



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 1004/2020* **

<i>Communication submitted by:</i>	B.N. et al. (represented by counsel, Nabil Boudi and Hervé Temime)
<i>Alleged victims:</i>	B.N. et al.
<i>State party:</i>	France
<i>Date of complaint:</i>	4 February 2020 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 22 May 2020 (not issued in document form)
<i>Date of adoption of decision:</i>	5 May 2023
<i>Subject matter:</i>	Repatriation of French nationals detained in Iraq
<i>Procedural issue:</i>	Extraterritorial jurisdiction
<i>Substantive issues:</i>	Measures to prevent acts of torture; cruel, inhuman or degrading treatment or punishment
<i>Articles of the Convention:</i>	2, 3, 5 and 16

1.1 The complainants are B.N. (born 15 June 1986), B.K. (born 21 February 1987), L.L. (born 13 April 1986), F.T.A. (born 29 March 1986) and M.D. (born 17 January 1979). They are all French nationals and have been sentenced to death by the Iraqi authorities for their alleged collaboration with Da'esh. They are currently incarcerated in Baghdad Central Prison awaiting execution. The complainants claim that, by refusing to try them, transferring them from the Syrian Arab Republic to Iraq and refusing to fulfil their consular protection obligations, the French authorities have allowed inhuman and degrading treatment to occur and continue. The complainants therefore consider that their transfer and the subsequent lack of protection afforded to them constitute a violation of articles 3 and 5 of the Convention. They interpret article 2 of the Convention as imposing an obligation on States parties to take such measures as may be necessary to put an end to any form of treatment of their nationals that is prohibited under the Convention. According to the complainants, when considered in conjunction with article 16 of the Convention, this obligation extends to cruel, inhuman and

* Adopted by the Committee at its seventy-sixth session (17 April–12 May 2023).

** The following members of the Committee participated in the examination of the communication: Todd Buchwald, Claude Heller, Erdogan Iscan, Liu Huawen, Maeda Naoko, Ana Racu, Abderrazak Rouwane and Bakhtiyar Tuzmukhamedov. Pursuant to rule 109, read in conjunction with rule 15, of the Committee's rules of procedure, and paragraph 10 of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines), Sébastien Touzé did not participate in the examination of the communication.



degrading treatment that does not constitute torture. The State party made the declaration provided for in article 22 (1) of the Convention on 23 June 1988. The complainants are represented by counsel.

1.2 On 22 May 2020, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to take all measures reasonably within its power to actively protect the physical and mental integrity of the complainants and to prevent the execution of their death sentence. The Committee requested the State party to inform it without delay of any measures taken to this effect.

1.3 On 19 October 2020, the State party noted that, since the complainants' incarceration, five consular visits had been arranged on 21 April 2019, 9 June 2019, 24 June 2019, 29 July 2019 and 17 December 2019. The visits of 9 and 24 June 2019, which occurred after the complainants' conviction, took place in the appeal period, during which the French authorities made sure that those complainants who wished to appeal their conviction were able to do so, and spoke with those who had chosen not to appeal, namely B.K. and F.T.A., regarding the reasons for their choice. These visits allowed the consular agents to gather information on the health of the complainants, to convince the Iraqi authorities to arrange for them to have access to a doctor in prison, and to enquire about their personal situation. Moreover, the French authorities, including the President of the Republic and the Minister for Europe and Foreign Affairs, reminded the Iraqi authorities of their opposition to the death penalty and requested that the complainants' sentence not be carried out.

Facts as submitted by the complainants

2.1 In January 2019, B.N., L.L., F.T.A. and M.D. were arrested in the Syrian Arab Republic. B.K. surrendered to the Syrian Democratic Forces on the advice of the French General Directorate of External Security. The complainants were then transferred from the Syrian Arab Republic to Iraq by the Syrian Democratic Forces and coalition forces.¹

2.2 Between 25 and 28 February 2019, the complainants were placed in the custody of the Iraqi authorities and then detained in Muthanna Prison without access to a lawyer or consular assistance. According to the complainants, the State party actively participated in the transfer of its own nationals from the Syrian Arab Republic to Iraq. Between 26 May and 3 June 2019, the complainants were sentenced to death by the Iraqi Central Criminal Court in Baghdad following expedited and unfair trials. In October 2019, the complainants were transferred to Rassafat High Security Prison, in which prisoners of both the Shiite and the Sunni branches of Islam are held, which greatly exacerbates the level of violence in the prison, thereby placing the complainants' lives at risk.²

2.3 In January 2020, B.N. and F.T.A. sent a letter to their families in which they described the inhuman and degrading conditions of their detention and the imminent threat of death they faced.³ They claimed to be subjected to incessant verbal and physical threats from the militia fighters working in Rassafat Prison in Baghdad, including verbal threats that had their root in an "arrangement between France and Iraq". They also described an arrangement under which the Iraqi militias had been ordered to assassinate French nationals "whenever the opportunity arises".

2.4 The complainants were subjected to inhuman and degrading treatment during interrogations, during their transfer between prisons and within the prisons themselves. In one of its reports, Human Rights Watch documents the use of methods of torture including the whipping of the soles of suspects' feet (*falaqa*) and simulated drowning (waterboarding).⁴ These methods leave no lasting traces on the bodies of the tortured.⁵ The physical and

¹ Mediapart, "Irak : Paris montre une inquiétante tolérance face aux condamnations à mort de ses ressortissants", 24 October 2019. See also "En secret, le transfert des djihadistes de Syrie vers l'Irak a commencé", *Le Parisien*, 24 October 2019.

² No further information is available.

³ A copy of the letter appears in the case file.

⁴ The complainants do not claim to have been subjected to such treatment themselves.

⁵ Human Rights Watch, "Iraq: French Citizens Allege Torture, Coercion", 31 May 2019.

psychological torture in prison is constant and leaves the prisoners completely broken, as evidenced by the call for help sent by B.N. and F.T.A. in their letter.

2.5 According to eyewitness reports, there are around 70 prisoners, including Shiites and Sunnis, in every cell; these inhuman detention conditions lead to heightened violence within the prison. The overcrowding has become much worse following uprisings that resulted in the incarceration of a large number of militia fighters in Rassafat Prison. The prisoners are allowed out only once a month, for around 10 minutes. Human Rights Watch has documented deaths in detention resulting purely from overcrowding.⁶ Communication with relatives and lawyers is very limited because of the cost of calls and the risk of reprisals.

2.6 Regarding the exhaustion of domestic remedies, the complainants state that, according to established case law, the decision of the State party as to whether to repatriate its citizens currently detained in the north-east of the Syrian Arab Republic and in Iraq is intrinsically bound up with the country's foreign affairs. As a prerogative act, the decision is not subject to appeal before the French courts, which routinely consider themselves to lack jurisdiction in this area.⁷ In a case concerning the repatriation of women and children detained in the north-east of the Syrian Arab Republic, the Paris Administrative Court issued an ordinance establishing that such decisions, rather than being the administrative responsibility of the State, are a diplomatic matter and can be considered a prerogative act. This strongly suggests that any decision to repatriate and try the men detained in Iraq would also be considered a diplomatic matter. This means that the complainants face an insurmountable procedural hurdle.⁸

2.7 The complainants submitted a complaint regarding the inhuman conditions in which French nationals were being held and the death sentences they faced in Iraq to the President of the Republic and the Ministry for Europe and Foreign Affairs. In a letter of 8 August 2019 addressed to the French President, the Special Rapporteur on extrajudicial, summary or arbitrary executions denounced the fact that the French Government had not taken steps to put an end to the violations of international law to which the complainants were being subjected in Iraq. These complaints were either rejected or received no response.

2.8 On 17 October 2019, the Minister for Europe and Foreign Affairs met his Iraqi counterpart in Baghdad in order to reach an agreement with the local authorities regarding the fate of the prisoners.⁹ Following this meeting, the French Government and the Ministry for Europe and Foreign Affairs issued a public statement recognizing Iraqi sovereignty and the universal jurisdiction of the Iraqi justice system.

2.9 On 17 December 2019, the French consul visited the prisons of Baghdad to meet F.T.A. and B.N., who informed him about the torture, humiliation and death threats to which they had been subjected on a daily basis; the consul's response, however, was that there was nothing he could do.

Complaint

3.1 The complainants are of the view that by authorizing or, worse, ordering the transfer of its nationals from the Syrian Arab Republic to Iraq, the State party committed a serious violation of article 3 of the Convention. They argue that, if the State party is able to organize the transfer of French nationals who were members of the so-called Islamic State from the Syrian Arab Republic to Iraq, then it should be able to provide them with consular protection and potentially organize their transfer from Iraq to France. Furthermore, the State party has violated article 5 of the Convention by refusing to assert its jurisdiction despite its knowledge of the inhuman situation in which its nationals find themselves.

3.2 The complainants recall that, under article 2 of the Convention, States parties have an obligation to take effective legislative, administrative, judicial or other measures to prevent

⁶ "Irak: Human Rights Watch dénonce des conditions de détention 'dégradantes'", *Le Figaro*, 4 July 2019.

⁷ For a discussion of the established case law of the national courts, see Conseil d'État, *Mégret and Mekhantar*, applications No. 206303 and No. 206965, decision, 5 July 2000.

⁸ *Ali v. Tunisia* (CAT/C/41/D/291/2006), para. 12.3.

⁹ "Le Drian à Bagdad pour discuter du sort des djihadistes français", *Le Parisien*, 17 October 2019.

acts of torture in any territory under their jurisdiction. Firstly, it is the responsibility of every State party to take all measures necessary to put an end to situations that are in violation of the Convention. It is true that article 2 of the Convention refers to States parties' jurisdiction in terms of territory. However, the interpretation of the Convention set out by the Committee in its general comment No. 2 (2007) provides a basis for a broader understanding of the concept of jurisdiction in that it affirms that States parties should also take steps to prevent violations of the rights of persons over whom they exercise jurisdiction, including personal jurisdiction. Thus, article 2 must be interpreted as imposing an obligation on States parties to take such measures as may be necessary to put an end to any form of treatment of their nationals that is prohibited under the Convention.

3.3 Furthermore, under article 2 of the Convention, States parties have a positive obligation to use every possible means to prevent acts of torture. This obligation, when considered in conjunction with article 16 of the Convention, extends to cruel, inhuman and degrading treatment that does not constitute torture¹⁰ and requires States parties to remove all legal obstacles that would expose a person to the risk of being subjected to treatment prohibited by the Convention.

3.4 By refusing to repatriate French nationals who are victims of treatment prohibited by the Convention and are clearly exposed to the risk of torture, the State party is in breach of its obligations under articles 2 and 3 of the Convention. The complainants request the Committee to take urgent protective measures and to find that the refusal to repatriate French nationals who are being subjected to treatment prohibited by the Convention and are exposed to the risk of torture constitutes a violation of articles 2 and 3 of the Convention by the French authorities.

3.5 The complainants make two further points. First, in 2019, Iraq was among the top five countries that executed the death sentence most often and alone carried out 78 per cent of all executions worldwide. Secondly, article 73 of the Iraqi Constitution does not provide for any punishment other than the death penalty for terrorist acts and pardons may not be granted in respect of individuals convicted of terrorism. The State party thus participated in or even orchestrated the transfer of its own nationals to a country that sentences persons found guilty of terrorist acts to death without a fair trial. The fact that the State party recognizes Iraqi jurisdiction has been confirmed by the Ministry for Europe and Foreign Affairs.

3.6 In view of the above, the complainants request the Committee to urge the State party to take all appropriate measures to put an end to these violations, to provide them with consular protection and to hand over all reports and other documentation related to the consular visits carried out.

State party's observations on admissibility and the merits

4.1 On 19 October 2020, the State party contested the admissibility of the complaint on the ground that it lacks jurisdiction. Firstly, the State party observes that the wording of the Convention in this regard is more restrictive than that used in other international human rights conventions, such as in article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and article 2 of the Convention on the Rights of the Child, which do not refer to the "territory" under a State's jurisdiction but to the persons over whom the State has jurisdiction.

4.2 The State party notes that article 2 of the Convention refers only to the concept of jurisdiction, which is by no means the same as the concept of nationality. States have undertaken to respect the rights set forth in international human rights instruments, of which the Convention is one, only in the event of situations that fall within their jurisdiction and over which they exercise sovereignty and effective control. It is not possible to render a State responsible for the implementation of international human rights instruments in situations to which it has not given rise and over which it has no effective control simply by attributing to it the actions of other States or non-State actors. The Committee should bear in mind, on the one hand, what States understand their commitment to be when they assume the obligation of taking legislative, administrative, judicial and other measures to prevent the commission

¹⁰ Committee against Torture, general comment No. 2 (2007), para. 3.

of acts of torture in any territory under their jurisdiction and, on the other hand, the inextricable links between the concepts of jurisdiction and effective control over a situation. It is also not possible to artificially expand the concept of jurisdiction and thus give the Convention broader scope than States understood it to have when they ratified it.

4.3 The State party notes that, in public international law, the concept of jurisdiction is primarily a territorial one; it is only in exceptional circumstances – i.e. when a State exercises effective control over a person located in another territory – that a State may exercise jurisdiction beyond its borders under the Convention.¹¹ The State party notes that the Committee has, on these grounds, found other complaints dealing with acts committed outside the territory of a State party by agents of another State to be inadmissible *ratione personae*.¹²

4.4 The State party notes that, in its general comment No. 2 (2007), the Committee recognizes that “territory” includes all areas where a State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.¹³ The Committee also considers that the scope of “territory” under article 2 must include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention,¹⁴ although it does not give criteria for determining when a State party exercises effective control over a territory or over persons in detention.

4.5 The State party notes that the European Court of Human Rights has found that a State party may exercise effective control over an area situated beyond its borders either directly through its armed forces or indirectly through a local subordinate administration.¹⁵ However, in order for a State to bear responsibility for a human rights violation committed in a territory that is not its own, it must be established that the State wields so decisive an influence over the administration of that territory that it does indeed exercise effective control and that, without its support, the local administration could not function.¹⁶ The International Court of Justice has developed a similar concept of extraterritorial jurisdiction based on effective control.¹⁷ Lastly, the Inter-American Commission on Human Rights has found that extraterritorial jurisdiction may be present when a State party, through the acts of its agents abroad, exercises total and exclusive control over the persons whose rights are at issue.¹⁸

4.6 The State party argues that, in the light of this jurisprudence, the complainants’ argument that the State party has an obligation under the Convention to protect its nationals outside of the “territory under its jurisdiction”, by virtue of their French nationality, is not in accordance with either the letter or the spirit of the Convention. According to the State party, the Committee’s general comment No. 2 (2007) does not by any means extend the scope of the Convention to all nationals of the State party; it indicates only that States bear responsibility for the acts and omissions of their officials and that States parties should take

¹¹ Vienna Convention on the Law of Treaties, art. 29; European Court of Human Rights, *Banković and others v. Belgium and others*, application No. 52207/99, decision on admissibility, 12 December 2001, paras. 59 et seq.; and European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, application No. 55721/07, judgment, 7 July 2011, paras. 138 et seq. See also Committee against Torture, general comment No. 2 (2007), para. 16; joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child, para. 12; and Human Rights Committee, general comment No. 31 (2004), para. 10.

¹² *Z. v. Australia* (CAT/C/53/D/511/2012); *Agiza v. Sweden* (CAT/C/34/D/233/2003); and *Roitman Rosenmann v. Spain* (CAT/C/28/D/178/2000 and CAT/C/28/D/176/2000/Corr.1), para. 6.6.

¹³ Committee against Torture, general comment No. 2 (2007), para. 16.

¹⁴ *Ibid.*

¹⁵ European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, para. 139.

¹⁶ European Court of Human Rights, *Ilaşcu and others v. Moldova and Russia*, application No. 48787/99, judgment, 8 July 2004, para. 392, and European Court of Human Rights, *Mozer v. the Republic of Moldova and the Russian Federation*, application No. 11138/10, judgment, 23 February 2016, para. 110.

¹⁷ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p.136, paras. 109–112.

¹⁸ Inter-American Commission on Human Rights, report No. 17/12, case No. P-900-08, *Djamel Ameziane v. United States*, 20 March 2012, para. 30.

effective measures to prevent acts of torture not only in their sovereign territory but also in any territory under their jurisdiction. The State party also contends that the objective of the concept of jurisdiction that arises from article 5 (1) (c) of the Convention is to ensure the punishment of the violations covered by article 4 and the provision of a remedy for the victim but that it does not extend the jurisdiction of a State party within the meaning of article 2 of the Convention to all its nationals located outside its territory or in a territory under its effective control.

4.7 Consequently, the complainants cannot infer from article 5 of the Convention that an individual falls within the jurisdiction of a State party merely because he or she is a national of that State, nor can they infer that States parties are obliged to take all measures necessary to prevent acts of torture against their nationals in cases where such persons are not under their effective control.¹⁹

4.8 In conclusion, the State party does not exercise any control or authority over the complainants through its agents. The complainants are being held in Iraq by the Iraqi authorities, not by French agents. The State party emphasizes that the allegations that the French authorities purportedly gave their consent to the transfer of the complainants from the Syrian Arab Republic to Iraq and that coalition agents participated in the transfer have not been substantiated by the complainants, who have not produced any evidence or documentation to support their claims. With regard to the letter of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the latter merely reports allegations – the source of which she does not cite – that the transfer took place at the request of the French authorities and was carried out in part by French nationals and expresses her concern about these allegations, without asserting or demonstrating their veracity; consequently, it has not been demonstrated that the French authorities requested the transfer or participated in it and that the complainants were therefore subject to the jurisdiction of the State party in this respect.

4.9 On 10 February 2021, the State party provided its observations on the merits. With regard to the claim of a violation of article 3 of the Convention, which relates to the alleged participation of the State party in the transfer of the complainants from the north-east of the Syrian Arab Republic to Iraq, the State party argues that the complainants are relying on a *petitio principii*, without substantiating their allegations or producing any evidence and instead merely referring to unverifiable statements made by persons whose claims do not indicate that they were present at the time of the transfer.

4.10 Regarding the claim related to the decision of the French authorities not to repatriate the complainants, the State party recalls that the complainants are currently detained in Iraq – an independent sovereign State – in the context of criminal proceedings instituted by the Iraqi authorities, in accordance with Iraqi law, for crimes committed by the complainants when they travelled to the Iraqi-Syrian border area in order to join Da'esh. The State party asserts that it cannot be concluded from either the Convention or the work or Views of the various United Nations committees that States parties have a positive obligation to repatriate their nationals who may be at risk of inhuman or degrading treatment. Neither the European Court of Human Rights nor the Human Rights Committee has made reference to any such obligation. In practice, such an obligation would conflict with the principle of the sovereignty of the States in which violations are allegedly committed. It would also go beyond the commitment that States intended to make when they ratified the Convention. Such an obligation would also be at odds with the approach adopted by the Committee in recognizing that States parties may use their discretion in assessing the *de facto* situations of their nationals.²⁰ Consequently, the State party was not required to repatriate the complainants under article 2 of the Convention.

4.11 In any event, if the Committee were to find that the State party had an obligation to repatriate its nationals, this could only be understood as a simple obligation of means. Owing to the principles of sovereignty and non-intervention, it would be impossible for the State

¹⁹ According to the State party, the complainants are confusing the concept of personal jurisdiction with that of extraterritorial jurisdiction.

²⁰ *Roitman Rosenmann v. Spain*, para. 6.7.

party to impose the repatriation of the complainants on the Iraqi authorities without violating cardinal principles of international law and relations. In view of the foregoing, it cannot be claimed that the fact that the French authorities have not repatriated French nationals detained by the sovereign authorities of another State constitutes a violation of the Convention.

4.12 Regarding the claim related to the alleged lack of protection afforded to its nationals, the State party emphasizes that the Convention does not have the purpose or effect of regulating consular protection and that the Committee therefore has no jurisdiction over this issue. In the alternative, the State party argues that, in the case of the complainants, consular protection was duly provided.

4.13 As soon as they were informed of the imprisonment of the complainants, officials at the French Embassy in Baghdad began to take steps to ensure that they enjoyed and continue to enjoy consular protection, including by requesting consular visits, making requests regarding the complainants' health status, demanding the improvement of their detention conditions and changes of cell where necessary and requesting that the complainants be allowed to contact both their families in France and their Iraqi and French lawyers. With regard to the complainants' trials, a representative of the French Embassy in Baghdad attended all the hearings as an observer. It was able to determine that the complainants had engaged a defence counsel. In addition to the translator provided by the trial courts, an interpreter was appointed by the Embassy to translate during the hearings and thus ensure that the complainants fully understood the proceedings.

4.14 Lastly, the State party recalls that five consular visits were organized in 2019 and that it requested the Iraqi authorities not to carry out the complainants' sentences (see para. 1.3). Moreover, following the closure of Iraqi prisons in 2020 in the context of the crisis resulting from the coronavirus disease (COVID-19) pandemic, a first face-to-face visit took place on 7 January 2021. During this visit, the French authorities met the complainants and requested that they be provided with adequate health care and prescription medicine. In addition, the French Embassy in Baghdad made arrangements with the Iraqi authorities to ensure that consular visits were organized regularly in 2021.

Complainants' comments on the State party's observations

5.1 In his comments of 15 June 2021, L.L. contests his trial in Iraq. He has not received any information regarding an appeal and has no knowledge of whether an appeal has been lodged or what the applicable procedural timetable would be. Neither his lawyer nor his family has been able to write to him or speak with him regularly by telephone, in flagrant violation of due process and the right to a private and family life. Visits are prohibited.

5.2 Regarding admissibility, L.L. submits that, where a person is to be transferred to a State known to have engaged in torture or ill-treatment or that has not implemented adequate safeguards, the State is responsible and its officials subject to punishment for ordering, permitting or participating in the transfer. Each of these three behaviours alone constitutes a breach of the obligation of the State party to adopt effective measures to prevent acts of torture in accordance with article 2 (1) of the Convention.

5.3 The transfer of L.L. from the Syrian Arab Republic to Iraq was either directly ordered or indirectly authorized by the State party. The complainant was in the Syrian Arab Republic, under the control of the Syrian Democratic Forces and the international coalition formed by France and the United States of America, among others, which decided on and carried out the transfer to neighbouring Iraq. It is obvious that, since the complainants are French nationals, instructions from or at least the consent of the French authorities were obtained before the transfer. This cannot possibly not be the case, even though the State party has tried to claim otherwise, without providing any convincing proof that it was not involved in the decision. Although the complainant has not and cannot possibly obtain a document proving that his transfer was ordered or at least consented to by the French authorities, the press articles submitted in support of the complaint and various reports, in particular those of the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, make

this clear.²¹ The Committee should take into account that the transfer took place at the request of the French authorities, which have repeatedly stated that the complainants should be tried in Iraq. Moreover, the State party has neither obtained nor sought a guarantee that the death penalty handed down will never be carried out.

5.4 On the merits, L.L. is of the view that, despite the State party's findings, his transfer to a State that carries out the death penalty and practises torture is contrary to the principle of non-refoulement provided for in article 3 of the Convention. His death sentence, which was made possible by a transfer that was ordered, carried out or at least authorized by the State party, was handed down following an unfair trial. The State party is hiding behind the sovereignty of the Iraqi State in order to avoid voicing even the slightest criticism of the proceedings that took place in Iraq; however, it should be recalled that the complainant was sentenced after an exceptionally short hearing, which lasted only a few minutes. The State party is unable to provide any information regarding the events of the complainant's trial despite its assertion that representatives of its consular authority in Iraq were present. No copy of the judgment or even a summary of the hearing has ever been provided. Every observer to the various trials of European citizens that have taken place in Iraq has reported an absence of preliminary investigations and the commission of grave violations of the most basic principles of the right to a fair trial.

5.5 It is also clear that the cardinal principle that penalties should be individually determined has not been respected, since the death penalty is the only sanction provided for by the Iraqi system as punishment for participation in a terrorist organization. There is also the question of access to an interpreter, the right to legal assistance and the complainant's access to the documents in the case file. He was denied the consular protection to which he was entitled during his trial, which ended in his being handed an inhuman sentence. The State party does not contest the inhuman nature of the death sentences imposed on the complainants; this sentence compounds the inhuman, cruel and degrading treatment to which L.L. has been subjected and the acts of torture he has reported. Moreover, L.L.'s lawyers have been unable to obtain an answer to their requests from the French consulate in Iraq. Their appeals and written requests remain unanswered. As a result, they do not have his prison number or any information that would allow them to communicate with him in writing without the assistance of the French consular authorities. His parents have been unable to communicate with him by mail for several months. The French consular services have not facilitated any communication between L.L. and his family since his transfer to Rassafat. No one has had access to any record of the consular visits that allegedly took place or to any information that the French consular authorities may have obtained during his expedited trial in May 2019.

5.6 In their comments of 16 June 2021, B.N., B.K., F.T.A. and M.D. argue that, under article 3 (1) of the Convention, States parties have a positive obligation of repatriation in cases of torture. They refer to the case law of the European Court of Human Rights to recall that the notion of jurisdiction is not limited to the notion of national territory and argue that a State exercises jurisdiction when a decision taken by its agents on the national territory affects the legal situation of persons outside the territory.²² They also cite the Court's decision in *M.N. and others v. Belgium*, in which the Grand Chamber stated that its consideration of whether Belgium had exercised extraterritorial jurisdiction in respect of the applicants was "primarily a question of fact, which requires it to explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter effectively exercised authority or control over them".²³

5.7 Since the complainants are French nationals, there is an undeniable de jure link between them and the State party. Regarding torture, the State party has a reinforced obligation of means to prevent the torture or ill-treatment of its nationals at all costs. However,

²¹ He cites statements made by the complainant B.K., who was among the 11 French nationals who were transferred blindfolded and who claims that other French people were present during the transfer because they "could be heard talking" – see *XXI Magazine*, issue No. 52 (2020), "La France nous a abandonnés".

²² European Court of Human Rights, *Drozđ and Janousek v. France and Spain*, application No. 12747/87, judgment, 26 June 1992.

²³ *M.N. and others v. Belgium*, application No. 3599/18, decision, 5 March 2020, para. 113.

in the present case, this obligation has not been fulfilled, since the State party had the possibility of exercising its jurisdiction over its nationals abroad, through the acts of its diplomatic or consular agents, in order to prevent them from being tortured and ill-treated, but did not do so. The State party's refusal to exercise jurisdiction, albeit an omission, is tantamount to an act of its authorities producing effects outside its own territory, namely in Iraq. According to the complainants, the State party did in fact have the power to exercise its control over them but used this power to prevent their repatriation. In conclusion, since both applicable jurisdictional criteria have been met, the extraterritorial jurisdiction of the State party has been established.

5.8 On the merits of the complaint, B.N., B.K., F.T.A. and M.D. recall that, as a matter of principle, the sovereignty of a State may be limited by the State itself. Thus, Iraq may accept French diplomatic requests to repatriate jihadists so that they can be tried on French soil without such transfers constituting a violation of Iraqi sovereignty.

5.9 As for the violation of article 3 of the Convention, the complainants deduce from the explicit prohibition of extradition an implicit obligation of repatriation attributable to the State party. This obligation has already been established in judicial decisions. Regarding the status of an individual who had travelled abroad to fight in the jihad, the French-speaking civil court of Brussels, ruling as an international court (rather than as a national court), found that "the Belgian State has a prima facie obligation of repatriation".²⁴ The complainants argue that the foregoing is in keeping with the spirit of the Convention.

5.10 Lastly, B.N., B.K., F.T.A. and M.D. invoke the acts of torture and ill-treatment committed against them, finding that the State party violated article 3 of the Convention by rejecting their request for repatriation whilst they were being subjected to those acts. At no time did the State party attempt to exercise jurisdiction over its nationals in Iraq through its diplomatic or consular agents. The State party therefore did not take all steps necessary to prevent the aforementioned acts to which its nationals were subjected to in Iraq, despite the fact that it is bound by a reinforced obligation of means.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes that the State party contests the admissibility of the communication on the grounds that the complainants are detained in Iraq and are not under its jurisdiction. The State party argues that it does not exercise any control or authority over the complainants through its agents. The complainants are being held in Iraq by the Iraqi authorities, not by French agents. The State party also rejects the argument that it has an obligation under the Convention to protect its nationals on the basis of their nationality even outside the territory under its jurisdiction. Lastly, the State party emphasizes that the allegations that the French authorities purportedly gave their consent to the transfer of the complainants from the Syrian Arab Republic to Iraq and that coalition agents participated in the transfer have not been substantiated by the complainants, who have not produced any evidence or documentation to support their claims. Nonetheless, the Committee notes that the complainants insist that the State party was involved in their transfer from the Syrian Arab Republic to Iraq.

6.3 The Committee recalls that, pursuant to article 22 of the Convention, it receives and considers communications from or on behalf of individuals subject to a State party's jurisdiction who claim to be victims of a violation by that State party of the provisions of the

²⁴ French-speaking civil court of Brussels (summary procedure chamber), 30 October 2019 – no further details provided.

Convention, provided that the State party has declared that it recognizes the competence of the Committee in that regard.²⁵

6.4 In the present case, the Committee notes that, in order to determine whether the claims made by the complainants may be considered under the Convention, it is necessary to determine whether the complainants are located in a territory where the State party exercises de jure or de facto control. In this regard, the Committee notes that at present the complainants are located in places that are not under the jurisdiction of the State party, but rather are under the jurisdiction of the Iraqi State. Regarding the complainants' allegation that the State party ordered or participated in their transfer from the Syrian Arab Republic to Iraq – where they claim to have been subjected to treatment contrary to the Convention – the Committee notes that the complainants have not submitted any tangible evidence in support of their claim that the State party authorized their alleged transfer to the Iraqi authorities.²⁶ Although it is mindful of the fact that it would be difficult to substantiate such a claim with material evidence, the Committee cannot indulge in speculation as to the role that the State party may have played in the transfer. The Committee's role is not to make assumptions about the facts of the case before it but to examine the complaint in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

7. In the light of the foregoing, the Committee is of the view that the claims made by the complainants do not fall under the Convention.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 22 (1) of the Convention;
- (b) That the present decision shall be communicated to the complainants and to the State party.

²⁵ Committee against Torture, general comment No. 4 (2017), para. 6.

²⁶ *H. v. France* (CAT/C/73/D/933/2019), para. 7.6.