

A Turn of the Tide in the Extraterritorial Application of Child Rights

On the French Approach towards ISIS' Child Returnees

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Abstract

There are hundreds of children of French jihadists detained in northeast Syrian camps, being in direct danger of irreparable damage to their physical and psychological development. France has been denying the existence of any competence in Syria that could impose international obligations regarding these children. However, in November 2020, the Committee on the Rights of the Child decided in an individual communication procedure that the French State has jurisdiction over these children, marking a significant development in the extraterritorial application of human rights that is not immune to severe criticism. The Committee established that competence is found entirely upon a factual assessment and used the nationality of the children as a central criterion, posing arbitrariness concerns. The decision is nevertheless a decisive basis to uphold the positive obligation to protect child nationals, making the refusal of the State to systematically repatriate them less and less defensible. Finally, an understanding of security concerns was found to be crucial in a policy change. Any future decisions should therefore strike a better balance between public security and the rights of the child.

Keywords: Al Hol, child returnees, child rights, CRC, extraterritorial jurisdiction, ISIS foreign fighters, repatriation

1. Introduction

Since the fall of ISIS in 2019, Western countries have been facing the thorny issue of foreign terrorist fighters and their families. France adopted a case-by-case approach to the repatriation of children of French jihadists from the conflict zones, denying the existence of any competence in Syria that could impose international obligations regarding these children. In November 2020, the Committee on the Rights of the Child (hereinafter 'the Committee') decided on two individual communications relating to three French families whose children, born or brought to Syria by their parents, are currently being held in the Roj, Aïn Issa and Al-Hol camps under the control of the Kurdish forces in northeast Syria (Committee on the Rights of the Child [CRC] 2020). The Committee found that France had jurisdiction over these children, marking a significant development in the extraterritorial application of child rights. For the purposes of this paper, 'child returnees' designates minors who left the EU to live in ISIS territory or were there born to EU parents, and who are seeking return, with their parents or on their own (Perešin & PISOI, 2018). The aim of this paper is twofold. On the one hand, it will assess how France's repatriation policy of jihadist families in Syria led to a major development in the extraterritorial application of child human rights. On the other hand, it will analyze the different compromises that the State may take in reaction to the Committee's decision. The objective is to open a debate on a policy change that would serve the best interests of the child. To this end, the paper will start by retracing the child returnee issue in France, before addressing the Committee's findings and analyzing its consequences. This research brings a new perspective as there was no comprehensive literature reviewing the Committee's decision in conjunction with the French context. Bearing this in mind, the paper mainly builds on international organization reports, academic writings, articles, and legal practitioner works.

2. Defining the Child Returnee Issue in France

2.1 The Living Conditions in the Northeastern Syria Camps

For a better understanding of the overall claim, this part provides a short description of the humanitarian context in the northeastern Syria camps where the families of foreign fighters are detained. The conditions in the camps

are particularly appalling as some families are spending their fourth winter in captivity. The children living in prison camps – the majority of whom are under 6 years of age – face inhuman sanitary conditions such as food insecurity and lack of appropriate health care, putting them at imminent risk of injury or death and reducing the likelihood of their survival in war zones (CRC, 2020). According to the World Health Organization, in the winter of 2018-2019, at least 29 children froze to death in the Al-Hol camp alone (Le Monde, 2021). Child mortality tripled in the same camp during the summer of 2020 due to limited access to essential medical services (Save the Children, 2020). Facing these concerns, Human Rights Watch described the prison camp as a ‘burning hell’ and deplores the fact that foreigners, including detained French citizens, are put in even worse conditions (Human Rights Watch, 2019). Turkey’s 2019 offensive in northeast Syria, the reach of the Covid-19 pandemic in the overcrowded camps, and the increasing number of Daesh fighters’ families escapees (Committee on Legal Affairs and Human Rights, 2020) render the situation even more precarious by further stretching the resources of local NGOs and Kurdish authorities (Barbarani, 2021). These developments in the region are therefore making the need for increased repatriations even more pressing.

2.2 The French Approach to Child Returnees

As of the start of 2021 more than 200 minors and 150 adults of French nationality are still stranded in Syria and Iraq (Le Monde, 2021). Half of the minors are under 6 years old and a large number of them were born in conflict zones (CRC, 2020). The number of children that were already repatriated is remarkably low, especially considering that France is the Western European country with the highest number of minors in Syria (Cook & Vale, 2019).

In 2019, the newspaper *Libération* revealed the existence of a document from the French domestic intelligence service (DGSI) describing the plan of a massive operation of repatriation of adults and children held in northeastern Syria. The flight numbers meant to bring them back on French soil were annotated for the first 162 names on the list of jihadists and their families (Libération, 2019). Another unveiled document from the DGSI, dated 6 March 2019, provided a detailed judiciary procedure for the returnees, indicating that the national judiciary was ready to take on these cases (Libération, 2019). Even though the authorities had the capacity to carry out these repatriations, the operation was later called off by the head of State. Instead, France is pushing for its citizens to be tried and detained directly in Syria or Iraq by the local authorities, with no regard to gender or age (Cook & Vale, 2019). This approach has been widely recognized as a response to public opinion polls that were indicating in March 2019 that seven out of ten French citizens would prefer the children of French jihadists to remain in Syria or Iraq (France-Info & Odoxa-Dentsu consulting, 2019).

In total, nevertheless, 35 children have been repatriated from Syria since the fall of ISIS in March 2019. They are mostly orphans and the children of the few mothers that consented to be separated from them (Le Monde, 2021). It is no coincidence that most of these children do not have parents: according to Human Rights Watch, Western European countries fear that “if they bring home children of living parents, their own courts might compel them to repatriate their mothers.” (Wille, 2019). The reluctance to bring back adults can be explained by the fear that bringing home ISIS suspects would amount to “political suicide” for public officials (Wille, 2019). A large part of the European public indeed fears that older children may have planned to return to Europe to carry out terrorist attacks (Scherrer, 2018).

The first repatriations received significant media attention and were justified by the French Government by the fact that they concerned orphaned or isolated children, or children who needed urgent medical care (French Ministry of Foreign Affairs, 2019). As a comparison with France’s case-by-case policy, Denmark adopted a law depriving the right to citizenship to children born abroad to Danish jihadists (Wittendorp et al., 2017) while Germany’s approach was to consider every child as a victim by default (Galindo, 2019). Whereas the French policy keeps the repatriation door open, it implies a lingering and difficult process that is leaving a bitter taste for the families demanding the return of the children from Syria (Le Monde, 2021).

More importantly, the policy of case-by-case is questionable in that it causes a breach of equality between the children since in reality all of them survive in particularly inhuman living conditions necessitating their immediate repatriation to the national territory (Pradel & Mancini, 2021). In turn, the policy entails that the children are either victims of the situations or dangerous individuals that should not be repatriated (Commission Nationale Consultative des Droits de l’Homme [CNCDH], 2019). Refraining from repatriating the rest of the children to preserve national security is a position that can be refuted as the harsh conditions in the camps have made them a fertile ground for recruiting the next generation of jihadists (Committee on Legal Affairs and Human Rights, 2020). Thus, the longer the children stay in the camps the more likely they are to be radicalized.

Finally, it can be noted that the limited case-by-case policy adopted by France contrasts greatly with the systematic and comprehensive system to deal with the children after their repatriation that was set up by the domestic

authorities. This approach, prioritizing the wellbeing of the children, their reintegration into the education system, was recognized as an example of good practice for child returnees cases (Perešin & PISOI, 2018).

2.3 Repatriating French Minors from Syria

2.3.1 Domestic Proceedings

This section provides an overview of the domestic proceedings engaged in view of compelling the State to repatriate the children. The lack of success in these proceedings explains why three families resorted to initiating communication procedures to the Committee on the Rights of the Child.

In a statement on the 2nd of May 2019, the French Ombudsman reminded the government that several constitutional and international rules make the French State responsible to find solutions for the children detained in Syria. In particular, he stressed that the rights of the child to an effective remedy before the French judiciary must be guaranteed to stop and repair the inhuman and degrading treatment and the arbitrary detention they are subjected to (Toubon, 2019). This recommendation was based on the Declaration of Rights of Man and the Citizen of 1789, the French Constitution of 1958, and in particular, subparagraphs ten and eleven of the Preamble to the 1946 Constitution, laying down the obligation to protect the best interests of the child, highlighted in a recent decision of the constitutional court in March 2019 (Conseil Constitutionnel, 2019). Nonetheless, recent decisions in French courts have not ruled in favor of the repatriation of these children.

In three joint decisions, the Conseil d'Etat, France's supreme administrative court, rejected demands of repatriation of French women and their children detained in Syria (Conseil d'Etat, 2019). These appeals were aimed at compelling the State to intervene or organize the repatriation of respectively the three children of the first appellant detained in the Roj camp; the two under-aged nephews of the second appellant held in the Al-Hol camp and the daughter and her two children of the third appellant, held in the Al-Hol camp. The court rejected all the requests on the ground that the demanded actions depended on the engagement of France in negotiations with foreign authorities or intervention on foreign territory and that it is, therefore, inseparable from the international relations of France, that do not belong to the jurisdiction of the court. The National Advisory Commission on Human Rights deplored the denial of justice in the joint decisions of the Administrative Court as the jurisdictional immunity of government acts should be excluded when a fundamental right of constitutional or conventional value is endangered (CNCDDH, 2019).

2.3.2 Repatriation under International Law

Before going into the communication procedures, this part offers an overview of what role international law had in the dissention on whether France should repatriate the children from the camps.

In May 2019, a statement from Dunja Mijatovic, the Human Rights Commissioner for the Council of Europe, urged its member states to repatriate imperatively their under-age nationals stranded in Northern Syria by invoking the Geneva Conventions and their Additional Protocol, as well as the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which all Council of Europe member states are a party. The statement advocated for these children to be treated first and foremost as victims and asked for the repatriation of their mothers as well to safeguard the best interests of the children (Mijatovic, 2019).

The cornerstones of the Convention on the Rights of the Child are especially affected by the issue of child returnees (United Nations Convention on the Rights of the Child [UNCRC], 1989). The French Ombudsman highlighted in particular that the *retention* of the under-aged French nationals in Syrian camps constituted an infringement to the right to survival and development of the child,¹ the right of the child to be protected from any forms of violence,² the right of the child not to be deprived of his or her liberty unlawfully or arbitrarily,³ the right to health,⁴ identity⁵ and education⁶ (Toubon, 2019). Prime Minister Edouard Philippe answered in a letter on the 14th of June 2019 by arguing that France does not have competence in Syria and therefore cannot be disregarding its international obligations by refusing to initiate repatriation procedures (Phillipe, 2019). This answer demonstrates that the issue of child returnees is above all a question of jurisdiction, which highlights the importance of the forthcoming.

Facing the persistent refusal of the French State to repatriate the children, the families submitted two

¹ UNCRC, 1989. Article 6(2)

² Ibid., Article 19(1)

³ Ibid., Article 37(b)

⁴ Ibid., Article 24

⁵ Ibid., Article 8

⁶ Ibid., Article 28

communication procedures to the Committee in March and November 2019. The Committee's decision on the admissibility of the communications is by far the most significant development for the children and their families in their pursuit of remedies. The next part of this paper will address the content and the impact of the decision.

3. The Committee's Decision and Its Consequences

In order to determine the competence *ratione personae* of France over the children subject to the communication procedures No. 79/2019 and No. 109/201, the Committee first considered the extraterritorial jurisdiction of State Parties, the criterion of the nationality of the children, as well as the capacity of the French State in the circumstances of the case to protect its minor nationals (CRC, 2020). The vulnerability of the children and the extreme conditions of the detentions resulting in imminent risk to the children's lives and physical and mental development was used as the starting point for this assessment.

3.1 *The Deciding Factors Delineated by the Committee*

3.1.1 The UN Rapporteur's Legal Analysis

The Committee's decision referred substantially to the legal analysis of the UN Rapporteurs on Extra-territorial jurisdiction of States over children and their guardians in camps in the northern Syrian Arab Republic. The Rapporteurs provided more detailed reasoning than the Committee's, including that given the dangers of death, starvation, and extreme physical and emotional harm for the children and their mothers, "the State of nationality for citizens have the only tenable legal claim to protect their citizens, and the capacity to make such claims materialize" (UN Special Rapporteurs, 2020). Nationality is therefore seen as a last resort obligation to promote the rights of the children and their guardians based on their capacity to repatriate them. Furthermore, the Special Rapporteurs concluded that States that have *de facto* control over the human rights of children and their guardians in the camps have the positive obligations to prevent violations of those rights". The existence of a duty to protect the rights of the children based on the State's capacity to do so follows a strictly functional approach as the positive obligations in this case solely depend on a factual assessment. This reasoning by the Rapporteurs was later applied in the Committee's decision.

3.1.2 Extraterritorial Jurisdiction in the Convention on the Rights of the Child

In its decision, the Committee cited precedents from the European Court of Human Rights for its interpretation of general principles of international law for jurisdiction. The European Court defined two criteria for extraterritorial jurisdiction that have to be assessed factually: first, the *de facto* control of a State on a territory outside of the national territory, and second, the control and authority exercised outside of the territory, through a state agent (European Court of Human Rights, 2011).

Subsequently, the Committee highlighted that territorial jurisdiction was purposely excluded from the wording of Article 2.1 of the Convention on the Rights of the Child (Office of the United Nations High Commissioner for Human Rights, 2007). The Committee then referred to its findings on extraterritorial responsibility in migration context through child-sensitive, rights-based consular protection (Committee on Migrant Workers & CRC, 2017), and to its decision on the extraterritorial competence of Belgium to guarantee the rights of a child with Belgian citizenship in Morocco (CRC, 2017).

3.1.3 Nationality

The Committee isolated the nationality criterion to establish the jurisdiction of the State, by using the nationality link between France and the children in its reasoning (CRC, 2020). Reference was also made to the right to ask for consular assistance in cases of detention, a right that is characteristically derived from nationality (Vienna Convention on Consular Relations, 1963).

The notion that nationality is a factor used to establish extraterritorial competence is supported in the third-party submissions of the procedure. It was stated that protecting nationals, and in particular, children, is a right for every States, and perhaps even a duty under international customary law (Thomson, 2012). It is to be noted that despite the central role of citizenship in the findings, the Committee did not use it as the only criterion for the establishment of jurisdiction in the sense of Article 2.1 UNCRC (Pradel & Mancini, 2021).

3.1.4 Capacity and Power to Protect

In assessing the capacity and the power to protect the rights of the children, the Committee noted the following: First, the French State did not deny having been informed by the applicants of the extremely vulnerable situation of the children. Second, the French State is aware of the extreme conditions of detention of the children, having been widely documented in reports by national and international organizations. Third, Kurdish Forces, exercising effective control over the camps, publicly declared that they do not have the means nor the will to take care of the

detainees and that they are waiting for the States concerned to repatriate their nationals (CRC, 2020). In April 2018, Mr. Abdalbasset Ausso, leader of the Kurdish judiciary, declared that the detention of French nationals by the Kurdish authorities could not get ahead in the long term. As a result, several states such as Russia, Indonesia, Egypt, and Sudan repatriated several dozen of their nationals (Pradel & Mancini, 2021). Finally, the Committee highlighted the relationship of the French State with the Rojava (Syrian Kurdistan) authorities and considered the fact that the French Government had already repatriated a dozen of French children its national territory.

In light of these circumstances, the Committee concluded that the French state has the capacity and the power to protect the rights of these children by repatriating them or providing them with consular protection, therefore recognizing that France does exercise jurisdiction over the children subject of the communications (CRC, 2020).

3.2 Potential Drawbacks of the Decision

On the one hand, the functional model that was applied by the Committee can be the object of multiple criticisms. First and foremost, it does not define the threshold criterion outside of the facts inquiry, and it becomes problematic to determine which category of victims outside the State's border deserve protection while others do not (Milanovic, 2020). In matters of extraterritorial jurisdiction, the question of an excessive burden on States is invariably raised, highlighting the need for a more rigorous reasoning to impose this kind of obligation. Before the decision of the Committee, the prevailing position was that "[The] very question of the concrete feasibility of duties only arises once jurisdiction has been established and the abstract rights recognized. There can be no human rights duties without human rights, and the existence of human rights depends on jurisdiction in the first place. Jurisdiction cannot, therefore, be directly equated with the feasibility of human rights duties" (Besson, 2021). Furthermore, if inaction by a State in situations in which it could have acted suffices to bring individuals under the jurisdiction of that State, most individuals would be very often under the jurisdiction of any State (Spadaro, 2021). The application of the functional model is therefore revolutionizing the traditional approach to human rights jurisdiction, begging the question of what kind of threshold will be used in future cases.

On the other hand, the central role of nationality in the protection of the children also brings about arbitrariness concerns as it establishes that States only have a duty to protect their own nationals, which is contrary to the notion of universal human rights, as opposed to rights and obligations that only arise depending on a person's nationality. Grounding human rights in citizenship can be subject to morality criticisms as for the most part, citizenship is acquired coincidentally, as a mere accident of birth (Milanovic, 2015). This concern can be linked to the perpetual conflict between human rights, the principle of sovereignty, and the responsibility to protect that is inherent to the system of nation-states (Larking, 2004). The risk is therefore that the reasoning of the Committee and the Rapporteurs would lead to an increased emphasis on nationality as a condition for the application of human rights.

Despite these gaps, the decision from the Committee is now a decisive basis to uphold the positive obligation of states to protect their child nationals in territories under the control of non-state armed groups. The functional rationale, the role of nationality, and the limited reasoning that was provided could however harm the purpose of protecting the children. The government may find interests in disapproving the approach of the Committee, therewith refraining from creating State practice on a burdensome obligation.

3.3 Consequences and Solution

This final section provides an analysis of the consequences of the Committee's admissibility decision. The decision recognized France's competence and stated that the detention conditions pose high risks of harm to the children's survival, physical integrity, and development (CRC, 2020). Without going ahead of oneself, the final recommendations from the Committee are therefore foreseeable as the responsibility of France under international law was already recognized.

As seen in section 2.1, some families are spending their fourth year in captivity in increasingly alarming situations. The Kurdish authorities will not be able to continue administrating the camps in the foreseeable future. Hence, compensating measures such as the provision of assistance directly in the camp are not sustainable and will not exonerate the State from its international obligations. For the moment, systematic repatriations are therefore the only viable solution to safeguard the rights of the children.

Until the Committee's decision, the French courts had refrained from intervening on the repatriation issue because they found they did not have competence in the international relations of France. Thus, even though the decision may influence future judicial cases, the government is the only decision-maker regarding future repatriations.

The government's stance is mainly determined by public opinion, which is itself influenced by the fear of national security incidents following repatriations (EU Counter-Terrorism Coordinator, 2017). However, the reality is that prompt repatriations would discontinue radicalization risks which is much higher in Syria and Iraq (Committee on

Legal Affairs and Human Rights, 2020). The earlier the rehabilitation process starts the better. Hence, an understanding of the public security implications is a prerequisite to any change of policy regarding children.

The crucial step would be for the public to understand that child returnees, whether born into ISIS or having joined on their own, can only be treated as victims under international law as the involvement of children by terrorist groups is a form of serious violence to the children (United Nations Office on Drugs and Crime, 2017). The presumption that children may pose security threats does not lessen the fact that they are first and foremost victims, on a par with any other child involved in armed conflicts (EU Counter-Terrorism Coordinator, 2017).

As a final observation, any future decisions should therefore strike a better balance between security concerns and the rights of the child.

4. Conclusion

This paper discussed the child returnee issue in France before analyzing the Committee's decision establishing that France has extraterritorial jurisdiction for its minor nationals detained in northeastern Syria.

It can be concluded that the children of foreign terrorists are detained in appalling conditions posing imminent risks of irreparable harm. While the majority are under 6 years old, the children are particularly exposed to extremist ideologies. On account of the increasingly alarming situation in northeast Syria camps, repatriation was found as the only viable solution to comprehensively safeguard the rights of the child.

In the Committee's admissibility decision, the rise of the functional approach and the central role of nationality have drawbacks, highlighting the need to establish a more rigorous threshold for extraterritorial jurisdiction that is not conditioned on the nationality of the children.

Finally, the security concerns debate was found to be crucial in a policy change, which must be considered by any future decisions regarding child returnees.

Whereas the verdicts of United Nations treaty bodies are not binding, the French State will nevertheless have to take into consideration the future recommendations of the Committee (Optional Protocol to the UNCRC, 2011). Above all, any decisions would continue to have an important impact on the media and political class, making the systematic refusal of repatriations less and less defensible (Pradel & Mancini, 2021).

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