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H.F. and others v. France*:*
Has the time finally come to rethink extraterritorial jurisdiction?

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Abstract

On 14 September 2022, the Grand Chamber of the European Court of Human Rights rendered its much-awaited decision in the case of H.F. and others v. France*, concerning the refusal by the respondent State to repatriate the relatives of the applicants, all possessing French nationality, from prison camps in North-East Syria after the fall of the Islamic State in Iraq and Levant. Against this background, the main issue the Court was required to assess was whether the detained individuals therein fell under the State's jurisdiction. This comment will focus on the reasoning of the Grand Chamber which found that France exercised jurisdiction over its nationals, by comparing the judgment with the existing case law on extraterritorial jurisdiction and pointing out its shortcomings.*

A. FACTS OF THE CASE AND JUDGMENT

1. To repatriate or not to repatriate, that is the question!

Since the fall of the Islamic State in Iraq and Levant (ISIL or Daesh), thousands of men, women and children – mainly Iraqi and Syrian citizens but, overall, from about 60 nationalities – have been detained by Syrian Democratic Forces (SDF) in camps located in north-east Syria. The living conditions therein are widely known to be appalling: widespread violence and sexual exploitation, extreme weather conditions, no education, lack of access to basic healthcare, as well as limited food, water and shelter. As if that were not enough, the vast majority of the detainees pertain to extremely vulnerable categories, such as women and children, who often cannot be blamed except for being the relatives of former Daesh (foreign) fighters.

In light of the inhuman conditions of detention, some European Countries – including Belgium, Germany, and France – started repatriating the family members of foreign fighters in order to ensure the protection of their human rights, avoid radicalization and share the burden of their management, which should not entirely fall upon SDF.

Nonetheless, such an effort rapidly faded. Domestic authorities have indeed appeared increasingly reluctant to repatriate their adult nationals from prison camps (FLUZIN, 2022a). In this regard, States have adduced different justifications, ranging from security risks posed by their nationals after returning, to the argument that it would be in the interest of justice that they face a trial in Syria, to the free choice of foreign fighters and their partners to join ISIL. Moreover, as far as the repatriation of child nationals, governments have often argued that it would be inappropriate to separate children from their parents: thus, to the extent that the latter might represent a threat back home, the former cannot be repatriated either (FLUZIN, 2022a; RAGAB).

2. The background of the case and the decision by French courts

The facts of *H.F. and others v. France* fall squarely within this framework. Between 2014 and 2015, the daughters of the applicants, French nationals, left France for Syria following their partners, who had decided to join the ranks of ISIL, which was reaching its maximum territorial expansion. In 2014, however, an international coalition of seventy-six States was established with the aim to provide support to the local forces engaged in the fight against Daesh and, by the end of 2019, the control of almost all Syrian territories was regained.

As soon as the SDF took control, the families of ISIL fighters were arrested and taken to prison camps: the daughters of the applicants, together with their children born in Syria, were also captured and have been ever since interned – together with other 60.000 people, of which around 40.000 children – in the camps of al-Hol and Roj.

As soon as the applicants became aware of the detention of their relatives, they immediately sought urgent repatriation, by also relying on the fact that the respondent State had already brought home some nationals through an agreement with the SDF. Facing the silence and inaction of the Government, the applicants seized domestic courts. French judges, however, refused to hear the claim, arguing that the remedy sought by the applicants concerned acts indissociable from the conduct of France's international relations. Indeed, repatriation would require the negotiation of a new agreement, coupled with the deployment of military resources: all matters that the judges found not to be subject to an order by a court of law ("act of State doctrine").

3. The applications and the Grand Chamber's judgment

Following the unfavourable decisions of French courts, the applicants started proceedings before the European Court of Human Rights (ECtHR or European Court). Notably, they alleged that the refusal of domestic authorities to immediately repatriate their relatives constituted a violation of Article 3 (prohibition of torture), Article 8 (right to respect for private life and family ties), as well as Article 3(2) of Protocol No. 4 of the European Convention of Human Rights (ECHR) on the right to enter the territory of the national State – separately and in conjunction with Article 13 of the ECHR enshrining the right to an effective remedy. The European Court, however, deemed it appropriate to examine the applications solely under Article 3 ECHR and 3(2) of Protocol No. 4, excluding – without any argumentation – the relevance of Article 8, and considering Article 13 already encompassed in the analysis concerning the «procedural rights of those concerned and/or any corresponding procedural obligations of the State in the context of a refusal to repatriate». In the Court's view, indeed, this approach would allow all the relevant questions to be properly addressed.

Before examining the merits of the claims, the Court had to decide on a very sensitive issue, namely whether the family members of the applicant did fall within the jurisdiction of the respondent State under Article 1 ECHR.

In this respect, the French Government claimed that there was no basis under which extraterritorial jurisdiction could be established. Notably, France argued that it neither exercised effective control over the relevant territory ("spatial" model), nor the respondent State could be deemed to run the prison camps by itself, since the contacts with the SDF forces were insufficient to consider them a «subordinate local administration» (*Ilascu and others v. Moldova and Russia*). At the same time, the Government stressed that its agents did not exercise any physical power or control over the individuals abroad ("personal" model), and there were no special procedural circumstances – such as those identified by the ECtHR in *M.N. and others v. Belgium* and *Hanan v. Germany* – that could trigger the application of the Convention vis-à-vis the relatives of the applicants. Lastly, the respondent State rejected the possibility of finding a jurisdictional link based on either France's mere capacity to act ("capacity-impact" model),

or the fact that the persons to be allegedly repatriated had French nationality or ties with the State (Committee on the Right of the Child, *L.H. and others v. France*). However, as far as the right to enter the Country of nationality goes, France recognized that such a right, by its own nature, is to be applied extraterritorially, an issue contested by some of the intervening Governments (para. 174).

When it comes to the "spatial" and "personal" models of extraterritorial jurisdiction, the applicants were ready to concede that they were not applicable in the case at stake. However, they claimed that the bond of nationality, as well as the previous family life on national territory, were sufficient to trigger the extraterritorial jurisdiction of the respondent State. Furthermore, in addition to the bond of nationality, the applicants claimed that France exercised jurisdiction by having «control over the legal situation of their family members» (para. 165), a statement clearly echoing the one of the Human Rights Committee (HRC) in its General Comment no. 36 on the right to life, according to which: «a State party has an obligation to respect and to ensure the rights under article 6 of […] all persons subject to its jurisdiction, that is, *all persons over whose enjoyment of the right to life* it exercises power or effective control» (italics added).

In this respect, the Strasbourg judges recalled the principle according to which, since «a State's jurisdictional competence is primarily territorial», it must be ascertained whether there are special features eventually justifying the finding that a State exercises jurisdiction extraterritorially (para. 185). In a few sentences, the European Court excluded that the spatial or the personal models of extraterritorial jurisdiction could apply in the case at stake. Similarly, it found that the opening of proceedings at the domestic level did not create a jurisdictional link between France and the daughters and grandchildren of the applicants. Finally, the ECtHR moved to consider whether there were connecting ties with France that might have triggered the latter's jurisdiction over the relatives of the applicant. In this regard, however, the Court deemed it necessary to examine Article 3 ECHR and Article 3(2) of Protocol 4 separately. While this approach might appear, at a first glance, surprising – inasmuch as one would think that jurisdiction is exercised or not, independently of the substantive norm allegedly violated – the jurisprudence of the Court has by now developed in this direction (*Güzelyurtlu and others v. Cyprus and Turkey*; *Georgia v. Russia (II)*). In other words, to the extent that – resorting to the well-known formula employed by the ECtHR – conventional rights might be «tailored and divided», one could argue that jurisdiction might be «tailored and divided» as well.

As far as Article 3 ECHR, the Grand Chamber concluded that French nationality did not *per se* constitute a sufficient link to establish extraterritorial jurisdictional. Moreover, the mere fact that France possessed the operational capacity to repatriate its nationals – as proved by the other repatriations successfully carried out – «[did] not suffice to constitute a special feature capable of triggering an extraterritorial jurisdictional link» (para. 199).

The Court then turned to examine whether jurisdiction could be found with regard to Article 3(2) of Protocol No. 4. In this respect, while finding again that nationality could not constitute an autonomous basis of jurisdiction, the Strasbourg judges noted that specific circumstances of the case might nonetheless be sufficient to establish a jurisdictional link between States and their nationals abroad. As far as the relatives of the applicants, the Grand Chamber identified different relevant elements: *i*) the existence of a nationality bond; *ii*) the numerous official requests brought by the applicants to obtain reparation and assistance; *iii*) the fact that the requests were made on the basis of the fundamental values of the democratic societies; *iv*) the impossibility for the daughters and grandchildren of the applicant to return to France without the assistance of domestic authorities; *v*) the manifest will of the SDF to have French nationals held in camps repatriated. In sum, all these elements were found sufficient to establish the jurisdiction of the French Government vis-à-vis the relatives of the applicant for the sole purpose of Article 3(2) of Protocol No. 4.

Moving to the merits of the case, the Court firmly excluded the existence of a general obligation upon State parties to repatriate their nationals, thus rejecting the existence of a specular "general right to repatriation" based on Article 3(2) (CAPONE; MCKEEVER). Against this background, however, the Strasbourg judges found that the right to enter national territory could nevertheless be interpreted as imposing some positive obligation on contracting States in all the circumstances in which their inaction might amount to a *de facto* exile. In particular, the Court considered that States have a duty to set and apply appropriate guarantees against arbitrariness in the decision-making process. In light of the specific circumstances of the case, such guarantees were not deemed to be appropriate and thus the applicant had suffered a violation of their rights.

B. COMMENT

1. Another brand-new model of extraterritorial jurisdiction?

In addressing the inexistence of extraterritorial jurisdiction, the French Government overtly claimed that «the facts at issue did not relate to any of the special circumstances that could give rise to a finding that the State was exercising its jurisdiction, *unless a new basis of jurisdiction were to be created* and the scope of the Convention thereby broadened in a manner that its drafters never intended» (para. 156; italics added). To the extent that respondent States are accustomed to denying (almost any) exercise of extraterritorial jurisdiction, this statement did not come out as a surprise, nor one can simply take its content for granted; suffice it to mention that France relied upon the infamous ruling in *Bankovic and others v. Belgium and others* to support the position that the relatives of the applicants did not fall within its jurisdiction: a decision, as is well known, which was strongly criticized for resorting, *inter alia*, to the deferent notion of *espace juridique* to limit the extraterritorial application of contracting Parties' obligations. A finding, however, largely overruled by subsequent jurisprudence of the

Strasbourg judges (*Al-Skeini and others v. the United Kingdom*, *Jaloud v. the Netherlands*). Does this mean that the respondent State was (completely) wrong in claiming that there were no chances to establish extraterritorial jurisdiction unless a new legal basis was to be crafted? Probably not.

From this perspective, the judgment cannot but be seen as the latest – yet not the least – episode «in the saga of the ECtHR and extraterritorial jurisdiction» (PIJNENBURG). Since its leading decision in *Loizidou v. Turkey*, indeed, the Court has often addressed the issue of extraterritorial jurisdiction and its requirements. As testified by all the arguments raised by the French Government, it cannot be claimed anymore that there are only two models of extraterritorial jurisdiction, namely the spatial and the personal one. In the last twenty years, the EctHR has indeed found that State's jurisdiction might be triggered by the provision of military, political and economic support that contributes to the establishment and/or consolidation of separatist regimes (*Catan and others v. Moldova and Russia*), the existence of special procedural circumstances – be they the opening of criminal investigations (*Güzelyurtlu and others v. Cyprus and Turkey*, para. 188) or the fact that the territorial State is not capable of conducting an effective investigation of the incident (*Hanan v. Germany*; MILANOVIC, 2021a) –, as well as by an exercise of authority over the individuals abroad that fell short of the physical power or control that traditionally characterized the personal model of extraterritorial jurisdiction. Even more, in its recent judgment *Carter v. Russia*, the Court apparently opened its doors to a functional approach (MILANOVIC, 2021b). All in all, it could be claimed that – despite being often criticised for having lost its leading role within human rights jurisprudence (MALLORY) – the Court has proved to be willing to innovate. Nevertheless, innovation came at a great cost.

The Court, indeed, has not been capable of properly framing its arguments in a coherent fashion. Namely, rather than rethinking its theoretical approach to extraterritorial jurisdiction and openly claiming that the spatial and personal models were no longer sufficient to catch all the different situations in which States are (one could argue, socially) expected to ensure and protect human rights (FLUZIN, 2022b), the case law of the Court has been characterized by exceptionalism. The ECtHR has indeed completely embraced a case-by-case approach. This might not appear problematic, as long as extraterritorial jurisdiction does require a careful examination of the specific circumstances of the case in order to understand whether the applicants fall under the control of the State. Nevertheless, by carefully looking at the European Court's jurisprudence, one will understand that the Court is rather deciding on a case-by-case basis the requirements under which a State might be found to exercise extraterritorial jurisdiction. In this way, the Court is thus renouncing a clear framework to ensure that the contracting parties of the ECHR are capable of foreseeing the circumstances under which an individual might fall under their jurisdiction.

In light of this, it seems appropriate to question whether the approach to extraterritorial jurisdiction in *H.F. and others v. France* falls within any of the strands of jurisprudence already

covered by the Court or if we are confronted with another hypothesis of exceptionalism. By looking at the special features that triggered France's jurisdiction, such as the nationality bond as well as the will of the SDF to have their French detainees repatriated, there seems to be little (if any) space for claiming that the case might fit into any of the, indeed numerous, existing strands of jurisprudence. Quite the opposite, one could conclude that this is another brand-new model of extraterritorial jurisdiction, which seems crafted *ad hoc* to address this specific case. In this respect, the feeling that we are facing an *ad hoc* decision is further reinforced by the fact that «the circumstances that trigger jurisdiction in this case are so specific that it is unlikely to be relevant to other cross-border situations» (PIJNENBURG). Put otherwise, the approach risks being confined to such a decision, without even contributing to the development of a new line of jurisprudence on extraterritorial jurisdiction.

2. The risk of interpretative fragmentation in international human rights law

Be that as it may, one could wonder whether the judgment eventually follows the path traced by other human rights monitoring bodies. Indeed, in less than five years, several thought-provoking decisions have been rendered on the matter of extraterritorial jurisdiction. Notably, it must be mentioned: the Advisory Opinion on The Environment and Human Rights of 15 November 2017 by the Inter-American Court of Human Rights (IACHR; for a comment, BERKES); the decision of the Committee on the Rights of the Child in *L.H. and others v. France*, where the substantial issue at stake was the same of the present case, namely the repatriation of children from Syrian prison camps (for a comment, MILANOVIC, 2020); and the decisions of the Human Rights Committee in the twin cases *S.A. and others v. Italy* and *S.A. and others v. Malta* of 2021 (for a comment, BUSCO; FAZZINI; MILANOVIC, 2021c; MINERVINI).

In each of these decisions, the competent monitoring body advanced a different – yet wider – approach to extraterritorial jurisdiction: the IACHR accepted that a jurisdictional link can be found «when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights» (para. 104, "control over the activity" model); the CRC found that the applicants fell within the respondent State's jurisdiction since «as the State of the children's nationality, France [had] 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» ("functional-nationality" model, MILANOVIC, 2020); the HRC concluded that a State exercises extraterritorial jurisdiction if it possesses the capacity to do so and there is a «special relationship of dependency» with the persons affected ("functional-impact" model, GIUFFRÈ).

While it is easy to exclude that the ECtHR sided with the IACHR, since there are no elements that could be traced back to a "control over the activity" model, it could be argued that the Strasbourg judges followed a functional model of extraterritorial jurisdiction. Notably, because of the reliance on the nationality bond of the relatives of the applicant, the functional-

nationality model sketched by the CRC could be the proper one. However, this is not the case. Among the five special features upon which the ECtHR based its finding, there is no space for what could be described as the pivotal element of functionalism: the capacity of the State to uphold human rights. Indeed, the assumption behind any functional approach to extraterritorial jurisdiction is that «if States have the capacity to protect human rights, they are required to do so». Of course, as argued in both case law and scholarship (*S.A. and others v. Italy*; *L.H. and others v. France;* SHANY; MINERVINI), the mere fact that a State has the capacity to do so does not alone trigger its jurisdiction. Otherwise, the burden upon States would probably be unsustainable. This is the reason why other factual and/or legal elements are required in order to enter a finding that the State exercises jurisdiction: be the existence of a special relationship of dependency, the bond of nationality or legitimate expectations, there must be something more. Nevertheless, capacity is fundamental.

Contrariwise, in the case at hand, the fact that France could protect and ensure the human rights of its citizens detained in Syrian camps did not find any place in the reasoning of the European Court. Quite the opposite, the Court excluded any relevance of capacity, alone or coupled with other elements, explicitly as far as the former (para. 199, when analysing jurisdiction for the purposes of Article 3 ECHR), implicitly as far as the latter (paras 206-214). In other words, the Strasbourg judges departed from the approach of both the HRC and the CRC, resisting the temptation of accepting that capacity might be one of the considerations in triggering extraterritorial jurisdiction, while also closing the chink it had opened in *Carter v. Russia*. Seen from the perspective of the coherence of international human rights law, this is another critical point of the judgment: indeed, it risks to (further) compromise the unitarity of the notion of extraterritorial jurisdiction by directing the Court towards another new path, different from the – already numerous – ones walked by other monitoring bodies. The fear of fragmentation might soon flutter again: until future changes, there is a concrete possibility that four of the main human rights monitoring bodies will each have their own approach to extraterritorial jurisdiction.

3. Conclusions: has the time finally come for the European Court to rethink jurisdiction?

The ruling of the Court can be seen as another fundamental tile of the mosaic of extraterritorial jurisdiction. A mosaic which, at the time being, is far from offering a well-defined image. It is only possible to catch a glimpse of the future outcome, nothing more. By reading this judgment in light of the case law of other human rights monitoring bodies, what seems apparent is that there is a current trend towards a wider notion of extraterritorial jurisdiction: a notion capable of capturing those situations in which there is a compelling need to grant people the protection of their fundamental rights, despite the fact that the authority exercised by States falls short of an effective (mainly, physical) control or power over a territory or an individual.

At the same time, it seems apparent that the paths taken by monitoring bodies lack an in-depth elaboration as far as the requirements for State parties to exercise extraterritorial jurisdiction. Whatever the path taken, there is an urgent need to stand back from a case-by-case approach in order to ensure legal certainty and foreseeability. That is the challenge jurisdictional and quasi-jurisdictional bodies are called to face in the next future (RAIBLE).

C. FURTHER READINGS

To read the text of the judgment:
ECtHR, 14 September 2022, case of *H.F. and Others v. France*, applications nos 24384/19 and 44234/20

Case law:
CRC, 2 November 2020, case of *L.H. and others v. France*, communications nos 79/2019 and 109/2019
ECtHR, 7 July 2011, case of *Al-Jedda v. the United Kingdom*, application no. 27021/08
ECtHR, 7 July 2011, case of *Al-Skeini and others v. the United Kingdom*, application no. 55721/07
ECtHR, 29 January 2019, case of *Güzelyurtlu and others v. Cyprus and Turkey*, application no. 36925/07
ECtHR, 21 September 2021, case of *Carter v. Russia*, application no. 20914/07
HRC, 27 January 2021, case of *S.A. and others v. Italy*, communication no. 3042/2017

Literature:
M. GIUFFRÉ, *A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights*, in *Questions of International Law, Zoom-in*, n. 82, 2021.
C. MALLORY, *A second coming of extraterritorial jurisdiction at the European Court of Human Rights?*, in *Questions of International Law, Zoom-in*, n. 82, 2021.
G. MINERVINI, *Extraterritorial Jurisdiction Before the Human Rights Committee: First Considerations on S.A. and Others v. Italy*, in *Diritti umani e diritto internazionale*, vol. 15, 2021.
A. OLLINO, *The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations*, in *Questions of International Law, Zoom-in*, n. 82, 2021.
L. RAIBLE, *Extraterritoriality between a rock and hard place*, in *Questions of International Law, Zoom-in*, n. 82, 2021.
Y. SHANY, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, in *Law & Ethics of Human Rights*, vol. 7, 2013.
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