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***Hearing of the Grand Chamber of the European Court of Human Rights  
in the cases of H.F. and M.F. v. France and J.D. and A.D. v. France***

**Oral submission by Dunja Mijatović**  
Council of Europe Commissioner for Human Rights

Strasbourg, 29 September 2021

Mr President, Distinguished members of the Court,

I have decided to intervene in these cases because they concern an urgent situation, demanding urgent action.

The situation faced by nationals of Council of Europe member states detained in the camps in North-East Syria is continuously deteriorating, from both a humanitarian and a security point of view – and it involves many small children.

Furthermore, it has important implications for the protection of the rights of victims of terrorism and the prevention of terrorism.

My Office has been working on the return of suspected European ISIS fighters for several years.

Their voluntary return and, in some instances, their expulsion to their home countries have raised a wide range of issues for the member states concerned.

These include identifying and locating these “returnees” (as they are often called); bringing them to justice where appropriate; identifying, assisting, and protecting those who may have been victims of trafficking; and providing adequate medical, social and psychological support to their children.

With the territorial defeat of ISIS and the detention of large numbers of Council of Europe citizens – mostly women and children – in camps in North-East Syria, new challenges have emerged.

For several years now, and still at this very moment, women and children are literally dying in these camps – or their lives are threatened by the appalling conditions and the violence prevailing therein. This has been widely documented, including in the written submissions of the parties and the third parties to these cases.

Against this background, two main questions arise:

- Do State Parties have a duty under the Convention and international human rights law to address the situation of their nationals detained in these camps?
- And, if so, what are they required to do?

Relying on the many discussions and consultations I held not only with human rights interlocutors, but also with counter-terrorism and security experts and with representatives of victims of terrorism, I have reached the following conclusions:

- i) the first question (do State Parties have a duty) should be answered positively since the State Parties' nationals detained in these camps fall within their State of nationality's jurisdiction. Therefore, the State Parties concerned have a positive obligation to protect the rights of their nationals.
- ii) as for the second question (what are they required to do) in the present situation, their repatriation is, in my opinion, the only way forward.

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I should like to briefly address the issue of **jurisdiction**.

In this regard, much of the discussion focused on the interpretation of this Court's decision in the case of *M.N. and others v. Belgium* in the light of the present circumstances.

According to that decision, jurisdiction presupposes the existence of a link with the respondent state and the exercise by that state of authority or control over persons located outside its territory and for whom it is responsible.

Clearly, the European nationals detained in North-East Syria have a much closer link with the States Parties to which they are applying for repatriation than the applicants in the case of *M.N. and others v. Belgium*: they are nationals, which forms an uncontested, robust link for personal jurisdiction.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on arbitrary, summary and extra-judicial executions have stressed that UN soft law instruments confirm the responsibility of the States of nationality towards their nationals.

In particular, one of the *UN key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups* sets out the states' "primary responsibility for their own nationals".

It adds that States "should ensure that their citizens suspected of having committed crimes on the territory of another member state are treated in accordance with international law, including international human rights law, international humanitarian law and international refugee law".

Furthermore, in its admissibility decisions of 30 September 2020 and 4 February 2021 concerning two communications lodged by the relatives of French children detained in the camps of North-East Syria, the Committee on the Rights of the Child found that States "have the positive obligation to protect the human rights of child nationals in the Syrian camps, despite the fact that these camps are under the control of a non-state armed group".

Finally, it is important to note that the State Parties' nationals who are willing to be repatriated remain stranded in these camps despite the agreement to repatriation given by the Autonomous Administration of North and East Syria and the proven ability of a number of States Parties to organise such operations.

These circumstances suggest that the main factor determining the fate of these European citizens is the State Parties' refusal to repatriate them – and therefore, that they exercise decisive influence on the situation of these persons.

While this may not constitute "effective control" within the meaning of this Court's case-law, it falls, in my view, within the "authority or control" referred to by this Court in its decision *M.N. and others v. Belgium*.

Therefore, I consider that the European citizens detained in the camps of North-East Syria fall within the jurisdiction of the States Parties of which they are nationals.

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I would also like to share with the Court my views on the **scope of the States' responsibilities towards their nationals detained in these camps.**

It is not disputed that there is a proven risk of serious harm to the physical and psychological integrity of persons detained in the camps in North-East Syria.

It has been argued that the treatment that the detained women are exposed to is the result of their own choice. Such assertions prompt several remarks.

Firstly, the entire Convention system is based on the idea that certain treatments cannot be justified under any circumstance and that State Parties have the collective duty to eradicate them.

Therefore, "they get what they deserve" cannot be an acceptable answer to treatment that is incompatible with the Convention, even when inflicted outside of the territory of the State Parties, especially when the State concerned has the capability to act to put an end to a violation.

Secondly, most of the women are detained with their children, who should not be forced to bear the consequences of their mothers' choices.

Thirdly, these women and children may have been victims of coercion and trafficking and States have an international obligation to identify, assist, and protect victims, including extraterritorially, as the UN Special Rapporteur on trafficking in persons, especially women and children, has stressed.

The conditions of detention in the camps in North-East Syria raise serious questions about their compliance with Article 3 of the Convention prohibiting torture and inhuman or degrading treatment or punishment.

This Court has judged on many instances that State parties have a positive obligation to take measures to prevent persons under their jurisdiction from being subjected to treatment contrary to Article 3.

In the present situation, it is not disputed that State Parties are aware of the nature and gravity of the risks to which their nationals are exposed: an accumulation of unbearable heat in summer, cold in winter; insufficient food; limited access to water and sanitation; lack of hygiene; anxiety generated by lengthy detention without prospect of judgment or release; physical and psychological violence...

In addition, several of them, including France, have demonstrated that they are able to organise the repatriation of their nationals in co-operation with the Syrian Democratic Forces.

In this context – and considering the fact that the situation is deteriorating rapidly – repatriating their nationals is, in my view, the only way of fulfilling the State Parties' positive obligation under Article 3 of the Convention.

Repatriation also seems to me to be the only possible way to protect the rights enshrined in the UN Convention on the Rights of the Child.

According to experts, life on the ground, including the experience of war and bombings, as well as the violence between children and from adults towards children in the context of the camps forms a continuum of violence.

It is urgent to stop this continuum now since the chances of trauma recovery diminish with the length of exposure.

In view of the situation in the camps, I do not believe that a case-by-case approach before repatriation can be justified, nor would it be feasible.

No one can claim that certain children are not at risk or are not going through this continuum of violence.

I consider that the repatriation at the earliest opportunity of all children who are nationals of States Parties to the Convention is the only measure that can put an end to the ongoing violation of their most fundamental rights.

Their repatriation along with their mothers is necessary to safeguard their best interests and prevent their re-traumatisation through separation from the primary caregiver.

Once on the ground, relevant experts will be able to properly assess the steps to be taken in each individual case, in the best interest of the child, and in the interest of justice.

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Finally, I should like to underline that the protection of the rights of victims of terrorism and the prevention of terrorism may be hindered by the refusal to repatriate European nationals.

Women detained in the North-East Syrian camps are not being prosecuted by the Autonomous Administration of North and East Syria.

As for criminal investigations initiated in their home countries, these cannot be conclusive either without them being present.

It is therefore also in the interest of victims of terrorism to see the possible perpetrators of terrorist acts being returned and properly tried, to get access to trials and demand reparation.

In addition, many reports from national and international counter-terrorism bodies show that the terrorist and security risk resulting from the detention of foreign nationals in camps and prisons in North-East Syria or Iraq is greater than the risk that might arise from their repatriation.

States have a duty, under international law, to bring terrorists to justice and to prevent terrorism.

Repatriation is necessary to fulfil this duty as well.

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There is no doubt that repatriating their nationals detained in the North-East Syrian camps is a very delicate challenge for the State Parties concerned.

But, to conclude, let me stress that they are not left helpless: they can count on the experience of counterparts having already repatriated their nationals, the assistance of other States and the guidance and expertise provided by international organisations, especially the UN.

A French prosecutor dealing with returned and repatriated children recently [stated](#): "These are our kids, they didn't ask for anything. It's normal that we take care of them and that their parents are held accountable. Since the first returns in 2016, the system has worked. These children had no interest in going to school, in having friends... We can already see that they are returning to a normal life."

It is the State Parties' duty to give all the children stranded in the camps a chance to return to a normal life.

I hope my comments will be helpful to the Court and I thank you for your attention.