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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

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ABSTRACT

A significant number of children with ties to the jurisdiction of the Netherlands through their Dutch nationality or for other reasons, are currently trapped in camps in Syria, Turkey and Iraq, often under poor or life-threatening conditions. Like many other governments, the Netherlands Government is not actively engaged in returning these children to the Netherlands. This article asks whether these children fall within the jurisdiction of the Netherlands pursuant to Article 2(1) of the UN Convention on the Rights of the Child and if so, whether the Netherlands Government is discharged from the relevant obligations that flow from this convention to protect these children. It sets out arguments in favour of a more extensive interpretation of the concept of jurisdiction than currently adhered to by governments and courts. Based on these arguments, it can be argued that the children fall within Dutch jurisdiction and that the Dutch Government is under the obligation to adequately protect their rights as laid down in the UN Convention on the Rights of the Child.

KEYWORDS

UN Convention on the Rights of the Child; jurisdiction; nationality; right to return; right to life; children's rights

1. Introduction

The Netherlands Government is not actively engaged in returning children with ties to the Netherlands¹ who are located in refugee camps in Syria, Turkey and Iraq,² to the Netherlands.³ According to the Minister for Legal Protection, children who are Dutch nationals

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¹See Section 2 for an elaboration of what is meant by 'ties to the Netherlands'. For the sake of convenience, further reference will be made to 'returning' children, which includes those children that would be brought to the Netherlands for the first time since they were born outside Dutch territory.

²Algemene Inlichtingen- en Veiligheidsdienst (AIVD), 'Uitreizigers en terugkeerders. Hoeveel Nederlanders zijn uitgereisd naar een jihadistisch strijdgebied?' <www.aivd.nl/onderwerpen/terrorisme/dreiging/uitreizigers-en-terugkeerders> accessed 14 May 2020; the Nationaal Coördinator Terrorismedebestrijding en Veiligheid (NCTV), 'Veiligheidsimplicaties wel of niet terughalen van uitreizigers en minderjarige kinderen'; attachment to Parliamentary Paper, Letter from the Dutch Minister of Justice and Security to the Speaker of the Dutch House of Representatives (6 December 2018) in which the NCTV noted that there are children with a link to the Netherlands in Iraq.

³With the exception of two Dutch orphans who were brought to the Netherlands, see letter from the Dutch Minister of Foreign Affairs and the Minister of Justice and Security to the Speaker of the Dutch House of Representatives (10

or who have the right to acquire Dutch nationality have the right to return.⁴ They would have to report to a Dutch representation in the region where they find themselves, such as the one located in Erbil (Iraq) or Ankara (Turkey).⁵ In 2018, the Minister of Justice and Security explained this passive policy in a letter to the Dutch House of Representatives by arguing that the Netherlands does not have 'effective powers or authority' in Syria, Turkey, or Iraq, and that no obligations arise under the UN Convention on the Rights of the Child (UNCRC)⁶ to 'actively' return the children.⁷ Although the Minister is not explicit on this, the Dutch Government seems to deny the extraterritorial application of the UNCRC in order to disavow any obligations the Netherlands might have toward these children.

The passive policy of the Netherlands was stated to be further grounded in considerations related to (1) international relations (the Netherlands government has no diplomatic ties with Syria, for example), (2) the safety of those who wish to return (should the local authorities become aware of a potential warrant for arrest for the parents, they could be prosecuted in Syria which may lead to the imposition of the death sentence), and (3) the security of the Netherlands (children with fighting experience pose a threat⁸ and the separation of children from parents is a legally complex procedure, meaning that 'jihadist' parents may return to the Netherlands should the children be repatriated).⁹ The safety of civil servants, were they to be sent to the region for repatriating the children, was later added to the list of arguments.¹⁰ The Dutch Children's Ombudsman, amongst others, has criticised this passive policy. She has urged the Dutch Government to take a more active role, for instance by ensuring proper shelter, care and education in the camps and making every effort to return the children.¹¹

The Dutch Government is not alone in its passive stance. Other European countries show the same reluctance in accepting responsibilities for children from former ISIS-held territories, despite the fact that some have incidentally repatriated small numbers¹²

June 2019) BZDOC-883556718-41. The Dutch Minister of Foreign Affairs has emphasised that this action is not a change in the current policy line to not actively retrieve children: see 'Minister Blok over terughalen IS-kinderen: 'Unieke situatie, beleid niet gewijzigd' (RTL Nieuws,) 11 June 2019 <www.rtlnieuws.nl/nieuws/politiek/artikel/4742436/minister-blok-over-halen-weeskinderen-unieke-situatie-geen-nieuw> accessed 13 January 2020.

⁴Dutch Minister for Legal Protection, *Antwoorden Kamervragen over het artikel 'Speciale opvang voor jihad-kinderen bij terugkeer in Nederland'* (20 September 2019) 2692716.

⁵District Court The Hague, ECLI:NL:RBDH:2019:11909 (11 November 2019) 3.2.

⁶The UNCRC was unanimously adopted by the United Nations on 20 November 1989. It took effect on 2 September 1990 and currently nearly all countries around the world (196) have ratified the UNCRC. On 8 March 1995, the UNCRC took effect in the Netherlands.

⁷Letter from the Dutch Minister of Justice and Security (n 2).

⁸Also Dutch Minister for Legal Protection (n 4); NCTV (n 2).

⁹Letter from the Dutch Minister of Justice and Security (n 2); Parliamentary Documents II 2017–18, 29754, 461.

¹⁰Parliamentary Documents II 2018–19, 29754, 492. These arguments were repeated recently by the Minister: Parliamentary Documents II 2019–20, *Aanhangsel*, 1403.

¹¹Letter from the Dutch Children's Ombudsman for Children to the Dutch Minister of Justice and Security (8 January 2019) <www.dekinderombudsman.nl/system/files?file=inline/2019.01.08briefaanministerGrapperhausinzakekindereninkampeninSyrii.pdf> accessed 14 May 2020; M Kalverboer, 'Haal de kinderen terug uit Syrië, ze hebben hulp nodig' (NRC 15 oktober 2019); 'Terugkeer van kwetsbare Nederlandse kinderen moet onderdeel worden van het Nederlands beleid' (UNICEF, 18 June 2019) <www.unicef.nl/nieuws/2019-06-18-terugkeer-van-kwetsbare-nederlandse-kinderen-moet-onderdeel-worden-van-het-nederlands-beleid> accessed 14 May 2020. See also The Child Justice Advocacy Group, *Child Returnees Position Paper* (Updated Draft November 2019) <<https://defenceforchildren.org/wp-content/uploads/2020/01/Position-paper.pdf>> accessed 14 May 2020.

¹²Emma Broches, 'What is Happening with the Foreign Women and Children in SDF Custody in Syria?' (*Lawfareblog*, 24 March 2020) <www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria> accessed 14 May 2020. In 2019, Kosovo repatriated 74 children; France, 17; Sweden, 7; Belgium, 6 and Norway, 5. A handful of orphans were repatriated by Germany, Austria, the Netherlands, the UK, Finland and Denmark. The countries have avoided generalising these practices to all children who remain in the camps.

and despite the European Parliament urging EU Member States to repatriate all European children.¹³ Domestic jurisprudence shows a fragmented picture with courts assuming states' responsibilities and courts concluding that these children fall outside of states' jurisdictions.¹⁴

This article asks to what extent the children with ties to the jurisdiction of the Netherlands in camps in Syria, Turkey and Iraq, fall within the jurisdiction of the Netherlands pursuant to Article 2(1) of the UNCRC and, accordingly, whether the Dutch Government is discharged from the relevant obligations that flow from this convention to protect these children. It first explains who these children are. How many children are involved, and how homogeneous are they as a group? A brief explanation is given of the circumstances they are living in. The extent to which this group of children has Dutch citizenship is also considered; an important factor when it comes to their legal position (section 2). The sections thereafter analyse to what extent the UNCRC applies extraterritorially in this context and how jurisdiction pursuant to Article 2(1) UNCRC should be understood. In addition, it addresses the relevant substantive rights of the UNCRC should the children with ties to the Netherlands be considered to fall within Dutch jurisdiction (sections 3 and 4). Before closing with some concluding observations (section 6), the article briefly refers to recent developments in Dutch case law: a group of mothers and children with ties to the Netherlands, residing in camps in Northern Syria, initiated legal proceedings to challenge the principally passive policy of the Dutch Government with respect to their repatriation. This case was pending before the Netherlands Supreme Court at the time of writing, after the District Court and Court of Appeal delivered judgments with conflicting outcomes.¹⁵

This article sheds light on the obligations of the Netherlands Government, but it also aims to inform other jurisdictions about how to approach the protection of children from former ISIS-held territories whose rights and interests are under threat.¹⁶ Although the position of children in Syria, Turkey and Iraq also prompts questions in relation to youth protection law, juvenile criminal law and migration law, these questions will not be dealt with here. These, and other questions, deserve further attention. This article takes the perspective of children's rights¹⁷ to clarify the position of the children and government responsibility towards them. By suggesting a reconsideration of

¹³European Parliament Resolution of 26 November 2019 on Children's Rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child (2019/2876(RSP)), <www.europarl.europa.eu/doceo/document/TA-9-2019-0066_EN.html> accessed 14 May 2020.

¹⁴See e.g. the Higher Administrative Court of Berlin and Brandenburg (Germany), ECLI:DE:OVGBEB-B:2019:1106.OVG10543.19.00 (6 November 2019), ordering the German State to repatriate a mother and her children; District Court of Brussels (Belgium), 2019/90/C Anonymised (11 December 2019) <www.rechtbanken-tribunaux.be/sites/default/files/nieuwsartikels/IS111219.pdf> accessed 27 May 2020 ordering measures to facilitate the return of a group of children from Syria and the French Council of State, No 429668, 429669, 429674, 429701 (23 April 2019) <www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/rejet-des-demandes-de-rapatriement-de-ressortissantes-francaises-et-de-leurs-enfants-retenus-en-syrie> accessed 27 May 2020 rejecting claims for repatriation arguing that the matter was one of French diplomacy and therefore outside of its jurisdiction. See section 4 for Dutch jurisprudence on the matter.

¹⁵Days before the final version of this article was sent in, the Netherlands Supreme Court delivered its ruling: see section 5.

¹⁶According to Save the Children, 9,500 children from different countries are living in camp Al-Hol alone, of which almost half have not reached the age of five: Isabel Coles, 'Almost 10,000 Children of Islamic State Live in Perilous Limbo in Syrian Camps' *Wall Street Journal* (New York, 30 December 2019).

¹⁷Taking this perspective, the UNCRC is first examined. Some of the relevant provisions and issues are also supported in other human rights conventions or elaborated on in human rights case law. Where necessary, these other instruments will be referred to as well.

the restrictive interpretation of the concept of jurisdiction and by clarifying the substantive obligations for states parties to the UNCRC, it aims to contribute towards appropriate protection for these children, who have generally not chosen to live in former ISIS conflict zones and who find themselves in a vacuum with no government helping them.

2. Children with Ties to the Netherlands: Numbers, Circumstances and Nationality

2.1. The Number of children with ties to the Netherlands residing in Syria, Iraq and Turkey

The Dutch General Intelligence and Security Service (AIVD) estimates that there are at least 210 children located in Syria and Turkey who have ties to the Netherlands.¹⁸ There may also be children with ties to the Netherlands residing in Iraq.¹⁹ According to the National Coordinator for Security and Counterterrorism (NCTV), one or both parents of these children have Dutch citizenship or resided for a long period in the Netherlands.²⁰ The actual number of children is likely to be higher, since the Dutch authorities are not immediately aware of such children who were born abroad.²¹

This is not a homogenous group: some of the children are still with one or both parents, others are not;²² Fewer than one quarter were taken to the conflict zone by one or both parents; more than three quarters were born there;²³ more than half the group are very young (four years or younger) and only 10% are nine years or older.²⁴

2.2. The situation of children with ties to the Netherlands

Children staying in refugee camps are apparently not free to leave the camps,²⁵ which prevents them from returning to the Netherlands. This has a tremendous impact on their lives. Children who were taken from the Netherlands have difficulty adjusting to their new living environment. They have experienced many stressful situations such as bombings, death and destruction.²⁶ Soldiers of the Syrian army have been accused of killing and torturing children, and of sexual abuse.²⁷ Two Dutch children have already died in Syrian

¹⁸AIVD (n 2).

¹⁹NCTV (n 2).

²⁰NCTV (n 2).

²¹AIVD (n 2).

²²Parliamentary Documents II 2018–19, 29754, 499.

²³NCTV (n 2). See also The Child Justice Advocacy Group (n 11); Letta Tayler, 'Fear Grips Women and Children Trapped in Syria Camps' (*Human Rights Watch*, 18 October 2019) <www.hrw.org/news/2019/10/18/fear-grips-women-and-children-trapped-syria-camps> accessed 27 May 2020.

²⁴NCTV and AIVD, *Minderjarigen bij ISIS* (2017) <<https://www.aivd.nl/onderwerpen/terrorisme/documenten/publicaties/2017/04/06/minderjarigen-bij-isis-van-nctv-en-aivd>> accessed 20 August 2020; AIVD, 'Uitreizigers en terugkeerders. Hoeveel Nederlanders zijn uitgereisd naar een jihadistisch strijdgebied?' <www.aivd.nl/onderwerpen/terrorisme/dreiging/uitreizigers-en-terugkeerders> accessed 20 August 2020.

²⁵Hans Ulrich Jessurun D'Oliveira, 'Nederlandse kalifaatkinderen aan hun lot overlaten? Nee toch!' *NJB* (2018) 10; Vivian Yee, 'Thousands of ISIS Children Suffer in Camps as Countries Grapple With Their Fate' *The New York Times* (8 May 2019); Edwin Bakker, Jessica Sciarone and Jeanine de Roy van Zuidewijn, *Terugkeerders uit jihadistische strijdgebieden. Een vergelijking tussen Nederland, België, Denemarken, Duitsland, Frankrijk, het VK en de VS* (Leiden University 2019) 16.

²⁶NCTV and AIVD (n 24) 9; Noman Benotman and Nikita Malik, *The Children of Islamic State* (Quilliam 2016) 46.

²⁷Benotman and Malik 2016 (n 26) 46; Dutch Children's Ombudswoman 2019 (n 11).

refugee camp Al Hol.²⁸ Recently concerns due to the spread of the COVID-19 virus were added to the list of threats.²⁹

In legal proceedings pending before the Dutch Supreme Court,³⁰ it has been established the children in Northern Syria live in poor conditions.³¹ It is icy cold in winter, and year-round the camps are plagued by overcrowding, avoidable diseases, ideological indoctrination, and a lack of water, food, sanitary facilitations, medical care and education.³²

2.3. Nationality of the children

The NCTV and AIVD refer to children with ‘ties to the Netherlands’.³³ According to the NCTV, these are children with one or both parents who have Dutch citizenship or with parents who have resided in the Netherlands for a long period.³⁴ Children with one or both Dutch parents automatically obtained Dutch nationality as they were born in the Netherlands before leaving for the conflict zone, or later by birth in the conflict zone itself. Article 3(1) of the Netherlands Nationality Act (RWN) provides that a child whose father or mother is Dutch at the time of the child’s birth, as well as the child of a Dutch national who is now dead, automatically obtains Dutch nationality. This also applies in the case of a child born abroad.³⁵ In addition, if a Dutch father in the Netherlands acknowledges his child at any time before the child reaches the age of seven, the child automatically obtains Dutch nationality.³⁶ Acknowledgement in a foreign country can also be valid under certain circumstances.³⁷ If the child is already older than seven years of age, but still a minor, Dutch nationality can only be obtained by acknowledgement if proof is submitted of the biological paternity within one year of the acknowledgement.³⁸

It is possible to establish to what extent the children born in the Netherlands, who were taken by their parent, or parents, to a conflict zone abroad are Dutch. Data in relation to their nationality can be found in the municipal records in the Netherlands.³⁹

The situation is different, however, when it comes to the children born in Syria, Iraq and Turkey. As mentioned above, this group of children is much larger.⁴⁰ In so far as these children are Dutch, they will have difficulty proving their Dutch nationality.

²⁸A girl aged three-and-a-half died from a piece of shrapnel: see Hassan Bahara and Tjerk Gualthérie van Weezel, ‘Dochtertje van Nederlandse Syriëganger overleden’ *De Volkskrant* (Amsterdam, 5 April 2019). A three-week-old baby died from a lung infection: see Casper Luckerhof, ‘Koerdische troepen: baby van Arnhemse jihadist Yago R. overleden’ *De Volkskrant* (Amsterdam, 8 March 2019).

²⁹‘Virus Fears Spread at Camps for ISIS Families in Syria’s North East’ (*International Crisis Group*, 7 April 2020) <www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/virus-fears-spread-camps-isis-families-syrias-north-east> accessed 14 May 2020.

³⁰See further section 5.

³¹District Court The Hague (n 5) 4.9; Court of Appeal The Hague ECLI:NL:GHDHA:2019:3208 (22 November 2019) 1.3; The Child Justice Advocacy Group (n 11); the statement of Paulo Sergio Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, during the 41st session of the UN Human Rights Council on 2 July 2019 <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24773&LangID=E>> accessed 20 August 2020.

³²District Court The Hague (n 5) 4.9; Coles (n 16); ‘Terugkeer van kwetsbare Nederlandse kinderen’ (n 11).

³³AIVD (n 2); NCTV (n 2) 1.

³⁴NCTV (n 2).

³⁵Gerard de Groot in Sylvia M Wortmann (ed), *Groene Serie Personen- en familierecht* (Wolters Kluwer 2017) art 3 RWN, para 1.5.

³⁶*Ibid.* art 4 RWN, 3.

³⁷*Ibid.* art 4 RWN, 4.1.1.

³⁸*Ibid.* art 4 RWN, 8.

³⁹Act on the Register of Persons (*Wet basisregistratie personen*), art 2.7 (1)(a) (5).

⁴⁰NCTV (n 2).

In order to return by their own means, they will need a passport.⁴¹ To be considered for a passport, the child will have to prove that he or she is Dutch. If Dutch nationality was obtained via the father, then it is important that (1) he is father by virtue of a statutory provision (for example as the spouse of the mother); or (2) that he has acknowledged the child.⁴² It is not certain whether fathers in former ISIS-territories – have a marriage certificate, birth certificate and/or document acknowledging paternity that can be produced as evidence for their children. If Dutch nationality was acquired via the mother, the mother must be able to produce a birth certificate. These documents must be sent from the Netherlands or – if the documents do not already exist – be drawn up locally –generally in areas where there appears to be no infrastructure for government services. Further, if documents can be prepared in Syria, Turkey and Iraq, then their value as evidence is possibly open to doubt.⁴³ A DNA test may have to be carried out to prove the parentage of the Dutch parent.⁴⁴ It is uncertain whether local hospitals could or would even want to cooperate, since the group of children at stake is associated with a violent former occupier. In the case of orphans, it seems that without assistance from adults it is practically impossible for them to find their way through this maze of official rules and formalities.

In conclusion, strictly speaking it is not impossible that those children born in Syria, Turkey and Iraq may be able to prove their nationality. However, without assistance from the Dutch authorities in supplying proof, reporting to consular services (in the surrounding countries), as far as that is in itself possible, does not seem to be worthwhile. It also appears to be unlikely, therefore, that these Dutch children can return to the Netherlands through their own means and without a passport.⁴⁵

3. The Extraterritorial Application of the UNCRC

3.1. Various perspectives on jurisdiction

Reports make it clear that the dignity and rights of children currently staying in Syria are being seriously compromised.⁴⁶ As in Iraq and Turkey, the right most clearly compromised in Syria is the right to life, survival and development (UNCRC, art 6). The right

⁴¹Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 regarding a Union Code for crossing borders by persons (Schengen Borders Code) art 8(2).

⁴²De Groot (n 35) art 3 RWN, 1.6.

⁴³Ibid. art 3 RWN, 1.5, refers in a general context to problems that can arise in relation to the evidentiary value of foreign documents.

⁴⁴NCTV and AIVD (n 24) 6.

⁴⁵The establishment of identity (normally by inspection of a person's passport) is a fixed element of the process persons are subjected to who want to enter the Schengen area (Schengen Borders Code, art 8(2)).

⁴⁶The Child Justice Advocacy Group argues that 240 children died in camp Al-Hol due to inadequate medical and humanitarian care: The Child Justice Advocacy Group (n 11) and Sergio Pinheiro (n 31). On 11 September 2019, the UN Commission of Inquiry on the Syrian Arab Republic reported at least 390 preventable deaths of children, due to malnutrition or untreated infected wounds: see UN Commission of Inquiry on Syria, 'Escalating Violence and Waves of Displacement Continue to Torment Civilians during Eighth Year of Syrian Conflict' (UNHRC website, n.d.) <www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24972&LangID=E> accessed 13 May 2020. See also 'Syria: Women and Children Suffer Amid Poor Conditions in Al Hol Camp' (Doctors Without Borders, 16 May 2019) <www.doctorswithoutborders.org/what-we-do/news-stories/news/syria-women-and-children-suffer-amid-poor-conditions-al-hol-camp> accessed 14 May 2020; 'Data Analyzed by the IRC Reveals Staggering Health and Humanitarian Needs of Children in Al-Hol Camp, Northeast Syria – Urging Repatriation of Foreign Children' (International Rescue Committee, 16 September 2019) <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24972&LangID=E>> accessed 13 May 2020.

to be protected against unlawful or arbitrary deprivation of liberty and the right to be treated with humanity and respect when deprived of liberty (UNCRC, art 37(b) and (c)) appear to be being violated. In the camps in Syria, apparently very little is done to treat the physical and psychological damage that has resulted from neglect, abuse, torture and other forms of violence (UNCRC, art 39).⁴⁷ Many other rights are also affected, however, with serious consequences for the children, who are often very young.⁴⁸

As signatories to the UNCRC, the Netherlands, Syria, Turkey and Iraq are obliged to (i) respect, (ii) protect and (iii) fulfil children's rights.⁴⁹ The state in which a child resides is principally responsible for this obligation. After all, that state has the responsibility to realize and implement the rights of children within its territorial jurisdiction. However, as far as Northern Syria is concerned, it is questionable whether it is realistic to expect the Syrian Government to comply with this obligation. It seems to have lost control over the northern part of its territory which is where camp Al-Hol is located.⁵⁰ In this part of Syria the rights violations seem to be caused by an alliance of non-state actors under leadership of the Kurds, also known as the Syrian Democratic Forces (SDF),⁵¹ an alliance that resists the authority of the Syrian Government and is not party to human rights treaties. In addition, the Syrian Government may not want to take responsibility for the children concerned, since they may be associated with ISIS.

By taking the position that the Dutch Government has no powers or authority *in* Syria, Iraq, or Turkey, the minister of justice and security appears to assume that the Dutch Government has no enforcement jurisdiction in those countries, and therefore cannot be obliged to take protective measures in relation to children in them with ties to the Netherlands. Enforcement jurisdiction, after all, is in principle strictly territorial and cannot be exercised on the 'streets' of other States.⁵² However, a distinction can be made between

⁴⁷UNICEF stepped in to offer psychological support to around 500 children a day in camp Al-Hol: see 'UNICEF Supports Children's Wellbeing in Al-Hol through Child-Friendly Spaces' (UNICEF, 1 August 2019) <www.unicef.org/syria/stories/unicef-supports-childrens-wellbeing-al-hol-through-child-friendly-spaces> accessed 15 May 2020. The total number of children in camp Al-Hol is estimated at 9,500: Coles(n 16).

⁴⁸For example, there are concerns in relation to the right to protection from violence and torture and other forms of cruel, inhuman and degrading treatment or punishment (UNCRC, arts 19 and 7(a)). Children with disabilities are entitled to special care, which they do not seem to get (UNCRC, art 23). Other rights at risk of being violated include: the right to the highest attainable standard of health (UNCRC, art 24), to an adequate standard of living (UNCRC, art 27), to education (UNCRC, arts 28 and 29), to play (UNCRC, art 31) and to be protected from economic and sexual exploitation and trafficking (UNCRC, arts 32, 34 and 35); see also the Optional Protocol on the sale of children, child prostitution and child pornography. See further also UNCRC, art 38 and Optional Protocol on the involvement of children in armed conflict, art 4(1) and (2) (the Netherlands ratified this Protocol on 24 September 2009).

⁴⁹CRC Committee, General Comment No 19 (2016) on public budgeting for the realisation of children's rights (art 4), 27. The obligation to respect, protect and fulfil is incorporated in the broader field of human rights: Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 *Nordic Journal of International Law* 427.

⁵⁰In the Northern part of Syria, pro-Turkish militias are fighting the Syrian Democratic Forces, the United States of America, the Syrian army, pro-'Assad' militias and the Russian army. Besides, there are individual ISIS-combatants carrying out terror attacks: see Harald Doornbos, 'IS-vrouwen en -kinderen ophalen wordt nog een hele toer' *Het Parool* (Amsterdam, 16 November 2019).

⁵¹The SDF is an alliance between different Kurdish and Arab militias that has been fighting against ISIS. The leadership of the SDF is in the hands of the YPG, which is the armed branch of the Kurdish Party PYD which has ties to the PKK: Parliamentary Documents II, 2018–19, 29754, 254. The SDF seem to control the custody of the children in the camps: see Tayler (n 23).

⁵²René Lefeber and Olivier Ribbelink, 'Jurisdiction' in Natalie Horbach, René Lefeber and Olivier Ribbelink (eds), *Handboek Internationaal Recht* (TMC Asser Press 2007) 10. See also Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857.

the various forms of jurisdiction: enforcement, legislative and adjudicatory.⁵³ The Dutch Minister appears to be particularly concerned with enforcement jurisdiction, but this overlooks the fact that by choosing passive policy, the Dutch Government – presumably aware of the right to return (UNCRC, art 10(1))⁵⁴ of these children given their ties to the Netherlands – has in fact exercised legislative jurisdiction, or at a minimum influenced the legal position of these children. By adhering to this policy, the government makes the chances that the children can find their way to the Netherlands on their own means slim, given their limited freedom of movement,⁵⁵ and difficulties in proving their nationality.⁵⁶ It can even be argued that the Dutch Government, through its passive policy and narrow interpretation of jurisdiction, abets a situation in which children with ties to the Netherlands are exposed to risks to their lives, risks not directly caused by the Dutch Government (and not easily averted), but which it could minimize; for example, by revising its passive policy and assisting them in proving their nationality or accepting the aid offered by the Kurds, the United States, and the Red Cross in repatriating the children.⁵⁷ The repatriation of the two orphans in the Summer of 2019, as well as cases of repatriation by other countries of their nationals,⁵⁸ show that it is not impossible to assist children return to the Netherlands.⁵⁹ Finally, if the Syrian, Turkish and Iraqi governments cannot or do not want to take responsibility for these (foreign) children within their territories, and Dutch jurisdiction is not obvious, the children are relegated to a legal void in which no State Party to the UNCRC bears any legal responsibility towards them. It thus seems flawed to disregard these circumstances and only take enforcement jurisdiction as a decisive basis for assuming no jurisdiction pursuant to Article 2(1) UNCRC.⁶⁰

The term jurisdiction in jurisdiction clauses (e.g. Article 2(1) UNCRC) is not restricted to the (territorial) notion of enforcement jurisdiction. According to Bhuta, at the inception of human rights, the Westphalian international system was taken for granted.⁶¹ This is a system of independent states refraining from interference in each other's domestic affairs, devised nearly four centuries ago at a peace conference in Westphalia.⁶² State jurisdiction in the Westphalian system was supposed to be a territorial affair only.⁶³ Despite this, according to Bhuta, it was not ruled out that human rights could apply extraterritorially. Bhuta gives the drafting debate of the International Covenant on Civil and Political Rights as an example of this. The drafting debate of the jurisdiction clause of that Covenant was

⁵³Lefeber and Ribbelink (n 52). Regarding adjudicatory jurisdiction, see e.g. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art 4(2) and (3).

⁵⁴See section 4.2 hereunder.

⁵⁵See section 2.2 above.

⁵⁶See section 2.3 above.

⁵⁷Court of Appeal The Hague 2019 (n 31).

⁵⁸Broches (n 12).

⁵⁹Ana van Es and Hassan Bahara, 'Nederland haalt twee kinderen op van IS-strijders terug uit Syrië vanwege 'erbarmelijke omstandigheden' *De Volkskrant* (Amsterdam, 10 June 2019).

⁶⁰See also Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Vandenhole and others, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 157, who argue that where a State Party acts outside the limits of its jurisdiction, the applicability of the human rights regime does not depend on the legitimacy of these actions, but on the actual context. What counts is the connection between the individual whose rights were violated through this action and the State Party in question, and whether this was sufficiently close to oblige the State Party to safeguard the rights of the individual.

⁶¹Nehal Bhuta, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights. Extraterritoriality and its Challenges* (Oxford University Press 2017) 2.

⁶²Henry Kissinger, *World Order* (New York 2014).

⁶³*Ibid.* 3.

(amongst other things) preoccupied with a scenario in which military forces supervised some form of national government abroad (as was the case with United States forces at that time in Germany, Japan and Austria).⁶⁴ This scenario seems to align with the ‘effective-control’ cases later adjudicated by the European Court of Human Rights (ECtHR), in which it allowed the power (or control) actually exercised over a person or territory abroad, as an exception to the principle of territorial jurisdiction within the meaning of Article 1 of the European Convention on Human Rights (ECHR).⁶⁵ Extraterritorial application of the ECHR should, however, not be equated with the full application of the rights of the ECHR. The ECtHR recognised that the scope of a State’s extra-territorial human rights obligations differs depending on the degree of extra-territorial authority or control exercised.⁶⁶ This leads us to the interpretation of the jurisdiction clause of the UNCRC. Is jurisdiction under article 2(1) UNCRC to be understood as a restrictive territorial notion? Or does it allow for a more extensive extraterritorial interpretation? And if so, to what extent would the rights of the UNCRC apply in such cases?

3.2. Jurisdiction pursuant to Article 2(1) UNCRC

According to UNCRC Article 2(1), States Parties have the responsibility to respect, protect and to realise or implement the rights of ‘each child within their jurisdiction’ (UNCRC, art 2(1)). According to Abramson, the territoriality condition was deliberately left out of the text of UNCRC Article 2.⁶⁷ In a former draft of the UNCRC provision, the applicability of the UNCRC was explicitly linked to jurisdiction *and* the territory of a State Party. Later, the drafting parties backtracked on this double condition: ‘in order ‘to cover every possible situation’, the Finnish delegation proposed relinquishing the territorial boundary of the applicability of the UNCRC and only retaining the concept of jurisdiction.⁶⁸ Jurisdiction is therefore not intended to be limited to the borders of a State Party. At the same time, it is not clear what was meant by ‘every possible situation’ and it is unlikely that the UNCRC’s scope of applicability is unlimited.

The UN Committee on the Rights of the Child (CRC Committee) proposes that jurisdiction outside the territory of a State Party can be exercised if there is ‘effective control’.⁶⁹ It also acknowledges that children attempting to reach the territory of a State Party, and who are thus not actually on its territory and fall outside its enforcement jurisdiction through ‘effective control’, could nevertheless fall within the jurisdiction of the State Party under certain circumstances.⁷⁰ The CRC does not clarify in this case what is relevant to ascertain that these children, in spite of the lack of ‘effective control’, fall within the jurisdiction of a State Party and to what extent the State Party in question then can be held

⁶⁴Bhuta (n 61).

⁶⁵European Court of Human Rights Guide on Article 1 of the European Convention on Human Rights, version 31 December 2019, 11 and 29. <https://www.echr.coe.int/documents/guide_art_1_eng.pdf> accessed 17 August 2020.

⁶⁶See Daragh Murray, ‘The Extra-Territorial Applicability of International Human Rights Law’ in Elizabeth Wilmshurst and others (eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016).

⁶⁷Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination* (Martinus Nijhoff 2008).

⁶⁸Den Heijer and Lawson (n 60) 161, with reference to Sharon Detrick: see Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff 1992) 147.

⁶⁹Joint 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 on the general principles regarding the human rights of children in the context of international migration, 12.

⁷⁰*Ibid.*

responsible for the implementation of the UNCRC rights. However, it is plausible that the State Party, if the children have almost reached its border, can easily have them fall within its enforcement jurisdiction by offering them a helping hand.

The position of children residing outside of their countries of origins in refugee camps was not been recognised during the drafting of the UNCRC, nor has it yet been addressed by the CRC Committee. One could argue that these children find themselves in a situation which falls within the category of ‘every possible situation’, especially if the country of origin is expected to be aware of the real threat to the children’s right to life,⁷¹ and has a certain degree of influence over their fate by designing and adhering to a passive policy, which acknowledges the link of these children to the legislative jurisdiction (or at a minimum the sphere of influence) of that country. As mentioned above, children with ties to the Netherlands in camps in the Middle East are likely to be within physical reach of the Dutch Government, especially in view of possible cooperation with other parties (the Kurds, the United States and the Red Cross),⁷² despite the current lack of enforcement jurisdiction. It is therefore not implausible that in spite of the lack of enforcement jurisdiction on the ground, children with ties to the Netherlands could fall within Dutch jurisdiction under UNCRC Article 2(1).

Stretching the concept of jurisdiction to this specific context is not inconceivable and may be further justifiable on the basis of the fact that these children finds themselves in a *de facto* legal void. It would also be in line with the rationale of the UNCRC providing for the protection of a particular group of people who due to their ‘... physical and mental immaturity, need special safeguards and care’.⁷³ UNCRC Article 2(1) should thus not be interpreted restrictively in the sense that the exercise of jurisdiction, in the traditional, territorial and enforcement sense, is a condition for the establishment of obligations on the grounds of the UNCRC, and that government responsibilities related to this would then only apply to children within the physical jurisdiction. Arguably UNCRC rights then apply extraterritorially to the extent they can be observed. This brings us to the further clarification of the substantive rights of the child that are at stake.

4. Relevant Substantive Rights of the UNCRC

4.1. Various relevant substantive rights

It is clear that the Dutch Government cannot be assumed accountable for the direct rights violations that take place in the refugee camps in Syria, Iraq and Turkey. These seem attributable to (non-)state actors that do not operate under Dutch command, or on Dutch territory. It would, however, seem relevant—should Dutch jurisdiction be accepted in this context—to examine to what extent the justification for the government’s current passive policy is in line with the requirements of UNCRC Article 3(1) (the best interests of the child) and to what extent a right to be retrieved follows from the right to return (UNCRC Article 10(1)). In addition, it can be argued that the Dutch Government would have a responsibility to protect children against rights violations committed by

⁷¹See section 3.1 and n 46 above.

⁷²See also UNCRC, art 4. One could also argue that a restrictive interpretation of jurisdiction does not fit in a globalised world in which individuals (including families and children) easily migrate from one country to the other.

⁷³UNCRC, Preamble.

State and non-State actors in Syria, Iraq and Turkey. This touches upon the obligation to respect and protect children's rights which will be commented on in this section as well.

4.2. The justification for the current policy by the Minister and UNCRC Article 3(1)

The justification for the Dutch Government's policy appears to be at variance with UNCRC Article 3(1) which stipulates that 'the best interests of the child' shall be a primary consideration in all actions concerning children. The policy seems mainly motivated by the potential threat from any accompanying parents.⁷⁴ The NCTV's security analysis emphasises that all security risks outlined that apply to children are applicable to a large degree to adults.⁷⁵ The risks involved with the repatriation of women should not be underestimated according to the NCTV, now that women are also being called on to fight as jihadists.⁷⁶ After returning, a woman who is a jihadist could come into contact with other jihadists and try to reinforce the jihadist movement in the Netherlands.⁷⁷ According to the Minister of Justice and Security, the separation of these children from their parents is not the solution as that is would be a complicated legal matter. It could also fuel 'feelings of revenge' that could affect their development at a later stage.⁷⁸

Although the victimhood of these children with ties to the Netherlands is acknowledged—their development may be impaired by their parents and they did not choose themselves to travel to a war zone⁷⁹ – this does not appear to have been a serious consideration when the policy was established. It is unclear to what extent an assessment was made of the interests of the children, and how these interests were balanced against the interests of State security.⁸⁰ Determining policy in relation to or affecting children requires a comprehensive inventory of their interests and rights, and the attribution of a certain value to these. On the grounds of UNCRC Article 3(1), the interests of children should carry serious weight.⁸¹ The interests of children should be seen separately from the role and position of their parents, though it should not be forgotten that the relationship between child and parents is highly relevant and should not be restricted without reason (see also UNCRC Article 9). That the Dutch Government wants to prevent the risks arising from accompanying parents is understandable, but these risks are a separate issue to the question of whether the children themselves have a wish, interest and right to return (see also UNCRC Article 12).

On the other hand, it should be noted that the children themselves could also form a risk. The greatest threat according to the security services are children who have received combat training or have combat experience. Children could also have been indoctrinated by ISIS with the notion that the Netherlands (and the whole of the West) is the enemy. It is

⁷⁴Parliamentary Documents II 2017–18, 29754, 461.

⁷⁵NCTV (n 2).

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Parliamentary Documents II 2017–18, 29754, 461.

⁷⁹Ibid.

⁸⁰Next to these counter-terrorism arguments, the Minister brought forward the argument related to international relations, the safety of those who wish to return and the safety of the civil servants were they to be sent to the region for repatriation purposes.

⁸¹CRC Committee, 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(1)), 39. This is also supported in the literature in relation to UNCRC, art 3(1); see e.g. Noam Peleg, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer 2019) 135–57.

also possible that these children are traumatised because they have become accustomed to brutalities, perhaps lowering their threshold for the use of violence.⁸² Nevertheless, the threat posed by most of these children does not appear to be considerable.⁸³ After all, more than half are only four years old or younger.⁸⁴ Still, when it comes to possibly dangerous children, an explicit and thus transparent balance of interests should also be carried out as a basis for this policy.

Ultimately, in accordance with the CRC in General Comment No 14, a child's best interests has to be established for each individual case.⁸⁵ This enables a better distinction to be made between different children and the risk they might represent to the interests of others and society as a whole, taking account of the heterogeneous character of the group.

4.3. *Is the right to return also a right to be retrieved?*

The right of children with ties to the Netherlands to return to the Netherlands to be reunited with family on the grounds of UNCRC Article 10(1) is a right that – in view of the text of the Article – must be respected beyond the borders of a State's own territory. The right to return is rooted in older human rights instruments.⁸⁶ On the grounds of Article 9 of the Universal Declaration of Human Rights, it is forbidden to subject a person to exile. Article 3(2) of the fourth Protocol of the ECHR⁸⁷ provides that no person can be forbidden from entering the territory of the State of which he or she has citizenship. On the grounds of Article 4 of the ICCPR, it is not permissible to arbitrarily deprive a person of the right to return to their own country.

The question is to what extent reuniting family members more broadly, also falls within this right. It is likely that most of the children are still staying in the vicinity of one or both parents in Syria, Iraq and Turkey. In General Comment No 14, the CRC makes it clear that the *preservation* of the family situation should be understood in a broader sense than just the child–parent(s) relationship.⁸⁸ It is not clear here whether the CRC also means the *reunification* of family, including for instance grandparents.

This right is not only relevant for the Dutch children (irrespective of whether they can prove their Dutch nationality), but also for those children who only have ties to the Netherlands. It is also not important whether they have been to the Netherlands before.⁸⁹ The UN Human Rights Committee states on the right to return:

The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual

⁸²NCTV and AIVD (n 24) 16.

⁸³See 'KNVIR Spring Meeting: The Children of the Caliphate and International Law' (Royal Netherlands Society of International Law (KNVIR), 13 June 2018) <www.knvir.org/wp-content/uploads/2018/07/Report-13-June-KNVIR-Children-of-the-Caliphate-FINAL.pdf> accessed 28 May 2020.

⁸⁴Section 2.2 above.

⁸⁵See CRC Committee (n 81) 32.

⁸⁶Flavia Zorzi Giustiniani, 'The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue' (2015) 30 Connecticut Journal of International Law 171.

⁸⁷The Netherlands ratified this Protocol in 1982. This right is absolute: D'Oliveira (n 25).

⁸⁸CRC Committee (n 81) 60.

⁸⁹UN Human Rights Committee, CCPR General Comment No 27: Article 12 (Freedom of Movement) (1999) 19.

who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.⁹⁰

According to the UN Human Rights Committee, persons with a special connection to a country are thus also entitled to claim the right to return. This interpretation, however, is not legally binding.⁹¹ It is also questionable whether this right goes so far that it requires the Dutch Government to actively facilitate their return. This does not follow from the literal text of UNCRC Article 10(1). For that reason, assuming that the children with ties to the Netherlands fall within the Netherlands' jurisdiction, there is no obvious violation of UNCRC Article 10(1).

As already stated, it is not likely that the children with ties to the Netherlands who are located in Syria, Iraq and Turkey will be able to return to the Netherlands without assistance from the Dutch Government,⁹² even though in the light of the (non-binding) interpretation of this right by the UN Human Rights Committee, this would be desirable. This is on strained terms with the right to return as set out by the UN Human Rights Committee.⁹³ The current policy of the Dutch Government is thus at variance with the right to return of children who have ties to the Netherlands.

4.4. The obligation to respect international children's rights

Respect for children's rights, according to the CRC, entails that a State Party not only refrains from committing a direct violation, but also refrains from indirect violations. A direct link between an act or an omission by a State Party and a violation of children's rights appears to be present if the violation was caused by the act or omission of a State Party authority.⁹⁴ According to the CRC, an indirect violation exists if a State Party supports or facilitates a violation.⁹⁵ The CRC does not specify more details in this regard, and so it is not entirely clear whether this presumes active actions other than policymaking. The question here is whether the Dutch Government through its policy of not reaching out to children with ties to the Netherlands or accepting the help of others (the Kurds, the US and the Red Cross) does not in fact support or facilitate the direct violations by local State and non-State actors. As long as the children with ties to the Netherlands are not assisted in returning to the Netherlands, they are unable to escape the reported violations of children's rights, and as a result it is questionable whether the Dutch Government is demonstrating sufficient respect for their rights.

4.4.1. The obligation to protect against violations by State and non-State actors outside the territory of a State Party

The obligation to protect against violations is also relevant in light of the situation of the children in Syria, Turkey and Iraq. The Dutch Government can be expected to take all

⁹⁰Ibid. 20.

⁹¹Lutz Oette, 'The UN Human Rights Treaty Bodies: Impact and Future' in Gerd Oberleitner, *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

⁹²D'Oliveira (n 25).

⁹³Sandra Krähenmann, 'The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016).

⁹⁴Tzevelekos and Katselli Proukaki (n 49). See also Draft articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission, art 5 ff.

⁹⁵UN Committee on the Rights of the Child, General Comment No 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, 26.

appropriate measures to protect children with ties to the Netherlands from violations by third parties, i.e. State or non-State actors under the responsibility or control of other countries.⁹⁶ How these obligations to act should be fulfilled specifically depends on the circumstances of the case and the law in question. The Dutch Government, for instance, could make efforts to improve the conditions in camps abroad or to invest in the relevant justice system. But it is doubtful whether this would adequately help the children in question (many of whom are very young), and whether it would do so fast enough. It would be more effective to assist in returning the children, for this would solve many problems immediately.

The abovementioned obligation to act is substantiated in part by various (non-binding) recommendations from UN bodies. First, there are the recommendations recommendations of the CRC Committee to Belgium. In response to the Belgian decision to only repatriate Belgian children under the age of 10, the CRC *recommended* the repatriation of all children, irrespective of age, and where possible also their families.⁹⁷ Consequently, the CRC appears to take the view – incidentally, without providing motivation – that Belgium has the responsibility to return all Belgian children. The question is what this implies for the Dutch Government. In addition, the UN Security Council encourages the facilitation of the return of the children⁹⁸ and the UN Secretary-General has called on all countries of origin of the children who are staying in refugee camps to facilitate access to consular services.⁹⁹ This also prompts the question of whether, given the growing international pressure on UN Member States, the policy of the Dutch Government will be sustainable for much longer.

4.4.2. Appropriate measures in the context of the obligation to protect against violations of children's rights by State and non-State actors outside the territory of a State Party

The reasonableness of expected measures also depends on any security risks to society identified by the Dutch Government, as well as any risks to international relations, to those who wish to return and to those who would be involved in a repatriation operation. It is difficult to gain a clear picture of these risks on the basis of the information that is available to the public, but the risks arising from the children themselves would appear to be very limited, particularly in the case of the younger children.¹⁰⁰

One appropriate measure could be to draw up bilateral agreements. States Parties are obliged to enter into international cooperation where this appears necessary for the implementation of children's rights (UNCRC, Article 4).¹⁰¹ The preamble to the UNCRC¹⁰² and certain UNCRC provisions refer explicitly to the need for international cooperation.¹⁰³ In the words of the CRC: '... the implementation of the Convention is

⁹⁶Ibid. 28; UNCRC, art 4.

⁹⁷Concluding Observations on the Combined Fifth and Sixth Reports on Belgium, CRC/C/BEL/CO/5-6 (2019), 50(b). Belgium is still seeking to repatriate 42 children under the age of 10 from Northern Syria: Broches (n 12).

⁹⁸Resolution 2427, S/RES/2427 (2018) 26.

⁹⁹UN Security Council, Children and Armed Conflict in the Syrian Arab Republic. Report of the Secretary-General, S/2018/969 (2018) 65. See also European Parliament Resolution (n 13).

¹⁰⁰See 'KNVIR Spring Meeting' (n 83). It can also be asked if this applies to the parents of a child as well.

¹⁰¹CRC Committee (n 95) 41.

¹⁰²See final paragraph of the UNCRC, Preamble.

¹⁰³See in addition to UNCRC, art 4, UNCRC, art 24(1) – which provides that States must encourage international cooperation in the context of the right to the highest attainable level of health. UNCRC, art 34 obliges States Parties to protect children

a cooperative exercise for the States of the world.’¹⁰⁴ This is also true for the Optional Protocol to the UNCRC on the involvement of children in armed conflicts, which requires that States must cooperate in the rehabilitation and social integration of children who are the victim of violations of the Protocol, where necessary through technical cooperation and financial assistance and bilateral or multilateral programmes.¹⁰⁵

5. Recent Dutch Case Law

A group of mothers and children with ties to the Netherlands who reside in camps in Northern Syria initiated preliminary legal proceedings to challenge the principally passive policy of the Dutch Government with respect to their repatriation. At the time of writing this article, the case was reviewed by both the lower District Court and the Court of Appeal and is now pending before the Netherlands Supreme Court. The group demands return to the Netherlands and substantiate their claim by arguing that conditions in the camps are poor and chances of relief non-existent. They further argue that their security is deteriorating due to Turkish military operations in the Northern part of Syria. In addition, they claim that the life-threatening situation damages the development of the child claimants, who are all Dutch nationals.¹⁰⁶

Both the District Court and the Court of Appeal of The Hague concluded that these children cannot vindicate their rights as enshrined in the UNCRC against the Dutch Government, because they do not fall within Dutch jurisdiction. Despite the courts’ conclusions that the UNCRC cannot be invoked, they did find that the UNCRC determines the scope of the due diligence standard of Dutch tort law that both courts applied instead.

On 11 November 2019 the District Court of The Hague ruled that the rights of the child enshrined in the UNCRC should be considered in the assessment whether there is merit to the claim. However, the District Court subsequently ruled that the claimants cannot exercise these rights directly against the Dutch Government because the children are located outside Dutch territory where the Dutch Government lacks ‘authority (jurisdiction)’.¹⁰⁷ Nevertheless, it was ruled that the Dutch Government is bound by Dutch tort law (Dutch Civil Code, art 6:162), which includes a due diligence standard. According to the District Court the question to be answered is to what extent this due diligence standard requires the Dutch Government to take action. The Court considered that the fundamental rights of children as laid out in the UNCRC ‘influence to a certain extent the content and scope of this due diligence standard’.¹⁰⁸ The District Court did not elaborate on how the due diligence standard is influenced, and by which rights of the UNCRC exactly. Cognisant of the dire situation the children find themselves in and the threats to their rights as enshrined in the UNCRC, the District Court ultimately ruled that the Dutch Government

from every form of sexual exploitation and in doing so to take all fitting national, bilateral and multilateral measures to prevent children from being sexually abused. See also Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on a Communication Procedure. (The Netherlands has not yet ratified this Protocol.)

¹⁰⁴CRC Committee (n 95) 41.

¹⁰⁵Protocol, art 7, on the involvement of children in armed conflicts.

¹⁰⁶District Court The Hague 2019 (n 5), 3.2.

¹⁰⁷District Court The Hague (n 5) 4.5.

¹⁰⁸The District Court also refers to the ECtHR at this point: see *ibid.* 4.7.

is required to take reasonable measures to protect the child claimants, even though they are located outside Dutch territory.¹⁰⁹ The District Court furthermore emphasised that this does not mean that the Dutch Government should deploy executive authority in a third country. Rather it should use all reasonable measures at its disposal to protect these children, without infringing rules of public international law. If the Dutch Government fails to do so it would be acting unlawfully.¹¹⁰ In other words, the District Court concluded that the Dutch Government is bound to endeavour to repatriate the children, as far as can be reasonably expected in these circumstances, as it is not realistic to assume that the children's protection can be guaranteed in another way. The District Court ruled that the lack of action in repatriating the children must end.¹¹¹ It therefore sentenced the Dutch Government to engage actively in the repatriation of the children, insofar as possible.¹¹²

The Court of Appeal of The Hague overturned this ruling and denied the claim of the mothers and children.¹¹³ It agreed with the District Court that the rights of the UNCRC cannot be invoked directly against the Netherlands, as the Dutch Government lacks 'authority' and 'effective control' in Syria. The Court of Appeal did acknowledge that the Dutch Government can indirectly assert a 'certain factual influence' on the position of the children, but stated that this does not imply 'jurisdiction'.¹¹⁴ That would imply an interpretation of 'jurisdiction' that would be too extensive, according to the Court of Appeal. It further held that, as far as these fundamental rights would be secured in Dutch law, the same argumentation applies; when there is no jurisdiction, the Dutch Government cannot safeguard these fundamental rights.¹¹⁵

Like the District Court, the Court of Appeal found the due diligence standard of Dutch tort law to be applicable (Dutch Civil Code Article 6:162). It argued that the assessment of compliance with that standard requires a balancing of interests. The justifiable interests that are protected by the fundamental rights of the UNCRC, which were not considered to apply directly, must be part of this balancing exercise.¹¹⁶ The Court of Appeal confirmed the District Court's findings that the children due to the poor conditions in the camps, which may deteriorate even further. It furthermore found that the most fundamental interests of the children are at stake: life, survival, and development.¹¹⁷

The interests as brought forward by the Netherlands Government in the proceedings relate to (national) security and foreign affairs. The conduct of the Government in relation to these issues, as argued by the Court of Appeal, depends heavily on political considerations. The Dutch Government may use a wide margin of appreciation in these areas, which – according to the Court of Appeal – requires courts to display a high degree of

¹⁰⁹Ibid. 4.10.

¹¹⁰Ibid.

¹¹¹Ibid. 4.11.

¹¹²Ibid. 4.24. Note that the District Court ruled that the mothers or relatives of the child claimants do not have an independent claim to be repatriated based on the due diligence standard of Dutch Civil Code, art 6:162, amongst others, due to the fact that they deliberately left the Netherlands – despite efforts of the Netherlands to prevent them from doing so – to join a terrorist group: see para 4.16 and further (n 5).

¹¹³Court of Appeal The Hague 2019 (n 31).

¹¹⁴Ibid. 6.3.

¹¹⁵Ibid. 6.4.

¹¹⁶The Court of Appeal finds that the fact remains that, without jurisdiction, the Netherlands cannot safeguard the implementation of these rights: *ibid.* 7.2.

¹¹⁷Ibid. 7.5. It is interesting to note that the Court of Appeal speaks about interests and not about the right to life, survival and developments (cf UNCRC, art 6).

restraint when assessing claims of unlawfulness of actions carried out to implement (national) security and foreign policy.¹¹⁸ The Court of Appeal concluded that the interests related to (national) security and foreign affairs, as brought forward by the Dutch Government, justify the conclusion that it may refuse to take action to repatriate the children.¹¹⁹

The claimants have lodged a cassation appeal to the Netherlands Supreme Court. Days before the final version of this article was sent in, the Supreme Court confirmed the Court of Appeal's ruling.¹²⁰ It rejected the argument that the children fall within Dutch jurisdiction and that the UNCRC or other human rights treaties can be invoked directly. It also found that the Dutch Government's decision not to repatriate the women and children was not unlawful, particularly in light of the arguments presented on the basis of national security, the safety of Dutch civil servants and other parties in case of repatriation and international relations. The Supreme Court also pointed at the fact that the women had willingly travelled to ISIS-held territories. This ruling reflects a narrow interpretation of the concept of jurisdiction, contrary to the line of reasoning in this article. In addition, the Supreme Court does not seem to acknowledge that the children have their own rights and interests (i.e. independent from the rights and interests of their parents) and that they themselves have not chosen to live in (formerly) ISIS-held territories.

6. Concluding Observations

It is clear that children in Syria, with ties to the Netherlands are experiencing great suffering. Being there endangers their lives. This is arguably also the case for the children trapped in Turkey and Iraq. The children concerned have entitlements under international children's rights law, embraced by nearly all countries in the world – including the Netherlands, the States involved in the Middle East, and other (home) countries that face similar issues. Yet, the context the children find themselves in, including their association with ISIS, has resulted in 'Western' governments' reluctance to actively engage with securing adequate protection of these children. Critically, governments' and courts' strict approach towards jurisdiction pursuant to UNCRC Article 2(1) has relegated the children to a *de facto* legal void, leaving them in extremely vulnerable situations.

This article suggests reconsidering the restrictive interpretation of the concept of jurisdiction as a prerequisite for human rights obligations and acknowledging that a State is under obligation to protect the human rights of children with clear ties to it, particularly when the children are extremely vulnerable, their parents being unable to provide adequate protection, and their vulnerability is enhanced by the State's passive policy of not reaching out. Obviously, the Dutch Government cannot be assumed to be accountable for direct rights violations taking place in refugee camps in Syria, Iraq, and Turkey, which seem attributable to (non-)state actors that do not operate under Dutch command or within Dutch territory. Nevertheless, the Dutch Government has various

¹¹⁸Court of Appeal The Hague (n 31) 7.8. The Netherlands Government advanced various arguments that obstruct the repatriation of the children: see *ibid.* 7.10–7.13.

¹¹⁹*Ibid.* 7.14.

¹²⁰The Netherlands Supreme Court, 26 June 2020, ECLI:NL:HR:2020:1148; see also R van Arik and C Paulussen, 'Analysis: Dutch Supreme Court Rules on the Group Repatriation of the Families of IS Fighters: 'We expect that more individual court cases will now be started' (Asser Institute, 26 June 2020) <www.asser.nl/about-the-institute/asser-today/analysis-dutch-supreme-court-rules-on-the-group-repatriation-of-the-families-of-is-fighters-we-expect-that-more-individual-court-cases-will-now-be-started/> accessed 28 June 2020.

obligations under international children's rights law and arguably its passive policy does not align with its obligation to take appropriate measures to protect children from third-party violations. Overall, imperiled children are being left alone despite the fact that they have ties with specific countries and that 196 UNCRC States Parties have committed to the protection of children, so accordingly have obligations in this regard. This article therefore concludes by submitting that a more extensive approach towards jurisdiction would not only acknowledge that the world has become a globalised system in which many children and families can cross borders relatively easily and in which flows of information and intelligence do not seem to have many limitations; it would also do justice to the UNCRC as a living instrument meant to effectively protect the rights and freedoms of all children.

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