction**

159. The Government rejected the possibility of inferring from France's capacity to act, as evidenced by certain repatriations of children, which they described as humanitarian repatriations, that a jurisdictional link could be recognised. First, the Court had pointed to the decisive factor which made it possible to establish "the authority and control of a State agent" over individuals outside its borders, namely the exercise of physical power and control over the persons in question (they referred to *Georgia v. Russia (II)*, cited above, § 130). The Court had also rejected a causal conception of jurisdiction (*M.N. and Others v. Belgium*, cited above, § 112, and *Georgia v. Russia (II)*, cited above, § 124). It had, moreover, found that the Convention did not govern the actions of States which were not Parties to it and did not purport to be a means of requiring the Contracting States to impose Convention standards on other States (reference was made to *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161). Secondly, such recognition would be a source of serious difficulties. A State's capacity to act was difficult to assess, in view of the legal and material obstacles to this type of operation. It would entail complex negotiations and many months of preparation, the sending of agents to dangerous zones where Daesh remained present and active, including in the camps, the difficulty of locating the individuals in question, operations in the nearest operational airports (Qamishli and Deir ez-Zor) under the control of Syria, a State with which France no longer had diplomatic relations, and the need to deal with the hostility of some of those being held who would prevent the children from being repatriated. To impose an obligation of repatriation would render the operations more foreseeable and would help Daesh fighters to prepare attacks against French or European agents. Regretting the applicants' "very simplistic view" of north-eastern Syria, the Government warned that to base jurisdiction on the State's capacity for action would mean establishing jurisdiction "à la carte" depending on the capacity of States to act, which was relative and subject to change, thus giving rise to significant legal uncertainty for them. This uncertainty would also stem from the difficulty faced by the Court in assessing the conduct of international relations by States.

This analysis, they argued, would not create a risk of the applicants' family members finding themselves in a "legal vacuum", as the SDF remained bound by their obligations under international humanitarian law.

160. The fact that the applicants' daughters and grandchildren had French nationality and ties with France did not, moreover, create any basis of jurisdiction in respect of those family members. First, the State's personal jurisdiction over its nationals abroad did not encompass a "general principle of repatriation" that had allegedly been developed, according to the applicants, by the French authorities, since it would involve the use of mechanisms, strictly governed by international law, which would be

inapplicable in the present case: diplomatic protection was not possible as it had to be arranged between two sovereign States, and consular protection could not be exercised in the absence of French consular representation in Syria or of any other consular post in that country. The applicants' interpretation of the concept of personal jurisdiction confused it with that of jurisdiction within the meaning of Article 1 of the Convention. The Government disagreed with the applicants' analysis of the above-mentioned *Güzelyurtlu and Others* case and of *Gray v. Germany* (no. 49278/09, 22 May 2014). In those cases, the Court had not, contrary to what the applicants claimed (see paragraph 166 below), regarded the State's nationality-based jurisdiction as a basis of jurisdiction for Convention purposes. Its refusal to equate the two forms of jurisdiction had, moreover, been confirmed in the above-cited judgments in *Hanan* and *Georgia v. Russia (II)*. To secure Convention rights to an individual on the basis of his or her nationality would be tantamount to bringing under the State's jurisdiction all of its nationals abroad (2.5 million expatriates in the case of France) if that State failed to repatriate or protect them, and would thus create a general obligation of assistance towards them, at odds with international law and the Convention system. At the hearing, the Government emphasised that such recognition would also be a source of concern for the functioning of the Court, as it could result in a flood of applications and cause problems for the execution of judgments since their implementation would depend on foreign authorities. The Government also expressed their fear that the nationality criterion might present a particular risk in connection with the debate that had taken place in certain States as to the withdrawal of nationality and would lead to discrimination in the guarantee of Convention rights in foreign countries depending on the individual's nationality and the capacity to act of his or her State.

Secondly, the Government argued that the Court's case-law did not make ties with a country a basis of Convention jurisdiction (referring to *M.N. and Others v. Belgium*, cited above, § 109) and that, in any event, such a bond had been broken as the applicants' daughters had chosen to join a terrorist group, or had never existed in the case of their grandchildren born in Syria.

**(d) The right to enter the country of one's nationality**

161. In their written observations the Government recognised that the right to enter the country of one's nationality under Article 3 § 2 of Protocol No. 4 was susceptible, by its very nature, of extraterritorial application. At the hearing they submitted that Article 1 should apply to all the rights and freedoms secured by the Convention and the Protocols thereto.

## 2. *The applicants*

162. The applicants admitted that France did not exercise any effective control either over the territory concerned, or over individuals thereon, where they were not “in the hands of” State agents within the meaning of the case-law deriving from *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, §§ 131-42, ECHR 2011).

163. They did, however, call for an interpretation of Article 1 of the Convention that would be consistent with the case-law according to which Convention obligations were imposed on acts of a State Party which were performed within the national territory but which affected persons outside its territory, thus not under its physical control. This approach meant that a State could exercise its authority and control by opening a criminal investigation (they referred to *Güzelyurtlu and Others*, cited above), by refusing entry to national territory (case-law cited in paragraph 210 below and *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012) or by subjecting persons to the jurisdiction of its courts (*Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II, and *Stephens v. Malta (no. 1)*, no. 11956/07, 21 April 2009). They argued that such an approach could be followed in the present case, applying the criteria for the exercise of extraterritorial jurisdiction which had been reformulated by the Court in the *M.N. and Others v. Belgium* decision (cited above). In their view, these criteria, namely the “nature of the link between the applicants and the respondent State” and the question whether the respondent State “effectively exercised authority or control over them” (*ibid.*, § 113), were satisfied and the Court should thus recognise France’s jurisdiction.

### (a) **The bond of nationality**

164. The applicants submitted that L., M. and their children had a *de jure* link with France, that of nationality, together with *de facto* ties, namely previous family life on national territory, which, according to public international law, formed the basis of France’s jurisdiction and ability to protect them while they were detained outside the country and were seeking to (re-)enter it. As the State of nationality, France had jurisdiction in respect of their situation, and was therefore obliged to protect them even outside its borders (see paragraph 65 above). The applicants relied on the decision of the European Commission of Human Rights in *Cyprus v. Turkey*, according to which “a State’s nationals fall partially under its jurisdiction wherever they may be” (26 May 1975, no. 6780/74) and on the decisions of the UN committees (see paragraphs 106 and 115 above). The respondent State was, moreover, the only one with jurisdiction in respect of their situation since they were not subject to the territorial jurisdiction of any other State, thus circumscribing the scope of the interpretation of Article 1 that they defended, without calling into question the principles developed hitherto by the Court.

**(b) Whether France has extraterritorial jurisdiction in north-eastern Syria**

165. In addition to the bond of nationality, as one form of connection with France, the applicants claimed that the respondent State exercised control over the legal situation of their family members. They argued that the latter were not fully under the control of the SDF but were dependent on decisions taken by – and thus under the control of – the French authorities, which had already exercised their authority and jurisdiction both by opening proceedings concerning them and by repatriating some other French children. Their situation was not comparable to the more conventional scenario of nationals held by another State for the purpose of standing trial and who were complaining of treatment in breach of Article 3 on the part of that State. The detaining authorities, the SDF, had publicly stated that they would not try foreign nationals and had asked the States of nationality to assume their responsibilities. L. and M. also faced proceedings in France and had expressed the wish to return in order to stand trial, a wish shared by their parents. All the stakeholders, including the military allies and in particular the United States, agreed with the need to return those concerned to their respective countries. This showed that it had indeed been the decision to refuse repatriation taken by France, for purely electoral motives, which had caused L., M. and their children to be left in a situation which breached Article 3 and prevented them from returning.

166. The applicants found it paradoxical that a State could be authorised, on the basis of public international law, to act upon a situation arising outside its borders and, at the same time could be released from any responsibility under the Convention when it decided to act or not to act *vis-à-vis* that same situation. The link between “jurisdiction” under international law and “jurisdiction” for the purposes of Article 1 was the basis on which a State exercised its extraterritorial jurisdiction in cases concerning the opening of a criminal investigation into a death which had occurred outside its jurisdiction *ratione loci*. In their view the factor determining such jurisdiction was the exercise by the State of its criminal jurisdiction, that is, the jurisdiction *ratione personae* that the State was recognised as having under public international law (they referred to *Güzelyurtlu and Others*, cited above, and *Gray*, cited above, see paragraph 160 above).

167. At the hearing the applicants submitted that the ties between their family members and the respondent State, and the control and authority exercised by the latter in deciding not to repatriate them, served in themselves to confirm the jurisdictional link for the purposes of Article 1.

**(c) The right to enter the country of one’s nationality**

168. The applicants observed that the prohibition on removing the right to enter the territory of the State of the person’s nationality, as secured by Article 3 § 2 of Protocol No. 4, inherently entailed extraterritorial application.



If that prohibition could be relied upon only where the person was already on a given territory, the guarantee under that provision would be theoretical and illusory.

## **B. Observations of the third-party interveners**

### *1. Belgian, British, Danish, Dutch, Norwegian, Spanish and Swedish Governments*

169. Relying on the *Banković and Others* and *M.N. and Others v. Belgium* decisions (both cited above), the intervening Governments argued that the applicants' complaints were inadmissible because their daughters and grandchildren did not fall within the "jurisdiction" of France within the meaning of Article 1 of the Convention.

170. All the intervening Governments took the view that France had no effective control over north-eastern Syria, neither because of its participation in the international coalition, nor on account of the exercise of any authority or control by its agents over the Kurdish authorities, the camps or the applicants' family members who were being held there.

171. At the hearing, the representatives of the intervening Governments emphasised that the French nationality of the individuals being held in the camps could not engage France's extraterritorial jurisdiction. Where nationals of a given State were in a foreign country they would only be within that State's jurisdiction for the purposes of Article 1 of the Convention in exceptional circumstances of control or authority, as set out by the Court in its case-law, otherwise the scope of a State's obligations towards its nationals abroad, and the legal area of the Convention, would be unduly extended. A jurisdictional link based on nationality would also create – contrary to the Convention – discrimination between nationals and non-nationals. To admit of such a link would, in any event, be incompatible with international law, which limited the jurisdiction of the State of nationality outside its territory, and would lead in the present case to a duty on the part of France to take proactive measures to protect its nationals in Syrian camps from treatment prohibited by Article 3, even though France was not required to secure respect for that provision in the place concerned.

172. In their written comments, the British, Danish, Dutch and Norwegian Governments had already argued that no basis for France's "jurisdiction" could be derived from any repercussions, for the right under Article 3 of the Convention, of the refusal to repatriate L., M. and their children. The Court's case-law on extraditions or expulsions could not, in their view, be relied on in this connection for the reasons pointed out in the *M.N. and Others v. Belgium* decision (cited above, § 120). The Dutch Government had observed that the *Soering* (cited above) case-law did not constitute an exception to the principle of territoriality but a positive obligation of a State bound by the Convention on its own territory.

173. Referring to the decision in *M.N. and Others v. Belgium* (cited above, § 112), the intervening Governments pointed to the lack of a causal conception of jurisdiction. They also inferred from that decision, with regard to the proceedings initiated and pursued in France, that only obligations of a procedural nature could, where appropriate, be incumbent on that State (they referred to *Markovic* and *Güzelyurtlu and Others*, both cited above), which did not have jurisdiction in respect of the substantive complaints submitted to the Court. The Danish Government pointed out that the circumstances of the cases were different from those in *Güzelyurtlu and Others*; if the mere opening of a judicial investigation against the applicants' daughters, who had not returned to France or been arrested, were sufficient to trigger a jurisdictional link, on the one hand, this would trigger the protection of the Convention in respect of the daughters while not benefitting other nationals abroad, and, on the other, it would dissuade States from prosecuting their nationals involved in acts of terrorism in spite of their international obligations in such matters.

174. The Danish Government refused to accept that extraterritorial application stemmed from the very nature of Article 3 § 2 of Protocol No. 4. To accept this would be tantamount to considering that any national of a Contracting State on the territory of another State would fall within the jurisdiction of the former within the meaning of the Convention. The United Kingdom Government shared this view. They stated that this provision, which concerned the "expulsion of nationals", did not trigger any extraterritorial jurisdictional link, especially where no measure had been taken to prevent entry into the country. L. and M. had left France of their own free will and could not expect it to fulfil any positive obligations towards them. Even supposing that this provision was inherently one of an extraterritorial nature, the daughters did not fall within France's jurisdiction for the purposes of any other Convention provisions.

175. Lastly, the Norwegian Government referred to the repatriations that they had agreed to negotiate, solely on the basis of humanitarian considerations, and not pursuant to any other legal obligation arising from the Convention. They took the view, like the other intervening Governments, that those repatriations had no effect on the establishment of jurisdiction within the meaning of Article 1 since jurisdiction could not be based solely on a State's capacity to act. This interpretation was in their view consistent with the principle of legal certainty in international law (it referred to *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 150, 8 November 2016).

## 2. Council of Europe Commissioner for Human Rights

176. The Commissioner for Human Rights submitted that the close link between the nationals being held in the camps and their States of nationality, and the decisive influence of those States on their situation, in deciding whether or not to repatriate them, established a form of "authority or control"

within the meaning of the *M.N. and Others v. Belgium* decision (cited above, § 113), and consequently an exercise of jurisdiction for the purposes of Article 1 of the Convention.

3. *National Advisory Commission on Human Rights (CNCDH) and Défenseur des droits*

177. According to the CNCDH, France exercised control over the situation of French nationals in Syrian camps because it decided that they should be kept there. Referring to press articles concerning a plan for the grouped repatriation of French jihadists and their children, scheduled for the first quarter of 2019, which had not been implemented and had ultimately been described by the Minister of the Interior as a working “hypothesis” among others, it concluded that the failure to repatriate was the result of a political choice and a discretionary decision by the French authorities. It further noted that these authorities had been able, on several occasions, with the cooperation of the Kurdish guards who controlled the camps, to carry out some repatriations. It concluded that the French nationals being held there fell within the jurisdiction of France.

178. The *Défenseur des droits* took the view that France’s jurisdiction was established in several respects. First, it argued that France had a decisive influence on the SDF, which controlled the camps. Citing press releases of 30 March 2018, issued by the Foreign Ministry and the French President, according to which France was “working towards the stabilisation of the areas liberated from Daesh in northern Syria” as well as the structuring of “governance” in this area, it argued that France had established a military and diplomatic partnership with the SDF. It also referred to the press releases about previous repatriations (see paragraphs 26 and 27 above) and to a press release of 19 April 2019 from the President on the reception of a delegation from the SDF, during which “[the President] assured them of France’s continued active support in the fight against Daesh, which continue[d] to pose a threat to collective security, and in particular in the processing of terrorist fighters who ha[d] been taken prisoner and their families”. Secondly, the *Défenseur des droits* took the view that the request for the return of the children and their mothers necessarily fell within the jurisdiction of France. Thirdly, by refusing repatriation, the authorities were perpetuating a situation that put the lives of those held in the camps at risk. Lastly, a jurisdictional link arose from the opening of judicial proceedings in France, with the resulting need to ensure respect for the rights protected by Article 6 of the Convention.

4. *UN Special Rapporteurs (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Special Rapporteur on trafficking in persons, particularly women and children)*

179. The first two Special Rapporteurs took the view that the individuals being held in north-eastern Syria fell within the jurisdiction of their States of nationality, as those States had the capacity to exercise direct influence over some of their rights in the camps in applying their domestic law, for example by issuing identity documents or by authorising medical staff to verify parent-child relationships. They emphasised that the States of nationality were the best placed to ensure – and the only ones who could ensure – the protection of their nationals, in particular children, referring in this connection to General Comment No. 36 on Article 6 of the ICCPR, paragraph 63 of which provided that “a State party ha[d] an obligation to respect and ensure the rights under [A]rticle 6 of all persons who [were] within its territory and all persons subject to its jurisdiction, [i.e.] all persons over whose enjoyment of the right to life it exercise[d] power or effective control” and that “[t]his include[d] persons located outside any territory effectively controlled by the State whose right to life [was] nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner” (CCPR/C/GC/36, published on 3 September 2019 by the Human Rights Committee concerning the right to life).

180. In their view, States exercising *de facto* control over the fundamental rights of their nationals in the camps in Syria were required to prevent the violation of those rights. Whether a State exercised such control was a question of fact; factors for this assessment included the close link between the State’s actions and the alleged violation, the degree and extent of cooperation, engagement and communication with the authorities holding the children and their guardians, the extent to which the home State could put an end to the violation of its nationals’ rights, and the extent to which another State or non-State actor could support it in doing so.

181. The UN Special Rapporteur on trafficking in persons argued that Council of Europe member States had a responsibility to protect victims and potential victims of trafficking (see paragraph 233 below), including outside their territory, when they were at risk of serious human rights violations or when their lives were threatened.

5. *Reprieve*

182. According to Reprieve, the lack of acknowledgment of a jurisdictional link between the residents in the camps of north-eastern Syria and their States of nationality, and the failure of the Contracting States to

assume their responsibility *vis-à-vis* their nationals, had exposed the latter to serious human rights violations and had left them in a complete legal vacuum.

#### 6. *Human Rights Centre of Ghent University*

183. The Human Rights Centre took the view that France's capacity to protect and the obvious bond of nationality were sufficient to engage its jurisdiction, particularly in view of the inability of the parents themselves to protect their children and the incapacity or refusal of the local "State" to exercise its authority over them and to take responsibility for them. In these circumstances a denial of the jurisdictional link would create an unacceptable vacuum in human rights protection. It further argued that the respondent State's jurisdiction also stemmed from the extraterritorial application that was inherent in the nature of the right to enter the State of one's nationality as guaranteed by Article 3 § 2 of Protocol No. 4.

### C. The Court's assessment

#### 1. *Applicable principles*

184. The Court has established a number of principles in its case-law under Article 1. Thus, as provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 103, ECHR 2012 (extracts), and the references therein). The concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 344, 16 December 2020).

185. As to the meaning to be given to the concept of "jurisdiction" for the purposes of Article 1 of the Convention, the Court has emphasised that, from the standpoint of public international law, a State's jurisdictional competence is primarily territorial. It is presumed to be exercised normally throughout the territory of the State concerned. In line with Article 31 § 1 of the Vienna Convention on the Law of Treaties of 1969, the Court has interpreted the words "within their jurisdiction" by ascertaining the ordinary meaning to be given to the phrase in its context and in the light of the object and purpose of the Convention. However, while international law does not exclude a State's extraterritorial exercise of its jurisdiction, the suggested bases of such jurisdiction (including nationality and flag) are, as a general rule, defined and

limited by the sovereign territorial rights of the other relevant States. The Court has recognised that, as an exception to the principle of territoriality, acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention. In each case, with reference to the specific facts, the Court has assessed whether the existence of special features justifies the finding that the State concerned was exercising jurisdiction extraterritorially (see *M.N. and Others v. Belgium*, cited above, §§ 98-99 and 101-02, and the references therein, and *Georgia v. Russia (II)*, cited above, § 82).

186. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory. Firstly, the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government. Where, in accordance with custom, treaty or other agreement, authorities of the Contracting State perform executive or judicial duties on the territory of another State, the Contracting State may be responsible for any breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State. In addition, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (see *Al-Skeini and Others*, cited above, §§ 133-37, and the references therein, and *Georgia v. Russia (II)*, cited above, §§ 114-15).

187. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, following lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory (*ibid.*, § 116). The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. The Contracting State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be

liable for any violations of those rights (see *Al-Skeini and Others*, cited above, § 138, and the references therein).

188. Lastly, specific circumstances of a procedural nature have been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory (see *M.N. and Others v. Belgium*, cited above, § 107). In the *M.N. and Others* decision (*ibid.*, § 123) the Court explained that the mere fact that an applicant had brought proceedings in a State Party with which he or she had no connecting tie could not suffice to establish that State's jurisdiction over him or her. To find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, regardless of where in the world that individual might be, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction. However, even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6. As regards a complaint under this provision, the Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a "jurisdictional link" for the purposes of Article 1 (see *Markovic and Others*, cited above, § 54, and *M.N. and Others v. Belgium*, cited above, §§ 107 and 122). In addition, the Court reiterates that if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law (for example, under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings may be sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court. That being said, even where there is no such investigation or proceedings, a jurisdictional link may be established. Although the obligation under Article 2 comes into play, in principle, only for the State within whose jurisdiction the victim found himself or herself at the time of death, any "special feature" of the case may justify departing from this approach (see *Güzelyurtlu and Others*, cited above, §§ 188, 190 and 192-196).

## 2. *Application to the instant case*

### (a) **Preliminary remarks on the scope of the Court's assessment**

189. Having regard to the applicants' observations, which suggest applying in a specific manner the criteria for the exercise of extraterritorial jurisdiction as set out in the *M.N. and Others v. Belgium* decision (cited above), the Court must ascertain whether it can be considered that on account, first, of the bond of nationality between the family members concerned and the respondent State and, second, the decision of the latter not to repatriate them, and therefore not to exercise its diplomatic or consular jurisdiction in respect of them, they are capable of falling within its jurisdiction for the purposes of Article 3 and of Article 3 § 2 of Protocol No. 4. In this regard, the present case requires the Court to address the possibility, as it has previously accepted, that the State's obligation under Article 1 to recognise Convention rights may be "divided and tailored" (see paragraph 186 above). Moreover, it is the first time that the Court has been called upon to decide on the existence of a jurisdictional link between a State and its "nationals" in respect of a complaint under Article 3 § 2 of Protocol No. 4. The few cases examined hitherto under that provision concerned the compatibility with the right in question of decisions to banish members of royal families or the failure to deliver travel documents (see paragraphs 207 and 210 below).

190. As the Court has recently reiterated in the case of *Georgia v. Russia (II)* (cited above, § 82), its case-law has recognised a number of special features capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether there are special features which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts. In the present case, in order to determine whether the Convention and the Protocols thereto are applicable, the Court will address each of the following aspects: whether France exercises "control" over the area in which the applicants' family members are being held, whether a jurisdictional link can be derived from the opening of domestic proceedings, and lastly, whether there are any connecting ties with the State (through nationality and diplomatic or consular jurisdiction) in respect of each of the provisions at stake.

### (b) **Whether France exercises control over the relevant area**

191. The Court would begin by noting that the French military presence within the international coalition is minimal (see paragraph 12 above) and it is not established by the documents in the file that French soldiers are conducting operations in the camps of al-Hol or Roj. Nor is there any indication in the file that the local administration, and in particular the SDF which control the camps, is subordinate to the French authorities on account



of benefiting from any decisive French military or other support that might entail the exercise by France of extraterritorial jurisdiction over the region. Secondly, the Court notes that whilst L., M. and their children are under the control of the SDF, until proven otherwise, the French State, whose embassy in Syria has been closed since 2012, has not taken any action concerning them through agents or military personnel present on Syrian territory, and is therefore not exercising any “control” over them (compare *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, § 88, 30 June 2009, and contrast *Hassan and Others v. France*, nos. 46695/10 and 54588/10, § 39, 4 December 2014).

192. The Court concludes, without this being in dispute between the parties, that France does not exercise any “effective control” over the territory of north-eastern Syria and nor does it have any “authority” or “control” over the applicants’ family members who are being held in the camps in that region.

**(c) Whether a jurisdictional link is created by the opening of domestic proceedings**

193. In respect of the applicants’ argument that the opening of criminal proceedings in France against their daughters and the proceedings that they themselves had brought before the urgent applications judge reflected the exercise of the State’s jurisdiction *ratione personae* and, therefore, of its jurisdiction within the meaning of Article 1 of the Convention, the Court does not find this argument valid, for the following reasons.

194. In the first place, unlike the above-cited *Güzelyurtlu and Others* and *Gray* cases, on which the applicants relied to demonstrate the exercise of a State’s criminal jurisdiction abroad (see also *Hanan*, cited above, § 133), and which concerned initiatives of the States in question falling within the scope of their procedural obligations under Article 2 of the Convention (see *M.N. and Others v. Belgium*, cited above, § 122), in the present case the criminal proceedings brought by the French authorities against L. and M. for participation in a terrorist association do not relate to the violations now alleged before the Court. Those domestic proceedings therefore have no bearing on whether the facts complained of under Article 3 and Article 3 § 2 of Protocol No. 4 fall within France’s jurisdiction. In that connection the Court notes the concerns expressed by the respondent and intervening Governments that an interpretation to the contrary would dissuade States from opening investigations, on the basis of their domestic law or international obligations in respect of individuals involved in acts of terrorism, if they would then be required, on that basis alone, to secure Convention rights to those individuals even though they are not under their effective “control” (see, *mutatis mutandis*, *Hanan*, cited above, § 135).

195. Secondly, the Court takes the view that the bringing of proceedings by the applicants before the domestic courts does not suffice in itself to trigger

France's jurisdiction in respect of their daughters and grandchildren. In that connection it would point out that in the case of *M.N. and Others v. Belgium* (cited above) it found that the mere fact that the applicants, Syrian nationals who had been denied visas to travel to Belgium, had initiated proceedings in that State did not constitute a special feature that was sufficient to trigger a jurisdictional link in respect of their substantive complaint under Article 3 of the Convention, unlike the situation of Belgian nationals seeking the protection of their Embassy (ibid., §§ 118 and 121-23). In the present case the Court considers that it should focus on the substance of the complaint (see also *Markovic*, cited above, §§ 4 and 49-50, and *Abdul Wahab Khan v. the United Kingdom* (dec.), no. 11987/11, § 28, 28 January 2014) and confirm that the bringing of proceedings at domestic level has no direct impact on the question whether the applicants' substantive complaints fall within France's jurisdiction within the meaning of Article 1 of the Convention. The Court concludes that the mere fact that domestic proceedings have been brought cannot suffice for an extraterritorial jurisdictional link to be triggered between the applicants' family members and France, within the meaning of Article 1 of the Convention and for the purposes of Article 3 of the Convention or Article 3 § 2 of Protocol No. 4 to the Convention, the provisions relied upon in the present applications.

196. Having regard to the foregoing and without there being, in the present case, any special procedural circumstances which would create a jurisdictional link under the Convention, the Court finds that the opening of proceedings at the domestic level, whether by the French authorities or by the applicants, does not trigger France's jurisdiction or, therefore, the application of the Convention.

**(d) Whether there are connecting ties with the respondent State**

197. The Court must further determine whether any special features, stemming from the bond of nationality between the applicants' family members and the respondent State, or from the diplomatic jurisdiction that should allegedly be exercised by that State in order to protect them from ill-treatment in the camps of north-eastern Syria and to extract them from that situation, trigger its jurisdiction *ratione loci* to examine the applications.

*(i) Article 3*

198. The Court dismisses the applicants' argument that the French nationality of their family members constitutes a sufficient connection with the State in order to establish a jurisdictional link between them and that State, as such a position would be tantamount to requiring the State to comply with Article 3 of the Convention despite the fact that it has no "control", within the meaning of its case-law, over the camps in north-eastern Syria where the impugned ill-treatment is allegedly being inflicted (compare *M.N. and Others*

*v. Belgium*, cited above, § 118, and *Cyprus v. Turkey*, Commission decision, cited above, § 8).

199. Furthermore, the Court considers that the mere reliance by the applicants on France's operational capacity to repatriate, seen by them as the normal exercise of its nationality-based jurisdiction *ratione personae* as defined in public international law, or as a form of control or authority which it has wrongly failed to exercise in the case of their family members, does not suffice to constitute a special feature capable of triggering an extraterritorial jurisdictional link. As observed by the respondent and intervening Governments, for the following reasons it cannot be argued that the French State's refusal to intervene constitutes an omission which provides a basis for the exercise of its jurisdiction in respect of the complaint under Article 3 of the Convention.

200. First, the mere fact that decisions taken at national level have had an impact on the situation of persons residing abroad is not such as to establish the jurisdiction of the State concerned over them outside its territory (see *M.N. and Others v. Belgium*, cited above, § 112).

201. Secondly, while the applicants maintained that the repatriation of their family members had been refused with full knowledge of their situation and that the repatriation operations carried out by France between 2019 and 2021 had demonstrated the exercise of control and authority over its nationals detained in the camps in Syria, the Court observes that neither domestic law (see paragraphs 80-83 above) nor international law, whether customary law on diplomatic and consular protection (see paragraphs 89-94 above) or Security Council resolutions (see paragraphs 111-113 above), requires the State to act on behalf of its nationals and to repatriate them. Moreover, it reiterates that the Convention does not guarantee the right to diplomatic or consular protection (see *M. and Others v. Italy and Bulgaria*, no. 40020/03, § 127, 31 July 2012, and *Mediterranean joint venture and 10 other applications v. Italy* (dec.), no. 351/05, 29 April 2008).

202. Thirdly, even assuming, as the applicants do, that the situation of their family members does not fall within the classic scenarios of diplomatic and consular protection, defined and limited as they are by the sovereign territorial rights of the receiving States, and that only France, to which they have turned, is capable of providing them with assistance, the Court is of the view that these circumstances are not such as to establish France's jurisdiction over them. Thus, and in spite of the stated desire of local non-State authorities that the States concerned should repatriate their nationals, France would have to negotiate with them as to the principle and conditions of any operation it might decide to undertake. It would also have to organise the implementation of such an operation, which would inevitably take place in Syria.

203. In conclusion, the Court is of the view that the applicants cannot validly argue that the mere decision of the French authorities not to repatriate

their family members has the effect of bringing them within the scope of France's jurisdiction as regards the ill-treatment to which they are subjected in Syrian camps under Kurdish control. Such an extension of the Convention's scope finds no support in the case-law (see, *mutatis mutandis*, *Abdul Wahab Khan*, cited above, § 27).

(ii) Article 3 § 2 of Protocol No. 4

204. The applicants argued that the status of L., M. and their children as French nationals constituted, together with the inherent extraterritorial application of Article 3 § 2 of Protocol No. 4, a sufficient link with the respondent State at least for the purposes of that provision. That paragraph reads:

“No one shall be deprived of the right to enter the territory of the State of which he is a national.”

205. The Court notes that the right to enter a State guaranteed by this provision specifically concerns the “nationals” of that State and not aliens. In that sense it differs from the principle derived from the wording of Article 1, which grants the protection of the Convention to anyone regardless of nationality. It is thus self-evident that the French nationality of L. and M., and their life in France prior to their departure, combined with their wish to return, in full knowledge of the consequences, to be reunited with their families who live there, constitute strong legal and factual connections with the respondent State for the purposes of Article 3 § 2 of Protocol No. 4. The Court nevertheless considers that the fact that Article 3 of Protocol No. 4 applies only to nationals cannot be regarded as a sufficient circumstance for the purpose of establishing France's jurisdiction within the meaning of Article 1 of the Convention.

206. While nationality is a factor that is ordinarily taken into account as a basis for the extraterritorial exercise of jurisdiction by a State (see *Banković*, cited above, § 59), it cannot constitute an autonomous basis of jurisdiction. The protection by France of the applicants' family members would in the present case, as indicated by the domestic courts, require negotiation with the Kurdish authorities which are holding them, or even an intervention on Kurdish-administered territory.

207. The Court finds, moreover, that the refusal to grant the applicants' requests did not formally deprive their family members of the right to enter France, nor did it prevent them from doing so. This is not a case where those concerned have been deprived of the right to enter for the reason that the respondent State did not carry out the formalities required by domestic law and international rules to guarantee their entry or because it failed to issue the requisite travel documents to allow them to cross the border and to ensure they could return (compare, for example, *Marangos v. Cyprus*, no. 31106/96, Commission decision of 20 May 1997, and *Momcilovic v. Croatia* (dec.),

no. 59138/00, 29 August 2002). This decision does not therefore fall within the exercise by the State of its ordinary public powers in policing the border, a circumstance which would suffice to bring the applicants' family members, French nationals, within the territorial jurisdiction of France, which begins at the line forming the border (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 109, 13 February 2020). The Court refers here in particular to the position of the Government which, in their written observations on the complaint under Article 3 § 2 of Protocol No. 4 and at the hearing, indicated that if the applicants' daughters and grandchildren were to arrive at the border they would not be turned away and would be allowed to enter France (see paragraph 218 below).

208. Nevertheless, the question arises as to whether their cross-border situation may have consequences for France's jurisdiction *ratione loci* and *ratione personae*. In order to reply to that question, the Court must take account of the fact that the relevant provision forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions. It must also take into account the purpose and meaning of Article 3 § 2 of Protocol No. 4 and analyse them with due regard to the principle, firmly established in the Court's case-law, that the Convention must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical or illusory (see, among many other authorities, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, and *N.D. and N.T. v. Spain*, cited above, § 171).

209. As the parties have recognised, Article 3 § 2 of Protocol No. 4 inherently implies that the right guaranteed thereby will apply to the relationship between a State and its nationals when the latter are outside its territory or a territory over which it exercises effective control. If the right to enter secured by that provision were limited to nationals already in the territory of that State or under its effective control, the right would be rendered ineffective, since Article 3 § 2 of Protocol No. 4 would not in such cases provide any real protection of the right to enter for those who, in practical terms, most need that protection, namely individuals who wish to enter or return to the territory of their State of nationality. Both the subject matter and scope of that right imply that it should benefit a State Party's nationals who are outside its jurisdiction. Thus, neither the wording of Article 3 § 2 of Protocol No. 4, nor the preparatory work in respect of that Protocol, which was informed by other sources of international law, and in particular Article 12 § 4 of the ICCPR, limit the right to enter to nationals who are already within the jurisdiction of the State of nationality (see General Comment no. 27, § 19, paragraph 97 above).

210. The Court would also emphasise that increasing globalisation is presenting States with new challenges in relation to the right to enter national territory. A long period has elapsed since Protocol No. 4 was drafted. The

absolute prohibition on the expulsion of nationals and the corresponding absolute right of entry stemmed from the intention to prohibit exile once and for all, as it was seen to be incompatible with modern democratic principles. This historical basis is reflected in the long-standing case-law of the Commission and the Court in response to complaints about the compatibility of the banishment of members of royal families with the right of entry under Article 3 § 2 of Protocol No. 4 (see *Victor-Emmanuel De Savoie v. Italy* (Striking out), no. 53360/99, 24 April 2003; Association “*Regele Mihai*” v. *Romania*, no. 26916/95, Commission Decision of 4 September 1995; and *Habsburg-Lothringen v. Austria*, no. 15344/89, Commission Decision of 14 December 1989). Since then, international mobility has become more commonplace in an increasingly interconnected world, seeing many nationals settling or travelling abroad. Accordingly, the interpretation of the provisions of Article 3 of Protocol No. 4 must take account of this context, which presents States with new challenges in terms of security and defence in the fields of diplomatic and consular protection, international humanitarian law and international cooperation.

211. The work of the International Law Commission reflects the evolving debate on the usefulness of diplomatic protection as an instrument of human rights protection (see paragraphs 91 and 92 above). The right to enter a State lies at the heart of current issues related to the combat against terrorism and to national security, as shown in particular by the enactment of legislation to govern the supervision and handling of the return to national territory of individuals who had travelled abroad to engage in terrorist activities (see paragraphs 71-75 above and 231 below). If Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrive at the national border or who have no travel documents it would be deprived of effectiveness in the context of the contemporary phenomena mentioned above.

212. In the light of the foregoing, it cannot be excluded that certain circumstances relating to the situation of individuals who wish to enter the State of which they are nationals, relying on the rights they derive from Article 3 § 2 of Protocol No. 4, may give rise to a jurisdictional link with that State for the purposes of Article 1 of the Convention. However, the Court does not consider that it has to define these circumstances *in abstracto* since they will necessarily depend on the specific features of each case and may vary considerably from one case to another.

213. In the present case, the Court considers that it is necessary to take into account, in addition to the legal link between the State and its nationals, the following special features, which relate to the situation of the camps in north-eastern Syria. First, the applicants have addressed a number of official requests to the French authorities for repatriation and assistance, calling on the respondent State to allow their family members to exercise their right under this provision (see paragraphs 44, 45, 48 and 54 above). Second, those requests were made on the basis of the fundamental values of the democratic

societies which make up the Council of Europe, while their family members were facing a real and immediate threat to their lives and physical well-being, on account both of the living conditions and safety concerns in the camps, which are regarded as incompatible with respect for human dignity (see paragraphs 17, 24 and 25 above and 230, 232, 238 and 239 below), and of the health of those family members and the extreme vulnerability of the children, in particular, in view of their age (see *Khan v. France*, no. 12267/16, § 74, 28 February 2019, and *X and Others v. Bulgaria* [GC], no. 22457/16, § 197, 2 February 2021). Third, having regard to the form and length of their detention, the individuals concerned are not able to leave the camps, or any other place where they may be held incommunicado, in order to return to France without the assistance of the French authorities, finding it materially impossible to reach the French border or any other State border from which they would be passed back to those authorities (see paragraph 25 above and 232 below). The Court notes, lastly, that the Kurdish authorities have indicated their willingness to hand over the female detainees of French nationality and their children to the national authorities (see paragraphs 26 and 29 above and paragraphs 240 and 268 below).

214. Accordingly the Court concludes that in the present case there are special features which enable France's jurisdiction, within the meaning of Article 1 of the Convention, to be established in respect of the complaint raised under Article 3 § 2 of Protocol No. 4.

**(e) Conclusion**

215. To sum up, the Court considers that the applicants' daughters and grandchildren do not fall within the jurisdiction of France in respect of the complaint under Article 3 of the Convention. That complaint must be found incompatible with the provisions of the Convention and therefore inadmissible pursuant to Article 35 §§ 3 and 4 thereof.

216. The Court finds, however, that France's jurisdiction is established in respect of the alleged violation of Article 3 § 2 of Protocol No. 4. Consequently, the applicants' daughters and grandchildren are within the respondent State's jurisdiction for the purposes of that provision, in accordance with the meaning of Article 1 of the Convention. The Court, when it proceeds to consider the merits of this complaint, will determine the extent and scope of France's positive obligations under Article 3 § 2 of Protocol No. 4 in the circumstances of the present case.

**V. ALLEGED VIOLATION OF ARTICLE 3 § 2 OF PROTOCOL No. 4**

217. The applicants complained that their family members were arbitrarily deprived of the right to enter France on account of the French authorities' inaction. They submitted that those authorities had a duty to

repatriate them in order to ensure the effective protection of their right to return to France.

Article 3 of Protocol No. 4<sup>1</sup> to the Convention reads as follows:

“1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.”

### A. Admissibility

218. The Court observes that the Government raised the question whether the situation of the applicants’ daughters and grandchildren fell within the scope of Article 3 § 2 of Protocol No. 4, arguing that this provision did not apply to the situation of individuals wishing to return to their country but who were prevented from doing so for material reasons. In their submission, it would apply only where a national arrived at a border-crossing to enter his or her country and would not therefore create any positive obligation for States, in particular to organise the repatriation of their nationals. At the hearing they reiterated that the applicants’ family members had not been banned from returning to France and that they would not be turned away at the border if they arrived there, explaining that the many French nationals who had left north-eastern Syria had been able, in the context of the “Cazeneuve” Protocol, a police cooperation agreement between France and Türkiye, to reach France from Turkish territory. However, the Government did not raise any objection to the complaint to the effect that it was incompatible *ratione materiae* with the Convention, submitting that “France [had] never breached Article 3 § 2 of Protocol No. 4”. The absence of such an objection does not in principle dispense the Court from ensuring that it has jurisdiction to entertain the complaint under Article 3 § 2 of Protocol No. 4 (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III). However, since it has already recognised that the respondent State was exercising extraterritorial jurisdiction in the particular circumstances of the case (see paragraphs 213-214 above), the Court will address the question of the scope of this provision when it proceeds to examine the merits of the case.

219. The Court considers, in the light of the parties’ submissions, that the complaint raises, under the Convention, serious issues of law and fact, the determination of which requires an examination of the merits. It follows that

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<sup>1</sup> Protocol No. 4 entered into force on 2 May 1968. To date, forty-two States have ratified it: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Northern Macedonia, Malta, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden and Ukraine.



this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicants**

220. The applicants inferred from the wording of Article 3 § 2 of Protocol No. 4, the relevant preparatory work and the interpretation adopted by international bodies in respect of Article 12 § 4 of the ICCPR, on which it is explicitly based, that this provision enshrines a genuine “right to enter the national territory” that is subject to the Court’s supervision.

221. They further argued that France was depriving their daughters and grandchildren of their right to enter its territory by its failure to act. A deprivation of the right to enter did not only stem from measures taken by the State at the legislative, administrative or judicial level, in order to “deny” or “prevent” entry, such as a sentence of exile, withdrawal of nationality, refusal of leave to enter at the border, confiscation of travel documents or refusal to issue the latter. The case of *C.B. v. Germany* (no. 22012/93, Commission decision of 11 January 1994, unreported) referred to a deprivation measure that could be more or less formal, thus indicating in principle that a deprivation of the right to enter could be the result of formal State action but also of inaction. As to the international jurisprudence, the IACtHR and UN Human Rights Committee had considered that a failure to act on the part of the State might constitute a deprivation of the right to enter its territory (see paragraphs 100 and 102 above). In the applicants’ view, while the inability of their daughters and grandchildren to enter France was the result of their detention by the SDF, France could not be regarded as totally disconnected from this situation. They pointed out that the SDF were holding them against their will and that as a result they were *de facto* banished from French territory.

222. Relying on the case-law concerning the State’s obligations under Article 1 of the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 33, ECHR 2004-VII) and on the principle of effectiveness of respect for rights, as applied in relation to Articles 3 and 4 of the Convention, the applicants submitted that Article 3 § 2 of Protocol No. 4 likewise imposed positive obligations on the State to take the necessary measures to protect those concerned and guarantee their right to enter national territory. In their submission, France had failed, in the present case, to fulfil its positive obligation to take the necessary measures to secure that right to L., M. and their children, in spite of the fact that it was materially impossible for them to return to their country, that France was aware of their situation and that

they had requested repatriation. They regarded repatriation as the only possible means of guaranteeing the effectiveness of the right to return. Such a measure would not constitute an excessive burden for the State for the following reasons: the majority of the stakeholders involved were in favour of their return, the security situation had never prevented repatriation, France had the material and logistical capacity to take such action – it would mean chartering a plane and deploying a dozen agents –, other States had repatriated their nationals and partnerships could be put in place.

223. The position of the French authorities was based, in the applicants' view, on purely political considerations, which did not take into account the balance of interests involved or the absolute nature of the right in question, that nature being crucial to an assessment of the margin of appreciation afforded to the State in fulfilling its positive obligation. The fact that Protocol No. 4, when drafted, sought to address the radical and unconditional penalty of exile, and thus the expulsion of nationals, meant in the applicants' view that the right to enter the territory of one's State of nationality was also an absolute right. The fact of having left one's country voluntarily was irrelevant: the right to return to that country could not be prevented either by the law in force or by State practice. Consequently, the decision not to repatriate L., M. and their children was arbitrary, as it was unfair, unforeseeable and inappropriate, since other French nationals had been repatriated, without it being possible to establish on what criteria those repatriations had been based. The fact that the cases of L. and M. were before the French courts, while the SDF had no intention of trying them, demonstrated the incoherence of the French authorities' position.

224. The applicants deplored the lack of remedies under French law in respect of their complaint asserting the right to enter national territory. There had been no possible examination of their complaint by means of requests to executive authorities or judicial avenues, as such remedies were neither available (as the authorities did not reply on the merits of the complaints and the courts had no jurisdiction) nor effective. On the latter point, the applicants argued that the executive authorities had failed to reply to their request for repatriation and that the legal basis for the tacit refusal was unknown. Even assuming that there was such a basis in law, its implementation was entirely unforeseeable, as the State had already repatriated a number of other nationals. As to the decisions of the administrative courts, which were based on the jurisprudential doctrine of acts of State, they had also been arbitrary since the courts had not considered whether the implementation of this doctrine was in conformity with the particular circumstances of the cases, or the questions they raised under the Convention, before concluding that they lacked jurisdiction.

**(b) The Government**

225. The Government were of the view that no positive obligation arose from Article 3 § 2 of Protocol No. 4. This text, which was similar to Article 12 § 4 of the ICCPR, sought to prevent the introduction of rules and legislation in States that would prohibit the return of certain nationals. The existence of a positive obligation in this respect, when nationals of a State were unable to return to its territory, did not follow from the above-cited *C.B.* decision and found no support in the Explanatory Report, the above-mentioned General Comment on Article 12 § 4 or international case-law. It would be unwise to create a new right of this kind in disregard of public policy considerations and in spite of the burden that an obligation to repatriate would place on States from a material and financial point of view, with the resulting infringement of their sovereignty (see also the arguments at paragraph 159 above). At the hearing, the Government drew attention to the discretionary power of States in matters of consular protection and argued that no obligation to repatriate could be derived from Article 3 § 2 of Protocol No. 4. The occasional humanitarian repatriation of certain minors in difficult conditions did not prejudice the feasibility of such operations in respect of other individuals and in an uncertain context. If such missions were to have the effect of bringing the situation of the family members within the provisions of Article 3 § 2 of Protocol No. 4, that could only have a chilling effect on the conducting of such operations by States, for fear that humanitarian action might become an obligation for the future. Moreover, the fact that the cases against the applicants' daughters were being dealt with in the French courts could not serve as a pretext for establishing a positive obligation: even if an international arrest warrant were issued against them, the State would not be under any obligation to execute it outside its borders, since the criminal investigation police had no jurisdiction to make arrests abroad and international criminal-law cooperation could not be envisaged in a situation where the individuals concerned were not being held by a sovereign State.

226. The Government referred to France's position that L. and M. had to be tried on the spot, a view that was shared by the SDF in respect of women held as fighters. This policy was justified by considerations of justice and by the imperatives of ensuring the security and protection of the French population; for the return of the adults could give Daesh a renewed capacity to take action in France. The children could, however, be repatriated subject to their mothers' approval and if the conditions so allowed. The Government added that the children's return depended on the agreement of the AANES authorities, but such agreement would not be automatic since those authorities were against the idea of treating mothers and their children differently.

227. As to the question of judicial review in the present case, following the refusal by the French authorities to take measures to secure the return of

the applicants' family members, the Government explained that the outcome was based on the fact that the conduct of international relations stemmed from the political programme implemented by the government following democratic elections and on the competing sovereignty of other States. The applicants' appeals had thus fallen outside the scope of judicial review, as the courts could not rule on international relations or order a government to proceed with negotiations or other measures without breaching international law.

228. The application of the acts of State doctrine had not, in their view, prevented the administrative court from making an assessment of the entire body of information before it or from rendering decisions devoid of arbitrariness. As in the *Markovic* case (cited above), the court had carried out a meaningful review of the measures requested in order to decide whether or not they would interfere with the government's diplomatic action. In relation to application no. 24384/19 the applicants had been able to put forward their arguments, during a hearing and in their written observations, as to whether or not an act of State was at stake, and they had therefore had access to a court, albeit to a limited extent "as it [had] not enable[d] them to secure a decision on the merits" (the Government referred, *mutatis mutandis*, to *Markovic and Others*, cited above, § 115). As to application no. 44234/20, there had been no hearing because the previous similar cases had led to a finding that the administrative courts manifestly lacked jurisdiction. The general court had also rejected the applicants' request after ruling on the compatibility with the Convention of the acts of State doctrine (see paragraph 58 above).

## 2. *Observations of the third-party interveners*

### (a) **Intervening Governments**

229. The intervening Governments submitted that the applicants' family members had not been deprived of the right to enter France as Article 3 § 2 of Protocol No. 4 did not enshrine any positive obligation to repatriate them or to help them reach the border, even for the purposes of pursuing the criminal proceedings pending in France. They took the view that this approach was consistent with the above-cited *C.B.* decision, as confirmed by the decision in *Rasul Guliyev v. Azerbaijan* ((dec.), no. 35584/02, 27 May 2004).

### (b) **The Commissioner for Human Rights**

230. The Commissioner for Human Rights emphasised the timeliness of her appeals of 25 May 2019 and 30 January 2020 calling on member States to repatriate their nationals. She pointed to the significant deterioration of living conditions, in terms of health and security, in the camps in recent months and the imperative and urgent nature of such a measure, in particular

for minors, in order to give them a chance of leading a normal life in France. Repatriation was, in her view, the only measure capable of putting an end to the ongoing violation of their most fundamental rights. A case-by-case approach in this area would not be justified, as all the children were at imminent risk of irreparable harm to their lives, physical well-being and development. In addition, and in order to guarantee their best interests, in the course of repatriation minors should not be separated from their mothers, who could be sent for trial before the courts of their own country, as was the case for the French women arrested on the basis of warrants issued by counter-terrorism judges.

231. The Commissioner emphasised that the female detainees in the camps would not be prosecuted or tried on the spot. If they were repatriated and handed over to the judicial authorities of their country of nationality this would enable the domestic courts to bring to fruition the criminal proceedings against them and to help ensure respect for the interests of victims of terrorism. She observed that member States of the Council of Europe had a duty to combat terrorism, which meant that they had to put terrorists on trial and thereby reduce the terrorist threat. An increasing number of experts in the field of intelligence and terrorism prevention, but also counter-terrorism judges, as in France, agreed that repatriation was a key to security in the long term. To rise to this difficult challenge, the Commissioner emphasised that the States could rely on the know-how of those authorities which had already carried out repatriations, and of those which had set up return supervision mechanisms, and on the various tools developed by international organisations, in particular the United Nations.

**(c) UN Special Rapporteurs**

232. According to the UN Rapporteurs, the return of the individuals concerned to their country of origin was an imperative which stemmed from the situation on the ground and the dangers facing the vulnerable women and children. They said that it should be carried out either directly or through the intermediary of partners (other States, non-State actors and humanitarian organisations) with whom cooperation must be strengthened in order to identify the individuals being held, remove them safely from the camps, arrange their air transport and ensure that they were provided with humanitarian assistance whether before, during or after their transfer. The Special Rapporteurs for Counter-Terrorism, and for Extrajudicial, Summary or Arbitrary Executions emphasised the responsibility of the States of origin, whose duty it was to put an end to the serious human rights violations of which their nationals were victims in the camps. Their repatriation and return were prerequisites for the fulfilment of their international obligations to bring to justice, rehabilitate and reintegrate women and children with links to terrorist groups, and to protect the children. This would also put an end to arbitrary detentions, which were prohibited in all circumstances and in an

absolute manner by customary international law, while no assessment had been made of the risks or legality of the detention of French nationals in the camps.

233. The Special Rapporteur on Trafficking in Human Beings explained that the trafficking of women and children in areas of armed conflict was part of the ideology of terrorist groups and could be used to foster various forms of exploitation, including sexual exploitation, forced marriages or forced labour. In the camps in north-eastern Syria, and as reported *inter alia* by the International Independent Investigation Commission on the Syrian Arab Republic (A/HRC/46/55, 11 March 2021), some women were trafficked or sexually exploited after being forced or groomed to join ISIL. Relying on the Court's relevant case-law in such matters, she referred to the positive obligations under Article 4 of the Convention, and the duty of States to identify victims or potential victims, to protect them and not to punish them, without which they would be complicit in inhuman treatment or torture (Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2016), A/HRC/31/57, § 41).

These requirements were all the more imperative in relation to the child detainees, who were reportedly discriminated against owing to their parents' affiliation to ISIL and suffered from stigmatisation resulting in their isolation, recruitment by armed groups and exploitation. Assistance to victims of trafficking in the camps in north-eastern Syria necessarily required their repatriation to their State of nationality, pursuant to Article 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, or Article 16 of the Council of Europe Convention on Action against Trafficking in Human Beings, which stated that "[t]he Party of which a victim is a national (...) shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay".

**(d) National Advisory Commission on Human Rights (CNCDH) and *Défenseur des droits***

234. The CNCDH stressed that French law had not followed the development of certain other Council of Europe member States, such as Spain, which had enshrined the existence of a right to appeal against decisions which, while of the order of acts of State, encroached upon the fundamental rights of individuals. It submitted that the jurisdictional immunity enjoyed by a minister's decision, including in the case of any failure to act, constituted an infringement of the right to an effective remedy when that decision involved human rights. The difficulties faced by the national authorities in the international arena should not justify an *a priori* decision of the domestic court to decline jurisdiction, but rather should be taken into account when assessing the legality of their actions.

235. The *Défenseur des droits* maintained that limitations on the right to enter the national territory should be exceptional and considered that it was for the Court to verify that they were not arbitrary according to the following criteria: the existence of a legal basis for the decision or measure of limitation, a concrete examination by the authorities of the children's request taking into account their situation, their vulnerability and their best interests, the absence of consular protection in the area and of any foresight as to the evolution of their situation, and whether procedural safeguards existed to ensure that the right to enter national territory could be exercised. It added that the recommendations it had made to the government for the adoption of effective measures to put an end to the detention of the French children and their mothers, in its decision of 22 May 2019 (see paragraph 22 above), had not been followed up, while those concerned did not have an effective remedy by which to have their complaint under Article 3 § 2 of Protocol No. 4 examined by a court.

(e) *Clinique des droits de l'homme*

236. According to the *Clinique des droits de l'homme*, repatriation practices in Europe and elsewhere could be classified into three categories: selective, differentiated or mass repatriation. France's practices fell into the first category, along with some other European States (Belgium, the Netherlands), for security, logistical or jurisdictional reasons, while other countries (Germany, Finland) opted for a similarly restrictive approach but one that was more open to humanitarian imperatives. The practices in question also fell within the second category, as France had repatriated particularly vulnerable children and refused the return of mothers who, in its view, should be tried locally. A number of European States had adopted the same policy (Belgium, the Netherlands, Germany) but others, such as Finland or Norway, had opted for a proactive policy towards children, despite the negative reactions of public opinion in their countries. Belgium had recently indicated that it was also pursuing a case-by-case policy *vis-à-vis* Belgian mothers in detention. In the third category, the USA had taken the lead in repatriating its nationals detained in Syria and Iraq since 2019 and had urged allied coalition States to do the same. Kosovo, Bosnia and Herzegovina and North Macedonia had carried out mass repatriations of their nationals from Syria and Iraq (more than 150 of their citizens), as had the Russian Federation, Azerbaijan and several central Asian countries, which were believed to be responsible for more than sixty per cent of total repatriations.

237. The third-party intervener expressed the view that "public opinion" was the major obstacle faced by European States wishing to repatriate their nationals. It suggested that these States could learn from the experience of Kosovo, which had decided, in April 2019, to repatriate 110 nationals without informing the public. In addition, it argued that while public order considerations were paramount, they had to be weighed in the balance against

the extremely diverse profiles of the nationals concerned, who included children and persons objectively deemed not to be dangerous. With regard to ISIL fighters and supporters, their repatriation would be the best way for the security services to ensure that they had control over them. It also stated that the respondent State's argument concerning the lack of material and financial resources to carry out repatriations was invalid because the obligation to protect French citizens was a constitutional requirement which was binding on the national authorities. Moreover, in its view, the feasibility of such operations had been proven: the number of women and children concerned in relation to the French population was minimal, and France had the institutional capacity to take responsibility for them and could rely on international support (proposed aid from the USA in 2019, UNICEF) to repatriate them or assist them in resettling.

**(f) Rights and Security International (RSI)**

238. RSI emphasised the disgraceful conditions of detention in the camps. In addition to their nature (see paragraph 25 above), this organisation more specifically deplored the installation of plastic tents, which provided no protection against low temperatures, inclement weather or fire, together with a lack of food, rudimentary toilets and washrooms not meeting the minimum conditions of hygiene, and highly insufficient access to health care in view of diseases linked to malnutrition, poor water quality, post-traumatic disorders and stress. It also warned of the sexual violence suffered by women and children and indicated that the birth rate in the camp's Annex was three children for one thousand women even though no men lived there, thus raising serious questions about the risks of sexual abuse. Furthermore, RSI argued that no distinction should be made between children and their mothers with regard to repatriation: children in the camp had only their mother as a reference and it would be dangerous for their development to separate them; at the same time, women's cases should not be examined solely on the basis of their status as mother, as they too were subject to serious violations of their rights.

**(g) Reprieve**

239. Based on its fieldwork since 2017, and the monitoring in particular of forty-three women and children from twelve European states held in camps in north-eastern Syria, Reprieve highlighted the extremely vulnerable situation of foreign nationals with the resulting risk of very serious fundamental rights violations. The organisation stated that the detainees were living in conditions that seriously endangered their lives and dignity in violation of Articles 2 and 3 of the Convention. They were in real and immediate danger of being trafficked (or in some cases re-trafficked in the case of women who, upon arrival in Syria, had already been taken to houses



controlled by ISIL fighters), and of being exploited in any way by ISIL recruiters or other criminal groups present in the camps, who were taking advantage of the fact that they had been “abandoned” by their governments in order to commit their offences. The individuals concerned were also at risk of being transferred to Iraq where they could be subjected to torture and the death penalty. Reprieve deplored the legal vacuum in which the foreign nationals found themselves due to the refusal to repatriate them, thus increasing their vulnerability, especially as they had no contact with the outside world and could not receive help from their families because of the sanctions against the Syrian regime, while the NGOs on the ground provided insufficient and limited assistance, particularly with regard to food and medicine.

*(h) Avocats sans frontières*

240. *Avocats sans frontières* (ASF), which carried out missions to Iraqi Kurdistan and Rojava in December 2020 and February 2021, observed that France had indicated on several occasions that it wished to try its nationals “as close as possible to the place where they committed the offences”. However, with regard to judicial administration in the Rojava region, which was not a State, ASF noted, on the one hand, that the Kurdish courts did not have the means to try foreign fighters or to gather sufficient evidence with regard to women and, on the other, that the creation of a special (*ad hoc*) international tribunal by a UN Security Council resolution was not feasible in view of the divergent positions of the United States, France and Russia on this point. For this reason, on 29 March 2021 the Commander-in-Chief of the SDF had once again called on States to repatriate their nationals. Other judicial avenues had emerged in neighbouring countries for foreign nationals detained in Rojava. In Syria, where some local ISIL fighters had reportedly been tried, the human rights situation remained highly problematic. In Iraq, a country on which many States, including France, were relying for their nationals to be brought to trial, the situation was also very worrying given the failings of the judicial system: torture was widespread and tolerated by the Iraqi justice system, death sentences were systematic (eleven French nationals had been sentenced to death in 2019 by the Central Criminal Court of Baghdad) and justice was secret, expeditious and devoid of any due process (no pre-trial investigation, defence rights denied, access to a lawyer hindered, lack of consular protection, inhumane detention conditions).

241. With regard to the judicial response in France, ASF observed that all French nationals detained in the camps in north-eastern Syria were being processed by the justice system and were subject to international arrest warrants. The French counter-terrorism judges had specific resources enabling them to respond to the change in nature and intensity of the challenges linked to terrorism: a national counter-terrorism prosecutor’s office had been created by the 2018-2022 Programming and Justice Reform

Act, law enforcement benefitted from the national judicial database of the perpetrators of terrorist offences, different types of procedures could be used for trials (fast-track proceedings, trial at a lower criminal court or the Assize Court). The prison system also had specific features that allowed for the systematic pre-trial detention of any person returning from Syria and special supervision of post-conviction detention.

**(i) Human Rights Centre of Ghent University**

242. Drawing on the work of the ILC (paragraph 92 above), the jurisprudence of the ICJ on diplomatic and consular protection (paragraph 94 above), Article 9 of EU Directive 2015/637 (paragraph 135 above) and, more generally, the increasing consideration of individual rights in the implementation of diplomatic protection, the Human Rights Centre of Ghent University argued that the State of nationality must exercise diplomatic and consular protection by doing everything reasonably possible to protect its nationals from ill-treatment: if repatriation was not considered a reasonable measure, other forms of consular assistance must be attempted, such as issuing travel documents, contacting local NGOs to help them get to the nearest embassy or requesting assistance from another embassy. It emphasised the vulnerability of children who should be assisted, if possible without being separated from their parents. It argued for a positive obligation of the State to do everything possible to repatriate or facilitate the entry of its nationals, this being the “logical complement” to the principle of *non-refoulement*, in order to ensure the effectiveness of the right to enter one’s country in conjunction with Articles 2 and 3 of the Convention. The State would only be bound by such an obligation in the event of a serious violation of fundamental rights and after assessing the situation and vulnerability of its citizens. The expectation that the State would act stemmed from the applicant’s nationality and from a reading of Articles 2 and 3 of the Convention taken together with Article 3 § 2 of Protocol No. 4. The Centre also emphasised the absolute nature of the right guaranteed by the latter provision and argued that national security considerations were not capable of depriving a national of the right to enter his or her country.

*3. The Court’s assessment*

**(a) Interpretation of Article 3 § 2 of Protocol No. 4**

243. The Court finds it necessary, in the context of the present case, to clarify the meaning to be given to Article 3 § 2 of Protocol No. 4 according to the principles governing the interpretation of the Convention as reiterated in the *Magyar Helsinki Bizottság* judgment (cited above, §§ 118-25; see also *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 134, 21 June 2016).

244. Under that Article, no one shall be “deprived of the right to enter the territory of the State of which he [or she] is a national”. The Court observes that the preparatory work in respect of Protocol No. 4 shows that the drafters’ intention was to add to the list of rights protected by the Convention and First Protocol certain civil and political rights not yet included therein (see paragraph 125 above). The title of Protocol No. 4 to the Convention and its preamble in fact clearly refer to those “other rights and freedoms”. Moreover, the words “no one shall ...” imply that all citizens must be treated equally in exercising the right to enter (see, *mutatis mutandis*, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 152, ECHR 2005-XI). Therefore, Article 3 § 2 of Protocol No. 4 secures to a State’s nationals a right to enter its national territory, as do the equivalent instruments, the UDHR, the African Charter and the CRC (see paragraphs 95 and 108 above).

245. Only the nationals of the State concerned may rely on the right guaranteed by Article 3 § 2 of Protocol No. 4 to enter its territory (see *Nada*, cited above, § 164, ECHR 2012; *Nessa and Others v. Finland* (dec.), no. 31862/02, 6 May 2003; “*Regele Mihai*”, Commission decision cited above; and *S. v. Federal Republic of Germany*, no. 11659/85, Commission decision of 17 October 1986). The corresponding obligation to respect and secure this right is incumbent only upon the State of which the alleged victim of any violation of this provision is a national (see Explanatory Report, § 29, paragraph 128 above).

246. The heading of Article 3 of Protocol No. 4 reads “Prohibition of expulsion of nationals” and the first paragraph of the Article specifically reflects this prohibition. It could be inferred from this context that in principle this Article, including its second paragraph, is confined to cases where there has been a prior “expulsion”, thus excluding its application in situations where the national has either voluntarily left the national territory and is then denied the right to re-enter, or where the person has never even set foot in the country concerned, as in the case of children born abroad who wish to enter for the first time. However, there is no support for such a limitation in the wording of Article 3 § 2. Moreover, the preparatory work does not reveal any intention to rule out those situations: it shows, on the contrary, that the provision was informed by the rules of international law concerning the general right to enter one’s own country, and in particular Article 12 § 4 of the ICCPR, which encompasses nationals coming to the country for the first time (see General Comment no. 27, § 19, paragraph 97 above).

247. Article 3 § 1 of Protocol No. 4 prohibits only the expulsion of nationals and not their extradition. The right to enter a State of which one is a national must not therefore be confused with the right to remain on its territory and it does not confer an absolute right to remain there. For example, as mentioned in the Explanatory Report, a criminal who, having been extradited by the State of which he or she is a national, then escapes from prison in the requesting State, would not have an unconditional right to seek

refuge in his or her own country (see Explanatory Report, § 28, paragraph 128 above).

248. The right to enter the territory of which one is a national is recognised in terms that do not admit of any exception, unlike Article 12 § 4 of the ICCPR, which prohibits “arbitrary” deprivation of the right to return to one’s own country. The HRC has explained that any interference with this right, even where provided for by law, must be in accordance with the objectives of the Covenant and be reasonable in the particular circumstances, but that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable” (see paragraph 97 above). It can be seen from the preparatory work on Protocol No. 4 that the absolute nature of the right to enter national territory stems historically from the intention to prohibit, in an equally absolute manner, the exile of nationals. Article 3 of Protocol No. 4 thus secures an absolute and unconditional freedom from expulsion of a national (see *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 77, ECHR 2002-II (extracts)). However, the right to enter national territory cannot be used to negate the effects of an extradition order (see paragraph 247 above). Moreover, as Article 3 § 2 recognises this right without defining it, the Court admits that there may be room for implied limitations, where appropriate, in the form of exceptional measures that are merely temporary (see, *mutatis mutandis*, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113, and consider, for example, the situation envisaged in the context of the global health crisis caused by the Covid-19 pandemic, see paragraph 76 above, and the Explanatory Report, § 26, paragraph 128 above).

249. The Court notes that when Protocol No. 4 was being drafted, the Committee of Experts did not decide whether Article 3 thereof excluded the possibility for a State to deprive one of its nationals of his or her nationality in order to expel him or her as an alien, or to prevent him or her from returning (see paragraph 127 above). That being said, even though such a hypothesis does not arise in the present case, the Court has not ruled out the possibility that deprivation of nationality could be problematic under this provision (see *Naumov v. Albania* (dec.), no. 10513/03, 4 January 2005). It has also clarified the scope of its supervision of such a measure under Article 8 of the Convention, to ensure that the measure is not arbitrary (see *K2 v. the United Kingdom* (dec.), no. [42387/13](#), 7 February 2017; *Ghoumid and Others*, cited above; *Usmanov v. Russia*, no. 43936/18, § 54, 22 December 2020; and *Hashemi and Others v. Azerbaijan*, nos. 1480/16 and 6 others, § 47, 13 January 2022; see also, on the possibility that deprivation of nationality might constitute an arbitrary deprivation of the right to enter one’s country as guaranteed by Article 12 § 4 of the ICCPR, General Comment no. 27, § 21, paragraph 97 above).

250. The Court further notes that the wording of Article 3 § 2 of Protocol No. 4 is confined to prohibiting a deprivation of the right to enter

national territory. According to the generally accepted interpretation of the scope of this prohibition, it corresponds to a negative obligation of the State, which must refrain from depriving its nationals of the right to enter its territory (see, for the few rare examples to the contrary, paragraphs 100 and 102 above). Taken literally, the scope of Article 3 § 2 of Protocol No. 4 is limited to purely formal measures prohibiting citizens from returning to national territory. That being said, in the *C.B. v. Germany* decision (cited above) the Commission explained that the measure of deprivation could vary in its degree of formality. Thus, as the applicants emphasised, it cannot be ruled out that informal or indirect measures which *de facto* deprive the national of the effective enjoyment of his or her right to return may, depending on the circumstances, be incompatible with this provision. The Court would refer to its case-law to the effect that hindrance in fact can contravene the Convention in the same way as a legal impediment (see *Golder v. the United Kingdom*, 21 February 1975, § 26, Series A no. 18). In addition, the Court has also emphasised that fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, it cannot simply remain passive and “there is ... no room to distinguish between acts and omissions” (see, *mutatis mutandis*, *Airey*, cited above, § 25; *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31; and *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 22, Series A no. 14).

251. Certain positive obligations inherent in Article 3 § 2 of Protocol No. 4 have long been imposed on States for the purpose of effectively guaranteeing entry to national territory. These correspond to measures which stem traditionally from the State’s obligation to issue travel documents to nationals, to ensure that they can cross the border (see, for example, *Marangos* and *Momcilovic*, both cited above).

252. As to the principles concerning positive obligations, the Court would reiterate that, according to the general principle of interpretation of all the provisions of the Convention and the Protocols thereto, it is essential for the Convention to be interpreted and applied such as to render its safeguards practical and effective, not theoretical and illusory (see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 122, 15 October 2020, and the references cited in paragraph 208 above). Furthermore, the effective exercise of the rights guaranteed may, in certain circumstances, require the State to take operational measures (see, among many other examples, *Kurt v. Austria* [GC], no. 62903/15, §§ 157 et seq., 15 June 2021). Without calling into question the “absolute” nature of the right to enter guaranteed by Article 3 § 2 of Protocol No. 4, which contains no express restrictions, the Court would again emphasise that, as regards the implementation of this right, and as in other contexts, the scope of any positive obligations will inevitably vary, depending on the diverse situations in the Contracting States and the choices to be made in terms of priorities and resources. Those obligations must not

be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 81, ECHR 2009; *Kurt*, cited above, § 158; and *X. and Others*, cited above, § 182). As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for securing Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still have fulfilled its positive obligation by other means (see *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, §§ 134 and 135, ECHR 2008 (extracts), and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 216, 19 December 2017).

**(b) Whether there is a right to repatriation**

253. The applicants asked the Court to give a dynamic interpretation of the right to enter national territory, one which would entail an obligation for the State to act beyond its borders and to organise the repatriation of their family members, in the same way that it has already acted to enable the return of other children. The respondent and intervening Governments argued that the mere unfulfilled wish of the applicants' family members to enter or to be readmitted to France from the camps in north-eastern Syria did not suffice for them to be deprived of their right to return within the ordinary meaning of that term. As those family members were not physically at the border, there was no obligation for France to take any steps to enable them to enter national territory. The respondent Government further pointed to the complexity and difficulties of repatriation operations, particularly on account of the uncertain and evolving security situation in the area in question.

254. These arguments raise the question whether the French State is required to facilitate the exercise by those concerned of the right to enter national territory as part of its obligations under Article 3 § 2 of Protocol No. 4, and in particular whether it must repatriate them, regard being had to the fact that they are unable to reach its border as a result of their material situation.

255. The Court would first point out that, according to its case-law, the Convention does not guarantee a right to diplomatic protection by a Contracting State for the benefit of any person within its jurisdiction (see paragraph 201 above).

256. Secondly, it would note the submission by the UN Rapporteur that certain international instruments on human trafficking, which according to her is rife in the camps of north-eastern Syria, provide that States must repatriate their nationals who are victims of such ill-treatment (see paragraph 233 above). However, the Court does not consider that these instruments entail the existence of a general right to repatriation for a State's

nationals being held in the camps. The States themselves remain the protagonists of consular assistance as governed by the relevant Vienna Convention, which defines the conditions of its exercise, interpreted as follows: the rights enjoyed by nationals who are in difficulty or are detained abroad, under Articles 5 and 36 of the Vienna Convention, are binding only on the “receiving State” and such protection stems in principle from a dialogue between that State and the consular authorities (of the “sending State”) present in the relevant area (see paragraph 94 above). Individuals such as the applicants’ family members, who are being held in camps under the control of a non-State armed group and whose State of nationality has no consular presence in Syria, are not in principle entitled to claim a right to consular assistance.

257. The Court notes, admittedly, that the SDF have called upon the States concerned to repatriate their nationals and have shown cooperation in connection with a number of repatriations, which have been carried out in particular by France. While these factors constitute an indication, which must be taken into account, of the feasibility of certain assistance operations, the Court nevertheless does not consider that they provide a basis for a right to repatriation to be conferred upon the applicants’ family members. Nor can such a basis be found in current international law on diplomatic protection, according to which any act of diplomatic protection falls under a State’s discretionary power (see paragraph 89 above; see also the work of the ILC on the evolution in the practices of certain States, even though such practices have not yet become customary rules, see paragraph 92 above), and under the relevant international instruments in the present case, such as the ICCPR (see paragraph 97 above).

258. Lastly, the Court finds that there is no consensus at European level in support of a general right to repatriation for the purposes of entering national territory within the meaning of Article 3 § 2 of Protocol No. 4. It is true that, as shown by the material in its possession, certain States such as Belgium (see paragraph 140 above) protect their minor nationals by granting them a right to consular assistance. In addition, European Union law confers a right to consular protection on EU citizens who have no national representation, and this may take the form of repatriation in urgent situations (see paragraphs 133 and 135 above). It must nevertheless be said that the grounds given by the Contracting States in their decisions on requests for repatriation tend to vary according to the specificities of their legislation or to the procedures in place and that no European consensus emerges in support of such a measure (see paragraphs 138-142 above).

259. Having regard to the foregoing, the Court notes that there is no obligation under international treaty law or customary international law for States to repatriate their nationals. Consequently, French citizens being held in the camps in north-eastern Syria cannot claim a general right to repatriation on the basis of the right to enter national territory under Article 3 § 2 of

Protocol No. 4. In this connection, the Court takes note of the concerns expressed by the respondent and intervening Governments about the potential risk, if such a right were to be instituted, of establishing recognition of an individual right to diplomatic protection which would be incompatible with international law and the discretionary power of States.

**(c) Other obligations stemming from Article 3 § 2 of Protocol No. 4 in the context of the present case**

260. Even though Article 3 § 2 of Protocol No. 4 does not guarantee a general right to repatriation for the benefit of nationals of a State who are outside its borders (see paragraphs 255-259 above), the Court would refer to its earlier acknowledgment that this provision may impose on a State certain positive obligations *vis-à-vis* its nationals in order to ensure that their right to enter national territory is practical and effective (see paragraphs 251 and 252 above). One example is the obligation to issue them with travel documents to enable them to cross a border. The Court further points out that, as can be seen from the preparatory work on Protocol No. 4, the object of the right to enter the territory of a State of which one is a national is to prohibit the exile of nationals, a measure of banishment that has, at certain times in history, been enforced against specific categories of individuals (see paragraph 126 above). Seen from this perspective, it considers that Article 3 § 2 of Protocol No. 4 may impose a positive obligation on the State where, in view of the specificities of a given case, a refusal by that State to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile.

261. However, in view of the nature and scope of the right to enter the State of one's nationality under Article 3 of Protocol No. 4 and the absence of a general right to repatriation in international law, any such requirement under that provision must be interpreted narrowly and will be binding on States only in exceptional circumstances, for example where extraterritorial factors directly threaten the life and physical well-being of a child in a situation of extreme vulnerability. In addition, when examining whether a State has failed to fulfil its positive obligation to guarantee the effective exercise of the right to enter its territory, under Article 3 § 2 of Protocol No. 4, where such exceptional circumstances exist, the requisite review will be confined to ensuring effective protection against arbitrariness in the State's discharge of its positive obligation under that provision.

262. The Court is aware of the varying approaches adopted by States, which seek to reconcile the imperatives of their governmental policies and respect for their legal obligations under national or international law (see paragraphs 138-142 above). For the purposes of applying Article 3 § 2 of Protocol No. 4, the inability for anyone to exercise his or her right to enter national territory must be assessed also in the light of the State's return policy and its consequences. However, the Court must ascertain that the exercise by



the State of its discretionary power is compatible with the fundamental principles of the rule of law and prohibition of arbitrariness, principles which underlie the Convention as a whole (see, *mutatis mutandis*, *Grzęda v. Poland* [GC], no. 43572/18, § 342, 15 March 2022, and *Al-Dulimi and Montana Management Inc*, cited above, § 145).

263. The Court must therefore ascertain whether the situation of the applicants' family members is such that there are exceptional circumstances in the present case (i) and, if so, proceed to address the question whether the decision-making process followed by the French authorities was surrounded by appropriate safeguards against arbitrariness (ii).

(i) *Whether there are exceptional circumstances*

264. As to whether there are exceptional circumstances which may trigger an obligation to ensure that the decision-making process in the present case is surrounded by appropriate safeguards against arbitrariness, the Court would make the following points.

265. In the first place, the camps in north-eastern Syria are under the control of a non-State armed group, the SDF, supported by a coalition of States (including France) and assisted by the ICRC and humanitarian organisations. This situation must be distinguished from classic cases of diplomatic or consular protection and criminal-law cooperation mechanisms such as extradition or the transfer of convicted prisoners; it verges on a legal vacuum (see paragraph 25 above; and, *mutatis mutandis*, *Medvedyev and Others v. France* [GC], no. 3394/03, § 81, ECHR 2010). The only protection afforded to the applicants' family members is under common Article 3 of the four Geneva Conventions and under customary international humanitarian law (see paragraphs 122-124 above).

266. Second, the general conditions in the camps must be considered incompatible with applicable standards under international humanitarian law, in particular with regard to safety and healthcare, together with the general protection of human dignity and the prohibition of humiliating or degrading treatment (see paragraph 122 above and the references cited in paragraph 213 above). The Kurdish local authorities, which are bound by these standards, are directly responsible for the living conditions in the camps. However, according to common Article 1 of the four Geneva Conventions, all States parties to the instruments in question – including the relevant States of nationality such as France – are obliged to ensure that those authorities comply with their obligations under common Article 3, by doing everything “reasonably within their power” to put an end to violations of international humanitarian law. This obligation may include contributions to humanitarian efforts (see paragraphs 123-124 above).

267. Third, to date, no tribunal or other international investigative body has been established to deal with the female detainees in the camps, such as L. and M. The creation of an *ad hoc* international criminal tribunal has been

left in abeyance. It can also be seen from the ASF's submissions that the AANES cannot and will not try those female detainees against whom it has no evidence. There is therefore no prospect of these women being tried in north-eastern Syria (see also the Commissioner's comments on this point, paragraph 231 above). France, for its part, has initiated criminal proceedings against the applicants' daughters. The Court has no information about the progression of those proceedings and has not been informed whether, in the absence of the individuals under investigation, they could in fact progress. These proceedings are in part related to its international obligations and to the duty of States to investigate and, where appropriate, prosecute individuals involved in terrorism abroad (see paragraphs 111-113 above). However, it is also clear from the ASF's observations, which have not been disputed by the Government (see paragraph 75 above), that all the French nationals detained in the camps have had arrest warrants issued against them and on their arrival in France would be brought before a judge, who would assess the need for their pre-trial detention in the light of the evidence against them.

268. Fourth, the Kurdish authorities have repeatedly called on States to repatriate their nationals (see paragraphs 29 and 240 above), citing the living conditions in the camps, their inability to ensure proper organisation of detention and trial, and the security risks. For these reasons they have repeatedly indicated their willingness to hand over such persons to the relevant national authorities and have demonstrated, in practice, their cooperation in this regard, including with France (see paragraph 26 above). Thus, as some of the third-party interveners have stated (see paragraphs 231, 232, 233 and 239 above), keeping people in the camps could contribute to the insecurity of the area in the short, medium and long term, especially as it is reported that Daesh members are operating there and that the organisation is being reconstituted.

269. Fifth, a number of international and regional organisations, including the United Nations, the Council of Europe and the European Union, have, in their instruments and statements, called upon European States to repatriate their nationals being held in the camps (see paragraphs 115-121, 129-132, 137 and 230 above). Moreover, the UN Committee on the Rights of the Child has, for its part, stated that France must assume responsibility for the protection of the French children there and that its refusal to repatriate them entails a breach of the right to life and the prohibition of inhuman or degrading treatment (see paragraphs 106 and 107 above). In its decision of 8 February 2022 the Committee emphasised that it was important for France to ensure that the best interests of the child, as guaranteed by Article 3 of the International Convention on the Rights of the Child, was a primary consideration in examining requests for repatriation (see paragraph 107 above).

270. Sixth, and lastly, France has officially stated that French minors in Iraq or Syria are entitled to its protection and can be taken into its care and

repatriated (see paragraph 46 above, point 9). In this connection the Court notes that, according to the respondent Government, many French nationals have left north-eastern Syria in the context of a police cooperation agreement between France and Türkiye (the Cazeneuve Protocol, see paragraph 218 above), but this route from the Syrian camps to France is open only to those who have managed to flee and thus reach the border with Türkiye.

271. In the light of all the above points, and with regard to the extraterritorial factors which contribute to the existence of a risk to the life and physical well-being of the applicants' family members, in particular their grandchildren, the Court concludes that there are exceptional circumstances in the present case. Consequently, it must now turn to the question whether the denial of the repatriation requests by the French State was surrounded by appropriate safeguards against arbitrariness.

(ii) *Safeguards against arbitrariness*

272. Having regard to the foregoing considerations, the Court finds that it was incumbent upon the French authorities, under Article 3 § 2 of Protocol No. 4, to surround the decision-making process, concerning the requests for repatriation, by appropriate safeguards against arbitrariness.

273. The Court is acutely conscious of the very real difficulties faced by States in the protection of their populations against terrorist violence and the serious concerns triggered by attacks in recent years. Nevertheless, as the body tasked with supervision of the human rights obligations under the Convention, the Court finds it necessary to differentiate between the political choices made in the course of fighting terrorism – choices that remain by their nature outside of such supervision – and other, more operational, aspects of the authorities' actions that have a direct bearing on respect for the protected rights (see *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 481, 13 April 2017).

274. The examination of an individual request for repatriation, in exceptional circumstances such as those set out above, falls in principle within that second category. The State's undertaking pursuant to Article 3 § 2 of Protocol No. 4 and the individual rights guaranteed by that provision would be illusory if the decision-making process concerning such a request were not surrounded by procedural safeguards ensuring the avoidance of any arbitrariness for those concerned (compare, *mutatis mutandis*, *Ghoumid and Others*, cited above, §§ 44 and 47; *Beghal v. the United Kingdom*, no. 4755/16, § 88, 28 February 2019; and *K2*, cited above, §§ 49-50 and 54-61).

275. The Court reiterates in this connection that the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate

procedural limitations on the use of classified information where national security is at stake (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 123, 20 June 2002; *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 213, ECHR 2013; *Pişkin v. Turkey*, no. 33399/18, § 227, 15 December 2020; and compare *K2*, cited above, § 55). Situations involving the imperatives of protecting international peace and security are not exempt from that requirement (see *Al-Dulimi and Montana Management Inc.*, cited above, §§ 145-46).

276. In the present case, the Court considers that it must be possible for the rejection of a request for repatriation, in the context at issue, to give rise to an appropriate individual examination, by an independent body, separate from the executive authorities of the State, but not necessarily by a judicial authority. This examination must ensure an assessment of the factual and other evidence which led those authorities to decide that it was not appropriate to grant the request. The independent body in question must therefore be able to review the lawfulness of the decision denying the request, whether the competent authority refused to grant it or has been unsuccessful in any steps it has taken to act upon it. Such review should also enable the applicant to be made aware, even summarily, of the grounds for the decision and thus to verify that those grounds have a sufficient and reasonable factual basis (see, *mutatis mutandis*, *Muhammad and Muhammad*, cited above, § 201, and the references cited in that judgment at §§ 196 and 198). Where, as in the circumstances of the present case, the request for repatriation is made on behalf of minors, the review should ensure in particular that the competent authorities have taken due account, while having regard for the principle of equality applying to the exercise of the right to enter national territory (see paragraph 244 above), of the children's best interests, together with their particular vulnerability and specific needs (see paragraph 269 above). In sum, there must be a mechanism for the review of decisions not to grant requests for a return to national territory through which it can be ascertained that there is no arbitrariness in any of the grounds that may legitimately be relied upon by the executive authorities, whether derived from compelling public interest considerations or from any legal, diplomatic or material difficulties.

**(d) Application of those principles to the present case**

277. The Court observes that it is not in dispute that the applicants' family members were in a situation which could be characterised, at the time of their requests to the French authorities for their repatriation, as a humanitarian emergency and which required an individual examination of their requests. Those requests sought the implementation of their right to enter national territory, as provided for by domestic law, being a constitutionally guaranteed right, and also by Protocol No. 4, and therefore a right that could be invoked against the State (see paragraph 76 above).

278. Even though the applicants had the opportunity to submit any arguments that they considered useful for the defence of their interests and those of their family members, through their contact with the executive authorities and the judicial proceedings initiated by them, the Court is nevertheless of the view that the safeguards afforded to the applicants were not appropriate.

279. The Court would first note that the applicants wrote, on several occasions, to the President of the Republic and to the Minister for European and Foreign Affairs, including with the assistance of their counsel, in October 2018, April 2019 and June 2020, requesting the repatriation of their daughters and grandchildren. However, neither of those executive authorities replied to them expressly and the Government, at the hearing, gave no explanation of the reasons for their lack of response. Their lawyer received nothing more than a general policy document explaining the government's position on requests for repatriation from French citizens who had gone to Syria and Iraq (see paragraph 46 above). However, there is no evidence in the files to suggest that the refusals received by the applicants could not have been dealt with in specific individual decisions or have been reasoned according to considerations tailored to the facts of the case, if necessary complying with a requirement of secrecy in defence matters. Notwithstanding the different context and nature of the measures in the present case, the Court notes by way of comparison that the decisions that have been taken concerning the administrative supervision of returns to France of individuals who had left with the presumed intention of joining terrorist groups in their area of operation have been reasoned decisions of the competent minister and subject to a right of appeal (see paragraph 78 above).

280. Ultimately the applicants did not receive any explanation for the choice underlying the decision taken by the executive in respect of their requests, except for the implicit suggestion that it stemmed from the implementation of the policy pursued by France, albeit that a number of minors had previously been repatriated. Nor did they obtain any information from the French authorities which might have contributed to the transparency of the decision-making process.

281. The Court observes, secondly, that the situation it has just described could not be remedied by the proceedings brought by the applicants before the domestic courts. Those courts decided that they had no jurisdiction on the grounds that the matter before them concerned acts that could not be detached from the conduct by France of its international relations. This was the finding of the administrative courts, upon the urgent application for an order instructing the competent minister to organise the repatriation of L., M. and their children, or upon the application for the setting-aside of the tacit decision of refusal to take such a measure, and also that of the general courts, in response to the applicants' complaint of an illegal administrative act. As regards the application in the present case of the acts of State doctrine, with

its constitutional basis, it is not the task of the Court to interfere with the institutional balance between the executive and the courts of the respondent State, or to make a general assessment of the situations in which the domestic courts refuse to entertain jurisdiction. The question of sole importance is whether those concerned had access to a form of independent review of the tacit decisions to refuse their repatriation requests by which it could be ascertained that there were legitimate and reasonable grounds, devoid of arbitrariness, to justify those decisions in the light of the positive obligations stemming in the present case, in the exceptional circumstances set out above, from the right to enter national territory under Article 3 § 2 of Protocol No. 4. That was not the case, however, in the proceedings before the *Conseil d'État* or before the Paris *tribunal judiciaire*.

282. The Court concludes from the foregoing that, in the absence of any formal decision on the part of the competent authorities to refuse to grant the applicants' requests, the jurisdictional immunity raised against them by the domestic courts, in relation to their claims relying on respect for the right guaranteed by Article 3 § 2 of Protocol No. 4 and the obligations imposed on the State by that provision, deprived them of any possibility of meaningfully challenging the grounds relied upon by those authorities and of verifying that those grounds were not arbitrary. The Court would add that the possibility of such a review would not necessarily mean that the court in question would then have jurisdiction to order, if appropriate, the requested repatriation (see paragraph 259 above).

283. Accordingly, the examination of the requests for repatriation made by the applicants on behalf of their family members was not surrounded by appropriate safeguards against arbitrariness.

284. There has therefore been a violation of Article 3 § 2 of Protocol No. 4.

## VI. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

### A. Article 41

285. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### 1. *Damage*

286. The applicants requested, for each family, 50,000 euros (EUR) in respect of the non-pecuniary damage they claimed to have sustained as a result of the situation of their daughters and grandchildren, the inability to

maintain contact with them, the uncertainty as to whether or not they would return to France and the lack of a remedy by which to obtain redress.

287. The Government made no observations on the subject of the applicants' claim for non-pecuniary damage.

288. The Court considers that, in the circumstances of the present case, a finding of a violation is sufficient in itself to compensate for any non-pecuniary damage sustained by the applicants.

## *2. Costs and expenses*

289. The applicants in application no. 24384/19 requested EUR 6,000 in respect of the costs and expenses they had incurred in the proceedings before the domestic courts, corresponding to their lawyer's fees for drafting the applications and observations and representing them before those courts. They also claimed the sum of EUR 12,000 for the costs and expenses they had incurred in the proceedings before the Court, covering the drafting by their lawyer of their application and observations before the Chamber, the following-up of the proceedings after their relinquishment to the Grand Chamber, the drafting of the answers to the questions for the hearing before the Grand Chamber and of the oral submissions, and the lawyer's attendance at the hearing. The applicants in application no. 44234/20 also claimed EUR 6,000 for the costs and expenses they had incurred before the domestic courts and EUR 7,200 for those incurred in the proceedings before the Court, comprising the same work as that carried out in respect of the other application but without the observations before the Chamber (see paragraph 4 above).

290. The Government did not make any submissions in respect of the applicants' claim for the reimbursement of costs and expenses.

291. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the respective sums of EUR 18,000 and EUR 13,200 covering costs under all heads, and therefore awards those sums to the applicants.

## *3. Default interest*

292. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**B. Article 46**

293. The Court reiterates that under Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see, among other authorities, *Abdi Ibrahim v. Norway* [GC], no. 15379/16, § 180, 10 December 2021).

294. The Court further points out that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions and spirit of the Court's judgment. However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measure – individual and/or general – that might be taken to put an end to the situation which has given rise to the finding of a violation (*ibid.*, § 181).

295. In the present case the Court has found that neither the form of any examination by the executive authorities of the requests for repatriation, nor the review by the courts of the decisions on those requests, enabled the existence of arbitrariness to be ruled out. It is thus of the view that the French Government must re-examine those requests, in a prompt manner, while ensuring that appropriate safeguards are afforded against any arbitrariness (see paragraph 276 above).

**FOR THESE REASONS, THE COURT,**

1. *Decides*, unanimously, to join the applications;
2. *Declares*, unanimously, the complaints under Article 3 of the Convention inadmissible;
3. *Declares*, by a majority, the applications admissible as regards the complaint submitted by the applicants under Article 3 § 2 of Protocol No. 4 to the Convention on behalf of their daughters and grandchildren;



4. *Holds*, by fourteen votes to three, that there has been a violation of Article 3 § 2 of Protocol No. 4 to the Convention;
5. *Holds*, by fifteen votes to two, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants;
6. *Holds*, by fourteen votes to three,
  - (a) that the respondent State is to re-examine the requests to enter French territory, while ensuring that appropriate safeguards are afforded against any arbitrariness;
  - (b) that the respondent State is to pay the applicants, within three months, 18,000 EUR (eighteen thousand euros) to H.F. and M.F. jointly, and 13,200 EUR (thirteen thousand two hundred euros) to A.D. and J.D. jointly, plus any tax that may be chargeable to them, in respect of costs and expenses;
  - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses*, by fifteen votes to two, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert  
Deputy to the Registrar

Robert Spano  
President

H.F. AND OTHERS v. FRANCE JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Joint concurring opinion of Judges Pavli and Schembri Orland;
- (b) Joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Roosma;
- (c) Partly dissenting opinion of Judge Ktistakis joined by Judge Pavli.

R.S.  
J.C.

JOINT CONCURRING OPINION  
OF JUDGES PAVLI AND SCHEMBRI ORLAND

1. This case involves two French women and their minor children, who have been effectively exiled from their own country, in conditions of extreme precariousness. The Court’s judgment makes important contributions to our sparse jurisprudence on the right not to be expelled from – and the right to enter – the territory of the State of one’s nationality, as guaranteed by Article 3 of Protocol No. 4 to the Convention. While we have joined the majority in the primary finding of a violation of that provision and in large parts of their reasoning, we are unable to share the heavy proceduralist approach in certain aspects of their analysis. We are also of the view that the facts of the case warrant a stronger conclusion as to the nature of the Convention violation that has been found, which we consider to be substantive as well as procedural in character.

2. The Grand Chamber has held that no general right to repatriation can be derived from Article 3 of the Fourth Protocol for nationals who happen to find themselves outside their country of citizenship and are unable to return freely to its territory. That notwithstanding, in certain exceptional circumstances, including a serious risk to the life and limb of nationals (see paragraph 271 of the judgment), the State of nationality’s “refusal to take any action” to facilitate a national’s right to return may amount, in effect, to *de facto* exile prohibited by the said Convention provision (see paragraph 260 of the judgment). In such a scenario, positive obligations are triggered for the State of nationality to guarantee the effective exercise of its nationals’ right to enter its territory – in essence, a right to return.

What do such positive obligations consist of? The majority are rather circumspect in spelling out these “other obligations”: the Court’s “requisite review will be confined to ensuring effective protection against arbitrariness in the State’s discharge of its positive obligation”. Any positive duties “must be interpreted narrowly” in the light of the absence of a general right to repatriation (see paragraph 261 of the judgment). At the same time, “the exercise by the State of its discretionary power [should be] compatible with the fundamental principles of the rule of law and prohibition of arbitrariness”.

It is perhaps unprecedented for the Court to establish positive State obligations in order to give effect to a *substantive* Convention right without seeking at least to delineate in broad terms the nature of those positive obligations (contrast, for example, the elaborate methodology for compliance with the so-called *Osman* duties to protect a person’s right to life under Article 2 of the Convention from the actions of third parties). In our view, giving effect to the right to return – however exceptional the circumstances under which such a right might arise in the first place – necessarily implies positive obligations of a procedural as well as a substantive nature. If “a refusal to take any action” to facilitate a national’s repatriation is found to

have been arbitrary or otherwise unjustified, compliance with the relevant Convention provision would require that the State take reasonable steps to facilitate his or her return. Otherwise, a duty to ensure the effectiveness of the substantive Convention right not to be exiled would itself be severely undermined. As has often been said, great injustice has been perpetrated throughout human history on the basis of seemingly correct procedures.

It would appear that the nature of the positive obligations at stake in this case can be defined with no strenuous effort by relying on our established jurisprudence on positive obligations: no more (and no less) can be required of a State than to take, in good faith, genuine, reasonable and non-discriminatory steps to facilitate a national's return, in the absence of any Convention-compliant grounds for refusing to do so. This would imply a duty to obtain accurate information on the situation in which the national at risk finds himself or herself; to carry out an assessment of the legal and practical feasibility of arranging the repatriation; to make relevant representations to the authorities of the foreign country or entity and other actors concerned; or conversely, to provide convincing reasons for the national authorities' inability or unwillingness to proceed with the national's repatriation.

At the same time, it is obvious that protection from arbitrariness has both substantive and procedural components; not only should the process of decision-making be fair, but also the reasons provided for justifying a failure to act should be Convention-compliant. In the words of the Court, there should be "no arbitrariness in any of the grounds that may legitimately be relied upon by the executive authorities" (see paragraph 276 of the judgment).

3. The majority's heavily procedural approach becomes more evident in the standard of review that has been adopted: the Court's enquiry is to be limited to whether "the decision-making process followed by the French authorities was surrounded by appropriate safeguards against arbitrariness" (paragraph 263 of the judgment). Why the relatively low threshold of lack of arbitrariness is the appropriate yardstick in this context is not explained, nor is it obvious from the text of Article 3 of Protocol No. 4, its drafting history, object and purpose, or any other interpretative method that can be surmised, at least in the absence of any justification in the judgment itself.

The major premise of the judgment is that positive obligations to facilitate repatriation may exceptionally arise where a failure to act would be tantamount to imposing *de facto* exile. It is clear from the drafting history of the relevant Convention provision that the drafters did not look favourably on preserving the ability of States to exile their own nationals, opting instead for a prohibition phrased in unqualified terms<sup>1</sup> and a clear departure from a dark historical practice they wished to leave behind. It follows that State policies,

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<sup>1</sup> While it may be reasonable to read some implied exceptions into the absolute ban, so far they have only been found, or presumed, to have been justified as temporary measures, based on very compelling public interest grounds (see paragraph 248 *in fine* of the judgment).

actions or omissions that amount to *de facto* (or possibly even *de jure*) exile of their own nationals come with a very high burden of justification. In fact, it can be argued that no (direct or constructive) restrictions on nationals' ability to enter the territory are permissible under Article 3 of the Fourth Protocol, except for very short periods.

So whence the arbitrariness standard of review adopted by the Grand Chamber majority? The apparent connection would seem to be the Court's jurisprudence on deprivation of nationality or official refusal to grant a particular nationality. However, the Convention does not expressly provide for a right to obtain or retain a certain citizenship, and to the extent that the Court has recognised such a right, it has done so within the scope of the Article 8 right to respect for private and family life, subject to still-evolving thresholds of gravity of the interference with those rights. In the absence of a direct textual basis or regulation, the Court's arbitrariness review in deprivation of nationality cases has been developed, to a great extent, with reference to the relevant provisions of the Universal Declaration on Human Rights<sup>2</sup> and other sources of general international law (see, among other authorities, *Genovese v. Malta*, no. 53124/09, § 30, 11 October 2011, and *Ghousmid and Others v. France*, nos. 52273/16 and 4 others, § 43, 25 June 2020). We are therefore unable to find a sufficient connection, in adopting a standard of review, between deprivation of citizenship and the imposition of *de facto exile* on nationals<sup>3</sup>. Nor is there anything in our pre-existing case-law on Article 3 of Protocol No. 4 to justify such a choice.

A mere duty to prevent arbitrariness – allowing in other words for some form of *non-arbitrary exile* – sits poorly with the nearly absolute ban on the modern exile of nationals. In fact, the *travaux préparatoires* of Article 3 make it clear that the drafters of the Fourth Protocol made a deliberate decision to delete from its second paragraph the word “arbitrary”, which appeared at the time in the corresponding provision of the draft International Covenant on Civil and Political Rights. The omission was meant to confirm the “absolute and unconditional condemnation of exile” within “the homogeneous circle of the Council of Europe”<sup>4</sup>. The Grand Chamber has now put “arbitrary” back

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<sup>2</sup> Article 15 of the UDHR provides as follows:

“1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

<sup>3</sup> The fact that some States have used or contemplated using deprivation of citizenship as an *alternative* to the refusal to repatriate family members of ISIS fighters (see paragraph 249 of the judgment) does not change this conclusion. The distinction has strong historical roots: for example, in ancient Rome citizens were sometimes subjected to banishment without formally losing their Roman citizenship or related rights.

<sup>4</sup> See *Collected Edition of the “Travaux Préparatoires” of Protocol No. 4 to the Convention*, pp. 73 and 113, available at: <https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux->

into the second paragraph of Article 3. While a human rights court does not have to stay forever wedded to the drafters' original intent in all respects, it ought to have some compelling justification for watering down the level of protection set by the Convention's authors, in such clear terms, several decades ago.

If the majority's choice is result-oriented – by way of preventing an “opening of the floodgates” that would impose on States an excessive burden for facilitating repatriations of nationals in various situations of distress abroad – it would not appear to be warranted on prudential grounds either. The exceptional circumstances that trigger any positive obligations in this field have been defined with such care and parsimony (and rightly so, in our opinion) that the adoption of the arbitrariness standard can only serve to make it easier for States to refuse to take action even where such action is warranted to ensure the effective exercise of the right to enter. The floodgates can be controlled at the level of the trigger mechanism, coupled with the traditional restraints that are inherent in the nature of positive obligations.

4. Turning to the next step in the analysis, what may non-arbitrary exile look like? What are the Convention-compliant grounds on which a State may nevertheless rely to justify policies or failures to act to facilitate a repatriation, even where such a positive obligation arises in principle due to exceptional circumstances?

The judgment, through its primarily procedural lens, answers the question as follows: “there must be a mechanism for the review of decisions not to grant requests for a return to national territory through which it can be ascertained that there is no arbitrariness in any of the grounds that may legitimately be relied upon by the executive authorities, *whether derived from compelling public interest considerations or from any legal, diplomatic or material difficulties*” (see paragraph 276 of the judgment, emphasis added). Those grounds must have a sufficient and reasonable factual basis (*ibid.*).

The first set of grounds (compelling public interest considerations) refers generally to the *desirability* of a repatriation; in other words whether, quite apart from any practical challenges of organising the national's return, the repatriation of a given national should be precluded because of assumed threats to national interests. In view of the clear textual and drafting record of Article 3, such bans come, in our opinion, with an exceptionally high burden of justification. If a positive duty to repatriate should be interpreted narrowly, a refusal to do so on grounds of desirability should be construed even more narrowly. Likewise, if only very compelling considerations of individual distress may trigger the State's positive obligation in the first place, any countervailing interests militating against such a course of action must be of a stronger order of magnitude in order to prevail.

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P4-BIL2907919.pdf. The final version of Article 12 § 4 of the ICCPR provides as follows: “No one shall be arbitrarily deprived of the right to enter his own country.”

Conversely, the legal, diplomatic or material difficulties refer to the *feasibility* of ensuring a safe repatriation of the national at risk. This branch of assessment, while no doubt complex in situations such as those in which the family members of the current applicants find themselves, should present no special jurisprudential difficulties for the Court. As already indicated, it is our settled case-law that these are obligations of process, rather than of outcome: making a good faith, reasonable effort is generally sufficient to meet the Convention requirements.

5. One obvious question that is not answered in the judgment is the following: can European States of the twenty-first century choose to effectively exile their own nationals suspected of involvement in terrorism – or more pertinently, their family members, including very young children? That question is left to be decided another day. The matter assumes even greater urgency with respect to minors who are in a particularly vulnerable situation, which places them at a direct risk to life and limb squarely within the “exceptional circumstances” which trigger the State’s positive obligations in this case (see paragraph 271 of the judgment). In limiting its review to one of securing against procedural arbitrariness, the Court has fallen short of establishing the State’s substantive obligations to protect its own under-age nationals by taking good faith measures to secure the termination of their situation of *de facto* exile<sup>5</sup>.

Within the self-imposed procedural parameters of today’s judgment, the majority conclude that the application of the act-of-State doctrine by the French courts “deprived [the applicants] of any possibility of meaningfully challenging the grounds relied upon by [the executive] authorities and of verifying that those grounds were not arbitrary” (see paragraph 282 of the judgment).

The Court should have gone further, in our view, by calling a spade a spade. There are strong and consistent indications on the record before us that the French government’s policy of “case by case” consideration for repatriation applied, perhaps, to the grandchildren of the applicants, but not to their adult daughters. There is no evidence that the mothers’ repatriation has ever been seriously contemplated by the French authorities, at least as late as the summer of 2022 (see paragraph 28 of the judgment for an update on the return of the first group of French adult women detained in the Syrian camps). As a result, the possible refusal on the part of the mothers, or of the Kurdish authorities, to let their children be returned to France separately

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<sup>5</sup> See the decision of the UN Committee on the Rights of the Child of 8 February 2022, reported at paragraph 107 of the judgment, which found that “the fact that the State party [had] not protected the child victims constitute[d] a violation of their rights under Articles 3 and 37 (a) of the [CRC] ... and the failure of the State party to protect the child victims against an imminent and foreseeable threat to their lives constitute[d] a violation of Article 6 § 1 of the [CRC]” (point 6.11).

would also have condemned the children to growing up in the hellish conditions of the Syrian camps for many months or even years.

In the course of the Strasbourg proceedings the respondent Government sought to justify their inaction on additional grounds related to the practical challenges of securing the return of Syria-based detainees in general. However, this does not change the fact that the predominant reasons for such inaction, in so far as the adults were concerned, related to the desirability of the repatriations (see in particular paragraphs 46, points 6 and 9, 226 and 270, first sentence, of the judgment). The French Government have not shown that the applicant's daughters were, in fact, welcome to come home: they did not provide any reasons whatsoever at the national level for their refusal to act, and they have not proven in the Strasbourg proceedings that there has ever been a *serious and individualised* assessment of the feasibility of the repatriation of the applicants' daughters.

The respondent Government have put forward certain general arguments about the dangers of allowing French family members of ISIS fighters detained in Syrian camps to return to the country. However, they have not presented any facts or arguments related to the specific threats that these particular individuals (that is, the applicants' daughters) might present for French national security; presumably, due to the need to preserve the secrecy of the criminal proceedings currently pending against them. Whatever the merits of the latter argument, the Government's choice meant that such considerations played no role in today's judgment. It is also unclear how such a line of argument fits with France's obligations under international law to prevent further radicalisation as a counter-terrorism measure (see paragraph 269 of the judgment and further references therein). In any event, the Government have indicated that they would not prevent the applicants' relatives from entering France if they somehow manage to find their way to a French border, or to return via Türkiye under the Cazeneuve Protocol (see paragraph 270 of the judgment) – a position that tends to undermine any national security arguments against their repatriation. In the circumstances, the French authorities' inaction has subjected the applicants' relatives to a form of *de facto* exile.

6. Despite our misgivings on the above aspects of today's judgment, nothing in this separate opinion is meant to detract from its overall importance. The Court has used the opportunity to provide important clarifications on the question of jurisdiction, the circumstances under which positive obligations may arise with respect to repatriation of nationals, and other novel aspects of Article 3 of the Fourth Protocol to the Convention. The holding that act-of-State or similar doctrines cannot preclude the justiciability and adequate national protection of the fundamental rights guaranteed by the Convention is of crucial importance.

In December 2017 Rome's city council voted to symbolically revoke the extrajudicial banishment of the Roman poet Ovid to the shores of the Black



Sea on the personal order of the Emperor Augustus – an early version of the act-of-State doctrine. Some sixty years ago, and almost two thousand years since Ovid's misfortune, the drafters of the Fourth Protocol to the Convention sought to eradicate the brutal practice of the forced exile of nationals. The very real threat that terrorism poses to European nations has brought back the spectre of banishment into our midst. It remains one of the defining challenges of our era whether we can defeat this scourge without poisoning our body politic.

JOINT PARTLY DISSENTING OPINION OF JUDGES  
YUDKIVSKA, WOJTYCZEK AND ROOSMA

1. We agree with the finding in the present case that the applicants' daughters and grandchildren do not fall within the jurisdiction of France in respect of the complaint under Article 3 of the Convention. We also agree with much of the reasoning in the judgment related to Article 3 § 2 of Protocol No. 4. In particular, we agree with the "divided and tailored" approach to the State's obligation under Article 1 to recognise Convention rights as well as with the understanding that Article 3 § 2 of Protocol No. 4 inherently implies that the right guaranteed will apply to the relationship between a State and its nationals when the latter are outside its territory or a territory over which it exercises effective control. Furthermore, we subscribe to the view that Article 3 § 2 of Protocol No. 4 entails certain positive obligations.

2. Where we respectfully disagree with the majority is the scope of the right guaranteed under Article 3 § 2 of Protocol No. 4. We are of the opinion that the applicants' request for the repatriation of their family members falls outside the scope of this provision in its entirety and is as such incompatible *ratione materiae* with the provisions of the Convention and its Protocols. As this provision is not applicable it could not have been violated.

3. We have to emphasise, at this juncture, that we by no means overlook the deplorable situation in which the applicants' relatives find themselves in the camps in north-eastern Syria. There is enough evidence to show that the living conditions in the camps are harsh and dangerous. What is more, there seems not to be much hope for the inhabitants of the camps to leave in the foreseeable future.

4. While the above does call for a political solution and humanitarian efforts, we are not convinced that it justifies such an extensive interpretation of the scope of the right to enter one's country as that envisaged by the majority. Moreover, regardless of the – in our view – unjustified expansion of the right to enter, the practical consequences of the right read into Article 3 § 2 of Protocol No. 4 are most probably very limited and have little prospect of offering realistic help to persons in a situation comparable to that of the applicants' relatives. We also doubt that the present judgment really clarifies the meaning of Article 3 § 2 of Protocol No. 4; rather, it seems to imply that there may be exceptional circumstances where the provision concerned may find unexpected application.

5. First of all, the basis for finding jurisdiction in paragraph 213 is, in our view, grossly unconvincing. It appears arbitrary to suggest that the jurisdictional link exists in respect of the Syrian camp detainees whose family members have sent repatriation requests to the French authorities, but does not exist for those who have not. Considerations of particular vulnerability and a serious risk to life and well-being – as exceptions for establishing

jurisdiction – appear to be much more pertinent for an analysis under Article 3 of the Convention, but not under Protocol No. 4 to the Convention. The fact that it is not possible to reach the French border without assistance by the French authorities and that the Kurdish authorities have agreed to cooperate are completely irrelevant: such a *capacity-based* model of jurisdiction (neither spatial nor personal) undermines the entire concept. The whole idea proposed by the majority is based on a *potential* of France to *place* the applicants’ family members under their effective control, and not on any existing authority or control.

6. As to the question of compatibility *ratione personae* with the Convention, the right provided for in Article 3 § 2 of Protocol No. 4 is indeed worded as a negative obligation of the State. Nevertheless, we accept that certain positive obligations are inherent therein in order to ensure the practical and effective use of the right to enter one’s country. However, these positive obligations cannot amount to an obligation to remove any factual difficulty that a person may face while seeking to exercise that right. Certain positive obligations such as an obligation to issue a travel document can be seen to inherently follow from the right in issue: by withholding a travel document the State would itself – either intentionally or inadvertently – prevent its national from entering its territory.

7. This, however, is not the case in the present instance. The French authorities have confirmed that if the applicants’ relatives were to arrive at the French border they would not be turned away and would be allowed to enter France. Nor has it been argued that the return of the applicants’ daughters and grandchildren to France has been hindered by the absence of travel documents or that this would be attributable to the French authorities.

8. In paragraph 243 of the judgment reference is made, as regards the principles governing the interpretation of the Convention, to the cases of *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 118-25, 8 November 2016) and *Al-Dulimi and Montana Management Inc. v. Switzerland* ([GC], no. 5809/08, § 134, 21 June 2016). In the latter case, the Court reiterated the principle that the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law (*ibid.*). After careful analysis of the States’ obligations under international law, a conclusion is drawn in paragraph 259 of the judgment, that “there is no obligation under international treaty law or customary international law for States to repatriate their nationals”. While it has been widely recognised that the provisions of the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161), this principle does not entail a quest for expanding the scope of the Convention rights.

9. The fact that in recent decades exile may have seemed to be a measure of the past does not mean that this provision has lost its meaning and has to be reinvented. Recent decreases in the level of protection of human rights – in some cases to a rather considerable degree – have occurred in some countries; in that context prevention of violations that until recently seemed to belong to the past may well be a noble thing. While discovering new territories for rights may sometimes be justified and even inevitable in areas of scientific advances, we are not convinced that the undisputed increase in international mobility justifies or requires decisively an increased obligation for the States to protect their nationals abroad. While international law does not exclude a State’s extraterritorial exercise of its jurisdiction, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, “defined and limited by the sovereign territorial rights of the other relevant States” (see *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, § 99, 5 May 2020, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 59, ECHR 2001-XII). In particular, as observed in *Banković and Others* (cited above, § 60), “a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence (see Higgins, *Problems and Process* (1994), at p. 73; and Nguyen Quoc Dinh, *Droit International Public*, 6th Edition 1999 (Daillier and Pellet), p. 500)”. Moreover, in “dividing and tailoring” the Convention rights, this principle has to be kept in mind, along with the existence of recent examples of States invading foreign States, on the real or imaginary pretexts of protecting their nationals or compatriots outside their national territories, and thus causing major harm to the general human rights situation.

10. The operational capacity of the various States to act in situations like the present one differs and changes over time. To transform States’ humanitarian efforts into legal obligations would risk creating uncertainty and inequality, and may well prove to be counterproductive.

11. We also find worrying the reference to the humanitarian catastrophe as the basis for expanding the State’s legal obligations *toward its nationals only*. The humanitarian considerations and grounds listed by the majority in paragraphs 265-270 are, once again, much more pertinent to Article 3 of the Convention than to Protocol No. 4. But apart from that, the obligation to do everything possible to “stop violations of international humanitarian law” (see paragraphs 124 and 266) cannot be grossly discriminatory based purely on nationality. If France or any other State has the capacity to “put an end” to this humanitarian disaster, common Article 1 of the four Geneva conventions obliges it to do so regardless of the nationality of the victims.

12. In this respect, we recall Hanna Arendt’s renowned concept of citizenship as a source for all rights, which she famously described as the “right to have rights”. This concept was prompted by her personal experience

of being a stateless refugee for a number of years; however, after international mechanisms of human rights protection appeared, she explained further in her book *The Origin of Totalitarianism* that “the right to have rights, or the right of every individual to belong to humanity, *should be guaranteed by humanity itself*”. The applicants’ daughters and grandchildren have a right to life and physical integrity because they are human beings and not because they were born French; and if humanitarian considerations prompt any State to intervene, the universal nature of human rights precludes such an intervention from being limited only to the nationals of that State.

13. As regards the appropriate safeguards against arbitrariness on which the judgment seems to focus, we doubt that the judgment is sufficiently well-reasoned and clear and that the application of the principles it embodies will be of real benefit to individuals in a situation similar to that of the applicants’ relatives.

14. In the present judgment, inspiration has been sought from principles developed in the context of other Convention Articles and quite different situations. While this technique as such may be legitimate given the scarce case-law under Article 3 § 2 of Protocol No. 4 and its possible need for elaboration, we doubt that the elements chosen represent strong arguments in support of the judgment’s reasoning. Thus, it is doubtful that the operational aspects of the authorities’ actions assessed under Article 2 (State’s obligation to prevent threats to life), developed in the context of fighting terrorism (see paragraph 273), bear many similarities with the setting of the present case. Furthermore, reliance is placed (in paragraph 276) on the case of *Muhammad and Muhammad v. Romania* ([GC], no. 80982/12, 15 October 2020), which dealt with a complaint under Article 1 of Protocol No. 7; the latter – unlike Article 3 § 2 of Protocol No. 4 – being a procedural right with certain quite specific requirements explicitly set out in the text of the provision in question. As regards the cases related to Article 8 referred to in paragraph 274, this provision, too, is worded quite differently from Article 3 § 2 of Protocol No. 4. In short, while it is not unusual to seek inspiration for the interpretation of a Convention provision from that of other provisions, it goes rather far, in our view, to read such extensive requirements into Article 3 § 2 of Protocol No. 4 – as has been done in the present case – on the basis of quite different provisions of the Convention.

15. For the above reasons we doubt that Article 3 § 2 of Protocol No. 4 – a guarantee against deprivation of the right to enter one’s country – can be understood to encompass the procedural right to repatriation involving certain substantive elements.

16. Indeed, the language used in the judgment – the requirement that the decision-making process concerning the request for repatriation be surrounded by appropriate safeguards against arbitrariness – primarily seems to refer to the State’s procedural obligation. However, on a closer look it appears that there has to be an independent body that is to review the

lawfulness of decisions of a competent authority not to grant a request for repatriation and that review should enable the applicant to be made aware, even summarily, of the grounds for the decision and thus to verify that *those grounds have a sufficient and reasonable factual basis*. Moreover, in case of minors, the review should *ensure* in particular *that the competent authorities have taken due account of the children's best interests*. Thus, by requiring quite an extensive independent review, according to the guidelines set out by the Court, the Court in fact seems to set criteria for the assessment as to whether the States have complied with their obligation corresponding to the substantive right to be repatriated: any decision to deny repatriation must have a sufficient and reasonable factual basis and in case of children their best interests must have been duly taken into account. In other words, a decision to deny repatriation that does not have a sufficient factual basis or does not take into account the children's best interests seems to be in breach of Article 3 §2 of Protocol No. 4. In our reading, the above amounts to a proportionality analysis that is much more demanding than the proclaimed surrounding of the decision-making process by appropriate safeguards against arbitrariness. It also seems to amount to a substantive right to repatriation even if it is a limited one at this stage.

17. In case the correct reading of the judgment should be more limited and no proportionality requirement has been set – a hint in that direction is, indeed, made in paragraph 282 where it is said that the required independent review does not necessarily mean that the court in question would have jurisdiction to order the requested repatriation – one might ask what is the practical value of such review and whether the decision-making process that is surrounded by appropriate safeguards against arbitrariness is indeed capable of securing practical and effective exercise of the right to enter one's country, in the wide meaning attributed to it in the judgment.

18. Lastly, the clarity of the judgment is not enhanced by the limited circumstances in which the obligation to base a denial of repatriation requests on sufficient and reasonable grounds and to take due account of the children's best interests is triggered: those obligations of States exist only in exceptional circumstances (see paragraph 271). In other words, repatriation requests made in non-exceptional circumstances seem not to call for the same guarantees. The judgment does not specify in which procedure the existence or otherwise of exceptional circumstances is to be established.

**PARTLY DISSENTING OPINION OF JUDGE KTISTAKIS,  
JOINED BY JUDGE PAVLI**

I voted against points 5 and 7 of the operative provisions, to the effect that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants, as concluded by the majority (Article 41 of the Convention).

The present case has allowed the Grand Chamber to develop and clarify its sporadic case-law on the right not to be expelled from, and the right to enter, the territory of the State of one's nationality, under Article 3 of Protocol No. 4. More specifically, it was, at a minimum, the lack of effective protection against arbitrariness which mainly characterised this case (see, among others, paragraphs 283 and 295 of the judgment). The applicants have certainly experienced distress because of this long-lasting arbitrariness which continued even after the hearing of the case by the Grand Chamber, when the French authorities organised the return to national territory of thirty-five minors of French nationality and sixteen mothers, but the applicants' daughters and grandchildren were not among them (see paragraph 28 of the judgment). Thus, in my view, the Court's finding of a violation alone cannot constitute just satisfaction.