New approaches to extraterritorial jurisdiction in Human Rights Conventions

- An analysis of extraterritorial jurisdiction models in relation to repatriation of European children in Syrian detention camps

Nye tilgange til ekstraterritorial jurisdiktion i Menneskerettighedskonventioner

- En analyse af ekstraterritoriale jurisdiktionsmodeller i relation til repatriering af europæiske børn i syriske fangelejre

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Afhandlingens tema er jurisdiktion under ekstraterritoriale omstændigheder. Den rammesættende begivenhed er repatriering af europæiske børn af kvinder, der er tilbageholdt i syriske fangelejre i Syrien under mistanke for at støtte Islamisk Stat.

Disse børn er ifølge talrige rapporter udsat for gentagne menneskerettighedsovergreb. En oplagt løsning på problemet er at repatriere børnene, men det forsøger mange stater at undgå. Det har givet anledning til en række private sagsanlæg og efterfølgende afgørelser ved flere nationale domstole, den Europæiske Menneskerettighedsdomstol (EMD) samt FN's Børnekomite. Specialet analyserer en nyere dom[1] fra Menneskerettighedsdomstolen og en nyere afgørelse fra FN's Børnekomité vedrørende admissibilitet. Frankrig er den indklagede stat i både dommen og afgørelsen. I dommen fra EMD blev Frankrig dømt og domstolen etablerede jurisdiktion i forhold til art. 3, stk. 2 i tillægsprotokol nr. 4, der omhandler retten til at vende hjem til ens nationalstat. Børnene vandt dog ikke retten til egentlig repatriering, men fik i stedet domstolens ord for, at de ikke skulle udsættes for processuel vilkårlig forskelsbehandling.

Under de samme faktuelle omstændigheder tog FN's Børnekomité stilling til påståede overtrædelser af en række bestemmelser i Børnekonventionen. I modsætning til EMD kom FN's Børnekomité frem til, at der forelå fuldstændig extraterritorial jurisdiktion og at børnenes menneskerettigheder kun kunne opretholdes ved repatriering til nationalstaten. Afgørelserne fra FN's traktatkomitéer er dog kun vejledende og ikke bindende, så trods medhold kunne der heller ikke på den baggrund placeres et retligt ansvar ift. repatriering.

Hovedsageligt på baggrund af EMD-praksis, men også ved at analysere Børnekomitéens anvendelse af jurisdiktionsbegrebet, har specialet specifikt sigte på at undersøge, hvordan henholdsvis den Europæiske Menneskerettighedsdomstol og FN's Børnekomité afklarer jurisdiktionsspørgsmålet i de to sager med særligt fokus på anvendte jurisdiktionsmodeller samt argumentation herfor. Specialet konkluderer, at EMD og Børnekomitéen adskiller sig i deres anven-

[1] *H.F. and others v. France.*

delse af jurisdiktionsmodeller på forskellige måder: EMD etablerer den begrænsede jurisdiktion på baggrund af en række faktorer begrundet i sagens 'særlige omstændigheder'. Dette medfører således alene en processuel rettighed. Børnekomitéen derimod anvender en 'funktionel model', hvor der etableres jurisdiktion på baggrund af en række faktorer, herunder nationalitetsbåndet til Frankrig samt den helt afgørende indvirkning som Frankrigs undladelse har på børnenes situation – samt også – Frankrigs kapacitet til at sikre børnenes rettigheder.

Slutteligt giver specialet et bud på, hvad der ligger til grund for disse forskellige tilgange til ekstraterritorial jurisdiktion og hvilken betydning det har fremadrettet.

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1. Introduction

As of November 2022, approximately 60,000 persons are detained in the al-Hol and al-Roj camps in Northeast Syria. Of these, 12,000 individuals are third-country nationals.[2] According to estimates from the United Nations, 40,000 individuals in the two camps are children. All European women and children have been transferred to the al-Roj camp where an estimated 2,500 persons are detained, more than 50 % of which are children. For the vast majority, the detainment took its start in February and March 2019 after the final fall of the caliphate of Islamic State in Iraq and Syria (ISIS). The two camps are managed by the Autonomous Administration of North and East Syria (AANES) and controlled by the Kurdish-led Syrian Democratic Forces (SDF).[3]

The humanitarian situation for the children in the camps is deplorable. There is a lack of adequate food, water, health care, proper sanitation, and proper shelter. There is no freedom of movement as detained foreigners are not allowed to leave the camps. Education is inadequate with only 40 % of the children in al-Hol camp and 60 % of the children in al-Roj camp attending school. A *Save the Children* report points to several barriers to education: prohibition for children to receive a formal education, a lack of sufficient teaching facilities, inadequate Arabic language skills, persistence of general harassment, and a widespread use of child labour.[4] According to *Human Rights Watch*, the conditions for the children are life-threatening and degrading and may amount to torture.[5]

The security situation is fragile with reported camp violence and attempts by ISIS to radicalize and recruit children. Young boys between the age of 10-18 years are held in detention centres based on their alleged ties with ISIS, many of whom are held without criminal charges.[6] *Save the Children* has reported that over a 6-month period in 2021 in al-Hol camp alone 62 children died due to illnesses and violence, including three children who were shot to death.[7]

In the words of the Council of Europe Commissioner for Human Rights:

> "There is absolutely no doubt that the conditions of detention in the camps constitute an imminent risk of irreparable harm to the lives of children, their physical and mental integrity, and their development. The Commissioner therefore believes that the removal of all foreign children from the camps is an absolute and mandatory priority from the perspective of children's rights. In view of the situation in the camps, the Commissioner does not believe that a case-by-case approach can be justified, as no one can claim that certain children are not at risk.

[2] Defined as not originating from Syria and Iraq.
[3] ICCT Report.
[4] Save the Children Report, p. 14.
[5] HRW Report.
[6] ICCT Report.
[7] Save the Children Report, p. 11.

> The Commissioner believes that the repatriation of all children who are nationals of States Parties to the Convention at the earliest opportunity is the only measure that can put an end to the ongoing violation of their most fundamental rights and safeguard their best interests".[8]

It is evident that the situation in the camps constitutes a human rights emergency for the detained children. However, it has not been treated as such by numerous – particularly Western - states with nationals in the camps. Many states have repatriated only a portion of their citizens while very few have repatriated all.[9] Where repatriations have taken place, this has been on a case-by-case basis only. AANES has made it clear that they lack the resources to keep running the camps and has encouraged states to repatriate their nationals from the camps. On numerous occasions, the AANES has confirmed their willingness to cooperate with states in order to facilitate the repatriation procedure, a willingness they have also demonstrated in real life.[10]

States have also been called upon to repatriate their citizens by various international human rights actors such as: Human rights organisations,[11] UN Special Rapporteurs,[12] the Parliamentary Assembly of the Council of Europe[13] and the Council of Europe Commissioner for Human Rights. However, many states, particularly in the Western hemisphere, have been reluctant to do so. They cite domestic security concerns and use legal mechanisms, such as revocation of citizenship, to avoid repatriation. Several states have repatriated orphaned children of parents with the relevant nationality and some states have indicated their readiness to repatriate children without their mothers.[14]

As another argument to avoid repatriation some Western states have maintained the need to establish an international tribunal in Northeast Syria to facilitate prosecution of the relevant foreign nationals locally where the alleged crimes have been committed. As years have passed and no tribunal has yet been established, this argument however is not heard often anymore.

As mentioned, AANES is a non-state actor which is not internationally recognised. It has however, developed its own legal system trying thousands of male ISIS fighters before local courts while there is sparse information about prosecution of women of the caliphate. The roles of women in the caliphate can be difficult to decide as most women did not participate in direct fighting or other terrorist activities but instead maintained households. Perhaps this is the reason why prosecution of women has not been reported to take place in AANES in large numbers.

The situation of the children is closely linked to the fate of their mothers. AANES has declared its general unwillingness to separate children from their mothers unless very specific circumstances require it, e.g. medical evacuation along with the mother's full consent.

For those remaining in the camps and their families any hope for a return to their respective countries based solely on states' morality seem unfounded by now. Perhaps this is why some have sought legal mechanisms to place a legal responsibility on states, thereby forcing states to initiate repatriation processes. There have been cases in front of different Western national

[8] Third party intervention by the Council of Europe Commissioner for Human Rights before the European Court of Human Rights, H.F. and M.F. v. France and J.D. and A.D. v. France, para 28.
[9] ICCT Report and HRW Report.
[10] AANES press release. For a more reader friendly version, see *H.F. and others v. France*, para 29.
[11] Among others Amnesty International News & ICRC article.
[12] OHCHR press release from UN experts.
[13] PACE resolution 2321, para 6.
[14] Broches, Emma: What Is Happening with the Foreign Women and Children in SDF Custody in Syria?

courts,[15][16] in front of the European Court of Human Rights, and the United Nations Committee on the Rights of the Child with different outcomes. This clearly indicates that the question of repatriation of these children is a thorny legal issue with strong political interests.

1.1. Research question

At this point, three facts have been established:

Firstly, children in the camps are subject to numerous human rights violations that are reported to take place daily. Thousands of children continue to languish in deplorable conditions while being indefinitely detained with their mothers.

Secondly, the international community has widely recognised that human rights violations are taking place in the camps.

Thirdly, many Western states are reluctant to repatriate the children although they are clearly extremely vulnerable and subject to human rights violations.

Going into the fifth year with thousands of children still detained in the Syrian camps, it has become clear that the situation of the children has challenged the international human rights protection regime and that there are gaps and limitations in said regime. In this context, a pivotal question is that of the scope of Convention obligations in extraterritorial situations and the establishment of jurisdictional links. Jurisdiction is a prerequisite for invoking legal rights towards any specific state party to such Conventions and for the state to be responsible for such violations. Therefore, the establishment of jurisdictional links in this cross-border situation becomes the main key to legal protection and possible repatriation. As will become evident in the remainder of this thesis, the question of jurisdiction is the centre of the ongoing discussion on human rights issues.

Two human rights Conventions are relevant in this context. These are: The European Convention on Human Rights (ECHR) and the Convention on the Rights of the Child (CRC Conv.). In this thesis, greatest emphasis will be put on the ECHR as the jurisprudence of the European Court of Human Rights (ECtHR or the Court) is the richest and most developed. The ECHR system is the strongest of all human rights regimes due to its "ability to effectively secure compliance and have a direct impact on state policy".[17] The decisions and views issued by the Committee on the Rights of the Child (CRC Comm.) are of a non-binding nature and thus states are not obliged to comply with the decisions.

At least three distinct models to establish jurisdiction in extraterritorial situations can be identified in the jurisprudence of ECtHR and in the views and decisions by the CRC Comm. These are: A spatial model, a personal model, and a functional model (these will be discussed in detail in sections 4.2, 4.3, 5.2 & 5.3). The establishment of extraterritorial jurisdiction is highly contingent on the application of these models by the Court and the CRC Comm.

Therefore, it is a key concern to analyse which one(s) of the approaches are in fact used as a basis for determining when extraterritorial jurisdiction is established. On this basis, the research question for this thesis is:

[15] Broches, Emma: *What Is Happening with the Foreign Women and Children in SDF Custody in Syria?*
[16] Judgment from the national Court in Copenhagen issued on 16 December 2022.
[17] Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, p. 4.

Which different models establishing extraterritorial jurisdiction can be identified in the late ECtHR judgment H.F. and others v. France and the late CRC Comm. case F. B. et al. and L.H. et al. v. France?[18]

A comparative analysis of the mentioned ECtHR judgment and CRC Comm. decision provides a unique opportunity to compare Convention interpretation from the Court and the CRC Comm. in relation to the jurisdiction clause in extraterritorial situations on almost identical facts. Based on CRC Comm. practice on extraterritorial jurisdiction interpretation and based on ECtHR development in case law as well as extraterritorial jurisdiction interpretation, the thesis empirically examines how the Court and the CRC Comm. apply different models and argumentations to establish jurisdictional links in the specific case of children of European nationals in the camps.

1.2. Thesis outline

To examine the above question, chapter 2 will open with a short introduction to the concept of children and human rights. Chapter 3 will provide the theoretical framework of the thesis. It will do so by describing the concept of jurisdiction and outline some basic principles of Convention interpretation. The United Nations Convention on the Rights of the Child is in focus in chapter 4 which will examine the sources that support the United Nations Committee on the Rights of the Child in its legal reasoning and jurisdiction assessments. Furthermore, chapter 4 will provide an analysis of the late CRC Comm. case *F. B. et al. and L.H. et al. v. France*. Chapter 5 will describe the development in ECtHR case law concerning extraterritorial jurisdiction and analyse the different jurisdiction models and approaches in the Court's jurisdiction assessments before applying these in the analysis of *H.F. and others v. France.*

The thesis conclusion in chapter 6 is followed by a number of potential sociological explanations to the different approaches to extraterritorial jurisdiction by the Court and the Committee. Chapter 7 furthermore discusses how extraterritorial jurisdiction may become a key question in a world characterised by cross-border problems acerated by climate change and issues of migration and refugees.

1.3. Problem delineation

The current thesis will focus on various jurisdictional models and analyse how these are applied in extraterritorial situations. This means that a range of themes and questions are left out of the scope of the thesis. For example, the thesis will not put its emphasis on violations of the substantive rights enshrined in the two Conventions. Moreover, the thesis will not provide an in-depth analysis of the right to return to one's state of nationality (art. 3, para 2 of Protocol no. 4). Furthermore, the thesis will not analyse the lawfulness of the detention of the mothers and their children but merely ascertain that the women are detained without charges with no criminal proceedings in the pipeline and with no option to leave the camp without the interference of their states of nationality.

[18] CRC Comm., first decision, second decision and view concerning communications nos. 77/2019, 79/2019 and 109/2019.

1.4. Methodology

The aim of this thesis is to examine which models are applied in establishing extraterritorial jurisdiction in the late ECtHR judgment *H.F. and others v. France* and the late CRC Comm. case *F. B. et al. and L.H. et al. v. France.* To answer this question, different methodological approaches will be combined: First, in line with the legal dogmatic methodology, an overview of existing law will be presented by describing, interpreting, and analysing relevant sources relating to jurisdiction and application hereof in extraterritorial situations. The legal sources primarily used for this part are the European Convention on Human Rights and the United Nations Convention on the rights of the Child, ECtHR case law, CRC Comm. decisions and other authoritative sources such as General Comments from UN bodies shedding light on the subject.[19] Second, the two approaches by the ECtHR and CRC Comm. to extraterritorial jurisdiction will be compared to identify similarities and discrepancies. Third, within the framework of sociology of law, the thesis will outline some of the institutional and political motives for the differences in approaches to extraterritorial jurisdiction to better understand the underlying causes that affect the development in this area.[20]

2. Children as human rights holders

It goes without saying that children can invoke rights enshrined in the CRC Conv. Children are defined as follows in the Convention: “a child means every human being below the age of eighteen years” (art. 1, CRC Conv.)”, “and state parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination” (art. 2, para 1).

In the ECHR, there is no age definition of a child but under the jurisdictional clause of art. 1, states are obliged to secure rights under the convention to *everyone* within their jurisdiction. Article 14 also guarantees the right to enjoy the rights and freedoms under the convention *without discrimination*, including grounds of age. ECtHR has accepted the CRC Conv. definition of a child in its jurisprudence and ECtHR has also accepted applications directly from children or on behalf of children.[21] Based on the above, it is evident that children are rights holders, subject of their own rights and thus entitled to enjoy the rights enshrined in the ECHR. Another important feature enshrined in the preamble of the CRC Conv., and thus to be borne in mind when it comes to children’s enjoyment of their human rights, is the fact that children are a particularly vulnerable group. Thus, the preamble states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”.

2.1. Substantive rights violated in the Syrian detention camps

It is an unquestionable fact that human rights violations take place in the detention camps. Considering the situation on the ground, Martnes highlights the violation of several human rights which are enshrined in different international conventions of which a few will be mentioned here: A child has the right to life, survival, and development (art. 6, CRC Conv. and ECHR art.

[19] Evald, p. 13 & 198.
[20] Evald, p. 198.
[21] Handbook on European law relating to the rights of the child, 2022 edition, p. 20.

2), a child has the right to a satisfactory standard of living (CRC Conv., art. 27, (1) and International Covenant on Economic, Social and Cultural Rights, art. 11). A child has the right to education (CRC Conv. art. 28) as it also has the right to rest and leisure and to engage in play and recreational activities appropriate to the age of the child (CRC Conv. art. 31). Under the CRC Conv. art. 16, under the United Nations International Covenant on Civil and Political Rights art. 17, and under ECHR art. 8, a child has the right to respect for private and family life. The best interest of the child shall be a primary consideration in all actions concerning children (CRC Conv. art. 3, (1)) and a child has the right not to be discriminated against based on the status of their parents.[22] These are only some of the human rights violations faced by the children in the camps, additional ones could easily be added.[23]

3. Jurisdiction

The current chapter describes the concept of jurisdiction in international law, its importance in the context of international conventions and the different ways jurisdiction may be established in extraterritorial situations. The chapter starts off with a general description of convention interpretations.

3.1. Convention interpretations

The 1969 Vienna Convention on the Law of Treaties (VCLT) art. 31 provides some rules on the interpretation of international conventions. The ECHR and the CRC Conv. are both international conventions and should be interpreted in the light of these principles.[24] The UN Human Rights Treaty Bodies have generally "applied the VCLT and consider themselves bound by its rules."[25]

The ECtHR often refers to the VCLT in its judgments[26] and notes that ECHR must be interpreted in the light of the VCLT, particularly art. 31. The VCLT art. 31 (1) provides that a Convention shall be interpreted in the light of its object and purpose and in good faith in accordance with the ordinary meaning to be given to the terms of the treaty. According to art. 31 (2 & 3), in the words of Murdoch: "the Convention also have to be interpreted with regard to any relevant rules and principles of international law applicable in relations between the contracting states".[27] This means, according to Murdoch, that the ECHR "(…) is to be interpretated as far as possible in harmony with other principles of international law of which it forms part".[28] The UN Human Rights Treaty Bodies only rarely make references to the VCLT,[29] and generally follows a relatively restricted interpretation approach based on object and purpose, without spending much time on contextualising or even any external references.[30]

To recapitulate, both the CRC Conv. and the ECHR are to be interpretated considering the guiding principles disclosed in the VCLT. With regards to the interpretation of relevant rules and

[22] Martnes, p. 45-46.
[23] Ibid, p. 46.
[24] Keller & Ulfstein, p. 273.
[25] Ibid, p. 273.
[26] For example, *Bankovic*, paras 55-58 & *H.F. and others v. France*, para 185.
[27] Murdoch, p. 219 & the Vienna Convention on the Law of Treaties 1969, art. 31.
[28] Murdoch, p. 219.
[29] Keller & Ulfstein, p. 273.
[30] Ibid, p. 280.

principles of international law, the Court and CRC Comm. – as we will see – are not always aligned in their interpretation of jurisdiction in extraterritorial situations.

3.2. Jurisdiction in general international law and jurisdiction in human right treaties

The establishment of a jurisdictional link is crucial for the simple reason that jurisdiction is a condition for invoking rights to party states and - vice versa – for states' obligations (positive or negative) towards that individual. Oftentimes it is not difficult to establish jurisdictional links when it comes to the traditional concept of territorial jurisdiction in international law, i.e. within states' geographical boundaries.[31] However, the concept of jurisdiction becomes more complicated in situations where one or more parties find themselves within the territory of another state. Such a cross-border situation is referred to as an extraterritorial situation where jurisdiction can be triggered only if certain criteria are in place. An example of such an extraterritorial situation is when European children find themselves in Syrian detention camps in the territory of another state than the one from which they claim protection and positive action.

Jurisdiction has several meanings and in general international law it has traditionally been linked with the concept of the sovereign authority of the state, i.e. territorial jurisdiction. Marko Milanovic distinguishes between the *jurisdiction to prescribe* and the *jurisdiction to enforce*. The *jurisdiction to prescribe* is defined as the legislative privilege of the state to pass laws which applies for persons present on the territory of the state. *Enforcement jurisdiction* is the state's sovereign authority to enforce the substantive laws which the state has prescribed on its territory.[32] However, it should be noted that "a state may not exercise its enforcement jurisdiction on the territory of another state without that state's consent*"*. [33] The *jurisdiction to prescribe* and the *jurisdiction to enforce* is underpinned by the *judicial jurisdiction* which refers to a state's power to settle legal disputes before its courts.[34]

Milanovic argues that the concept of jurisdiction in general international law has nothing to do with jurisdiction clauses in human rights treaties.[35] The former definition of jurisdiction simply serves another purpose: "(…) it sets out limits on the domestic legal orders of states, so that they do not infringe upon the sovereignty of others".[36] This means that if and when extraterritorial situations arise within the area of general international law, a state's extraterritorial jurisdiction can only be established with the consent of the other relevant state. This could also be described as a competence to act outside a state's territory, examples include diplomatic and consular relations.[37] In general international law, extraterritorial jurisdiction should thus be regarded as an exception to the point of departure, namely that jurisdiction primarily is connected to a state's territory.[38]

In a human rights context, extraterritorial jurisdiction relates to the scope of a state's human rights responsibility outside of its geographical borders, regardless of the consent of the other

[31] With exceptions: e.g., diplomatic affairs, ships with flags.
[32] Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, p. 24.
[33] Ibid, p. 24.
[34] Ibid, p. 23.
[35] Ibid, p. 26.
[36] Ibid, p. 29.
[37] Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, p. 21.
[38] Rytter & Kessing: *Menneskerettighedernes ekstraterritoriale rækkevidde - har Danmark et menneskeretligt ansvar for at hjælpe (danskere) i udlandet?* p. 180.

relevant state.[39] Extraterritorial jurisdiction is therefore not about the *jurisdiction to enforce* but instead it involves a state's responsibility towards an individual in ensuring that the human rights of this individual are not violated, either by refraining from performing certain acts or by taking positive action to safeguard that individual's rights. Jurisdiction in a human rights context is therefore primarily of a territorial nature. However, jurisdiction is not necessarily restricted to a state's national territory. Acts performed on a state's territory which produce effects outside a state's territory could also trigger jurisdiction.[40] Establishing extraterritorial jurisdiction is exceptional and subject to the particular circumstances or ´facts´ of each case.[41]

3.3. Positive and negative obligations

If jurisdiction (whether territorial or extraterritorial) is established, state obligation towards the individual can be divided into positive and negative obligations. Which obligation is applicable varies according to which relevant provision is at stake. On the one hand, negative obligations instruct states to *refrain* from certain acts which could violate the right of the individual. On the other hand, positive obligations command states to *ensure* – by taking positive action - that certain individual rights are respected and protected.[42]

When looking at the wording of several of the provisions in the ECHR ("no-one shall be"), it is evident that the state is under a negative obligation and therefore *refrain* from interfering with the protected rights in the Convention. States' obligation to secure the rights set out in the ECHR can also place a positive obligation on the state which would require the state to take positive action to ensure that rights are upheld. This is also directly reflected in a few of the provisions, e.g., art. 2 and art. 6. The idea of positive obligations is underpinned by the key principle which the ECtHR has put in place: That Convention rights must be "practical and effective".[43] Murdoch puts it this way: "Whether a positive obligation exists does not however, depend on the semantic form in which a guarantee is expressed, but upon whether it is necessary to construe the guarantee as imposing a positive obligation in order to secure effective protection of the right in question".[44] The ECtHR case law has found that positive obligations exists in relation to a variety of the ECHR rights.[45]

In the CRC Conv., the same pattern is followed by several provisions phrased with an inherent positive obligation, for example "shall respect" (art. 2, art 5 etc.), "shall undertake" (art. 4), "shall ensure" (art. 9).

The distinction between positive and negative obligations are particularly important in relation to the extraterritorial application of human rights Conventions. The strength of a positive obligation can vary depending on which violation it relates to, and a positive obligation is in its nature more burdensome for states to fulfil than negative obligations. Milanovic argues that in extraterritorial situations, a state should need actual or effective control over a territory or a population to be capable of fulfilling its positive obligations while a state does not need more control than, for instance, control over a state agent to violate a negative obligation.[46] This

[39] Ibid, p. 179-180.
[40] Murdoch p. 197.
[41] Murdoch, p. 194.
[42] Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, p. 18.
[43] Murdoch, p. 209.
[44] Murdoch, p. 209.
[45] Ibid, p. 209.
[46] Milanovic: Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy, p. 18.

distinction between positive and negative obligations in extraterritorial situations is subject to criticism as it is argued that "jurisdiction also *may* apply to positive obligations in respect of harm or risk abroad, depending on the rights at stake and all the circumstances".[47] Notwithstanding these different scholarly approaches, a jurisdictional link entails state obligation (negative or positive) to ensure the rights and freedoms set out in the ECHR.

3.4. Developed models for determining extraterritorial jurisdiction

At this point, it has been established what jurisdiction *is* and what implications it has for states (positive or negative obligations). However, the thesis puts its emphasis on how jurisdiction is *established*, i.e. how the Court and CRC Comm. determine how and when states are legally responsible for acts or omissions in extraterritorial circumstances.

In the jurisprudence of the ECtHR and in the history of decisions and views from the UN Human Rights Treaty Bodies, three main models to determine jurisdiction in extraterritorial situations can be identified: 1) the 'spatial model' which puts in place the argument that jurisdiction is dependent on the existence of an effective overall control over the relevant territory, 2) the 'personal model' which puts in place the argument that jurisdiction is dependent on the state's authority and control over the individual in question, and 3) a 'functional model' which puts in place the argument that jurisdiction is dependent on states' capacity to act and the impact of their acts and omissions on the rights of the individual.[48] In sections 4.2 & 5.2, the thesis describes how the Court and the Committee apply these models. In sections 4.3 & 5.3, the thesis moves on to analyse how the models are applied in the late ECtHR judgment *H.F. and others v. France* and the late CRC Comm. case *F. B. et al. and L.H. et al. v. France*.

4. United Nations Convention on the Rights of the Child

The CRC Conv. has a near universal ratification[49] and state parties are obliged to "respect and ensure to all children within their jurisdiction" (art. 2) a range of civil, political, economic, social, and cultural rights. Four guiding principles permeate the convention: 1/ non-discrimination (art. 2), 2/ the best interest of the child (art. 3), 3/ the right to life, survival, and development (art 6) and 4/ the right to be heard (art. 12).[50] The Convention entered into force on 2 September 1990 and was adopted by the General Assembly through resolution 44/25 on 20 November 1989.

With the issuance of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* - adopted by the General Assembly through resolution A/RES/66/138 on 19 December 2011 and with an entry into force on 14 April 2014 - it became possible for individuals of ratifying state parties to lodge individual complaints to the CRC Comm. The number of state parties to the Optional Protocol are more limited with a present number of 50 states.[51]

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[47] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*.
[48] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*.
[49] Except from the United States of America.
[50] Bagheri & Bisset: *International Legal Issues Arising from Repatriation of the Children of Islamic State* p. 370.
[51] UN Treaty Collection, can be accessed here

The CRC Comm. is an independent body which provides interpretation of the CRC Conv. under the auspices of the Office of the High Commissioner of Human Rights. The decisions and views by the CRC Comm. are however in interplay with, and affected by, the other UN Human Rights Treaty Bodies[52] and their decisions, views, and General Comments.[53] The fact that decisions and legal reasoning by the UN Human Rights Committee (CCPR) directly impacts CRC Comm. decisions has been criticised. Among other things for a lack of relevancy and a lack of usefulness as legal opinions.[54]

The decisions and views issued by the CRC Comm. on individual complaints are of a non-binding nature. Contracting states are not legally obliged to abide by the Committee's decisions,[55] although they do represent an interpretation of the relevant treaty to which the state parties have agreed to be legally bound. According to Keller & Ulfstein, many states have chosen not to implement the decisions made by the UN Human Rights Treaty Bodies when it comes to individual complaints.[56]

The UN Human Rights Treaty Bodies, including the CRC Comm. have received some criticism over the years from the international legal academia. Among other things, it has been criticised for referring to its own views and decisions as 'jurisprudence' although it does not qualify as a legal body.[57] Other discussions discuss the legal status of their decisions and views. Thus, Keller & Ulfstein has made a general characterisation of the UN Human Rights Treaty Bodies:

> "However, while the function of the treaty bodies in deciding individual complaints is comparable to that of courts, they are formally designated 'Committees', not courts; they receive 'Communications' rather than cases; they are composed of experts and not judges; their procedure is confidential and the proceedings are written, with no oral elements; and their decisions are termed 'Views' (or comparable denominations) rather than judgments".[58]

Moreover, Abramson and Emberland argue that CRC Comm. decisions are not in accordance with the rules of legal interpretation in the 1969 Vienna Convention on the Law of Treaties (VCLT).[59] Abramson observes that decisions are not following the principle of 'good faith interpretation' as outlined in the VCLT. He further criticises the CRC Comm. for result-oriented decision-making where the CRC Comm. first decided what the law should be (or even which side should win the case) and then "manufactures an interpretation of the law that produces that result."[60] Another point made by Abramson is the lack of adequate explanation of the line of reasoning in the CRC Comm. decisions.[61]

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[52] There are ten UN Human Rights Treaty Bodies including the CRC Comm. and inter alia the Human Rights Committee (CCPR), the Committee Against Torture, the Committee on Migrant Workers. Of the ten Treaty Bodies, eight has an individual complaint mechanism.
[53] General Comments are also considered soft law and non-binding for state parties.
[54] Abramson p. 138-139.
[55] Keller & Ulfstein, p. 113.
[56] Keller & Ulfstein, p. 115.
[57] Emberland, *The Committee on the Rights of the Child's Admissibility Decisions in the 'Syrian Camps Cases' against France: a Critique from the View point of Treaty Interpretation*, p. 4.
[58] Keller & Ulfstein, p. 74.
[59] See section 3.1.
[60] Abramson, p.138.
[61] Abramson, p. 139.

4.1. Specific Convention interpretations, Committee on the Rights of the Child

One of the main guiding principles of the CRC Comm. is 'the best interest of the child' which is enshrined in CRC Conv. art. 3 (1). It provides that:

> "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."

From the terminology, it is clear that the principle of the 'best interest of the child' does not come with a fixed standard definition. It shall be *a* primary consideration but not *the* primary consideration. The CRC Comm. refers to the principle as "flexible and adaptable" and furthermore as a complex concept with a content that must be determined on a case-by-case basis.[62] According to CRC's own General Comment no. 14 on the subject, "the child's best interest shall be applied to all matters concerning the child or children and taken into account to resolve any possible conflicts among rights enshrined in the Convention or other human rights treaties".[63] Although the CRC Comm. in its General Comment no. 14 puts strong emphasis on the principle of the best interest of the child, the vague definition of the principle as a standard and its inherent flexibility, renders it difficult to apply as a decisive factor for other actors as for example the ECtHR.

4.2. Extraterritorial jurisdiction – Committee on the Rights of the Child

The jurisdictional clause in the Convention on the Rights of the child, is included under art. 2, para 1 which provides that:

> "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

With the inclusion of a non-discrimination phrase, the jurisdiction clause is slightly different than the one in ECHR art. 1.[64] In the case of ECHR, the jurisdictional clause does not say anything about the scope of the CRC Conv. in extraterritorial circumstances.[65] According to Abramson, in the light of the *travaux préparatoires* it was intentional to leave out the territoriality condition in the jurisdiction clause of CRC Comm.[66] Sandelowsky-Bosman & Liefaard add that a former draft of the Convention linked applicability of the CRC Conv. to jurisdiction as well as territory "but later the drafting parties backtracked on this double condition – in order to cover every possible situation".[67] Emberland does not agree with this interpretation of the

[62] CRC Comm.: General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (para 32).
[63] Ibid, para 33.
[64] See section 5.2.
[65] Milanovic, p. 13.
[66] Abramson, p. 127.
[67] Sandelowsky-Bosman & Liefaard: *Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child*, p. 149.

travaux préparatoires and claims that the word territory was left out "to avoid a perceived but potential misunderstanding of the status of diplomats' children".[68]

In a Joint General Comment from 2017, the CRC Comm. suggested in para 12 that extraterritorial jurisdiction may arise if a state party exercises 'effective control' outside its territory:

> "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".[69]

It should be stressed that the General Comment was issued in 2017 before the detention of alleged ISIS-affiliated mothers and children in Syria took place and relates to the general migration context. It is also not clear from the wording of this GC, how one should understand 'effective control'. However, as will be made clear in 4.3.2, the Joint General Comment no. 3 is one of the guiding principles of the CRC Comm. in establishing a jurisdictional link in *F.B. et al. and L.H. et al. v. France*.

All CoE states as well as Syria are signatories to the CRC. Conv. and thus they are obliged to respect, protect, and fulfil the rights of children. It is the state in which a child resides that has the primary responsibility to fulfil these protection obligations. As already mentioned, the children are under the de facto control of a non-stake actor, AANES and SDF, and as these are not states, they cannot be signatories to any international Convention. Instead, AANES and SDF might be bound by rules on conduct under International Humanitarian Law (IHL).[70] Since the Syrian state does not exercise effective control over the area of Northern Syria, it is not realistic to assume that the Syrian Government has any interest in complying with its obligations under the CRC Conv.[71]

Sandelowsky-Bosman & Liefaard suggest that avoidance of a legal vacuum coupled with the protection needs of a particularly vulnerable group could be another concern to the CRC Comm. in terms of its decision-making.[72] Thus, the particular vulnerability of children is described in the preamble of the CRC Conv.: "(…) the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection (…)".[73]

Another authoritative source which is guiding the CRC Comm. in its jurisdiction assessment is the General Comment (GC) no. 36, issued by the UN Human Rights Committee (CCPR) on the right to life:[74]

> "In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and

[68] See Emberland, p. 6.
[69] 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.
[70] The applicability of IHL in territory under the de facto control of armed non-state actors will not be further discussed in this thesis. See ICRC report: International Humanitarian Law and the challenges of contemporary armed conflicts.
[71] Sandelowsky-Bosman & Liefaard: *Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child*, p. 149.
[72] Sandelowsky-Bosman, & Liefaard: *Children Trapped in Camps in Syria, Iraq, and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child*, p. 150.
[73] CRC Conv. Preamble.
[74] Art. 6 of the International Covenant on Civil and Political Rights.

> 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 affected by its military or other activities in a direct and reasonably foreseeable manner".[75]

Based on the above, it is anticipated by the CCPR that jurisdiction can be triggered in extraterritorial situations where a party state through (military or) other activities *affect* the right to life of an individual in a direct and reasonably foreseeable manner. This model of jurisdiction is what is referred to as a 'functional model' which establishes jurisdiction based on the 'function of the state', coupled with other factors.[76] Rytter and Kessing interprets the General Comment in the sense that jurisdiction may arise if a state exercises some sort of power, i.e. a direct military activity or other activity which is related to some kind of action. Thereby, the authors suggest that a state's omissions would not be included and that the General Comment no. 36 is aligned with the general ECtHR practice.[77] Giuffre interprets the GC differently and indicates that "the actions and omissions of State authorities whose mandate and role warrant them to intervene (and nonetheless fail to act or act with unjustifiable delay) may have a direct and reasonably foreseeable impact on the right to life of individuals outside their territory".[78] According to para 7 of the GC, the right to life provides an obligation for state parties to the International Covenant on Civil and Political Rights (ICCPR) to ensure the respect and protection of the right, including protection from "reasonably foreseeable threats and life-threatening situations that can result in the loss of life" – or even when such "threats and situations do not result in the loss of live".[79]

Two recent significant decisions issued by the CCPR[80] suggest that the GC should be interpreted in a more expansive fashion than Rytter and Kessing propose. In these decisions, CCPR established jurisdiction based on the omissions of Malta and Italy. The case concerned a shipwreck outside Maltese and Italian territorial jurisdiction where 200 persons drowned due to an inadequately timed rescue operation. The Human Rights Committee found that the ship was under Maltese jurisdiction and consequently found a violation of art. 6 under the ICCPR. Jurisdiction was also established in relation to Italy because an Italian military ship was within proximity and aware of the emergency situation, however it did not respond as fast as it could. Jurisdiction was established based on the special dependency between the individual on the shipwreck and the Italian state (in the shape of the Italian military ship) and because the Italian state had the reason and capacity to act. [81] This situation is an example of the application of a functional jurisdictional model where jurisdiction is established extraterritorially on the primary

[75] United Nations Human Rights Committee: General comment no. 36, 3 September 2019, Article 6: right to life, para 63.
[76] Rytter & Kessing, p. 185.
[77] Ibid, p. 185.
[78] Giuffré: A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights, p. 69
[79] United Nations Human Rights Committee: General comment no. 36, 3 September 2019, Article 6: right to life, para 7.
[80] CCPR/C/128/D/3043/2017, decision on 28 April 2021 & CCPR/C/130/D/3042/2017, decision on 27 January 2021.
[81] Rytter & Kessing, p. 186 & Giuffré p. 73-74. See the same authors for criticism regarding the reasoning in the decision.

basis of inaction by the two states, coupled with other factors such as awareness of the situation, dependency and the right to life.

To sum up, the above examination of UN General Comments, decisions and views from UN Human Rights Treaty Bodies illustrate how the functional approach to extraterritorial jurisdiction is slowly developing and expanding within the UN Human Rights system. Now the thesis will examine whether this is also the case in *F.B. et al. and L.H. et al. v. France.*

4.3. Analysis of *F.B. et al. and L.H. et al. v. France*

4.3.1. The case before the CRC Comm.: *F.B. et al. and L.H. et al. v. France*

The CRC Comm. has issued two separate decisions on admissibility based on three different communications.[82] Two of these communications (no. 79/2019 and no. 109/2019) were joined under the same decision which was adopted on 30 September 2020. The third decision regarded communication no. 77/2019 and the CRC Comm. decision was issued on 4 February 2021. As all three communications were declared admissible, and due to the very similar facts of the case, they were joined as one case in the CRC Comm. view on the merits which was adopted on 8 February 2022. Where nothing else is noted - for the purpose of this thesis – the whole case complex including the two admissibility decisions and the view on merits will be referred to as *F. B et al. and L.H. et al. v. France*. Under the jurisdiction assessment, reference will only be made to the decision on communications no. 79/2019 and no. 109/2019 adopted on 30. September 2020 as the reasoning and main argumentation are the same in the two admissibility decisions.

It is unclear whether some of the authors (applicants) in *F. B. et al. and L.H. et al. v. France* are the same as in *H.F. and others v. France,* but the substances of the complaints are very similar.

A brief presentation of the facts of the two similar cases will be presented under section 5.3.1. while additional presentation of facts for each case will be omitted for the CRC Comm. cases.

A substantial number[83] of grandparents, aunts and uncles are acting on behalf of their grandchildren, nephews and nieces and have filed the communications on behalf of these. The complaint centres around the fact that France has not repatriated the children in question, although the French authorities have repatriated other children (with and without mothers) and although the French authorities knew of their dire situation. The family members of the children more specifically claim that France has violated the following provisions in the CRC Conv.:

- Article 2: Prohibition of discrimination.
- Article 3: Principle of the best interest of the child.
- Article 6: Right to life, survival, and development.
- Article 19: Protection from violence, injury, abuse, neglect, and exploitation.
- Article 20: Entitlement to special protection and assistance when deprived of family environment.
- Article 24: Right to access health care services.
- Article 37: Notably, (a) prohibition of torture, or other cruel inhuman or degrading treatment and (b) prohibition of deprivation of liberty.

[82] 'Communications' can be sidelined with individual complaints.
[83] See details of the authors (applicants) under para 1.1. under first and second decision.

4.3.2. The CRC Committee's jurisdiction assessment

The CRC Comm. has not previously dealt with the issue of the extraterritorial scope of the CRC Conv. in a 'contentious case'.[84]

The legal framework in which CRC Comm. places its jurisdictional assessment is rather short. CRC Comm. begins its jurisdictional assessment in para 9.6 of the first decision by noting that "the Convention does not limit a State's jurisdiction to territory". Thus, the CRC Comm. refers to the *travaux préparatoires*. The CRC Comm. further observes that jurisdiction can arise "in respect of acts that are performed, or that produce effects outside its national borders". It includes as a reference an interim report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, para 33.[85] This is particularly interesting as the quoted sentence is not even mentioned in para 33 of the A/70/303-interim report.[86] Instead, it is a phrase which is widely used in ECtHR case law. In addition, the CRC Comm. refers to a joint general comment from the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child.[87] Here the CRC Comm. establishes that "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". Finally, the CRC Comm. relied on its own previous view in *C.E. v. Belgium* to emphasise that the Committee had previously considered that "Belgium had jurisdiction to ensure the rights of a child located in Morocco".[88]

It is striking that the above-mentioned legal sources display a total absence of any reference to the ECtHR case law which is rich and developed on the subject. The CRC Comm. emphasises that the CRC Conv. does not limit jurisdiction to territory and that jurisdiction may arise outside the territory of a state. These statements would be the only specific references to inform the jurisdiction considerations and are not very controversial.

The reference to the specific CRC Comm. view adopted in *C.E. v. Belgium* does not provide much clarification in relation to jurisdiction as the question of extraterritorial jurisdiction was not an issue at stake in *C.E. v. Belgium*. This was not disputed by the state and, therefore, the CRC Comm. had not addressed the issue in their decision.

Based on the legal sources outlined and the facts of the case, the CRC Comm. concludes in one paragraph that France has jurisdiction over the children for the following reasons:

> "In the circumstances of the present case, the Committee observes that the state party, as the state of the children's nationality, has the capacity 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

[84] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*.
[85] A/70/303, para 33.
[86] *Al-Skeini*, para 133.
[87] Joint general comment no. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), paras 17 (e) and 19.
[88] First decision, para 9.6.

> 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".[89]

The CRC Comm. does not provide any information on which model or test it is applying in its jurisdiction consideration, nor does it attempt to put in place a standard for jurisdiction.[90] The Committee recognises that France does not have any effective control over the camp but assumes that the effective control was held by AANES. Instead, the CRC Comm. builds the jurisdictional link on the *capacity* and the *power* of France to protect the rights of the children. That France is seen to have this capacity and power centres around the fact that has France is the state of the children's nationality. However, the CRC Comm. does not claim that nationality alone can suffice to trigger jurisdiction. Instead, it contends that the capacity and ability of France to act (based on nationality link) is coupled with other contextual factors such as France's relationship with the Kurdish authorities and their willingness to cooperate. Lastly, the CRC Comm. puts emphasis on the fact that France had already repatriated other children from the camp which additionally demonstrates that France has the capacity to facilitate such repatriations.

Milanovic describes the CRC Comm.'s decision on jurisdiction as a nationality-based variant of the functional approach. He criticises the legal reasoning in support of establishing a jurisdictional link. Jurisdiction based on decisions on a state's territory which produce *effects* outside the state's territory (Milanovic refers to this as an 'effects model') has never consolidated in the human rights case law. According to Milanovic it "(…) lacks any internal coherence and any limiting ability for a threshold criterion."[91]

Duffy regrets that the Committee did not better explain the reasoning for establishing a jurisdictional link. In her view, this "could have helped locate this case within the trends and development around jurisdictions and increased the influence of the Committee's jurisprudence on international legal development".[92] Duffy further argues that the "effective control" test, which the CRC Comm. does seem to apply in its assessment, does not concern territory (as directly dismissed). Instead, it focuses on the effective control over the children's situation. Duffy suggests that a rethink of the models used to establish jurisdictional links from effective control over area or individuals to a 'control of rights approach' "is likely to prove essential to enable human rights law to keep pace with developments".[93] In Duffy´s eyes, a failure to articulate any standards for jurisdiction or clarifying a clear threshold for jurisdiction would raise the question of its reach. Thus, Duffy asks the question: "what would be the limits of a test that essentially required a state to take positive action because it has the power and capability, and can?"[94]

It is also clear from the CRC Comm.'s decision that it does not limit state responsibility to negative obligations, as otherwise posited as the way forward by Milanovic. On the merits, the

[89] First decision, para 9.7.
[90] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*.
[91] Milanovic: Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights Conventions, p. 2.
[92] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*.
[93] Ibid
[94] Ibid

CRC Comm. found (*view*, para 6.11) that the state party's failure to protect the child victims constitutes a violation of their rights under articles 3 (principle of best interest of the child) and 37 (a) (prohibition of torture, or other cruel inhuman or degrading treatment) of the Convention. Furthermore, the state party's failure to protect the child victims from an imminent and foreseeable threat to their lives constitutes a violation of article 6 (2) (right to survival and development) of the Convention". The CRC Comm. subsequently considers in para 6.12 (*view*) that after reaching the above conclusion, it is not necessary to examine whether the other claimed articles (2, 6 (2), 19, 20, 24 and 37 (b)) of the Convention have been violated. The findings of the CRC Comm. led to the conclusion that France should "take urgent positive measures to repatriate the child victims" (para 8 (c)).

To recapitulate, the above analysis has shown that the CRC Comm. in its jurisdiction decision rejects a formalistic approach to jurisdiction. Instead, the Committee adopts a functional approach based on the right of the individual, the state's effective control over that right and the impact of the state's acts and omissions.[95] The analysis also illustrates that the CRC Comm. does not provide adequate explanation of the line of reasoning - an approach which has also been criticised by Abramson (see chapter 4). The thesis will now move on to examine jurisdictional models within the ECHR regime.

5. The European Convention on Human Rights

The Council of Europe was founded in 1949 with an aim to protect human rights, democracy and the rule of law. The Council produced a number of treaties of which the European Convention on Human Rights was one of the most important. The ECHR was opened for signature on 4 November 1950 and came into force on 3 September 1953.[96] After Russia's exclusion on 16 March 2022, 46 member states constitute the Council of Europe. All member states are parties to the Convention which is binding for the ratifying countries.

The European Court of Human Rights is the judicial body which oversees the implementation of the Convention in the member states. The contracting states have an obligation to a) abide by the judgments of the European Court of Human Rights, b) put an end to the breach, and c) make reparations for its consequences.[97] In this section, the thesis will demonstrate the different jurisdictional models which the ECtHR has developed and applied throughout its jurisprudence.

5.1. Specific Convention interpretations, European Court on Human Rights

Over time, the Court has developed some specific doctrines and principles of interpretation which guide the Court in its decision-making. One is the doctrine of the 'living instrument'. The Court has described the Convention as a "living instrument which (…) must be interpreted in the light of present-day conditions"[98]. This is also referred to as the doctrine of the living instrument. In effect, this means that the Court interprets the Convention in a dynamic fashion and that "(…) the practical application of the general expressions used in the Convention is

[95] Duffy: *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*
[96] ECtHR: The European Convention on Human Rights; A living instrument.
[97] ECtHR: Guide on art. 46.
[98] *Tyrer v United Kingdom* (1978), para 31.

considered to change over time".[99] The principle of 'the living instrument' also means that there is no 'strict doctrine of precedent' which applies to the Court's decisions or judgments, although the Court does refer to previous case law and usually "builds upon them incrementally".[100]

Another important principle for the Court is 'the effectiveness principle'. This leads the Court to make judgments which ensure that Convention rights are practical and effective and not theoretical and illusory.[101] In practice, this means that the Court "is compelled to look behind the appearances and investigate the realities of the procedure in question."[102]

5.2. Extraterritorial jurisdiction – European Court of Human Rights

Historical decisions on extraterritorial jurisdiction and applicability of the ECHR in cross-border situations have led to much confusion as to the position of the ECtHR on this thorny issue. As Mallory puts it: "At points it has appeared settled, stable, and almost intelligible. At others it has been hugely confusing, infuriatingly contradictory and lacking in any sense of direction".[103]

The jurisdiction clause in art. 1 of the Convention does not clarify how jurisdiction should be understood and established in extraterritorial situations. Article 1 of the European Convention on Human Rights simply provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*." As we have seen above, the term jurisdiction has traditionally been linked with the concept of territorial jurisdiction and therefore the Court had to develop the concept of extraterritorial jurisdiction through its own case law.

Up until 1998, when Protocol 11 entered into force and thereby allowed individuals to raise cases directly to the Court, it was the European Commission on Human Rights which decided on admissibility of cases instead of the Court. In a number of decisions in the 1960's and 1970's, the Commission had first indicated that the Convention could be applied extraterritorially and thereby suggested that the term 'jurisdiction' should not be regarded solely in a territorial manner.[104]

After this, in a number of cases involving Turkey and Cyprus in the 1970s and 1980s, the Commission took the stand that jurisdiction could be triggered when "an individual's rights were affected by a Contracting Party to the Convention and where they were within a state's authority".[105] In this period, the Commission further developed its approach to personal jurisdiction in a series of cases where individuals were arrested and detained by state agents outside state party territory.[106] In all the cases, the Commission found that the individuals had been brought within the jurisdiction of the relevant state party.[107]

In the *Loizidou judgment* (preliminary findings) from 1995, the Court established:

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[99] Murdoch, p. 225.
[100] Ibid, p. 227.
[101] Murdoch, p. 223.
[102] *Deweer v. Belgium (1980)*, para 44
[103] Mallory: *A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights*, p. 32
[104] See *X v. Federal Republic of Germany* (1965) & *Ilse Hess v. United Kingdom* (1975).
[105] Mallory: *A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights*, p. 34
[106] See e.g., *Freda v. Italy* (1980) & *Reinette v. France* (1989)
[107] Mallory: *A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights, p.* 34

> "(…) the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises *effective control of an area* outside its national territory. 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 its armed forces, or through a subordinate local administration".[108]

With *Loizidou*, the Court suggested that a state party could also exercise jurisdiction over an entire territory if it was under its 'effective control'. The Court thereby paved the way for the spatial model of jurisdiction.

To sum up, the early jurisprudence of the Commission and Court had an incremental approach to jurisdiction in extraterritorial situations, slowly expanding the scope of the Convention extraterritorially. The case law in this period established that extraterritorial jurisdiction could be applied under two sets of circumstances: When a state agent has authority and control over an individual (personal model) or when a state exercises *effective control* over an area which is not a part of that state's territory (spatial model).[109]

However, the admissibility decision of *Bankovic and others v. Belgium and others* in 2001 put an end to this incremental development of extraterritorial jurisdiction. The case involved NATO airstrikes on a radio and television station in Belgrade and the applicants were family members to individuals who were killed in the bombing. The Court considered that jurisdictional links could not be established. In its jurisdiction assessment, the Court stated in paras 59 & 61:

> "As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial." [110]

> "The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case." [111]

Thus, the Court holds that the question of jurisdiction is of primary territorial nature, yet the Court also suggests that the establishment of extraterritorial jurisdiction would require special justification based on the particular circumstances of each case, thereby also indicating that jurisdiction is a threshold criterion.

In para 64-65, the Court notes that jurisdiction should be understood in relation to its meaning in public international law and that "the doctrine of the living instrument could not be used to expansively interpret the Convention's reach".[112] Thereby, the Court suggests that the 'living instrument doctrine' does not apply to the jurisdiction clause in art. 1 of the ECHR. [113] The Court refers to the *travaux préparatoires* in para 65 to validate why such an expansion cannot be justified. Neither Murdoch nor Mallory elaborates on this specific issue perhaps because the

[108] *Loizidou v Turkey* (Preliminary Objections) (1995), para 62.
[109] Murdoch, p. 197.
[110] *Bankovic*, para 59.
[111] *Bankovic*, para 61.
[112] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights*, p. 34.
[113] *Bankovic*, para 64-65 and Murdoch, p. 225, footnote no. 2.

Court later distanced itself from this approach, albeit not explicitly. In fact, the Court has expanded the Conventions' reach.

Moreover, in para 65, the Court hints that the findings in the *Loizidou* (preliminary findings) regarded the competence of the Convention organs to examine a case and thus could not directly be compared with *Bankovic* where "the scope of Article 1, at issue in the present case, is determinative of the very scope and reach of the entire Convention system of human rights' protection (…)"[114]

In para 80, the Court further contends that the Convention operates in an essentially regional context and in the legal space of the contracting states, i.e. in Council of Europe member countries. Thus, the Court emphasises the notion of extraterritorial jurisdiction as an extraordinary phenomenon.

It has been argued, that *Bankovic* put in place the foundations for the Court's restrictive interpretation of jurisdiction.[115] According to Mallory "the Bankovic judgment [*sic*] was then at points an anomaly, inconsistent with the rest of the Court's jurisprudence and something to be avoided, while at other times it was an authority, still relied upon to enforce a restrictive notion of jurisdiction."[116]

In the aftermath of the US-led[117] invasion of Iraq in 2003, the Court had to address the issue of extraterritorial jurisdiction in cases of human rights violations in Iraq. This included the significant judgment of *Al-Skeini v. United Kingdom* in 2011. In para 133-140, the Court clarified its stand on extraterritorial jurisdiction through the personal and spatial models. Triggering jurisdictional links could happen in situations where a state exercises de facto effective control over a territory abroad.[118] Jurisdiction through the personal model could be stablished in three situations: 1/ when exercised through diplomatic and consular agents, 2/ when state agents exercise public powers on the territory of another state and 3/ when an individual is brought into a state's jurisdiction through the use of force.[119]

In para 130 of *Al-Skeini*, the Court notes that jurisdiction under art. 1 is a 'threshold criterion' which must be fulfilled before Convention obligations can arise.[120] Under the personal jurisdiction model where force is not involved in the 'authority and control over an individual' that threshold is considered high.[121]

The Al-Skeini judgment was intended to provide a "skeleton upon which all future incantations of jurisdiction grew from (…)"[122] In subsequent judgments[123] about detention of Iraqis by British forces, the Court also found that jurisdiction was established through the personal model.

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[114] *Bankovic*, para 65.
[115] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights* p. 34.
[116] Ibid, p. 37.
[117] Including in the coalition Convention state parties such as United Kingdom, Denmark, the Netherlands, Italy, Portugal, and others. Not all provided military support, some provided only "political support".
[118] *Al-Skeini*, paras 138-140.
[119] *Al-Skeini*, paras 133-137.
[120] Murdoch, p. 194, footnote 1.
[121] Rytter & Kessing, p. 181.
[122] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights,* p. 38.
[123] *Hassan v. United Kingdom* (2014) *and Al-Jedda v. United Kingdom* (2011).

In the following years, as the Court faced new cases[124] with extraterritorial acts that did not fit well into the *Al-Skeini* skeleton, the Court returned to "cautious incrementalism".[125] In *Jaloud v. the Netherlands* (2014), which concerned the shooting by Dutch forces of an Iraqi individual at a military checkpoint in Iraq, the Court altered its previous stand on jurisdictional links through shooting. Thus, it established what Mallory calls "a new basis for jurisdiction".[126] The Netherlands exercised a 'sphere of influence' over the precise area by "asserting authority and control over persons passing through the checkpoint".[127] On this basis, the Court established a jurisdictional link. It was noted in the judgment in a joint concurring opinion by seven judges that this 'sphere of influence' could be seen as building on the spatial and personal models of jurisdiction.[128] The judges thereby indicated that a new period of incrementalism had begun. Thus, Mallory defines the jurisdictional link as "a new freestanding exception to the primacy of territoriality (albeit within the state agent authority and control subsection)".[129]

In *Güzelyurtlu and others v. Cyprus and Turkey* (2019*),* a family of three was killed in Cyprus. There were clear indications that persons from the Turkish Republic of Northern Cyprus (TRNC) were involved in the killing and that these persons after the killing fled back to the area of TRNC. The question was subsequently which of the two countries (Turkey or Cyprus) were responsible for conducting effective investigations into the killing of the family under the procedural limb of Art. 2. The Court found that jurisdictional links existed between the applicants who were relatives to the victims and Turkey. This was because police officials in the TRNC had already opened criminal investigations into the killings and detained seven murder suspects and questioned one of the applicants. This jurisdictional link was supported by two "special features". As a first special feature, the Court considered Northern Cyprus to be under the effective control of TRNC and thus Turkey. The second special feature centred around the fact that Cyprus could not conduct effective criminal investigations in the murder cases as the suspects were on the territory of TRNC. The Court stressed in para 196 that each of the two special features (the instigation of the criminal investigation or the special features) could separately give rise to a jurisdictional link.

With the above mentioned cases, the "special features doctrine"[130] made its entrance, although the Court had introduced the 'special features' discussion in earlier cases.[131] In *Güzelyurtlu,* para 190, the Court "does not consider that it has to define in abstracto which "special features" trigger the existence of a jurisdictional link (…), since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to another".

In the case law of ECtHR on extraterritorial jurisdiction, the recent admissibility decision of *M. N. and others v. Belgium* (2020) is worth mentioning. In this case, Syrian nationals had applied

[124] *Jaloud v. the Netherlands* (2014), *Güzelyurtlu and others v. Cyprus and Turkey* (2019), *Romeo Castaño v. Belgium (2019)*.
[125] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights,* p. 39
[126] Ibid, p. 39.
[127] *Jaloud v. the Netherlands*, para 152.
[128] Joint concurring opinion of judges Casadevall, Berro-Lefevre, Sikuta, Hirvelä, López Guerra, Sajó and Silvis, in *Güzelyurtlu,* para 1.
[129] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights,* p. 40.
[130] In the words of Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights*, p. 40.
[131] Ibid, p. 46, footnote no. 60.

for a visa permit at the Belgian embassy in Beirut. The visa application was subsequently turned down by the Belgian authorities. The facts lead the Court to "explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter effectively exercised authority or control over them".[132] The Court did not find that a jurisdictional link was established between Belgium and the Syrian visa applicants due to Belgium's exercise of authority through handling the visa application. According to Mallory, this decision "was a point of expansion beyond which judges would not go".[133]

In *Hanan v. Germany* (2021), the Court had to assess whether a jurisdictional link was triggered under the procedural limb of art. 2 (like *Güzelyurtlu*). The case regarded Germany's involvement in an airstrike on an oil-tanker in Afghanistan which killed civilian bystanders. Germany had only provided the intelligence; American Air Force pilots had carried out the actual bombing. The majority of the Court found a jurisdictional link based on 'special features'. For some of the judges in the Grand Chamber, this was stretching it too far: "Three judges concluded that the 'special features' relied on by the majority had been unjustified and given rise to a result which would excessively broaden the scope of application of the Convention".[134]

Another recent case, *Carter v. Russia* (2021), concerned the killing of the former Russian agent Mr. Litvinenko with a radioactive substance in the United Kingdom where he had been granted asylum. The widow of Mr. Litvinenko held that Russia was responsible for the killing and that the Russian state had violated both the substantive and procedural part of art. 2. The Court agreed with her and attributed the conduct of the two state agents suspected of the actual killing to Russia. The Court found that a jurisdictional link was triggered due to the "exercise of physical power and control over his life in a situation of proximate targeting" (para 161). It seems here that a causality logic is at play and that the Court is holding that Russia – through its agents – had control over Mr. Litvinenko's right to life instead of 'control over a person'. It should be noted that *Carter v. Russia* was a chamber decision. According to Milanovic: "The Court for the very first time, expressly held that ECHR applied to extraterritorial assassinations and arguably adopted a functional approach to extraterritoriality. In doing so it effectively disregarded – even ignored – contrary jurisprudence, especially *Bankovic*".[135] With Russia's expulsion of CoE it is unclear when and whether the case will go to the Grand Chamber.

In a few extradition cases, the Court also introduced what could be referred to as an 'effects model' based on the concept that authority decisions taken in one state (for example an extradition request) produces an effect on the territory of another state.[136] This happened in *Stephens v. Malta* (2009) where Mr. Stephens was arrested in Spain based on an extradition request by Malta. According to the Court, the arrest warrant was issued by a Maltese court, but the court did not have the authority to do so. Thus, the authority decision on Maltese territory produced an 'effect' on Spanish territory, namely that Mr. Stephens was arrested in Spain based on an unlawful arrest warrant and extradition request.[137] The effects logic was also at play in *Nada v. Switzerland* (2012). [138]

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[132] *M.N. and others v. Belgium*, para 113.
[133] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights,* p. 41.
[134] Ibid, p. 42.
[135] Milanovic: *European Court Finds Russia Assassinated Alexander Litvinenko*.
[136] Rytter & Kessing, p. 182.
[137] *Stephens v. Malta*, para 52.
[138] *Nada v. Switzerland*, paras 121-122.

To sum up, ECtHR jurisprudence on extraterritorial jurisdiction has not been consistent. In developing its jurisprudence on this subject, the Court for decades had an incremental approach which was abruptly halted in *Bankovic*. However, the case law has established that extraterritorial jurisdiction could be applied under two sets of circumstances: When a state exercises *effective control* over an area which is not a part of that state's territory (*Loizidou*) or when a state agent has authority and control over an individual. These two models were closely described in *Al-Skeini* which provided a skeleton for future judgments on the matter. The 'personal model' was mostly clear when it came to the actual exercise of physical power over an individual. It turned out to be more difficult to determine whether jurisdictional links are triggered when it comes to authority decisions where use of force is not involved. The 'personal model' was broken down into subsections in *Al-Skeini* and described three situations where extraterritorial jurisdiction could be established: 1/ when exercised through diplomatic and consular agents, 2/ when state agents exercise public powers on the territory of another state and 3/ when an individual is brought into a state's jurisdiction through the use of force.[139]

In *Jaloud*, the scope of applicability was expanded with the "sphere of influence" exercised by Dutch soldiers, and in *Güzelyurtlu* the 'special features doctrine' importantly made its entrance. The Court decided in *M.N. and others v. Belgium* that a negative authority decision made by the Belgian state was not enough to bring visa applicants in Beirut within the jurisdiction of Belgium, even though they had entered the Belgian Consulate. *Hanan v. Germany* showed us that the argumentation for establishing a jurisdictional link was within the sphere of a functional approach where causality played an important role. In *Carter v. Russia*, the Court took a "bold decision"[140] with a clear functional approach based on causality.

It has also been established that the Court has made jurisdictional links within the context of the 'personal model'. In these cases, the decisions are contingent to special features rather than a principled reading of jurisdiction. This has been referred to as the "special feature doctrine,"[141] a more recent approach by the Court as suggested in *Hanan* and *Güzelyurtlu.*

The above examination of ECtHR case law raises two issues linked to extraterritorial jurisdiction which needs to be clarified for the purpose of this thesis: One is the question of nationality as a basis for triggering extraterritorial jurisdiction. Another is the concept of 'dividing and tailoring' state responsibility according to the situation when jurisdiction has been established.

5.2.1. Nationality and jurisdiction

The wording of article 1 implies that convention rights apply to *everyone* within the jurisdiction of Convention state parties. Thus, no distinction between nationals and non-nationals is made. Nationality can however have an indirect impact on jurisdiction since the authority exercised by a state over an individual on another territory would often be linked to diplomatic and consular activities towards a national.[142] Another question is whether legal citizenship automatically establishes an autonomous basis for jurisdiction between a state party and a citizen who is located abroad. This question has been addressed a few times. In some of the early Commission decision on the subject, it has been suggested that citizens in certain respects are within the

[139] *Al-Skeini*, paras 133-137.
[140] Milanovic: *European Court Finds Russia Assassinated Alexander Litvinenko*.
[141] Mallory: *A second coming of extraterritorial jurisdiction at the European Court of Human Rights,* p. 40.
[142] Rytter & Kessing, p. 183.

jurisdiction of a contracting state even when residing abroad and that contracting states would thus be obliged to provide consular assistance.[143] This was established in *X v. West Germany* (1965), *Cyprus v. Turkey* (1975) and *X v. United Kingdom* (1977). In a later judgment (1984), the Court found that the lack of consular and diplomatic assistance by West Germany towards a citizen who was jailed in Morocco did not suffice to create a jurisdictional link between West Germany and the citizen abroad.[144] Thus, the Court had not been entirely consistent on the matter. Recently, in *M.N. and others v. Belgium* (2020), it created some confusion by arguing in para 118 that jurisdiction to Syrian nationals seeking consular assistance in Beirut (visa application) could not be established as there was not a sufficient connecting link: "the applicants are not Belgian nationals seeking to benefit from the protection of their embassy".[145] The Court thereby indicated that jurisdiction could have been established if the individuals in need of consular assistance were nationals. In *H.F. and others v. France*, the Court clarifies that while nationality is a factor which is normally taken into consideration as a basis for extraterritorial exercise of jurisdiction, it cannot constitute an autonomous basis of jurisdiction (para 206). This would even apply in relation to art. 3 of protocol no. 4 which concerns nationals only.

5.2.2. Dividing and tailoring jurisdiction

The jurisdiction clause in art. 1 is phrased as an all-encompassing provision. Either there is jurisdiction - which would cause a full human rights responsibility for the state – or there is not.[146] In its jurisprudence, however, the Court has emphasised that this type of jurisdiction with full scale human rights responsibility would only apply when "effective control over an area"-jurisdiction is established (*Al-Skeini*, para 138). When personal jurisdictional links are triggered through authority and control over an individual, state responsibility can be 'divided and tailored'. This renders the state responsible for the rights "relevant to the situation of the individual" (*Al-Skeini, para 137*).[147] When the state exercises a level of authority and control over an individual sufficient to trigger jurisdiction, the state has a human rights responsibility over that individual, including positive or negative obligations – but only according to the situation.[148]

The position taken by the Court in A*l-Skeini* (on 'dividing and tailoring' state obligations depending on the extent or type of jurisdiction exercised) was contrary to the Court's position in *Bankovic* a decade earlier. Here the Court suggested that the positive obligation enshrined in article 1 - "to secure the rights and freedoms defined in Section I of this Convention" could in fact not be divided and tailored.[149]

The above case law description has illustrated how the Court is grounded in a strict formalistic approach to extraterritorial jurisdiction in applying the spatial and personal model. However, the Court has also applied a functional approach based on 'effective control over right to life' in *Carter v. Russia* and in some cases has established jurisdiction with a functional approach based on causality and impact and special features (*Hanan* and *Güzelyurtlu*).

[143] *X. v. West Germany* (1965) & *Cyprus v. Turkey* (1975) and Rytter & Kessing, p. 184.
[144] *S. v. West Germany* (1984 & Rytter & Kessing, p. 184.
[145] *M.N. and others v. Belgium* (2020), para 118.
[146] Rytter & Kessing, p. 183.
[147] Rytter & Kessing, p. 183.
[148] Rytter & Kessing, p. 185.
[149] *Bankovic*, para 75.

The thesis will now move on to analyse which jurisdictional models the Court applies in *H.F. and others v. France*.

5.3. Analysis of *H.F. and others v. France*

5.3.1. The case before the ECtHR: *H.F. and others v. France*

The Court issued its judgment in *H.F. and others v. France* on 14 September 2022. The case attracted major political and legal interest which is evident when looking at the high number of third-party interventions from governments in countries such as Belgium, Denmark, United Kingdom, the Netherlands, Norway, Spain, and Sweden (section B, 1) as well as from a broad variety of human rights organisations and University professionals. The case originated in two applications by four French nationals who were the parents of two daughters who went to Syria. The applicants in the case are therefore the grandparents of the children.

One family consists of one of the applicants' daughter L, born in France in 1991, and her two children who were born in Syria. L travelled to Syria in July 2014 with her partner. The partner later died in Syria. L has repeatedly expressed a wish to return to France with her two children.

The other family consists of the other applicants' daughter M who was born in France in 1989 and who travelled to Iraq with her partner in July 2015. A year later the couple travelled to Syria. M had one child in Syria and lost contact with her partner who is presumably held in a Kurdish prison.

One of the main issues which the Court needed to address in the late judgement was the question of extraterritorial jurisdiction; the question of whether France exercises jurisdiction over the French children and their mothers in the Kurdish-controlled Syrian camps in relation to article 3 of the ECHR and article 3, para 2 of Protocol No. 4.

The applicants initially brought the following claims for the Court:

- Article 3: The applicants alleged that the refusal by the respondent State to repatriate their daughters and grandchildren, exposed those family members to inhuman and degrading treatment prohibited by Article 3 of the Convention (para 3).
- Article 3 § 2 of Protocol No. 4: The applicants claimed that the failure to repatriate their family members breached their right to enter the territory of the State of which they were nationals (para 3).
- Article 8: The applicants alleged that the right of the family members respect for their family life has been breached.
- Article 13 in conjunction with Article 3 para 2 of Protocol No. 4: The applicants claimed that they had no effective domestic remedy by which to challenge the decision not to carry out the requested repatriations (para 3).

In the Court's view however, all the questions raised by the applicants would sufficiently be addressed when examining Article 3 and Article 3 para 2 of Protocol No. 4. Consequently, the Court would not examine the claims under Article 8 and under Article 13 in conjunction with Article 3 para 2 of Protocol No. 4.

5.3.2. The findings of the Court

As in previous cases[150] the Court "divides and tailors" jurisdiction under article 1 in order to examine the claimed violations of each relevant provision - article 3 and article 3 para 2 of Protocol No. 4 (para 186 & 189). This essentially means that jurisdictional links and possible state obligations can be 'divided and tailored' according to the level of control exercised by State authorities.

The Court begins its assessment by applying three steps (para 190):

1. Whether France exercises "control" over the area in which the applicants' family members are being held,
2. Whether a jurisdictional link can be derived from the opening of domestic proceedings, and lastly,
3. 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."

1. Control over area

The Court concludes that France does not exercise any effective control over the territory of North-East Syria as France has no military presence or any other military links with SDF which could establish a jurisdictional connection to the French children in the camps. In addition, France does not have any authority or control over the French nationals detained there (para 192). These statements de facto mean ruling out the established spatial and personal jurisdiction models.[151]

2. Domestic proceedings

The Court does not find that any extraterritorial jurisdictional link can be triggered based on the criminal proceedings opened by the French authorities against the applicants' family members, nor based on the bringing of proceedings by the applicants before the domestic Court (para 193-196).[152] Domestic proceedings cannot suffice to establish an extraterritorial link between France and the applicants' family members as the domestic proceedings have no direct impact in assessing whether the substantive complaints fall under the jurisdiction of France. This was also established by the Court in the case of *M.N. and Others v. Belgium* (para 195).

3. Connecting ties

When examining whether there are connecting ties or special features which could trigger extraterritorial jurisdiction, the Court considers such connecting ties separately under each of the provisions - article 3 and article 3, para 2 of protocol no. 4.

- *Article 3*

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The Court rules out extraterritorial jurisdiction solely based on nationality. It thus states that nationality cannot trigger an autonomous basis for jurisdiction (para 198). The Court goes on to conclude that the mere ability of France to repatriate its citizens from the camps as well as the decision by France not to repatriate the applicant's family members also is not enough to

[150] *Al-Skeini,* para 137.
[151] Pijnenburg: *H.F. and others v. France: Extraterritorial jurisdiction without duty to repatriate IS-children*.
[152] Ibid.

bring them within the scope of France's jurisdiction (para 199 and 200) in relation to article 3. Furthermore, the Court is of the view that although the French authorities were aware of the situation of the children, there is no general rule in international law which requires states to repatriate its nationals and there is no guaranteed right to diplomatic or consular protection (para 201). The Court thereby rules out a functional approach to jurisdiction based on France's capacity to repatriate and based on the impact by the actions of France, in this context the inactions of France. The Court concludes that there are no special features which triggers jurisdiction in relation to article 3.

- *Article 3, para 2 of protocol no. 4*

"No one shall be deprived of the right to enter the territory of the state of which he is a national".

Before turning to the judgment, it is relevant to shed some extra light on the provision as only very little case law is connected hereto. With the issuance of *H.F. and others v. France*, it is the first time in the jurisprudence of ECtHR that the Court finds a breach of art. 3, para 2 in Protocol no. 4. [153]

Protocol no. 4 has not been ratified by all CoE member states.[154] At the time of the *H.F. and others v. France*, 42 states have ratified the Protocol. Protocol No. 4, art. 6, specifies that the provisions of article 1-5 in the Protocol shall be regarded as additional articles to the Convention and that all provisions of the Convention shall apply accordingly. The right to enter the territory of one's national state protected in art. 3, para 2 of Protocol no. 4 is consequently a right at the same level as other rights protected by the Convention provided jurisdictional links are established.

And now back to the Court's analysis. In para 205, the Court notes that the right to return to a state concerns "nationals" while the general jurisdiction principle stemming from article 1 involves "anyone within their jurisdiction" regardless of nationality. Nationality alone, however, is in the Court's view not sufficient to trigger France's jurisdiction although the Court also confirms that nationality is a factor that is ordinarily considered in jurisdiction assessments (para 206).

The Court suggests in para 207 that the decision by France not to repatriate the applicants' family members "did not formally deprive their family members of the right to enter France, nor did it prevent them from doing so". The Court here follows the position by the French Government. The Court refers to the "normal" diplomatic administrative formalities of a state which is required for cross-border activities, for example when issuing travel documents. The Court highlights the argument made by the French government 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" (para 207).

In para 208, the Court reiterates that "the Convention must be read as a whole" and that "the Convention must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory". The Court then decides to assess whether this particular cross-border situation may trigger a jurisdictional link.

[153] ECtHR Guide on art. 3, protocol no. 4, p. 6.
[154] Ibid, p. 6.

In para 212, the Court finds that it cannot be excluded that a jurisdictional link could be triggered based on 'certain circumstances' relating to the situation of individuals who wish to enter the state of which they are nationals and "relying on the rights they derive from Article 3 § 2 of Protocol No. 4". The Court then examines if 'certain circumstances' or 'special features' in the case would give rise to a jurisdictional link. And then the Court uses a phrase we have heard before (See *Güzelyurtlu,* para 190): "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".

The Court specifies in para 213 the special features that could trigger jurisdiction. Firstly, the numerous requests lodged by the applicants to the French authorities for repatriation and assistance to their family members. Secondly, the fact that these requests were made "on the basis of the fundamental values of the democratic societies which make up the Council of Europe". Thirdly, the fact that "the individuals concerned are not able to leave the camps or return to France without the assistance of the French authorities". In the Court´s view, it therefore becomes "materially impossible to reach the French border (or any other state border)". As a last point, the Court notes that the Kurdish authorities are willing to hand over the children (and mothers) to the French. The Court concludes that the mentioned special features enable jurisdiction – within the meaning of Article 1 of the ECHR – i.e., triggering some sort of obligation in respect of the applicants' complaint under Article 3 para 2 of protocol no. 4. The Court then proceeds to assessing the merits.

On the merits, the Court rejects the existence of a general right to be repatriated under international law (para 259). On that basis, France is not legally obliged to take positive action and repatriate its nationals detained in Northeast Syria. However, the Court notes in para 260, that article 3, para 2 of protocol no. 4 may impose a positive obligation (must be understood as one less comprehensive than that of repatriation) on the state in cases where the inaction of the state would leave the national in a situation comparable, de facto, to that of exile. The Court then proceeds in para 263 to assess whether there are 'exceptional circumstances' which could enable such a positive obligation and whether "the decision-making process followed by the French authorities was surrounded by appropriate safeguards against arbitrariness".

In paras 264-271, the Court establishes that such special features exists, namely the following special extraterritorial features: 1/ The actual control of the detention camps by the SDF "which verges on a legal vacuum" (para 265), 2/ the general conditions in the camps which are not compatible with international humanitarian standards (para 266), 3/ no prospect of the detained women in the camps to be tried locally in Northeast Syria (para 267), 4/ the Kurds have repeatedly called on states to repatriate their nationals (para 268), 5/ recalling that international organisations such as the UN, CoE and EU have called upon states to repatriate their nationals in the camps. Interestingly, the Court also mentions the CRC Comm. decision (view on merits) *F.B. et al and L.H. et al. v. France* and specifically addressing its findings on the 'best interest of the child, 6/ the fact that France previously have stated that French minors in Syria are entitled to its protection (i.e., not the mothers) (para 269).

Based on the above, the Court concludes that there are exceptional circumstances which could enable a positive obligation for France. Subsequently, it proceeds to establish whether the re-

patriation requests by the French state was surrounded by appropriate safeguards against arbitrariness. The Court finds that such appropriate safeguards were not available, and that France should have put in place an appropriate individual examination procedure by an independent body separate from the executive authorities of the state.

To sum up on the above examination on the Court's findings, the ECtHR finds that France had not violated art. 3 (prohibition of torture and ill-treatment). France did not exercise effective control over the territory, France did not have any control and authority over the individuals in the camps, the opening of domestic proceedings was not sufficient to establish jurisdiction, and the special features of the case were not sufficient to trigger a jurisdictional link. With regards to art. 3, para 2 of Protocol no. 4 (the right to return to one's own country), the ECtHR finds that jurisdiction was triggered based on several exceptional circumstances. The Court, however, did not find that there was a general right to be repatriated in international law nor under the ECHR. On this basis, France did not have a positive obligation to repatriate its nationals. The Court did, however, "create" a procedural limb (like in art. 2) to art. 3, para 2 of Protocol no. 4 and finds that France had violated this procedural limb by not putting in place 'appropriate safeguards against arbitrariness' in relation to the repatriation requests by the applicants' family members.

At a first glance - a hollow victory for the detained children and their mothers. It is yet to be seen whether 'appropriate safeguards against arbitrariness' in the procedural decision-making by the French authorities will have a direct impact on the repatriation of children with French nationality. Although it is not clear whether it was a result of the legal actions, it is evident that on 23 January 2023 (4 months after the ECtHR judgment in *H. F. and others v. France* and almost a year after the CRC Comm. view on 8 February 2022 in *F.B. et al and L.H. et al. v. France*), France launched a fourth repatriation mission, in the process returning 32 children and 15 women to France.[155]

5.3.3. An analysis on jurisdiction in *H.F. and others v. France*

The facts of the case do not fit well into any of the established models on extraterritorial jurisdiction as established in *Al-Skeini* and appears to be another 'exception' based on special features. France has no jurisdiction based on neither the spatial model nor the personal model in relation to art. 3 of the Convention. As for art. 3, para 2 of Protocol no. 4, France clearly has no jurisdiction based on the spatial model as France does not control the area of Northeast Syria. The 'classic personal model' also does not fit well as France has no direct authority or control over the French children in the camps via state agents or diplomatic agents. Instead, the jurisdictional link is established based on special features (like in *Hanan* and *Güzelyurtlu*) one of which is nationality. It should be taken into consideration that art. 3, para 2 of Protocol no. 4 is contingent to nationality (unlike the other provisions of the Convention) and therefore it can be difficult to extend the importance of nationality (under other provisions of the Convention) in extraterritorial situations beyond *H.F. and others v. France.* On this basis, the thesis puts forward the contention that the Court, in its decision-making in the case *H.F. and others v. France,* seems to have established a new subsection within the personal model of jurisdiction which could be referred to as a "special features variant". Making extraterritorial jurisdiction contingent to special features in cases that do not fit well into the established models justifies a case-

[155] Al-Jazeera news article.

by-case approach that keeps seeing extraterritorial situations as exceptional, like in *H.F. and others v. France.*

As in previous cases, the Court in *H.F. and others v. France* refers to the principle of 'effectiveness' (para 208) and reiterates that Convention rights must be practical and effective and not illusory and theoretical. With this judgment, it is difficult to see how the Court renders the right enshrined in art. 3, para 2 of Protocol no. 4 (providing a right to return to one's own state as a national) practical and effective for the French children (and other CoE nationals) in the camps.

The case also raises some questions which cannot be easily answered. Could the Court have stretched the application of art. 3, para 2 of Protocol no. 4 to include cases like this where state inaction not only *amounts to* de facto exile but *is* de facto exile? Although the state has not taken action to exile its nationals, the inaction still provides the same result. If the Court had assumed this approach, it would have applied a functional model based on France's ability to affect the rights (or control of rights) of the French nationals in the camps and the impact that France's inaction has on the continuing suffering of its nationals.

Finally, it has been argued that the doctrine of the Convention as a living instrument does not apply to the jurisdiction clause in art. 1 of the Convention (see section 5.2). This does not seem to be in line with ECtHR practise as a development has taken place, albeit at a very slow pace and in an inconsistent manner.

6. Conclusion

This thesis has analysed the different jurisdictional models that can be identified in the late ECtHR judgment *H.F. and others v. France* and the late CRC Comm. decisions in *F.B. et al. and L.H. et al. v. France.* As a starting point, the thesis has examined previous ECtHR case law and the legal reasoning in CRC Comm. decisions to contextualise the development in the extraterritorial jurisdiction models and identify how they are applied in the two mentioned cases. This examination shows that there are three distinct jurisdiction models: the spatial, the personal and the functional.

In *H.F. and others v. France*, the ECtHR found that there was no violation of art. 3 and that there was no general right to be repatriated under art. 3, para 2, protocol 4. Instead, the Court created a procedural limb to art. 3, para 2, protocol no. 4 and found that there was a violation because France had not put in place 'appropriate safeguards against arbitrariness'. The obligation imposed on France is thus a procedural one. Getting to this result, the Court ruled out the spatial and the personal jurisdictional model. Instead, the Court found that jurisdiction was triggered based on a 'special features variant' which took into consideration the very specific circumstances of the case of which nationality was one.

ECtHR case law on extraterritorial jurisdiction has slowly expanded the scope of the ECHR but the way forward for the Court has been, on a case-by-case basis, to make new exceptions to the point of departure – that jurisdiction is primarily territorial.

In *F.B. et al. and L.H. et al. v. France,* the CRC Comm. established full jurisdiction based on a functional approach which has mainly been developed within the UN Human Rights Treaty Bodies. The functional approach in this case is based on the right of the individual and the

state's effective control over that right as well as the impact of the state's acts and omissions. The analysis also illustrated that the CRC Comm. does not provide adequate explanation of the line of reasoning to the extent that CRC Comm. decisions are not adhering to the guiding principles of treaty interpretation as laid down in the VCLT.

Through the lenses of *H.F. and others v. France* and *F.B. et al. and L.H. et al. v. France* this thesis has also demonstrated that the European children of al-Hol and al-Roj finds themselves in a legal vacuum. Based on partial jurisdiction, the ECtHR has put in place a procedural right ensuring 'appropriate safeguards against arbitrariness' in the decision-making process but rejected the claim to a right to be repatriated. The CRC Comm. established full jurisdiction and thus violation of fundamental human rights which could only be guaranteed through repatriation. But the decisions and views by the CRC Comm. are not binding, only guiding and therefore the children will find themselves indefinitely detained in the Syrian camps.

7. What's next on extraterritorial jurisdiction?

In this section, the thesis will reflect on extraterritorial jurisdiction from a sociological point of view. The current thesis has analysed how two central human rights regimes – the European Court of Human Rights and the Committee on the Rights of the Child (and the UN Human Rights Treaty Bodies as such) - have divergent interpretations of similar norms. This obviously raises a question of coherence in international human rights law and whether there is a risk of international human rights norms being weakened in this context.[156] While there may be good reasons for the two bodies to exhibit different approaches to the question of jurisdiction in extraterritorial cases, it also constitutes a substantial problem to the human rights' legal framework.

Traditionally, the ECtHR has operated by means of a so-called dynamic approach that allows for changes in society to be reflected in its practices. Yet it is within the ECtHR that we find the most formalistic and strict approach to extraterritorial jurisdiction and a reluctance to let the dynamic approach affect art. 1 of the Convention. This fundamentally formalistic approach, however, does not fit well with a number of central societal developments (such as issues of migration, refugee crisis and climate change) which are extraterritorial problems in their very nature. If the world's most pressing problems are transgressing national state borders, then the international legal system needs to find of way of dealing consistently and coherently with the question of extraterritorial jurisdiction. As the German sociologist Ulrich Beck pointed to as early as the 1990s, society might best be conceptualized as a 'risk society' where problems that used to be manageable within the territories of national states now transgress national state borders and must be dealt with accordingly.[157] Interestingly, in *H.F. and others v. France,* the Court addresses the issue of how the globalised world presents new challenges to states, particularly in relation to the right to enter national territory. The Court notes that a long time has passed since Protocol no. 4 was drafted and that the absolute right to enter national territory was linked to the prohibition of exile (para 210). The Court however failed to implement its dynamic approach in this subject matter.

States have also discovered what is at stake. Extraterritorial jurisdiction and scope of state responsibilities in a human rights convention perspective is of particular interest in a world where

[156] Pijnenburg: *H.F. and others v. France: Extraterritorial jurisdiction without duty to repatriate IS-children*
[157] Beck, Ulrich: *Risk Society Towards a New Modernity.*

cross-border activities have been on the rise for the past decades. This is also evident when looking at the increase of third-party interventions by European States in cases on extraterritorial jurisdiction with political and/or military undercurrents. According to Mallory, states have "become far more active in attempting to shape the meaning of extraterritorial jurisdiction within judicial proceedings".[158] According to neo-institutional theory[159] all organizations that operate in political environments, such as the human rights bodies under discussion, need to legitimize themselves by making sure they are seen as relevant, co-operative and trust-worthy partners by their external political environment. This may explain the cautious approach by the ECtHR.

In this political environment, the special features model seems a pragmatic way forward for the ECtHR. Establishing jurisdiction based on special features displays a more tentative and cautious approach to the question of extraterritorial jurisdiction. The functional approach embraced by the UN Treaty Bodies seems better equipped to handle human rights in relation to the cross-border challenges of a modern world. Some argue that the functional-impact jurisdictional model is the way forward for the international human rights regime.[160]

Traditionally, precedence plays an important role in legal systems; the fact that past rulings form the basis for future rulings. However, the special feature approach displayed by the ECtHR does not seem productive in establishing such a system of precedence in the international legal system when it comes to jurisdiction in extraterritorial circumstances. In effect, the court is construing a system where the rulings are based on the special features that apply in the specific cases which renders it difficult to establish a proper system of precedence, predictability and legal certainty.

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