

## **Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic:**

### **Legal Analysis**

1. The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions take this opportunity to set out their views, a significant portion of which are already in the public domain, concerning the legal status of children and their mothers who are located in camps, prisons, or elsewhere in the northern Syrian Arab Republic.
2. The Special Rapporteurs recall that the urgent return and repatriation of foreign fighters and their families from conflict zones is the only international law-compliant response to the increasingly complex and precarious human rights, humanitarian and security situation faced by those women, men and children who are detained in inhumane conditions in overcrowded camps, prisons, or elsewhere in the northern Syrian Arab Republic and Iraq. Such return is a comprehensive response that amounts to a positive implementation of Security Council resolutions 2178 (2014) and 2396 (2017) and is considerate of a State's long-term security interests.
3. States, in their view, have a positive obligation to take necessary and reasonable steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law. This includes flagrant denial of justice, the imposition of the death penalty, torture or cruel, inhuman or degrading treatment, sexual violence, or deprivation of liberty in grave violation of human rights standards, including arbitrary detention, incommunicado detention, and detention that fails to comply with the most basic standards of humanity.
4. In light of the inhumane, degrading and increasingly dangerous situations of detention, the Special Rapporteurs cannot accept that stated practical challenges faced by States in the return process, including the lack of consular representation in areas where nationals are present and the shortage of information on the whereabouts of and conditions faced by nationals in conflict zones who frequently find themselves in the power of armed groups operating as de facto authorities, be used as excuses to obstruct returns. The Special Rapporteur on the promotion and protection of human rights while countering terrorism has seen first-hand that partnerships can be optimized in tracing, identifying and delivering the practical means to extract individuals from territories under the

control of non-state actors and ensure their safe return to home countries.<sup>1</sup> She has also seen that a number of steps can be taken to ascertain nationality, to obtain assistance from state and non-state actors to move individuals from camps and assist in air transport, as well as in the provision of humanitarian assistance and medical care before, during and after transit.<sup>2</sup> While both diplomatic protection and effective consular assistance can play a preventive role when facing a risk of flagrant violations or abuses of human rights, the remedial nature of consular assistance frequently means that it cannot effectively prevent an irreparable harm from being committed.<sup>3</sup>

5. The Special Rapporteurs further stress that an effective return process includes holding individuals accountable for serious violations of national and international law for serious and systematic crimes committed in Syria and Iraq. It is, in fact, the only way to close the gaping impunity gap for which the inadequate and dysfunctional judicial system in both Iraq and Syria is not an answer.
6. Returning children is a humanitarian and human rights imperative.<sup>4</sup> The argument that children are not deserving of protection constitutes a moral failure by their home countries, particularly those who have ample resources. State and non-state actors at all levels should affirm and respect the fundamental vulnerability of children caught up in armed conflict, through a range of circumstances almost always not of their own making, or from contexts which have no meaningful exit. Children enjoy special protection in accordance with the Convention on the Rights of the Child and its Optional Protocols as well as international humanitarian law. They also note the important legal obligations articulated by States on support to children in situations of armed conflict.<sup>5</sup> Children must always be treated primarily as victims, while the best interest of the child must always be a primary consideration. States have obligations to undertake individualized assessments for each child, determining what integration needs may be based on comprehensive, multiagency and

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<sup>1</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25510&LangID=E>.

<sup>2</sup> Preliminary Findings of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to Kazakhstan:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24637&LangID=E>.

<sup>3</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Visit to Belgium, 8 May 2019, A/HRC/40/52/Add.5, para. 80. *“The Special Rapporteur wishes to emphasize the important role that effective consular assistance plays as a preventive tool when faced with a risk of flagrant violations or abuses of human rights, while also noting that the remedial nature of diplomatic protection proceedings.”* See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to France, 8 May 2019, U.N. Doc. A/HRC/40/52/Add.4, para. 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.”*

<sup>4</sup> Noting the joint position of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism with the Special Representative of the UNSG on Children in Armed Conflict <https://childrenandarmedconflict.un.org/2019/11/joint-statement-on-human-rights-and-humanitarian-concerns-related-to-conflict-affected-women-and-children-in-syria-and-iraq/>.

<sup>5</sup> UN Security Council Working Group on Children and Armed Conflict <https://www.un.org/securitycouncil/subsidiary/wgcaac>.

multidisciplinary approaches, while preventing discrimination based on nationality, birth status, immigration status, and statelessness.<sup>6</sup>

7. In this context, the Special Rapporteurs have been requested to provide their views on the legal exercise of jurisdiction. They set out their assessment below based on a broad analysis of applicable international law including but not limited to human rights law.
8. A State's jurisdiction under human rights law is primarily territorial.<sup>7</sup> However, it is well established that a State may also have jurisdiction in respect of acts which are performed, or which produce effects, outside its national borders.<sup>8</sup> A guiding principle when considering extra-territorial jurisdiction is the need to avoid allowing a State to perpetrate violations on the territory of another State, which it could not perpetrate on its own.<sup>9</sup>
9. At the European Court of Human Rights (ECtHR), for example, a State's jurisdiction outside its border is primarily established on the basis of (i) the control that the State exercises over foreign territory (*ratione loci*) or (ii) the control that is exercised by the state over a person (*ratione personae*).<sup>10</sup>
10. The acts (and omissions) of States in relation to their nationals currently held in camps in the northern Syrian Arab Republic are most likely to engage their jurisdiction *ratione personae*.<sup>11</sup> Should any State assume additional territorial or effective control over the camps that position might change and should be kept under review.
11. International human rights law recognises a number of ways in which states may assume extra-territorial jurisdiction, including cases involving detention overseas,<sup>12</sup> use of force by state agents abroad,<sup>13</sup> consular and diplomatic agents acting abroad,<sup>14</sup> and the exercise of law enforcement and other legislative and administrative powers, including the issuance of passports.<sup>15</sup> The consistent

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<sup>6</sup> Cf. Convention on the Rights of the Child, Art 2(2) mandating the elimination of "all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".

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

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

<sup>8</sup> *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 131.

<sup>9</sup> *Lopez Burgos v. Uruguay*, Communication No. [052/1979](#), 29 July 1981, para. 12.3.

<sup>10</sup> *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 131.

<sup>11</sup> See, e.g., *Drozd and Janousek v. France and Spain*, Application No. [12747/87](#), 26 June 1992, para. 91.

<sup>12</sup> See, e.g., *Al-Skeini and Others v. United Kingdom* (op. cit.).

<sup>13</sup> See, e.g., *Isaak v. Turkey*, Application No. [44587/98](#), 28 September 2006; *Andreou v. Turkey*, Application No. [45653/99](#), Admissibility Decision, 3 June 2008.

<sup>14</sup> See paragraph 21 ff below.

<sup>15</sup> See paragraph 27 ff below; paragraph 32 on passports.

theme in cases before other international human rights bodies is to examine the extent of the state's control over the applicant<sup>16</sup> – or over some of their rights.<sup>17</sup>

12. When a State exercises authority and control over some but not all of an individual's rights, the State will have jurisdiction over just those rights over which it has control – in this way, Convention rights can be “divided and tailored.”<sup>18</sup> When assessing a State's jurisdiction a court must therefore consider the *extent* of the State's control in order to assess what extra-territorial obligations it owes. In relation to the situation of a child held in the camps in the northern Syrian Arab Republic, a State might, for example, have sufficient control over the child's right to enter their own country in order to have jurisdiction in respect of that right, but not have sufficient control over their right to property to have an obligation to guarantee that right while they remain in the camp.
13. The closer the connection between a State's acts and the repercussions for the individual, the more likely it is that the State will be considered to be exercising jurisdiction. In *Ilaşcu and Others v. Moldova and Russia* the Court considered that “A State's responsibility may [...] be engaged on account of acts which have *sufficiently proximate* repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.”<sup>19</sup> Similarly, in the context of armed forces operating outside a State's national territory, both the ICJ and ECtHR recognises that acts of a State which impact on the Convention rights of an individual outside that State's national territory may fall under the jurisdiction of the Convention, even when the person is not in the custody of the State, provided that the rights violations flow directly from the State's acts.<sup>20</sup>

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<sup>16</sup> See, inter alia, at the Human Rights Committee: *Lopez Burgos v. Uruguay*, (op.cit.) para. 12.3; at the Inter American Commission on Human Rights: *Coard v. United States*, Report No. [109/99](#), Case 10.951, 29 September 1999, para. 37 and *Armando Alejandro Jr and Others v. Republica de Cuba*, Report No [86/99](#), Case No 11.589, 29 September 1999, para. 25.

<sup>17</sup> See paragraph 12 below.

<sup>18</sup> *Al-Skeini and Others v. United Kingdom*, (op. cit.), para. 137.

<sup>19</sup> See for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. [48787/99](#), para. 317 (emphasis added). In *Ilaşcu and Others v. Moldova and Russia* the Court had to consider whether detainees in the region of Transnistria, a break-away region of Moldova which had declared its independence from Moldova but failed to get international recognition, could be considered to fall under the jurisdiction of Moldova. The Court held that irrespective of Moldova's lack of effective control over the territory it retained positive obligations to take those measures “in its power” in order to “secure to the applicants the rights guaranteed in the Convention”.

<sup>20</sup> See, for example *Andreou v. Turkey*, Application No. [45653/99](#), Admissibility Decision, 3 June 2008, in which the applicant was shot by a bullet fired by Turkish troops based in a Turkish controlled area, but while she was standing outside of that area. The Court found that Turkey had jurisdiction, repeating that “*in exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention*”. Turkey had jurisdiction because its acts were the “direct and immediate cause” of the applicant's injuries. See also *Issa & others v. Turkey*, Application No. [31821/96](#), Admissibility Decision, 16 November 2004, para. 71 and *Pad v. Turkey*, Application No. [60167/00](#), Admissibility Decision, 28 June 2007, para. 54 – 55.

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

14. The Human Rights Committee has affirmed in its General Comment No. 36 that a State may exercise control over a person's rights by carrying out activities which impact them in a direct and reasonably foreseeable manner. In relation to the right to life, the Committee considers that:<sup>21</sup>
- “In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”*<sup>22</sup>
15. A State's responsibility to protect may thus be invoked extra-territorially in circumstances where that particular State has the capacity to protect the right to life against an immediate or foreseeable threat to life. The determination of whether States have acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or should have known of the risks; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm.<sup>23</sup>
16. States may be said to have jurisdiction over their nationals detained abroad or held in camps abroad because their actions directly influence their right to life.
17. Such a duty of protection, implemented extra-territorially, applies to the circumstances of the children, women and men detained or held in the northern Syrian Arab Republic. States with nationals there must act with due diligence to ensure that the lives of their nationals are protected, including against acts of violence committed by state actors or armed groups, against ill-treatment, or against living conditions which endanger their physical and mental health or their life.<sup>24</sup>
18. Further, no State can argue convincingly that they do not know that (a) serious risks to the physical and mental integrity of those currently held in the northern Syrian Arab Republic exist, (b) they are likely to bring foreseeable harm, and (c) the harms include those of the most serious kind such as torture, enforced disappearance and death.
19. It goes without saying that the obligation to protect the right to life, must not be subject to discrimination, including on the grounds of religion or political or other opinions. The Human Rights Committee has understood the term “discrimination” to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has

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territory (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 9 July 2004, para. 107-08,).

<sup>21</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36.

<sup>22</sup> Para. 63. Footnotes omitted.

<sup>23</sup> *Osman v. The United Kingdom*, Application No. [23452/94](#), 28 October 1998, at para. 32-33.

<sup>24</sup> See the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, 20 August 2019, A/74/318: <https://undocs.org/A/74/318>.

the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>25</sup>

20. Should a State party to the ICCPR decide to withhold essential life-saving protection from an individual on the grounds of their purported crime, or on the grounds of the purported crimes of their spouses or parents this would violate both the State’s obligation to protect the right to life and the prohibition against discrimination. The Special Rapporteurs suggest that the “other status” reference in the ICCPR anti-discrimination provision should cover the alleged crimes committed by foreign nationals since “[a] flexible approach to the ground of “other status” is needed to capture other forms of differential treatment.”<sup>26</sup>

Examples of extra-territorial jurisdiction relevant to State acts and omissions in camps, prisons and elsewhere in the northern Syrian Arab Republic:

21. The ECtHR has long recognised that the acts of diplomatic and consular agents outside the State’s territory may amount to an exercise of jurisdiction where those agents exercise authority and control over others.<sup>27</sup> The Special Rapporteur on the promotion and protection of human rights while countering terrorism is directly aware of ongoing diplomatic/political engagement by a number of States with the non-state actors responsible for the administration of camps in the northern Syrian Arab Republic. While this occurs outside of formal recognition of the status of these authorities, it points to a degree and substance of capacity and influence on the lives of those under their control which ought not to be ignored by Courts in the context of protection of fundamental non-derogable and derogable rights.<sup>28</sup>
22. In the European Commission case of *X v. Federal Republic of Germany* the Commission concluded that Germany had jurisdiction over the applicant in relation to acts carried out by German consular

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<sup>25</sup> Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 7.

<sup>26</sup> UN Committee on Economic, Social and Cultural rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, E/C.12/GC/20, para. 27. See also the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, op. cit.

<sup>27</sup> *Banković and Others v. Belgium and Others* [GC], Application No. [52207/99](#), 12 December 2001, at para. 73; *Al-Skeini and Others v. United Kingdom*, (op. cit.) para. 131.

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

<sup>28</sup> As to the existence of a right of a national abroad to consular assistance, it is well established that a State has the right to exercise diplomatic protection on behalf of a national. In contemporary State practice, there is also significant support in domestic legislation and judicial decisions for the view that there is an obligation, either under national or international law, for the State to protect its nationals abroad when they have been subjected to serious human rights violations. See for example *Kaunda v. President of the Republic of South Africa*, 2004(10) BCLR 1009 (CC), 2 August 2004, at para. 29-33, 25-29, 51-66, 60-81 (S. Afr.). In *Kaunda*, the Court found that various international human rights treaties ratified by the South African Government, including the ICCPR, obliged the government to make use of the remedies provided in the international instruments when the rights contained had been violated or threatened. At para. 169.



agents in Morocco, explaining that: “in certain respects, the nationals of a Contracting State are within its “jurisdiction” even when domiciled or resident abroad [...] in particular, the diplomatic and consular representative of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention”.<sup>29</sup>

23. This applies to both acts and omissions of consular agents. In *Cyprus v. Turkey*, the Commission recognised that:

*“authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.”*<sup>30</sup>

24. In *X v. United Kingdom*, a British national living in the UK, whose daughter had been taken to Jordan by the child’s father, complained that the British consular authorities in Jordan were not doing enough to restore her custody of the child. The Commission agreed that the alleged omissions of the British consular authorities in Jordan triggered the application of Article 1, even though they were outside UK territory:<sup>31</sup>

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

25. Similarly, in *M v. Denmark*, a case brought by a German national against Denmark, arising from the conduct of the Danish ambassador towards the Applicant in the Danish Embassy in the former German Democratic Republic, the Commission concluded that the Applicant was under Danish jurisdiction because of the activities of the ambassador, despite not being in Danish territory.<sup>32</sup>
26. Thus, to the extent that a State is conducting consular activities – or failing to do so – in respect of individuals in the camps in the northern Syrian Arab Republic those individuals may fall under the jurisdiction of the State in relation to the rights affected by the State’s conduct.

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<sup>29</sup> *X. v. Germany*, Application No. [1611/62](#), Commission Decision, 25 September 1965, Yearbook 8, p. 158, at p.168.

<sup>30</sup> *Cyprus v. Turkey*, Application No. [6780/74 and 6950/75](#), 26 May 1975, p. 136.

<sup>31</sup> *X. v. United Kingdom*, no. [7547/76](#), Commission Decision, 15 December 1977, DR 12, p. 73

<sup>32</sup> *M v. Denmark*, Application No. [17392/90](#), 14 October 1992.

27. The ECtHR has also recognised that in some circumstances, jurisdiction can arise from a State exercising authority and control over a person through law enforcement or legislative powers that produce effects in a different state, with the consent of that second state.<sup>33</sup>
28. In *Stephens v. Malta*,<sup>34</sup> the Court found that Malta had jurisdiction in relation to the Article 5 rights of a UK national who was detained in Spain pursuant to a defective extradition request made by Malta to Spain. Despite the applicant being physically under the authority and control of Spain during the period of his detention, the Court found that “the applicant’s deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities” and that “Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain.”<sup>35</sup>
29. Similarly, where a State commences criminal proceedings against a person not in that State, the State will have jurisdiction over the person in relation to those proceedings, despite them not being physically present in the territory. Thus, a Contracting State has jurisdiction over the Article 6 rights of a person subject to trial in absentia, regardless of whether they are physically present in the state.<sup>36</sup>
30. As to a State’s domestic legislation which has effects outside the State’s national borders, in *X. and Y. v. Switzerland*<sup>37</sup> the Commission found that a German national prevented from entering Lichtenstein (at a time not a party to the ECHR) by Swiss law, could bring a claim against Switzerland for breaches of his Convention rights (Articles 3 and 8) caused by the refusal to enter: “Acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention.”<sup>38</sup>
31. The Human Rights Committee has adopted similar reasoning. In *Ibrahima Gueye et al v. France*, which concerned the underpayment of retired Senegalese soldiers in Senegal by the French State,

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<sup>33</sup> See also, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, African Commission on Human and Peoples’ Rights, Communication No. [157/96](#), 29 May 2003, which considered an embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire, Ethiopia and Zambia. The Commission ultimately found that there had not been a breach of the African Charter on Human and Peoples’ Rights, however it proceeded on the basis that the States had extra-territorial duties – reasoning that there was no breach because the embargo was proportionate: “[t]he critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose” (para. 75). In this case there was no State consent to the measure.

<sup>34</sup> *Stephens v. Malta (No. 1)*, Application No. [11956/07](#), 21 April 2009.

<sup>35</sup> *Stephens v. Malta (No. 1)*, (op. cit.), para. 51 – 52. See also *Soering v. United Kingdom* in which the Court found that the UK’s decision to extradite a German national resident in the UK to the US fell under UK jurisdiction even though the repercussions of the decision (real risk of torture or inhuman or degrading treatment) would be felt outside the UK (*Soering v. United Kingdom*, (op. cit.), para. 86 - 91).

<sup>36</sup> See for example *Sejdovic v. Italy*, Application No. [56581/00](#), 1 March 2006, in which a national of the former Federal Republic of Yugoslavia was tried in Italy in absentia, having absconded to Germany. The Court did not question that the Applicant was entitled to the protections of Article 6, despite the fact that he was outside the territory of Italy.

<sup>37</sup> *X. and Y. v. Switzerland*, Application No. [7289/75 and 7349/76](#), 14 July 1977, Admissibility Decision, at p.73.

<sup>38</sup> *X. and Y. v. Switzerland*, (op. cit.) at p.73.



the Committee found that France had jurisdiction, despite the fact that the soldiers were not within French territory, because their right to a pension derived from French law.<sup>39</sup>

32. The Human Rights Committee has also consistently found states to have jurisdiction over their nationals living abroad in relation to the State's exercise of the power to issue a passport. In *Martins v. Uruguay*,<sup>40</sup> the Uruguayan authorities refused to issue a passport to a Uruguayan national residing outside of Uruguay and the Human Rights Committee found that the applicant was within Uruguay's jurisdiction:

*“Article 1 of the Optional Protocol applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is “subject to the jurisdiction” of Uruguay for that purpose.”*<sup>41</sup>

33. The Committee has adopted the same reasoning in a number of subsequent cases relating to the refusal to issue passports.<sup>42</sup>
34. To the extent that a State directly impacts the rights of an individual in the camps, for example through law enforcement, or the issue or refusal of identification documents, or giving consent and capacity by allowing medical staff to ascertain parentage, that individual may fall under the jurisdiction of the State in relation to the rights affected by the State's conduct.
35. The Special Rapporteurs point out that States are in the best position to ensure the protection of human rights for children and their guardians in camps in the northern Syrian Arab Republic. In the absence of their engagement and acceptance of legal responsibility, children face death, starvation, and extreme physical and emotional harm, as do their mothers. In this context, they note that in the very specific circumstances of these camps in the northern Syrian Arab Republic it is undeniable that the State of nationality for citizens have the only tenable legal claim to protect their citizens, and the capacity to make such claims materialize. The Special Rapporteurs also underscore that the relevant Kurdish authorities have made consistently clear their willingness and capacity to support returns to States and their inability to manage the humanitarian catastrophe they face, a fact that is demonstrated by multiple successful return processes.<sup>43</sup>

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<sup>39</sup> *Ibrahima Gueye et al v. France*, Communication No. [196/1985](#), 3 April 1989, para. 9.4.

<sup>40</sup> *Vidal Martins v. Uruguay*, Communication No. [57/1979](#), 23 March 1982, para. 7

<sup>41</sup> The Committee continued: *“Moreover, a passport is a means of enabling him “to leave any country, including his own”, as required by article 12(2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality. Consequently, article 2(1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.”* (para. 7).

<sup>42</sup> *Lichtensztejn v. Uruguay*, Communication No. [77/1980](#), 31 March 1983, at para. 6.1; *Mabel Pereira Montera v. Uruguay*, Communication No. [106/1981](#), 31 March 1983, para 5; *Varela Nunez v. Uruguay*, Communication No. [108/1981](#), 22 July 1983, para. 6.1; *Loubna El Ghar v. Libya*, Communication No. [1107/2002](#), 15 November 2004, (concerning the refusal of the Libyan consular authorities in Morocco to issue a passport to a Libyan national residing in Morocco).

<sup>43</sup> <https://www.urdupoint.com/en/world/romania-returns-15-nationals-from-syria-via-t-686284.html>; <https://www.arabnews.com/node/1545586/middle-east>; <https://www.reuters.com/article/us-germany-syria/germany-takes-back-four-islamic-state-children-from-syria-idUSKCN1VA0UY>. Noting also the applicability of Protocol 4,

36. **States that have de facto control over the human rights of children and their guardians in camps in the northern Syrian Arab Republic have positive obligations to prevent violations of those rights. Whether a State has such control is a question of fact. Relevant factors are likely to include the proximity between the acts of the State and the alleged violation, the degree and extent of cooperation, engagement and communications with the authorities detaining children and their guardians, the extent to which the home State is able to put an end to the violation of the individual’s rights by exercising or refusing any positive interventions to protect and promote the rights of their nationals, and the extent to which another State or non-state actor has control over the rights.**

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