H.F. and M.F. v France

App. No. 24384/19

Third Party Intervention
before the Grand Chamber of the European Court of Human Rights

by a group of Belgian scholars

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Introduction

These written comments are prepared and submitted by the Human Rights Centre of Ghent University, Law & Development Research Group of Antwerp University, and the researcher Evelien Wauters (KULeuven) pursuant to the leave granted by the President of the Grand Chamber of the European Court of Human Rights on 15 June 2021, in accordance with Rule 44 §3 of the Rules of the Court. The interveners submit that the case of H.F. and M.F. v France (App. No. 24384/19) raises important issues relating to jurisdiction and nature of state obligations, when a State Party's citizens, and in particular children, are being subjected to treatment contrary to Articles 2 or 3 on foreign soil.

The first part of this intervention focuses on the issue of standing before the Court (section 1). The second part illuminates the issue of jurisdiction both generally under the Convention in relation to state failure to act (section 2.1), as well as under article 3(2) of Protocol no. 4 (section 2.2). The third and final part focuses on the nature of state obligations in relation to the case. This third part commences with general considerations on the principle of best interests of the child (section 3.1.1) and continues onto insights on the integration of the best interests of the child principle in relation to family unity (section 3.1.2), as well as access to nationality (section 3.1.3). It then examines states' duty to provide diplomatic protection and consular assistance (section 3.2), and finally, explores a (narrow) positive obligation for states to repatriate their own nationals under article 3 (2) of Protocol no. 4 read together with articles 2 and 3 ECHR (section 3.3).

1. On the issue of Standing

The European Court of Human Rights ('ECtHR' or 'Court') has previously held that the rules on admissibility, including the system of individual petition under Article 34 European Convention on Human Rights ('ECHR' or 'Convention'), 'must be applied with some degree of flexibility and without excessive formalism'[1]. In addition, '[r]egard must also be had to the object and purpose of those rules[2] and of the Convention generally, which, as a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective'.[3]

The system of individual petition provided under Article 34 ECHR excludes applications by way of *actio popularis*. Complaints must be brought by or on behalf of persons who are a victim of an alleged violation of one or more of the provisions of the Convention. Such persons must be able to show that they were 'directly affected' by the measure complained of.[4] However, in some cases it might be impossible for the direct victim to bring an application before the ECtHR. In such cases, applications can be represented under Rule 36§1 of the Rules of Court upon the production of a written authority to act as well as the demonstration of clear and explicit instructions from the alleged victim.

Yet, the Court has also declared admissible cases in which no such form of authority was presented, having regard to the vulnerability of the victim and the connections between the person lodging the application and the victim.[5] As such, the Court has held that a relative of the immediate victim of the alleged violation, can validly bring an application on their behalf, when the victim is 'in a particularly vulnerable position' and thus unable to bring the application themselves.[6] In other cases of detention or other deprivation of liberty of persons with mental health issues[7], the standing of their parents was

[1] Cardot v France, Judgment Of 19 March 1991, , § 34; İlhan v Turkey, Judgment 27 June 2000, ECHR 2000-VII, 51 ff.
[2] See eg, Worm v Austria, 29 August 1997, § 33; İlhan v Turkey, 27 June 2000, ECHR 2000-VII, 51.
[3] See eg, Yaşa v Turkey, 2 September 1998, 1998-VI, 2429, § 64; İlhan v Turkey, 27 June 2000, ECHR 2000-VII, 51.
[4] See eg, Open Door and Dublin Well Woman v Ireland, 29 October 1992, Series A no. 246-A, p. 22, § 44.
[5] Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania, Judgment 17 July 2014, ECHR 222 (2014), § 103.
[6] İlhan v Turkey, Judgment 27 June 2000, ECHR 2000-VII, 53 and 55.
[7] *De Donder and De Clippel v. Belgium* (6 March 2012); *Çoşelav v. Turkey* (9 October 2012).

not even called into question. Further, the Court has held that the existence of (other) known heirs or legal representatives of the direct victim does not preclude the Court from granting standing, if the exceptional circumstances of the case permit.[8]

It is submitted that it would be in line with this approach to recognize standing for grandparents or parents of direct victims who are detained abroad in an active armed conflict.

2. On the issue of jurisdiction

2.1. Jurisdiction and State Failure to Act

This Court has thus far set out only two clear categories in which jurisdiction necessarily applies outside the territorial borders of a State Party. The first is under the 'personal' model where an individual who is outside the territorial borders of a State Party, is within the control and authority of its agents.[9] The second is when one of the State Parties has exercised 'effective control' over the territory of another State – whether this is another State Party[10] or a State that is not a party to the ECHR.[11] However, the *Al-Skeini* judgment did not specify that these two categories were the exclusive bases for jurisdiction.

Outside of these categories, whether the Court has determined that 'jurisdiction' applies has been much more context-specific. The Court has found that jurisdiction and therefore 'responsibility can be involved because of acts of their authorities producing effects outside their own territory […]'[12] and this applies to action or inaction 'whether performed within or outside national boundaries [...].'[13] The Court has noted that State responsibility may be engaged if acts have 'sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.'[14]

The important issue that is brought before the Court in the present case is whether an issue can be within a State Party's jurisdiction when that state *has failed to take protective action* with regard to its citizens, among which children who find themselves on foreign soil.

In the Court's established case-law, the 'Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[15] In our view, the combination of capability to take protective action and a clear link through nationality creates a ground for jurisdiction, in particular in light of the inability of the parents to secure through their own efforts the protection of their children, and the inability or unwillingness of the territorial state to assume jurisdiction in relation to these children and secure their protection. By not accepting that a State Party exercises jurisdiction under these circumstances, an unacceptable vacuum in human rights protection would arise.

Such position is in line with the approach of the Committee on the Rights of the Child (CRC Committee). That Committee concluded in November 2020 that France exercised jurisdiction over children of French nationality in the camps in Syria since 'the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses'.[8]

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[8] Association Innocence en Danger and Association Enfance et Partage v. France (4 June 2020) para 126 ff.
[9] *Al-Skeini and Others v. the United Kingdom* [GC] no. 55721/07, § 133, 7 July 2011, *Öcalan v. Turkey* [GC], no. 46221/99, § 91, 12 March 2003, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 74, 23 February 2012.
[10] *Ilascu v. Moldova and Russia* [GC], no. 48787/99, § 314, 8 July 2004.
[11] *Al-Skeini,* cited above, §138-142; *Issa and Others v. Turkey*, no. 31821/96, § 74, 16 November 2004.
[12] *Drozd and Janousek v. France & Spain* [GC], § 91, 26 June 1992; *Loizidou v Turkey* [GC] § 52, 18 December 1996.
[13] *Loizidou v Turkey (Preliminary Objections)* [GC] no. 15318/89, § 62, 23 March 1995.
[14] *Ilascu et al. v. Moldova and Russia* [GC], no. 48787/99, § 317, 8 July 2004.
[15] *Airey v. Ireland*, no. 6289/73, § 24, 9 October 1979.

2.2. Jurisdiction under article 3 (2) of Protocol no. 4

In the analysis on extra-territorial jurisdiction relating to positive State obligations under the ECHR, Article 3 (2) of Protocol No. 4 to the ECHR assumes a specific position. This provision states that *'No one shall be deprived of the right to enter the territory of the State of which he is a national.'* In fact, all obligations under Article 3(2) of Protocol no. 4, both positive and negative obligations, apply by definition to persons who are outside the territory of the state on whom the obligation rests. This is inherent in the substance of the right at hand. Hence, the question of territorial jurisdiction should be a non-issue when the provision in question is applied. By its very nature, Article 3(2) of Protocol no. 4 allows to bring before the Court claims of applicants who are not present on the territory of the defendant State.

3. On the Nature of State Obligations

The case of H.F. and M.F. v France raises the issue of the existence and scope of a positive state obligation to repatriate citizens and their children who are suffering or at risk of serious human rights violations abroad, and unable to return without assistance. Before examining the basis for such a positive obligation in the ECHR (sub-section 3.3.), this section first highlights the importance of integrating the principle of the best interests of the child (sub-section 3.1.), and opens a window to repatriation as a matter of diplomatic and consular law (sub-section 3.2.).

3.1. Integrating the Principle of the Best Interests of the Child

It is submitted that the principle of the best interests of the child, which is a central tenet of children's rights law as enshrined in the Convention on the Rights of the Child (CRC) and one of the so-called general principles of children's rights, is a key principle that guides the obligations of States Parties of the ECHR in all matters that concern children rights-holders under the Convention.

3.1.1. General Considerations

The principle of best interests of the child, enshrined in Article 3 of the United Nations Convention on the Rights of the Child (CRC) states 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.' According to General Comment 14 of the Committee on the Rights of the Child (CRC Committee) on the best interests of the child, the concept of 'best interests of a child' serves three functions: it is a 'substantive right' in addition to being a 'rule of procedure' and 'a fundamental, interpretative legal principle'.[16] According to the CRC Committee, best interests is a substantive and actionable right that gives rise to self-executing obligations incumbent upon States Parties in relation to decisions involving children.[17]

The Council of Europe Guidelines on Child-Friendly Justice consider the best interests of the child as a fundamental principle and note *inter alia* that:

> 'Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them. In assessing the best interests of the involved or affected children:

[16] UN Committee on the Rights of the Child (CRC). 2013. 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1).' para 6.
[17] Ibid., para 6.a.

a. their views and opinions should be given due weight;
b. all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;
c. a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child. […]'[18]

This Court has previously held that 'there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance.'[19] Accordingly,

> 'The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family (...) On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment (…)'[20]

In that respect, this Court has noted that '[t]he child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences (...). For that reason, those best interests must be assessed in each individual case.'[21]

3.1.2. Best Interests of the Child and Family Unity

Of course, the best interests of children assessments should keep sight of the importance of family unity, which entails the presumption that children should not be separated from their parents except in circumstances where 'such separation is necessary for the best interests of the child' for instance in cases 'involving abuse or neglect of the child by the parents' (as foreseen in Article 9.1 of the CRC). This Court has reaffirmed the importance of the parent – child relationship in the context of family life in its previous jurisprudence under Article 8 ECHR and underscored the nature of child separation from parents as an exceptional measure of last resort.[22]

The Court has also opined in *Osman v. Denmark*[23] that a child's best interests include the right to respect for private and family life. Further, this Court has also noted that '[w]hilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life'.[24] Other positive obligations may be of consequence in these situations.

The ECtHR 'accepts that, when an emergency care order has to be made, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child'. But in principle, the parents must be 'properly involved in the decision-making

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[18] Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010 https://rm.coe.int/16807000f1.
[19] *S.L. and J.L. v. Croatia*, no. 13712/11, § 62, 7 May 2015 (references omitted).
[20] *Neulinger and Shuruk v. Switzerland* [GC], § 136; *Strand Lobben and Others v. Norway* [GC], no 37283/13 § 109.
[21] *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07 § 138.
[22] *Strand Lobben and Others v. Norway* [GC], no 37283/13, § 206-207, and most recently *A.I. v. Italy,* no. 70896/17, § 87.
[23] Application no. 38058/09, §73.
[24] *Bistieva and Others v. Poland,* Application no. 75157/14, § 73.

process' and be 'provided with the requisite protection of their interests'.[25] Even if the children would be separated from their parents, states have a 'positive duty to take measures to facilitate family reunification'.[26] More specifically, 'Article 8 includes a right for the natural parents to have measures taken with a view to their being reunited with their children […] and an obligation for the national authorities to take such measures'.[27] However, 'neither the right of the parents nor its counterpart, the obligation of the national authorities, is absolute' .[28]

Preparing a family reunification always requires the active and understanding co-operation of all concerned. […] the interests as well as the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under Article 8 of the Convention. Where contacts with the natural parents would harm those interests or interfere with those rights, it is for the national authorities to strike a fair balance […]. In sum, what will be decisive is whether the national authorities have made such efforts to arrange the necessary preparations for reunion as can reasonably be demanded under the special circumstances of each case.[29]

This case law offers clear guidance in the matter of repatriation where children are involved, in that it points towards the need to repatriate all members of a family unit whenever feasible.

3.1.3. *Best Interests of the Child and Access to Nationality*

Best interests of the child as a substantive right necessitates that States Parties not only respect but also protect the best interests of the child by discharging their positive obligations. In that respect, in cases of children whose parents are or were so-called 'foreign fighters', the United Nations High Commissioner for Human Rights has urged states to provide consular support and assistance, including for the purposes of return to the country of origin or to enter the parents' country of origin.[30] The Opening Statement of the High Commissioner for Human Rights at the 41st Session of the Human Rights Council drew attention to the rights violations experienced by children, including those whose parents are alleged foreign fighters, and noted that '[t]he primary consideration must be their rehabilitation, protection and best interests'.[31] Furthermore, the High Commissioner noted that 'States should provide the same access to nationality for children born to their nationals in conflict zones as is otherwise applicable'.[32] The OSCE Office for Democratic Institutions and Human Rights' Report *Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework* also recommends enabling the return of children of alleged foreign fighters who have 'meaningful links' or 'substantial links' to member states.[33] The report recommends that 'OSCE participating States [should]' '[e]nsure that children with meaningful links to the state are able to return and receive protection and support for reintegration, recovery and education consistent with their needs, taking all feasible measures to ensure that no child is rendered stateless'.[34] In

[25] *K. and T. v Finland*, App no 25702/94 (ECHR, 12 July 2001) paras 166 and 173.
[26] Id., para 178.
[27] *Olsson v Sweden (no. 2),* App no 13441/87 (ECHR, 27 November 1992) para 90; *Hokkanen v Finland*, App no 19823/92 (ECHR, 23 September 1994) para 55. See also *Eriksson v Sweden*, para 71.
[28] *Olsson v Sweden*, para 90.
[29] Ibid. See also *Hokkanen v Finland*, para 58; *Ignaccolo-Zenide v Romania* App no 31679/96 (ECR, 25 January 2000) para 94.
[30] United Nations High Commissioner for Human Rights 'Protection of human rights and fundamental freedoms while countering terrorism' A/HRC/40/28, 10 January 2019, para 66.
[31] *Opening statement by UN High Commissioner for Human Rights Michelle Bachelet*, 41st Session of the Human Rights Council, 24 June 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24724&LangID=E
[32] Ibid.
[33] OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework*, 2018 at 68 https://www.osce.org/odihr/393503?download=true.
[34] Ibid at 68.

addition, the OSCE notes that repatriation may be required as a part of states' obligation with respect to the best interests of the child 'currently left without protection and support'.[35]

International law aims to avoid statelessness of persons, both adults and children alike. As a corollary to the regulation of nationality, a prohibition of statelessness is consolidating. In the case of children, the CRC protects the right of a child to 'acquire a nationality' under its Article 7.1 and places a strong obligation on states to implement this right 'in particular where the child would otherwise be stateless' (Article 7.2). In addition, Article 8.1 of the CRC entails clear additional obligations, particularly positive obligations, for States Parties:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
>
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Furthermore, the Council of Europe's 1997 European Convention on Nationality provides under its Article 7.3 that 'A State Party may not provide in its internal law for the loss of its nationality … if the person concerned would thereby become stateless'.[36]

This Court has held in *Karassev v. Finland* and its subsequent case law that '[a]lthough right to a citizenship is not as such guaranteed by the Convention or its Protocols …, the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual'.[37] In *Genovese v. Malta*, the Court considered the right of access to a nationality is considered within the 'multiple aspects of the person's physical and social identity' (§30) that is protected under Article 8 of the Convention.[38]

3.2. States' duty to provide diplomatic protection and consular assistance

The Court's jurisprudence recognizes that Convention rights are not applied in a vacuum, but instead are interpreted in the light of, and in harmony with, other international law standards and obligations.[39] In what follows, the intervention will lay out the international legal framework regarding the provision of diplomatic protection and consular assistance, and what impact it has for states' obligations, including under the ECHR.

While diplomatic and consular law are traditional branches of international law with strong interstate roots, in the last decades steps have nevertheless been taken towards the recognition of a right to diplomatic protection and consular assistance vis-à-vis one's state of nationality.

In the International Court of Justice's (ICJ) LaGrand case brought by Germany against the United States regarding the detention, trial and sentence to death of two German brothers, the ICJ held that 'Article 36 [of the Vienna Convention on Consular Relations] […] creates individual rights, which […] may be invoked in this Court by the national State of the detained person'.[40] It acknowledged these individual

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[35] Ibid at 71.

[36] This is with the exception of cases where the nationality was acquired on fraudulent bases (as identified under Article 7.1(b) of the CoE European Convention on Nationality.

[37] *Karassev v. Finland* (dec.), no. 31414/96, ECHR 1999-II.

[38] *Genovese v. Malta*, Application no. 53124/09, 11 October 2011.

[39] Demir And Baykara v Turkey, Judgment 12 November 2008, [2008] ECHR 1345, § 67; Al-Adsani v UK, Judgment 21 November 2001, ECHR 2001-XI, § 55.

[40] Lagrand (Germany V United States Of America) [2001] ICJ Rep 466, 494 (§ 77).

rights in Avena, but added that '[w]hether or not the [Vienna Convention on Consular Relations] rights are human rights is not a matter that this Court need decide'.[41] Although both cases concerned inaction by the receiving state and not the state of nationality, '[i]f we take the notion of consular assistance as an individual right seriously enough to argue that it is opposable to the host state, then normatively speaking there must surely be a strong argument that one has a right to a certain level of diligent protection abroad by one's own state'.[42]

During discussions on the International Law Commission (ILC)'s Draft Articles on Diplomatic Protection, ILC members noted the 'growing support for the view that there is some obligation, however imperfect, on States, either under international or national law, to protect their nationals abroad when they are subjected to significant human rights violations'.[43]

One of those national court decisions was the Kaunda case regarding the detention (in bad conditions) and extradition of South African nationals in Zimbabwe and to Equatorial Guinea, respectively. Here the South African Constitutional Court held that

> [t]here may […] be a duty on the government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and the court would order the government to take appropriate action.

Diplomatic protection and consular assistance are 'but one means for the protection of human rights, and a very limited one, seeing that it is confined to the protection of the human rights of nationals'.[44] The fundamental nature of certain human rights norms is also illustrated in international legal developments obliging or allowing states to protect *both* nationals and non-nationals subjected to the violation of human rights norms (jus cogens[45] or erga omnes)[46] in foreign countries[47], such as the obligation for states to cooperate to bring to and end serious violations of peremptory norms of general international law (Art 41 Articles on State Responsibility). For example, in the DRC v Uganda case, judge Simma held that Uganda had the obligation to raise the violations before the ICJ of both international humanitarian and human rights law committed against both its nationals and non-nationals at Kinshasa airport on the basis of its duty to ensure respect for those norms. Regarding its nationals, the avenue of diplomatic protection would be preferred, as it 'normally [offers] even better protect[ion]'.[48]

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[41] Avena (Mexico V United States Of America) [2004] ICJ Rep 12, §§ 40 And 124.

[42] F Mégret, 'From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?' in A von Arnauld, K von der Decken and M Susi (eds), The Cambridge Handbook of New Human Rights (CUP 2020) 458.

[43] ILC, Draft Articles on Diplomatic Protection with commentaries, Yb ILC 2006, Vol II, Part Two, Commentary to Art 19, para 3; see also F Mégret, 'From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?' in von Arnauld et al (n 10) 458.

[44] ILC, Dugard, Seventh Report on Diplomatic Protection, UN Doc. A/CN.4/567 (2006), ILC 58th Session, § 84.

[45] See Articles 40, 41 and 48 of the Articles On Responsibility Of States For Internationally Wrongful Acts, Yearbook … 2001, vol. II (Part Two), 29–30. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

[46] Separate opinion of Judge Jessup, Barcelona Traction, Light and Power Company, Limited, Second Phase [1970] ICJ Rep 202-203.

[47] This was also emphasized in the Separate Opinion by Judge Simma in the case concerning Armed Activities on the Territory of the Congo, in which he held that developments of this kind in international law would have made it possible for Uganda to protect both nationals and non-nationals whose human rights were threatened by the army of the Democratic Republic of the Congo at Kinshasa airport (Separate Opinion of Judge Simma, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168, § 27-32).

[48] ibid para 27

One of such norms is the prohibition against torture. Its recognition as a jus cogens norm has been 'explicit and unambiguous'.[49] In its turn, statelessness constitutes a grave breach of the human rights to nationality and citizenship.[50] Due to the fact that a stateless person has no nationality, they are unprotected from serious violations of international law, such as discrimination which is a peremptory norm.[51]

The State thus has a duty to ensure that the persons in detention do not suffer from torture. A fortiori, it has such duty towards its nationals, as international law has provided states with the tools of diplomatic protection and consular assistance to come to their aid. On the basis of Article 5 VCCR[52] and Article 9 of the EU Directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries[53], states have agreed for consular assistance to mean: assisting nationals in case of arrest or detention, issuing travel documents to nationals, and providing relief and repatriation in case of emergencies.

Thus, even if a State party does not have effective control in a given area, it has positive obligations to take all appropriate measures and pursue all legal and diplomatic avenues at its disposal to protect their nationals and the rights of the children in particular.[54] In the migration context, the Committee on the Rights of the Child (CRC Committee) has held that under the Convention on the Rights of the Child (CRC), States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection.[55]

In case of detention the responsibility of consular authorities vis-à-vis their nationals increases.[56] In such instances, it is expected from diplomatic authorities to take adequate action to protect and uphold their nationals' fundamental rights. This heightened responsibility derives from the extremely vulnerable state of persons deprived of their liberty. Some persons deprived of their liberty, such as minors and women, are particularly vulnerable. With regards to children who are detained in the context of an armed conflict or on national security grounds, the UN Security Council has called to cease unlawful or arbitrary detention of children and encouraged States to establish 'standard operating procedures for the rapid handover of the children concerned to relevant civilian child protection actors'.[57] Against this background, the CRC Committee has previously observed that a State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. Importantly, the UN has recalled that children who find themselves in detention due to national security concerns should at all times be considered victims rather than perpetrators.[58]

In sum, consular authorities should do 'all that could be reasonably expected from them'. Arguably, even if repatriation would be considered 'unreasonable', other forms of consular assistance, such as providing travel documents, establishing contacts with local NGOs to safely assist nationals to the

[49] ILC, Tladi, Fourth report on peremptory norms of general international law (jus cogens), UN Doc. A/CN.4/727, § 69; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), [2012] ICJ Rep 422, 457, § 99.
[50] See for example African Committee of Experts on the Rights and the Welfare of the Child, *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v Kenya,* 22 March 2011.
[51] ILC, Provisional summary record of the 3373rd meeting, A/CN.4/SR.3373 4, ILC 69th Session, 4-5.
[52] Vienna Convention on Consular Relations [1963] 596 UNTS 261 (VCCR).
[53] Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L 106, 1–13.
[54] Ilascu and others v Moldova and Russia, Judgment 8 July 2004, ECHR 2004-VII.
[55] 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), §§ 17(e) and 19.
[56] ECommHR, S. v. Germany, application no. 10686/83.
[57] UNSC Res 2427, paras 19-21.
[58] See M., Nowak, UN Global Study on Children Deprived of Liberty, 2019, see https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562.

nearest embassy or to request the assistance of another embassy or consulate could be reasonably expected from the States' consular authorities in order to uphold and protect the human rights of their nationals who find themselves in a dire situation.[59]

3.3. A (narrow) positive obligation to repatriate one's own nationals under article 3 (2) of Protocol no. 4 read together with articles 2 and 3 ECHR

It is established in the Court's case law and in international human rights law more broadly, that in certain situations, States Parties have a responsibility in regard to very serious human rights violations that take place outside of their own territory. Notably, the principle of non-refoulement is a core principle of international refugee law and human rights law that prohibits states from returning individuals to a country where there is a real risk of being subject to persecution, torture, inhuman or degrading treatment or other serious human rights violations.[60] The ECtHR has also dealt with an important number of cases in which the expulsion of an alien by a State Party gave rise to an issue under Articles 2 or 3. In those cases, the state's responsibility has been engaged, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country. In these circumstances, Articles 2 and 3 imply an obligation not to deport the person in question to that country.[61]

The interveners submit that a positive obligation to repatriate could be regarded as a 'logical complement' of the principle of non-refoulement, where a national is already being subjected to treatment contrary to Articles 2 or 3 outside of the territory of the state of which he/she is a national, or is at a real (demonstrable) risk of undergoing such treatment. It is submitted that such obligation would follow from the joint reading of Articles 2 and 3 ECHR with Article 3(2) of Protocol no. 4. Under certain circumstances, Article 3 (2) of Protocol no. 4 can be practical and effective only if it is interpreted as requiring the state to repatriate its own nationals. In such cases, the state would have an obligation to repatriate, by doing what can reasonably expected from it within its powers to facilitate the return of a national who is in a real risk of being subjected or already being subjected to treatment contrary to Articles 2 or 3.

The principle of non-refoulement establishes the basic idea that a state can be held accountable for serious violations of Articles 2 and 3 of the Convention that take place outside its territory. Under non-refoulement, there is a negative state obligation arising from the fact that it is the action of the state that would expose the applicant to the risk of such violation.[62] The positive obligation to repatriate follows the mirror reasoning that it is the state's failure to act that exposes the applicant to (the real risk of) such violation. The expectation that this particular state would act, arises on account of the nationality of the applicant, and the reading of articles 2 and 3 ECHR together with Article 3 (2) of Protocol no. 4.

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[59] See X v UK cited above.

[60] See Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 33 of the Convention Relating to the Status of Refugees, 28 July 1951 (Geneva Convention); UNHCR *Note on International Protection,* 13 September 2001, A/AC.96/951, para. 16. Article 19 of the Charter of Fundamental Rights of the European Union. See also for 'the absolute character of the prohibition of torture in the context of deportation proceedings' in Olivier de Schutter, *International Human Rights Law* (Second Edition, 2014, Cambridge University Press), 304-339.

[61] See for example ECtHR (Grand Chamber), *F.G. v. Sweden*, no. 43611/11, 23 March 2016, paras. 110-11; *L.M. and Others v. Russia*, no. 40081/14, 15 October 2015, paras. 108-109; See considering Article 3, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), 27765/09, 23 February 2012, para. 114.

[62] ECtHR, *Saadi v. Italy [GC],* no. 37201/06, 28 February 2008, para. 126.

As always, a positive obligation (i.e. the obligation to repatriate) puts a higher burden on a state than a negative obligation (i.e. non-refoulement), yet in the opinion of the interveners, this is linked to a relevant difference with regard to evidence: whereas the non-refoulement obligation is built on the expectation that a violation of Article 2 or 3 ECHR is likely, the repatriation obligation would be built in most cases on the knowledge that such violation is already taking place. This would be about ending or preventing a situation in (nearly) certain violation of Article 2 or 3 ECHR, considering the 'absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention'.[63]

The positive obligation to organize the repatriation of citizens would be built on the combination of Article 3(2) Protocol no. 4 and Articles 2 and 3 of the Convention. Therefore, only very serious human rights violations would justify this positive obligation, in case the rights holders find themselves in a situation in which there is no reasonable alternative for the individuals involved to withdraw themselves from the situation that violates Articles 2 and/or 3 ECHR. The extent of this positive obligation, more specifically, the extent of the assistance in organizing the repatriation of citizens depends on the particular circumstances of the case, and the state should do all that could be reasonably expected of it to help its citizens. In the assessment of the extent of their positive obligations, it would seem necessary for the States Parties to consider any particular position of vulnerability of their citizens, such as those based on age, disability and health condition, or the fact of being accompanied by children.

It should be also underlined that Article 3 (2) of Protocol no. 4 does not permit a State to deprive its nationals of the right to enter the territory of the State in any circumstance.[64] It necessarily follows from the text of the Article that this right cannot be subject to restrictions for any reason such as protection of national security.

Lastly, according to the text of Article 3 (2) of Protocol no. 4, this article protects only a national's right to enter the territory of the State. However, it should be noted that Article 12 (4) of the ICCPR [65]also guarantees a very similar right, and the Human Rights Committee (HRC) has lately adopted a broader interpretation and took into consideration the non-national applicants' strong ties connecting them to the countries from which they were deported.[66] It is submitted that, when reflecting on its own interpretation of Article 3 (2) of Protocol no. 4, these developments in international human rights law are a relevant factor for consideration by the Court.

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[63] ECtHR, *F.G. v. Sweden*, no. 43611/11, 23 March 2016, para. 127.

[64] *Slivenko v. Latvia (dec.)* [Grand Chamber], no. 48321/99, 9 October 2003, § 77 ('The Court observes that Article 3 of Protocol No. 4 secures an absolute and unconditional freedom from expulsion of a national.').
Article 3(2) of Protocol no. 4(2) of the ECHR and Article 22(5) of the American Convention on Human Rights (ACHR) do not permit a State to deprive its national of the right to enter the territory of the State in any circumstance. Whereas Article 12 (4) of the ICCPR and Article 12 (2) of the African Charter on Human and Peoples' Rights (ACHPR) might permit it under some circumstances.

[65] Article 12(4) of the ICCPR states as follows: '*No one shall be arbitrarily deprived of the right to enter his own country.*'

[66] See UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9UN, paras 19-21; UN Human Rights Committee, *Warsame v. Canada*, CCPR/C/102/D/1959/2010; *Nystrom v. Australia*, CCPR/C/102/D/1557/2007; *Randolph v. Togo*, CCPR/C/79/D/910/2000. See for more detail, Rutsel Martha, Stephen Bailey, 'The right to enter his or her own country', 23 June 2020, available at https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/.