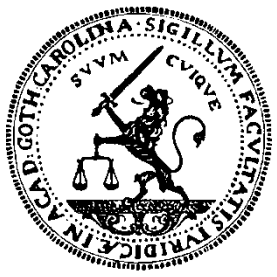

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If not us, then who?

On the repatriation of Swedish women and children from the al Hol and al Roj camps in the Syrian Arab Republic

LAGM01 Graduate Thesis

International Human Rights Law
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Contents

Summary

In the al Hol and al Roj camps in the north-eastern parts of the Syrian Arab Republic, women and children allegedly affiliated with the terrorist group the Islamic State of Iraq and the Levant are detained in precarious humanitarian and security conditions that have been equated with torture or cruel, inhuman or degrading treatment or punishment by the United Nations. In early 2021, the United Nations called upon states to repatriate their nationals from the camps. Sweden has refused to do so, arguing that it has no legal obligation to repatriate the 50 Swedish women and children detained in the camps.

This thesis examines the extent of Sweden's legal obligations under international human rights law and within the area of counter-terrorism and asks whether Sweden has to repatriate its nationals from the al Hol and al Roj camps in order to fulfil these obligations. To answer this question, the thesis examines and analyses the scope of positive obligations stemming from the prohibition of torture or cruel, inhuman or degrading treatment or punishment and the concept of extraterritorial jurisdiction under international human rights law under three core human rights treaties, namely the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Convention on the Rights of the Child. Based on these findings, it argues for a universalist approach to extraterritorial jurisdiction and an extensive reading of positive human rights obligations in this specific case. The thesis also examines and analyses Sweden's obligation to bring suspected terrorists to justice, stemming from relevant counter-terrorism frameworks established by the United Nations and the Council of Europe from a human security perspective.

This thesis concludes that Sweden must repatriate its nationals from the al Hol and al Roj camps to fulfil its international human rights and counter-terrorism obligation in this specific case. Failing to do so not only undermines individual and thus national and international security, but also Sweden's legitimacy as a rule of law and human rights-abiding actor.

Sammanfattning

I al Hol och al Roj-lägren i nordöstra Syrien hålls kvinnor och barn med misstänkta kopplingar till terroristgruppen Islamiska Staten frihetsberövade under prekära humanitära- och säkerhetsförhållanden. Representanter för Förenta nationerna (FN) har likställt förhållandena med tortyr eller omänsklig eller förnedrande behandling eller bestraffning. I början av 2021 uppmanade FN stater att ta hem (repatriera) sina medborgare från lägren, något Sverige vägrat göra då Sverige menar att det inte finns några juridiska skyldigheter att repatriera de 50 svenska kvinnor och barn som befinner sig i lägren.

Det här examensarbetet utreder Sveriges internationella åtaganden rörande mänskliga rättigheter och kontraterrorism, och ställer frågan huruvida Sverige måste repatriera sina medborgare från al Hol och al Roj-lägren för att uppfylla dessa åtaganden. För att besvara denna fråga granskas och analyseras först omfattningen av staters positiva skyldigheter i förhållande till förbudet mot tortyr eller omänsklig eller förnedrande behandling eller bestraffning och begreppet extraterritoriell jurisdiktion under tre instrument för mänskliga rättigheter: FN:s konvention om medborgerliga och politiska rättigheter, Europeiska konventionen om skydd för de mänskliga rättigheterna och grundläggande friheterna, och Barnkonventionen. Baserat på dessa analyser argumenterar arbetet för ett universalistiskt förhållningssätt till extraterritoriell jurisdiktion och för en expansiv tolkning av positiva skyldigheter i detta fall. Arbetet granskar och analyserar även Sveriges skyldighet att ställa misstänka terrorister inför rätta ur ett s.k. *human security*-perspektiv där individuell säkerhet är i fokus.

Arbetet konstaterar att Sverige måste repatriera sina medborgare från al Hol och al Roj-lägren för att uppfylla sina internationella åtaganden rörande mänskliga rättigheter och kontraterrorism i detta fall. Att inte repatriera svenska medborgare underminerar individuell och därmed nationell och internationell säkerhet, och riskerar dessutom att underminera synen på Sverige som en rättsstat med respekt för mänskliga rättigheter.

Acknowledgements

Five years of studies are now coming to an end. The better part of three of them were spent wondering why I ever chose to put myself through law school. When I finally realised what kind of lawyer I wanted to be, I was lucky enough to be able to spend the following two years engrossed in the subjects that I now leave my studies to pursue for the rest of my (working) life. My biggest thanks to my family who has always supported and believed in me; thank you for not letting me quit. Special thanks to my dad, who has proofread endless papers from middle school through law school. I hope you enjoyed it, because this might be the last one you read for a while!

I also want to thank my supervisor Jessica for all her insightful comments, and for always being open to discuss any questions and ideas that have come up during the process of writing this thesis.

With the end of my studies comes, of course, the end of my time as a student. These five years have been spent, when not cramming for exams (or perhaps when I should have crammed for exams), on organizing as well as attending balls, dancing in the early morning light in Lundagård and, sometimes, on kitchen sinks. I will miss studying at a coffee shop, mid-morning, looking out the window and not being surprised at seeing some guy dressed up as a taco. Above all, I will miss sharing these moments with my Lundafamilj. You have made these five years some of the best of my life. Thank you for being my second family.

These past two years I have met many amazing people and made new friends for life. You have all become so important to me so fast, and though we are now leaving Lund and moving to different places in the world, I know that we will see each other again soon.

Lund, May 2021

Aylin Volgsten

Abbreviations

AANES	Autonomous Administration of North East Syria
CRC	1989 Convention on the Rights of the Child
CoE	Council of Europe
ECHR	1950 European Convention on Human Rights
ECtHR	European Court of Human Rights
FTF:s	Foreign Terrorist Fighters
HRC	Human Rights Committee
ICCPR	1966 International Covenant on Civil and Political Rights
ISIL	Islamic State of Iraq and the Levant
ICJ Statute	Statute of the International Court of Justice
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
SDF	Syrian Democratic Forces
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	1969 Vienna Convention on the Law of Treaties
WCPT	2005 Warsaw Convention on the Prevention of Terrorism

1 Introduction

1.1 Background

Situated in the north-eastern part of the Syrian Arab Republic, the al Hol and al Roj camps house over 70 000 women and children, of whom an estimated 640 children and 240 women are European nationals.[1] In 2021, the Swedish Ministry of Foreign Affairs estimated that there are around 30 Swedish women and 20 Swedish children in the two camps.[2] The women and children living in al Hol and al Roj camps have been transported there from territories that were previously under the control of the Islamic State of Iraq and the Levant (ISIL), designated by the United Nations (UN) as a terrorist group.[3] Within the al Hol camp women and children who are allegedly affiliated with ISIL are housed in an annex within the camp, separated from the other detainees.[4]

ISIL was one of many armed groups that acquired control over large areas in Syria following the conflict that started with peaceful protests during the Arab Spring in 2011 and has now been going on for ten years. ISIL declared itself a 'caliphate' in 2014 but began losing territorial control in 2016 following Turkish military operations. The de facto capital of the 'caliphate', Raqqa, was lost in 2017 and ISIL's last stronghold Baghuz followed in 2019.[5] The conflict in Syria and the threat posed by ISIL has been characterized by the phenomenon of so-called foreign terrorist fighters (FTF:s), meaning individuals who leave their state of nationality or residence in order to

[1] Rights and Security International, 'Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria' (25 November 2020) (RSI Report) 11 <www.rightsandsecurity.org/action/research/entry/europes-guantanamo-unlawful-detention-in-syria> accessed 2021-01-26.
[2] Lars Larsson, 'Sverige går emot FN-kritik om IS-barn' in Svenska Dagbladet 27 March 2021 <https://www.svd.se/sverige-gar-emot-fn-kritik-om-barn-i-is-lager> accessed 2021-04-29.
[3] Cf. United Nations Security Council Resolution S/Res/2253 (17 December 2015).
[4] RSI Report (n 1) 11.
[5] United Nations Human Rights Council 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (21 January 2021) A/HRC/46/54, paras. 6, 13, 17.

perpetrate, plan or participate in acts of terrorism or terrorist training in other states.[6] In late 2017 it was estimated that 40 000 FTF:s had travelled to Syria and Iraq in order to join terrorist groups such as ISIL.[7] The Swedish Secret Service has estimated that around 300 individuals have travelled from Sweden to Syria and Iraq to join terrorist groups, women making up a third of that number. Of these 300 individuals around 75 % were Swedish citizens.[8]

Another armed group that has gained territorial control during the conflict in Syria is the Kurdish People's Protection Unit, to whom the Syrian Government ceded temporary authority over areas in the north-eastern parts of the country in mid-2012. Together with allies amongst other Arab and Assyrian opposition groups, the Kurdish People's Protection Unit formed the Syrian Democratic Forces (SDF) in 2015.[9] The SDF, which is now the military force of the Autonomous Administration of North East Syria (AANES), operate the al Hol and al Roj camps since 2015.[10]

The living conditions in al Hol and al Roj camps are harsh, with severely deficient sanitary facilities. Overflowing latrines result in sewage leaking into tents, and drinking water is contaminated with worms. Infections and acute diarrhoea affect children especially, sometimes with fatal outcomes.[11] The security situation is also precarious, with regular occurrences of violence between the individual detainees in the camps as well as violence between

[6] Cf. United Nations Security Council (UNSC) Resolution S/Res/2178 (24 September 2014) preamble.
[7] Organization for Security and Co-operation in Europe, 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework' (2018) 8, 11 <www.osce.org/odihr/393503> accessed 2021-04-28.
[8] Swedish Security Services Press Release (27 June 2017) <www.sakerhetspolisen.se/ovrigt/pressrum/aktuellt/aktuellt/2017-06-27-farre-reser-fran-sverige-till-terroristorganisationer.html> accessed 2021-05-03.
[9] A/HRC/46/54 (n 5) paras. 6, 12.
[10] RSI Report (n 1) 11.
[11] Human Rights Watch (HRW), 'Syria: Dire Conditions for ISIS Suspects' Families' (23 July 2019) <www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families> accessed 2021-04-25.

SDF guards and detainees.[12] The camps are reportedly used by ISIL insurgencies as incubators of extremism and radicalisation.[13]

The AANES has called upon states to repatriate their nationals from al Hol and al Roj, noting that operating the camps is 'a big problem' for them. Individual detainees are not free to leave the camps, and the AANES has emphasised that foreign nationals will not be released unless they are repatriated.[14] UN bodies and non-governmental organisations (NGO:s) alike have supported the position that states should repatriate their nationals.[15] The UN Secretary-General António Guterres has described the situation in al Hol and al Roj as increasingly untenable while noting that the situation is not unique, as similar situations are arising in different parts of the world. Repatriation has been established by the UN as one of the key measures in dealing with the situation of women and children detained in Syria.[16]

States have taken varying approaches to repatriation. Norway's prime minister stated in February 2019 that Norway will not actively repatriate its nationals, as it will not send any of its representatives into a precarious security situation.[17] Finland has reportedly repatriated six children and two women (mothers), stating that the Finnish constitution obliges the authorities to safeguard the basic rights of Finnish children interned in the camps as far

[12] RSI Report (n 1) 19 – 20.
[13] Bethan McKernan, 'Inside al-Hawl camp, the incubator for Islamic State's resurgence' in The Guardian (31 August 2019) <https://www.theguardian.com/world/2019/aug/31/inside-al-hawl-camp-the-incubator-for-islamic-states-resurgence> accessed 2021-03-17.
[14] RSI Report (n 1) 34; HRW, 'Syria: Dire Conditions for ISIS Suspects' Families' (n 11).
[15] Cf. i.a. RSI Report (n 1) 45; United Nations Children's Fund, 'Governments should repatriate foreign children stranded in Syria before it's too late' (4 November 2019) <www.unicef.org/press-releases/governments-should-repatriate-foreign-children-stranded-syria-its-too-late> accessed 2021-04-29; International Committee of the Red Cross, 'States must strike a balance between security and treating people humanely' (24 September 2019) <www.icrc.org/en/document/syria-states-must-strike-balance-between-security-and-treating-people-humanely> accessed 2021-04-29; HRW, 'Thousands of Foreigners Unlawfully Held in NE Syria' (23 March 2021) <www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria> accessed 2021-04-29.
[16] Report of the Secretary-General of the United Nations, 'Key Principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups' (Aril 2019) 2, 4 <www.un.org/counterterrorism/publications> accessed 2021-04-03.
[17] Norsk rikskringkastelse, 'Solberg: - Norske IS-krigere har rett til å komme hjem' (16 February 2019) <www.nrk.no/urix/solberg_-_-norske-is-krigere-har-rett-til-a-komme-hjem-1.14434249> accessed 2021-04-29.

as possible. Repatriation was deemed as the only way to safeguard the children's rights. Germany has reportedly repatriated 12 children and three women (mothers). The German authorities deemed these repatriations 'particularly necessary and urgent' as the cases concerned primarily orphans and children who were ill.[18] On May 18 2021, Denmark decided to repatriate 19 children and three women from the camps. The Danish Minister of Justice stated that Denmark wished to help the children and that it was in the best interest for Danish security to repatriate the children with their mothers.[19] Uzbekistan has reportedly repatriated 148 women and children from detention camps in north-eastern Syria.[20]

In early 2021, UN Special Rapporteurs urged 57 states to repatriate their nationals detained in the al Hol and al Roj camps in Syria, expressing grave concerns about the deteriorating humanitarian and security situation in the camps. The Special Rapporteurs argued that the situation in the camps may amount to torture or other cruel, inhuman and degrading treatment or punishment.[21] Sweden thus received a joint communication from the Special Rapporteurs, where they noted that Sweden has obligations under international law as well as under UN Security Council (UNSC) resolutions to bring to justice individuals who have committed serious and systematic crimes in Syria. The Rapporteurs argued that Sweden has de facto jurisdiction over the Swedish women and children detained in the al Hol and al Roj camps, as it has the ability to repatriate these individuals or at least impact the actions of camp authorities.[22]

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[18] Al Jazeera, 'Germany, Finland repatriate women and children from Syria camps' (20 December 2020) <www.aljazeera.com/news/2020/12/20/germany-finland-to-repatriate-women-children-from-syria> accessed 2021-04-29.
[19] Malthe Sommerand, 'De vil blive forsøgt varetægtsfængslet, så snart de sætter fod på dansk jord' in DR (18 May 2021) < https://www.dr.dk/nyheder/udland/de-vil-blive-forsoegt-varetaegtsfaengslet-saa-snart-de-saetter-fod-paa-dansk-jord> accessed 2021-05-26.
[20] The Defense Post 'Uzbekistan repatriates 148 women and children linked to ISIS from Syria' (30 May 2019) <www.thedefensepost.com/2019/05/30/uzbekistan-repatriate-isis-women-children-syria/> accessed 2021-04-29.
[21] United Nations News 8 February 2021 <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E> accessed 2021-04-29.
[22] United Nations Office of the High Commissioner of Human Rights/Special Procedures, 'Joint Communication from Special Procedures' (26 January 2021). *See annex I.*

In its response to the UN Special Rapporteurs, the Swedish Government stated that its goal is to see children of Swedish nationality 'brought to Sweden if and when possible'. As for women of Swedish nationality, the Government noted that they may have committed serious crimes, the accountability for which being a priority for the Government. However, the Government argued that it would be advantageous to conduct trials near the evidence and the victims of the crimes, and it 'noted with interest' that the AANES had expressed an intent to investigate crimes and prosecute women in local courts. The Government emphasised that it has, in dialogue with the AANES about this 'prosecution initiative', stressed the importance of upholding the rule of law in these proceedings. The Government also noted that it has explored the possibility to repatriate children without their mothers, but that the AANES has not allowed children to be separated from their mothers. Interestingly, Sweden noted that it had facilitated 'the successful repatriation of several orphaned children' from the al Hol and al Roj camps.[23]

Additionally, the Swedish Government rejected the claim that it is under a legal obligation to repatriate its nationals. The position of the Government is that Sweden does not have jurisdiction over the detained women and children, its argument being that jurisdiction under international human rights law is mainly limited to the sovereign territory of the state. Any exception, the Government further argued, requires the state to exercise effective control over the affected individuals either through effective control over the relevant territory or through its agents operating abroad, which Sweden does not.[24]

1.2 Purpose and research question

The purpose of this thesis is to clarify the extent of Sweden's international legal obligations towards women and children of Swedish nationality who are allegedly affiliated with ISIL and currently detained in the al Hol and al Roj camps in Syria. More specifically, the thesis concerns the issue of repatriation

[23] Ministry of Foreign Affairs, 'Communication from Special Procedures' (26 March 2021). *See annex II.*
[24] Ibid.

of said nationals from the camps and whether repatriation is necessary to fulfil Sweden's international legal obligations. It will examine Sweden's obligations under international human rights law and its obligations pertaining to international counter-terrorism measures.

To achieve this purpose, the following research question is posed:

- Does Sweden have to repatriate women and children of Swedish nationality from the al Hol and al Roj camps to fulfil:
    a) its obligations under international human rights law and/or
    b) its international obligations in the area of counter-terrorism?

In answering this question, three sub-questions will be addressed:

- Does Sweden's positive obligations under the prohibition of inhuman and degrading treatment require Sweden to repatriate Swedish women and children from the al Hol and al Roj camps?
- Does Sweden have jurisdiction under international human rights law over Swedish women and children detained in the al Hol and al Roj camps?
- Does Sweden's obligation to bring suspected terrorists to justice, established in the legal frameworks of the United Nations and the Council of Europe, require Sweden to repatriate Swedish women and children from the al Hol and al Roj camps?

1.3 Delimitations

This thesis focuses solely on the situation of Swedish women and children detained in the al Hol and al Roj camps. It will not address the situation of men who may be detained in other camps or detention facilities as suspected foreign terrorist fighters. The thesis focuses only on Sweden' legal obligations and thus excludes other states' potential obligations. Though it might be possible to apply the analysis relating to Sweden's international legal obligations *mutatis mutandis* to those of other states, this possibility will not be discussed in this thesis. Moreover, this thesis will not discuss the law

of state responsibility or, therefore, any potential international responsibility of Sweden for failure to fulfil its legal obligations.

Due to the limited scope of this thesis, only the prohibition of torture or cruel, inhuman or degrading treatment or punishment will be addressed, leaving other potential human rights violations that may occur in the al Hol and al Roj camps outside the scope of this thesis. The examination of the prohibition of torture or cruel, inhuman or degrading treatment or punishment is also limited to three main international human rights instruments to which Sweden is party, namely the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). The principle of the best interest of the child, a fundamental principle of the CRC (see section 2.3.3), will only be addressed insofar as it relates the analysis of positive obligations relating to the prohibition of torture or cruel, inhuman or degrading treatment or punishment under the CRC.

The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) concerns acts of torture and cruel, inhuman or degrading treatment or punishment administered by a public official or with the consent or acquiescence of a public official.[25] Since the alleged violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment occurring in the al Hol and al Roj camps relate to conditions within the camps and actions of non-state actors, the UNCAT falls outside the scope of this thesis and will not be discussed. Furthermore, any potential human rights obligations of non-state actors will not be discussed as this thesis focuses solely on Sweden's international obligations. Additionally, this thesis focuses only on obligations relating to international human rights law and international counter-terrorism

[25] Cf. Articles 1 and 16 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

measures. The issue of repatriation in relation to diplomatic and consular rights has been discussed elsewhere.[26]

As this thesis focuses on the issue of repatriation, international criminal law and international humanitarian law will not be discussed. The term repatriation, specifically voluntary repatriation, is used in international refugee law to refer to the 'free and voluntary return to one's country of origin in safety and dignity'.[27] Voluntary repatriation in international refugee law is constructed as a solution to refugeehood,[28] and the right to return to one's country is established in many human rights instruments under the freedom of movement.[29] In this thesis, the term repatriation will be used to refer to states actively returning their own nationals to their territories. States' active repatriation of women and children from detention camps in Syria under the right to return to one's country has been discussed elsewhere.[30]

1.4 Theory and perspective

1.4.1 The universality of human rights

Chapters two and three of this thesis focuses on the extraterritorial application of international human rights law and the scope of positive obligations in the extraterritorial setting. In these parts, this thesis takes a universalist approach to human rights as opposed to a state-centric approach. This universalist approach holds that the role of the state within the human rights regime is to implement universal values rather than solely functioning to give effect to

[26] E.g. Alessandra Spadaro, 'Repatriation of Family Members of Foreign Terrorist Fighters: Individual Right or State Prerogative?' (2021) vol 70 International and Comparative Law Quarterly 251.
[27] United Nations High Commissioner for Refugees, *Handbook for Repatriation and Reintegration Activities* (2004) <www.refworld.org/docid/416bd1194.html> accessed 2021-05-20., ONE-2.
[28] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 917.
[29] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn. Oxford University Press 2011) 492; cf. e.g. Article 12 of the International Covenant on Civil and Political Rights.
[30] E.g. Spadaro (n 25).

intra-state agreements.[31] This approach will be further discussed in the context of jurisdiction in chapter 3.6.

At this point, clarifying what is generally meant by 'the universality of human rights' within the scope of this thesis is appropriate. Contemporary human rights theory conceptualises human rights as universal.[32] The Universal Declaration of Human Rights (UDHR), which has set the framework for contemporary and internationally recognised human rights,[33] recognises in its preamble 'the inherent dignity' and 'the equal and inalienable rights' of every human, and states in article 1 that 'all human beings are born free and equal in dignity and rights'.[34] It is from the recognition of human rights belonging to each human being solely by virtue of their humanity that the universality of human rights may be derived.[35] While the possession of human rights by every individual on the planet is not dependent on any other kind of special relationship, the content of human rights are often made dependent on other relationships. This is because as *legal* rights, human rights are not universal. Instead, they are dependent on the legal system which to varying degrees reaffirms them in national constitutions and through legislation.[36] In international human rights law, the legalization of human rights is accomplished through treaties.[37] It is generally considered that the most fundamental moral rights are those enacted into legal human rights.[38]

As illustrated in the UDHR, the notion of human dignity is a fundamental concept underpinning the human rights regime. Christopher McCrudden has shown that the concept of human dignity was added in the UDHR as a

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[31] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47, 48 – 49.
[32] Gerhard Ernst, 'Universal Human Rights and Moral Diversity' in Gerhard Ernst and Jan-Christoph Hilinger (eds.), *The Philosophy of Human Rights* (De Gruyter 2012) 231.
[33] Cf. Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 22.
[34] 1948 Universal Declaration of Human Rights, preamble.
[35] Cf. i.a. Donnelly (n 33) 10; Ernst (n 32) 231.
[36] Ernst (n 32) 231, 234 – 235.
[37] Cf. Samantha Besson, 'Human Rights: Ethical, Political… or Legal?' in Donald E. Childress III (ed), *The Role of Ethics in International Law* (Cambridge University Press 2011) 240.
[38] Cf. Ernst (n 32) 234 – 235; Donnelly (n 33) 11.

theoretical basis of the developing human rights regime because states could not find consensus on more substantive concepts. It has become a fundamental principle for the idea of human rights, though it is often interpreted differently in different jurisdictions. McCrudden argues that the concept of human dignity is not without content; rather its content varies from context to context and thus allows different theories of human rights or human dignity to be interpreted into it. However, three core elements that McCrudden calls the 'minimum core' of human dignity can be identified: first, the ontological claim that dignity is an inherent value in every human being; second, the relational claim that this value must be respected by others and that this forbids certain behaviours while requiring others; and third, the limited-state claim that the state exists for the benefit of the individual and not the other way around. Even when recognising these core elements of human dignity, the concept is left open to wider interpretation.[39]

Human dignity, McCrudden further argues, has thus become an interpretative principle for at least the most fundamental human rights, if not all human rights. Using human dignity as an interpretative tool in international human rights law can be seen as a way to further the universalist claim of human rights. In judicial interpretation there is an acceptance of the concept of human dignity though not on its content, the latter remaining open to interpretation. The concept of human dignity therefore plays a role in legal interpretation, one of the functions being as a source from which to derive new rights or justify the extension of existing rights. McCrudden concludes that the only universal consensus on the contents of human dignity are the three identified core elements, and that it is mainly used to provide a justification of i.a. a more extensive interpretation of human rights.[40]

This thesis will adopt a universalist approach to international human rights law, meaning that in making arguments *de lege ferenda* (as will be discussed in section 1.5), it will argue in favour of a progressive interpretation of legal

[39] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) vol 19 no. 4 The European Journal of International Law 655 – 724, 656, 675, 677 – 679.
[40] Ibid 681, 696, 712, 721, 724.

human rights and their extraterritorial applicability. As McCrudden's account illustrates, the concept of human dignity is universal in the sense that it is considered inherent in every human being, much as the universality of human rights in general, and in the sense that the concept is universally agreed upon as providing a basis for the human rights regime. The concept of human dignity will be used in its interpretative function to argue for an extensive reading of the content of relevant human rights.

1.4.2 Human security

It is perhaps superfluous to point out that the detention of women and children in al Hol and al Roj camps because of their alleged affiliation with ISIL, a UN listed terrorist group, is a consequence of international terrorism. The connection between the situation of the detained women and children and international terrorism, and by extension international peace and security, however, cannot and should not be ignored. International terrorism is one of the most perilous challenges facing the international community. International responses to the threat posed by international terrorism has since the 9/11 attack on World Trade Center in New York been focused on national security and trading off human rights in favour of security concerns. Terrorism, security and human rights have been considered contradictory and irreconcilable. In reality, trading off human rights and freedoms in the fight against terrorism rather serves to create conditions that increase the risk for future terrorism. Indeed, Western states face another challenge in maintaining their own legitimacy through upholding the rule of law and basic human rights in their counter-terrorism efforts. Principles pertaining to the rule of law and human rights must be anchored not only in civil society but also in states' legislation and practice.[41]

A human security perspective holds that human rights and security are not mutually exclusive, human rights entering the security debate through the universality of human rights. Universality serves as a protective principle

[41] Mahmood Monshipouri, *Terrorism, Security and Human Rights: Harnessing the Rule of Law* (Lynne Rienner Publishers Inc. 2012) 1, 17, 171 – 173, 190.

against arbitrary enforcement and abuse of human rights law.[42] Following a human security perspective, human rights define security as individual security, which is a necessary condition for national security which in turn is necessary for international security.[43] The individual is therefore the focus of human security, whereas the state is considered an instrument for the protection of human life and welfare.[44] The individual as a focal point for the notion of security is present also within international human rights law, where four concepts of security can be discerned: negative security of the individual against the state (i.e. security in terms of freedom from state interference), security as a justification for limiting human rights (i.e. national security), international security, and positive security in the form of state obligations to protect individuals from threats posed by state agents or private parties. It has been argued, though in the context of structural situations of threat and risk, that a human security perspective allows for an extension of the criteria that trigger states' positive human rights obligations. A human security perspective is therefore a useful tool in the analysis of states' positive human rights obligations.[45]

A human security perspective thus provides a bridge between the human rights and the counter-terrorism frameworks that will be discussed in this thesis. By analysing Sweden's international counter-terrorism obligations from a human security perspective, these obligations will be clarified.

1.5 Method and material

The doctrinal research method will be used to identify and analyse the essential features of relevant sources of law, which will then be critically examined to establish what the current state of the law on the subject matter is. Generally, the doctrinal research method can be distinguished by three core

[42] Ibid, 172, 191, 253.
[43] Bertrand G. Ramcharan, *Human Rights and Human Security* (Martinus Nijhoff Publishers 2002) 10 – 11.
[44] Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2006) 72.
[45] Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law* (Hart Publishing 2016) 75, 92.

features. The first is that arguments within doctrinal research are derived from what is considered authoritative sources. Such include existing legislation, legal principles, legal precedents, and scholarly writings. The second is that the aim of legal doctrine is to present the law as a coherent system based on rules and meta-rules, principles and exceptions. This results in the third feature, namely that decisions in individual cases will have to fit within the system in order not to be arbitrary. When judicial decisions lead to stretching or replacing existing rules, they will be adapted so that the coherence of the legal system is maintained. Following the doctrinal method, the research will be undertaken in two steps. The first will be locating the relevant sources of law, the second interpreting and analysing these sources.[46] In the first step, the doctrinal research method will be used to identify and determine the current state of the law (*de lege lata*). In the second step, the relevant sources of law will be interpreted using the interpretative methods and tools described in the following paragraphs, and critically analysed to illuminate potential gaps in the current state of the law. Following this critical analysis, arguments on how the law should be construed (*de lege ferenda*) will be made based on the universalist approach and human security perspective presented in section 1.4. While it is important to clarify and distinguish when arguments *de lege lata* and *de lege ferenda* are being made,[47] the distinction is not clear-cut. This is because the doctrinal research method is both descriptive and normative; it pursues knowledge of the law as it is while simultaneously contributing to changing the law.[48]

As this thesis deals with international law, the sources of law are different from those in domestical law, and the doctrinal method will be applied with necessary changes to fit the structure of international law. Accordingly, the material used in this thesis will be primary and secondary sources of international law. These are recognised in article 38 (1) of the Statute of the

[46] Cf. Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* (Routledge 2013) 9 – 10, 13.
[47] Cf. Jan Kleineman, 'Rättsdogmatisk metod' in Fredric Korling and Mauro Zamboni (eds.), *Juridisk metodlära* (Studentlitteratur 2013) 36, 39.
[48] Aleksander Peczenik, 'Legal Doctrine and Legal Theory' in Corrado Roversi (ed.), *A Treatise of Legal Philosophy and General Jurisprudence,* vol 2 (Springer, Dordrecht 2005) 4 – 5.

International Court of Justice (ICJ Statute). [49] Primary sources are treaties, international customary law and general principles of law. Secondary sources include judicial decisions and legal scholarship.[50]

Treaties constitute the most important sources of international law,[51] and will receive the most attention in this thesis. When interpreting relevant treaties, the rules of treaty interpretation established in the Vienna Convention on the Law of Treaties (VCLT), which are generally accepted as customary international law,[52] will be followed. Article 31 (1) VCLT requires treaties to 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose'.[53] As there is generally not one single ordinary meaning of a word, the context and the object and purpose of the treaty are determinative of the ordinary meaning of the terms.[54] The *context* consists of the text of the treaty, including preamble and annexes, any agreements concluded by the states parties made in connection with the conclusion of the treaty that relate to it, and any instruments made by states parties in connection with the treaty's conclusion that is accepted by the other states parties.[55] Additional factors to be taken into account in the interpretation are subsequent agreements on the interpretation of the treaty between the states parties, subsequent practice on the application of the treaty, and relevant rules of international law applicable on the states parties.[56] According to article 32 VCLT preparatory works and the circumstances of the conclusion of the treaty may be used as supplementary means of interpretation. These supplementary means may be used to either confirm the meaning derived from the interpretation following the above-mentioned article 31, or to determine the meaning if the interpretation following article 31 left the meaning of the text ambiguous or

[49] Cf. James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 21 -22.
[50] Article 38 (1) (a) – (d) of the Statute of the International Court of Justice.
[51] Crawford (n 49) 30.
[52] Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd edn. Oxford University Press 2020) 460.
[53] Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties (VCLT).
[54] Gardiner (n 52) 465.
[55] Article 31 (2) VCLT.
[56] Article 31 (3) VCLT.

obscure or leads to a result that is 'manifestly absurd or unreasonable'.[57] The interpretation process thus involves a measure of creativity and subjectivity of the interpreter, as the process requires the interpreter to go beyond the rules and give the text meaning so as to apply the treaty provisions.[58]

Many of the treaties that will be examined in this thesis are human rights treaties. The interpretation of international human rights treaties follow the general interpretation rules set forth in articles 31 – 32 VCLT. However, there is a significant consensus amongst interpreters of various international and regional human rights treaties that human rights treaties should be interpreted in accordance with the so-called principle of effectiveness. The principle of effectiveness entails that the interpretation should render human rights provisions 'effective, real and practical' for the rights-holders. Accordingly, interpretations that lack actual and timely effect for the protection of human rights cannot be considered interpretations in good faith of the meaning of a human rights treaty's terms in light of its context, object and purpose, as set out in article 31 VCLT. Each treaty provision must therefore be interpreted with regard to the principle of effectiveness, and the approach to treaty interpretation should be either teleological (i.e. purpose oriented) or evolutive, or both.[59]

Judicial decisions by international and regional courts, especially the European Court of Human Rights (ECtHR), as well as decisions from UN treaty monitoring bodies, will also be examined in this thesis. Despite the fact that article 38 (1) (d) of the ICJ Statute states that judicial decisions are solely subsidiary means for determining the rules of international law, judicial decisions carry great weight within the international legal system, which lacks a centralised judiciary and legislature. Judicial decisions help develop international law, and the regional and international courts are especially

[57] Article 32 (a) – (b) VCLT.
[58] Gardiner (n 52) 461 – 462.
[59] Başak Çalı, 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd edn. Oxford University Press 2020) 511 – 513.

important within the field of international human rights law.[60] Decisions and general comments issued by UN treaty monitoring bodies are not legally binding but are often considered as authoritative interpretations of the treaty they concern.[61]

In chapter 4, non-legal instruments such as UN General Assembly resolutions and regional counter-terrorism strategies will be used to give context and gain an understanding of the international community's approach to counter-terrorism measures. Lastly, reference are made throughout this thesis to documents that are not readily available to the public, which are therefore attached as annexes. These are the joint communication from the UN Special Rapporteurs to the Swedish Government, found in annex I, the response from the Swedish Government, found in annex II, and the Decision of the Committee on the Rights of the child in the case of *L.H. and Others v. France* (discussed in section 3.5.1) which is found in annex III.

1.6 Contribution to current research

Chapters two and three of this thesis concern the extraterritorial application of international human rights law, examining and analysing specifically the scope of positive obligations in extraterritorial settings (chapter 2) and the concept of jurisdiction in international human rights law (chapter 3). Both the extraterritorial application of international human rights law and the concept of jurisdiction in international human rights law are widely discussed subjects in legal scholarship, e.g. in Marko Milanović' work *The Extraterritorial Application of Human Rights Treaties: Law, Principle, and Policy.*

As will be shown in the second and third chapters, however, international human rights law is ambiguous and open to further interpretation regarding the scope of positive human rights obligations in the extraterritorial setting and on the concept of extraterritorial jurisdiction. By analysing the current

[60] Christine Chinkin, 'Sources' in Daniel Moeckli et al. (eds.), *International Human Rights Law* (3rd edn. Oxford University Press 2018) 75; cf. Crawford (n 49) 37.
[61] Cf. Crawford (n 49) 639 – 640.

state of the law relating to extraterritorial jurisdiction and positive obligations under the prohibition of inhuman treatment, the thesis will contribute to the debate by clarifying the extent of Sweden's international legal obligations in towards Swedish women and children detained in the al Hol and al Roj camps.

Although the situation of detained women and children in Syria is undeniably extraordinary, it is not unique. The examination of the current state of the law on these matters shows that international human rights law cannot properly address the situation without embracing a new approach to the extraterritorial application of international human rights law. It is therefore not only of academic interest but of practical importance to clarify to which extent human rights obligations are applicable in such situations. Therefore, this thesis submits an argument on how the extraterritorial application of international human rights law should be construed so as to be able to address the situation of Swedish women and children detained in Syria and any similar situations that may occur in the future. This argument *de lege ferenda* is part of the answer to the research question posed in section 1.2 of this thesis.

The fourth chapter examines Sweden's international counter-terrorism obligations, focusing on the obligation to bring suspected terrorists to justice. By analysing the relevant legal frameworks through a human security perspective, the thesis not only clarifies the extent of Sweden's legal obligations in this regard but contributes to a holistic understanding of the situation of the women and children detained in the al Hol and al Roj camps in general.

1.7 Outline

The second chapter of this thesis examines the scope of international human rights obligations, and specifically the scope of positive obligations under the prohibition of torture or cruel, inhuman, or degrading treatment or punishment in the extraterritorial context. It analyses the prohibition as established under the ECHR, the ICCPR and the CRC, and whether repatriation may be required to fulfil Sweden's positive obligations in this

regard. The third chapter examines on the extraterritorial application of international human rights law and begins with an overview of the concepts of jurisdiction in general international law and international human rights law specifically. It then analyses the two established models of extraterritorial jurisdiction in international human rights law under the ECHR, the ICCPR and the CRC and whether Sweden exercises jurisdiction over Swedish women and children detained in the al Hol and al Roj camps based on these two models before introducing an alternative model of jurisdiction. It then inquires whether Sweden exercises so-called functional jurisdiction in this situation. The fourth chapter analyses the human rights violations of Swedish women and children detained in the al Hol and al Roj camps and counter-terrorism obligations applicable to their situation from a human security perspective. It examines Sweden's international counter-terrorism obligations under the UN and Council of Europe frameworks and inquires whether repatriation of Swedish women and children from al Hol and al Roj is a necessary means to fulfil these obligations. Chapter five argues, based on the findings of chapters two through four, that Sweden has to repatriate Swedish women and children from the al Hol and al Roj camps to fulfil its international human rights and counter-terrorism obligations. Chapter six concludes this thesis by presenting answers to the research question posed in section 1.2.

2 The scope of human rights obligations

2.1 Introduction

Swedish women and children detained in the al Hol and al Roj camps live under precarious humanitarian and security conditions, which according to UN representatives violate the prohibition of torture or cruel, inhuman or degrading treatment or punishment (see section 1.1), established in several international human rights instruments. This chapter will not engage in an analysis of whether the circumstances of detention meet the requirements of inhuman or degrading treatment under the relevant treaties, instead it will adopt the analysis made by the UN representatives. However, as acts need to be committed with a certain purpose to be defined as torture under international law,[62] it is likely that the situation of the detained women and children would amount to inhuman or degrading treatment. Therefore, reference will be made only to inhuman and degrading treatment and not to torture from now on.

This chapter will discuss the first sub-question posed in section 1.2, namely whether Sweden's positive obligation under the prohibition of inhuman and degrading treatment requires Sweden to repatriate Swedish women and children from the al Hol and al Roj camps. Section 2.2 will examine the concept of positive obligations under international human rights law, whereas section 2.3 will analyse the scope of positive obligations under the prohibition of inhuman treatment under the ECHR, the ICCPR, and the CRC.

[62] Cf. Nigel S. Rodley, 'Integrity of the Person' in Moeckli D et al. (eds.), *International Human Rights Law* (3rd edn. Oxford University Press 2018) 170.

2.2 Obligations to respect, protect and fulfil human rights

States' human rights obligations have both a negative and positive aspect, the negative aspect denoting the obligation of state authorities not to interfere with the exercise of rights, whereas the positive aspect denotes an obligation to actively protect the exercise of rights from infringements by third parties. Negative obligations thus require states not to act in certain ways, while positive obligations require states to take action to ensure rights-protection.[63]

Negative and positive obligations can be sorted under the more general typology requiring states to respect, protect and fulfil human rights. The obligation to respect human rights is a purely negative obligation,[64] which requires states to have control over the conduct of their state agents to ensure that they do not violate human rights.[65] The obligations to protect and fulfil require positive action. Accordingly, states are required under the obligation to protect to take proactive measures to prevent rights-violations by third parties and may be held liable for the failure to do so. Under the obligation to fulfil, states are required to take positive action for the promotion and greater enjoyment of human rights through legislative, judicial, administrative, and other measures.[66]

States' positive obligations under international human rights law is best understood as a duty of due diligence.[67] The duty of due diligence requires states to take all reasonable measures that are within their power to prevent human rights violations from third parties. This requires a high degree of control over the area where the state is obliged to protect and ensure human rights, and that control ought to extend to institutional mechanisms so that the

[63] Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 562 – 563.
[64] Frédéric Mégret, 'Nature of Obligations', in Daniel Moeckli et al. (eds.), *International Human Rights Law* (3rd edn. Oxford University Press 2018) 97 – 98.
[65] Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 210.
[66] Mégret (n 64) 97 – 98.
[67] Shelton and Gould (n 63) 581 – 583.

state has the ability to enact law aimed at protecting human rights and punish human rights violations.[68] Whether the state has acted with due diligence is determined i.a. with reference to whether the violation occurred with the support or acquiescence of the authorities or whether the state can be said to have allowed the violation to take place without acting to prevent it or punish the perpetrators.[69] In the extraterritorial context, states have been found to have positive obligations to secure the specific rights that are affected by the state conduct in question.[70]

2.3 The prohibition of inhuman or degrading treatment

The prohibition of inhuman and degrading treatment is established in article 3 ECHR, article 7 ICCPR and article 37 CRC. It is also part of customary international law and is a so-called jus cogens norm, a peremptory norm in international law,[71] meaning that it may not be derogated from under any circumstances and that it can only be modified by another jus cogens norm. States, therefore, cannot modify or derogate from jus cogens norms through international treaties or international or regional customary law, and are bound by them even if they have not expressly consented to them.[72] States' duty of due diligence, i.e. to take the reasonable measures that can be expected of the state to protect individuals from human rights violations, is more far-reaching when fundamental rights are concerned, such as the prohibition of inhuman or degrading treatment.[73]

Positive obligations under the prohibition inhuman or degrading treatment arise when there is a duty to act to prevent such treatment. The positive

[68] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 62) 210; cf. Besson (n 65) 860, 866, 868.
[69] Shelton and Gould (n 63) 581 – 583.
[70] *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR [GC], 7 July 2011) para. 137.
[71] Cf. Rodley (n 62) 167.
[72] Chinkin (n 60) 73.
[73] Cf. Rick Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 106 – 107.

obligation to act serves to ensure that states do not evade the prohibition by focusing only on its negative aspect, i.e. to refrain from action that amounts to inhuman or degrading treatment, thereby allowing other actors to subject individuals to such treatment. The limits of positive obligations, i.e. due diligence obligations, stemming from the prohibition of inhuman or degrading treatment are not clearly defined. When the issue concerns the state's omission to act preventively, whether and to what extent the state has an interest in the perpetration or continued affliction of harm onto the affected individuals should be considered when assessing the extent of the state's positive obligations.[74]

2.3.1 Article 3 of the European Convention on Human Rights

Under the ECHR, the existence of both negative and positive obligations can be derived from the wording in article 1 ECHR, whereby states undertake to *secure* the rights and freedoms therein.[75] Article 1 has, through the jurisprudence of the ECtHR, been developed into an independent source of general positive obligations on states. These general positive obligations arise independently from article 1 but their observance can only be tested with reference to an alleged violation of another substantive right under the ECHR. The existence of positive obligations under the ECHR serves to guarantee the effective enjoyment of ECHR rights.[76] Some positive obligations are explicitly mentioned in or follow by necessity the substantive rights of the ECHR, whereas others have been interpreted by the ECtHR as generated by the ECHR.[77]

Article 3 ECHR states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[78] Though the wording of article 3

[74] Rodley (n 62) 173 - 174.
[75] Shelton and Gould (n 63) 569.
[76] Jean-Francois Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation on the European Convention on Human Rights', Human Rights Handbooks no 7 (January 2007) 6, 9.
[77] D.J. Harris et al. (eds.), *Law of the European Convention on Human Rights* (3rd edn. Oxford University Press 2014) 22.
[78] Article 3 of the 1950 European Convention on Human Rights (ECHR).

does not reference the concept of human dignity, the protection of human dignity has been identified by the ECtHR in its jurisprudence as one of the primary purposes of the article.[79]

The positive obligation under article 3 ECHR has an investigative aspect, requiring the authorities to investigate allegations of ill-treatment by state agents, as well as preventative aspect.[80] The ECtHR has found that states are obliged to take measures to ensure that individuals are not subjected to inhuman or degrading treatment or punishment by private parties. Through effective deterrence measures, states are obliged to protect, especially, children and other vulnerable individuals from treatment contrary to article 3 ECHR.[81] This obligation primarily entails an obligation of states to put in place and enact adequate criminal law measures.[82] The obligation to protect individuals from inhuman or degrading treatment includes an obligation to take reasonable steps prevent such treatment that the authorities knew or ought to have known about. In a case concerning treatment contrary to article 3 ECHR of children by their parents, the ECtHR reaffirmed the state's duty to protect the children and that the state had 'a range of powers available' to it, including the power to remove the children from their home.[83] Thus, physical intervention by state agents as a preventative measure may be necessary to fulfil the positive obligation under article 3 ECHR to protect children and other vulnerable individuals from inhuman or degrading treatment.[84]

States' positive obligation to protect individuals, and especially children and other vulnerable persons, from becoming victims of inhuman or degrading treatment administered by private individuals has thus been interpreted quite extensively by the ECtHR. Physical interference to remove children from a

[79] McCrudden (n 39) 683.
[80] Harris et al. (n 77) 274 – 275.
[81] *A v. the United Kingdom* (100/1997/884/1096) (ECtHR 23 September 1998) para. 22.
[82] Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 44.
[83] *Z and Others v. the United Kingdom* App no 29392/95 (ECtHR [GC], 10 May 2011) paras. 73 – 74.
[84] Mowbray (n 82) 46.

situation where they face such treatment is perhaps the most extensive measure possible to take to prevent the continued ill-treatment of the concerned children. That states' positive obligation to protect individuals from inhuman or degrading treatment has been interpreted so extensively is in line with the nature of the prohibition itself, requiring the positive or due diligence obligation to be far reaching to protect the value behind the prohibition, namely human dignity. The acceptance of physical removal, as a means of fulfilling the obligation to protect children and other vulnerable individuals, from inhuman or degrading treatment could support the argument that, in the context of Swedish nationals detained in al Hol and al Roj, repatriation would serve as a similar means to fulfil the obligation to protect.

To make such an argument, however, one must first recall that the jurisprudence discussed above was decided in the domestic context and might not be readily transferred to the extraterritorial context. It was noted in section 2.2 that for a state's due diligence (positive) obligations to arise, sufficient control over the area where the obligations apply may be required. This line of argumentation relating to control over an area will be discussed further in chapter 3 in the context of jurisdiction. Here, however, it can be noted that positive obligations cannot at a general level be dismissed in the extraterritorial context; states remain obliged to act with due diligence in relation to those human rights affected by their conduct.

It was noted in section 2.3 that the purpose of the positive obligation under the prohibition of inhuman or degrading treatment is to ensure that states do not evade the prohibition by only focusing on the negative obligation to refrain from subjecting individuals to such treatment while allowing other actors to do so. As a duty of due diligence, the scope of Sweden's positive obligation under the prohibition of inhuman or degrading treatment under article 3 ECHR may be determined with reference to whether the violation(s) of the prohibition occurred to with the support of the Swedish authorities, or whether the Swedish authorities have allowed the violation(s) to occur without acting to prevent them (cf. section 2.2). Additionally, the ECtHR has considered the obligation to take reasonable measures to prevent individuals,

especially children and other vulnerable individuals, from being subjected to inhuman or degrading treatment by third parties to be triggered when state authorities knew or ought to have known of such treatment. In the case of Swedish women and children detained in the al Hol and al Roj camps, the violations of the prohibition of inhuman or degrading treatment or punishment cannot be considered to have occurred with the support of the Swedish authorities. However, Sweden undeniably knows about the conditions in the al Hol and al Roj camps and that these constitute inhuman or degrading treatment, and has not acted in order to prevent these violations from occurring.

Assessing the extent of Sweden's positive obligation under the prohibition of inhuman and degrading treatment in the case of Swedish women and children detained in the al Hol and al Roj camps should take into consideration whether Sweden has an interest in the violation of the prohibition or the continued affliction of harm on these women and children (cf. section 2.3). Sweden cannot be said to have an interest in the continued inhuman or degrading treatment of Swedish nationals in the al Hol and al Roj camps. It is, however, evident from the circumstances of the situation that the detention of individuals in al Hol and al Roj cannot be separated from the inhuman or degrading treatment of these individuals, as this treatment is a direct consequence of the detention in the camps. Arguably, Sweden has expressed an interest in the continued detention of its nationals in the al Hol and al Roj camps, as the Swedish Government noted that it considers it advantageous that women who may be suspected of terrorism crimes are investigated and prosecuted in local courts in north-east Syria (see section 1.1), which requires their continued detention in the camps.

When fundamental human rights, such as the right not to be subjected to inhuman or degrading treatment, are at stake, states' positive obligations should be extensive. The prohibition of inhuman treatment protects human dignity, a fundamental value in the human rights regime; indeed, a value that the whole conceptualisation of human rights is built upon. Thus, positive obligations under the prohibition of inhuman treatment may be more far-

reaching than positive obligations under other human rights, and still be considered as due diligence obligations falling within the reasonable power of the state because of the fundamental value the prohibition protects.

2.3.2 Article 7 of the International Covenant on Civil and Political Rights

Article 2 (1) ICCPR establishes that the states parties undertake 'to respect and to ensure' the Covenant rights 'to all individuals within its territory and subject to its jurisdiction'.[85] It defines the scope of states parties' legal obligations under the Covenant and it entails both negative and positive obligations for the states parties. States must not only refrain from violating the Covenant rights through their agents, but the positive aspect requires states to protect individuals from actions of private persons or entities that would violate Covenant rights. The Human Rights Committee (HRC) has found that positive obligations under article 2 (1) ICCPR are not territorially limited but applies extraterritorially as well.[86]

Article 7 ICCPR states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment',[87] and aims to protect 'the dignity and the physical and mental integrity of the individual'.[88] States' positive obligations under article 7 are implicit in the article.[89]

Article 7 ICCPR requires states to take legislative and other measures that may be necessary to protect individuals from acts that violate article 7, whether such acts are committed by private parties or state officials acting either in their official or private capacity. The HRC has stated that it is not enough for states to prohibit and criminalise cruel, inhuman or degrading treatment and that states must take legislative, administrative and other

[85] Article 2 (1) ICCPR.
[86] Human Rights Committee (HRC), General Comment No. 31 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13 26 May 2005, paras. 2, 6 – 8, 10.
[87] Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR).
[88] HRC, General Comment No. 20 'Article 7 (Prohibition on torture, or other cruel, inhuman or degrading treatment or punishment) adopted on 10 March 1992 (44th session), HRI/Gen/1/Rev.9 (Vol. I), para. 2.
[89] HRC, General Comment No. 31 (n 86) para. 8.

measures to i.a. prevent such treatment in any territory under the states' jurisdiction.[90] States' positive obligations to protect individuals from cruel, inhuman or degrading treatment extends not only to protection from actions of state agents but also from actions of private parties. The ICCPR is considered to be a living instrument of international human rights law and should therefore be interpreted 'in light of the contemporary understanding of human rights'.[91]

The extraterritorial applicability of positive obligations under the ICCPR can thus be confirmed. However, the extent of those positive obligations in the extraterritorial setting remains unclear and will ultimately depend on the circumstances of each case.[92] As mentioned, article 7 ICCPR aims at safeguarding human dignity, a concept that been established as fundamental within the human rights regime (cf. section 1.4.1). An extensive interpretation of what the right not to be subjected to inhuman or degrading treatment entails may therefore be justified. Human dignity, understood also as a claim to further the universality of human rights, likewise supports that positive obligations that aim to protect human dignity are applicable extraterritorially; dignity as an inherent value in all human beings does not evaporate or change when an individual moves across states' territorial borders. It could be argued that, as the HRC made a not of the preventative aspect under article 7 reaches any *territory* under the state's jurisdiction, the extent of positive obligations may be somewhat territorially limited. Such an interpretation, however, would be contrary both to the general position that states' positive obligations apply extraterritorially, the universality of human rights and the concept of human dignity which all support an extensive reading of positive obligations.

McCrudden identified three core elements of human dignity, discussed in section 1.4.1. In relation to the prohibition of inhuman or degrading treatment, the first element of human dignity holds that the prohibition is universal. The

[90] HRC, General Comment No. 20 (n 88) paras. 2, 8.
[91] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn. N.P. Engel, Publisher 2005) 182 – 183.
[92] Cf. Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn. Cambridge University Press 2019) 465.

second element holds that human dignity requires, in this case, that inhuman or degrading treatment not only be refrained from, but that actions must be taken by states to prevent such treatment and to protect individuals from being subjected to it. The third element holds in relation to the prohibition of inhuman treatment that the state exists for the benefit of the individual, therefore emphasising the requirement of states to take action to protect human dignity by protecting individuals from inhuman or degrading treatment inflicted by both state agents and third parties. Thus, the concept of human dignity supports an extensive interpretation of states' positive obligations to protect individuals from inhuman or degrading treatment under article 7 ICCPR.

2.3.3 Article 37 of the Convention on the Rights of the Child

States' positive obligations under the CRC can be inferred from both article 2 (1) CRC which requires states parties to 'respect and ensure' the Convention rights, and article 4 CRC requiring states to 'undertake all appropriate legislative, administrative and other measures' to implement the Convention rights.[93] The duty of states to *ensure* the Convention rights is an onerous positive obligation requiring states to take whatever measures necessary to give effect to them. Article 4 establishes the means by which states are to respect and ensure the Convention rights and is complementary to the substantive rights set forth in the Convention. Article 4 must therefore be read together with the substantive rights to discern the scope of state obligations under each substantive right.[94]

Article 37 CRC obliges states to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[95] That states are obliged to *ensure* the right not to be subjected to inhuman or

[93] Cf. William Schabas and Helmut Sax, *Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers 2006) 63.
[94] John Tobin, 'Art. 4 A State's General Obligation of Implementation' in John Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 50 – 51, 108 – 109.
[95] Article 37 of the 1989 Convention on the Rights of the Child (CRC).

degrading treatment emphasises states' positive obligations under the article. States are thus not only required to refrain from subjecting children to inhuman or degrading treatment but are also required to take measures to protect children from being subjected to such treatment by private actors.[96] Additionally, article 37 must be interpreted in light of the best interest of the child. The best interest of the child-principle is established in article 3 CRC, which states in its first paragraph that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[97]

The use of the word 'shall' implies a strong obligation upon the states parties.[98] The best interest of the child-principle has three specific functions; as a substantive right; as an interpretative principle and as a procedural rule. The best interest of the child is a fundamental value of the CRC and it aims to ensure the full and effective enjoyment of all Convention rights.[99] The principle is one of the most debated provisions in the CRC.[100] It will only be addressed here insofar as it relates to the interpretation of positive obligations under article 37 CRC.

The Committee on the Rights of the Child has stated that a full application of the best interest of the child requires a rights-based approach that engages all actors to secure i.a. the physical and psychological integrity of the child and to promote the human dignity of the child.[101] The Committee has also noted that not only the universal nature of children's rights, but also the 'global nature and reach of the Convention' and the tripartite obligations to respect,

[96] Schabas and Sax (n 93) 63 – 65.
[97] Article 3 (1) CRC.
[98] Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lambrechts, *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar Publishing 2019) 60.
[99] Committee on the Rights of the Child, 'General Comment No. 14 on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para. 1)' (29 May 2013) CRC/C/GC/14, paras. 1, 4, 6.
[100] Vandenhole et al. (n 98) 59.
[101] Committee on the Rights of the Child, 'General Comment No. 14' (n 99) para. 5.

protect and fulfil rights should be taken into account for the best interest of the child to have full effect.[102]

Following its interpretative function, all substantive rights must be interpreted so that the outcome most effectively serves the best interest of the child compared to alternative outcomes. Though the best interest of the child is not an easily defined principle, what can be determined with certainty is that actions which are contrary to the rights of the child will not be in the best interest of the child.[103] Needless to say, the Convention rights are presumed to be in the child's best interest.[104] The Committee has also noted that 'the best interest of the child is a dynamic concept', comprised of issues that are constantly evolving, noting that it cannot prescribe what the best interest of the child is any given situation or point in time.[105]

From this it can be discerned that not only do states have positive obligations under the CRC generally and article 37 specifically, but positive obligations must be interpreted so that the outcome realises the best interest of the child as far as possible. Without going into more detail on the debate on how to determine the best interest of the child, it can nevertheless be concluded that any action contrary to the Convention rights is contrary to the best interest of the child. The inhuman or degrading treatment of children in the al Hol and al Roj camps is contrary to article 37 CRC and to the best interest of the child.

That states have extensive positive obligations under the CRC can be derived from the continued emphasis on states' obligation to undertake not only all judicial and legislative measures, but whatever *other* measures are necessary to ensure the effective enjoyment of Convention rights. These measures have to be appropriate and result in an outcome which realises the best interest of the child. That positive obligations under the Convention applies extraterritorially follows not only from the lack of evidence to the contrary,

[102] Ibid para. 16.
[103] Geraldine van Bueren, 'Children's Rights' in Daniel Moeckli et al. (eds.), *International Human Rights Law* (3rd edn. Oxford University Press 2018) 330.
[104] Vandenhole et al. (n 98) 64.
[105] Committee on the Rights of the Child, 'General Comment 14' (n 99) para 11.

but also from the fact that the best interest of the child must be discerned with the universality of children's rights and the Convention's global reach and nature in mind. The best interest of the child also aims at protecting the inherent dignity of all children. As has already been discussed in the previous sections, the concept of human dignity serves as a justification of an extensive interpretation of existing human rights.

If the repatriation of Swedish children from the al Hol and al Roj camps can be considered necessary to fulfil Sweden's positive obligation under article 37 CRC, another aspect to take into consideration is whether the best interest of the child would permit that children are repatriated without their mothers. Notably, the Swedish Government has 'explored the possibility' to repatriate children without their mothers. However, AANES has not allowed children to be separated from their mothers (see section 1.1). It is debatable whether Sweden's approach to separate children from their mothers is within the best interest of the child in this situation. According to article 9 (1) CRC, children may not be separated from their parents against the child's will unless separation is deemed necessary by 'competent authorities subject to judicial review', in accordance with applicable law, in cases of e.g. parental neglect or abuse. According to article 9 (2) all interested parties must be given an opportunity to participate in such proceedings. Hence, states may not separate children from their mothers unless the separation follows a proper decision, which can only be taken during proceedings on the national territory of the state where the authorities are placed when both child and mother is present during the proceeding, and hence on the territory of the state. Article 16 CRC additionally prohibits any arbitrary or unlawful interference with the child's privacy, family or home. Repatriation of children without their mothers could thus violate not only article 9 CRC but also article 16 CRC and would likely result in an outcome contrary to the best interest of the child. It is possible to argue, therefore, that if Sweden's positive obligation under article 37 CRC requires Swedish children to be repatriated from the al Hol and al Roj camps, the principle of the best interest of the child would require that their mothers be repatriated with them.

3 Extraterritorial application of international human rights law

3.1 Introduction

The previous chapter discussed the scope of Sweden's positive obligations under the prohibition of inhuman or degrading treatment in the extraterritorial setting. However, it did not come to any conclusion as to Sweden's positive obligations towards its nationals detained in the al Hol and al Hol camps. Such a conclusion cannot be reached without first discussing the question of Sweden's potential extraterritorial jurisdiction, as this chapter will show. The discussion of Sweden's positive obligations in relation to its nationals in al Hol and al Roj will be continued in chapter 5, where it will be discussed together with the findings of this chapter relating to Sweden's extraterritorial jurisdiction.

This chapter will discuss the second sub-question posed in section 1.2, namely whether Sweden has jurisdiction under international human rights law over Swedish women and children detained in the al Hol and al Roj camps. Section 3.2 focuses on the concept of jurisdiction as a threshold for the applicability of international human rights law. Sections 3.3 and 3.4 analyses two models of extraterritorial jurisdiction, the spatial and personal models, which are well-established in the jurisprudence of the ECtHR and the HRC, and whether Sweden has jurisdiction based on these models. Section 3.5 analyses a recent decision from the Committee on the Rights of the Child and the position of two UN Special Rapporteurs regarding extraterritorial jurisdiction that deviate from the established spatial and personal models. Section 3.6 analyses an alternative, functional, model of jurisdiction and whether Sweden exercises jurisdiction over its nationals in the al Hol and al Roj camps under this model.

3.2 Jurisdiction – a threshold criterion

Many human rights treaties contain so-called jurisdictional clauses limiting their application to individuals *within the jurisdiction* of the contracting states.[106] The ECHR states in article 1 that the states parties:

> [S]hall secure to everyone *within their jurisdiction* the rights and freedoms defined in /…/ this Convention.[107]

Article 2 CRC similarly states that the:

> States Parties shall respect and ensure the rights set forth in the present Convention to each *child within their jurisdiction*…[108]

And according to article 2 (1) ICCPR, each state party:

> … undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant…[109]

What, then, does being 'within the jurisdiction' of a state mean? This question will be answered in two steps, first by looking at the concept of jurisdiction itself and then moving on to when jurisdiction as such is considered to be exercised by states. The concept of jurisdiction in both general international law and international human rights law refers to the jurisdiction of states (as opposed, e.g., to the jurisdiction of a court),[110] but the concept of jurisdiction in international human rights law differs from that in general international law in purpose and function.[111]

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[106] Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 65) 2.
[107] Article 1 ECHR (emphasis added).
[108] Article 2 CRC (emphasis added).
[109] Article 2 ICCPR (emphasis added).
[110] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 19 – 20, 23.
[111] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to'

Jurisdiction in general international law is an aspect of state sovereignty and refers to the legal competence of states to regulate the conduct of natural and juridical persons. The competence to regulate conduct encompasses states' legislative power (prescriptive jurisdiction), states' power to enforce its prescribed legislation (enforcement jurisdiction), and states' power to take judicial action to settle legal disputes (adjudicative jurisdiction). The exercise of states' prescriptive, adjudicative and enforcement jurisdiction is presumed to be territorial, following the fundamental principle in international law of sovereign equality of states.[112] International law does not in itself define the function or basis of the different jurisdictional powers outlined above, leaving that as a matter of domestic law. The concept of jurisdiction in general international law serves to regulate transnational and international implications of states' exercise of prescriptive, enforcement and adjudicative jurisdiction, as they may overlap. Put differently, the existence of prescriptive, enforcement and adjudicative jurisdiction is based on domestic law whereas the international lawfulness of its exercise is determined by the international regulation thereof.[113] The *extraterritorial* exercise of jurisdiction in general international law refers to instances where a state extends the application of its domestic law outside its territory to regulate the conduct of an individual situated there, and whether that extension is lawful or not.[114] Following the presumption of territoriality, any extraterritorial exercise of a state's prescriptive or adjudicative jurisdiction must have a basis in international law.[115]

State jurisdiction in international human rights treaties governs the territorial scope of application of the treaty. Jurisdiction in international human rights

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[2012] Leiden Journal of International Law 857, 868; Milanović *Extraterritorial Application of Human Rights Treaties* (n 65) 26.

[112] Crawford (n 49) 431, 440.

[113] Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (n 111) 868; cf. Bernard H Oxman, 'Jurisdiction of States', Max Planck Encyclopedias of International Law (last updated November 2007) section A.1 – 2 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436?rskey=ZZLQcy&result=10&prd=MPIL> accessed 19 March 2021.

[114] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 27.

[115] Crawford (n 49) 431, 440.

law thus functions as a threshold criterion for any human rights or obligations to arise under the relevant treaty.[116] While the function of jurisdiction in international human rights law as a threshold criterion is generally agreed upon, there are different views on *how* it functions as such. Some scholars, like Marko Milanović, draw a sharp distinction between the concepts of jurisdiction in general international law and international human rights law as he argues that jurisdiction in international human rights law is a question of exercising (physical) power, a question of fact.[117] Others, like Samantha Besson, have argued that the concept of jurisdiction in international human rights law denotes a normative relationship between the state as a human rights duty-bearer and the individual as a rights-holder. She argues that this normative relationship should be understood as referring to a *de facto* political and legal authority consisting of effective, overall and normative power or control. The exercise of control can be prescriptive, adjudicative or executive, and must be exercised with a claim to legitimacy for it to ascertain the relationship between state and individual required to reach the jurisdictional threshold. Besson argues that when jurisdiction is understood as the normative relationship between state and individual exercised through *de facto* legal and political authority, jurisdiction also provides the practical conditions for human rights and duties to be feasible, namely the institutional framework required to enact and protect human rights and to allocate the corresponding duties.[118]

Besson's account thus considers the two concepts of jurisdiction as interlinked, in that adjudicative, prescriptive and enforcement jurisdiction constitute means of asserting jurisdiction under international human rights law. As the following discussion will show, this account seems the most in

[116] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 118; Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (n 111) 860.
[117] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 41.
[118] Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (n 111) 863 – 865.

line with how both states and international judicial and quasi-judicial bodies have understood the concept of jurisdiction in international human rights law.

A consequence of jurisdiction in international human rights law functioning as a threshold criterion for the application of human rights treaties is that if a state does not have jurisdiction over an individual then that individual does not have any human rights claims against that state. The state, in turn, has no human rights obligations towards that individual. Human rights, systematized under treaty law, are dependent on the concept of jurisdiction. Jurisdiction denotes both the normative threshold of recognition of human rights and the practical conditions for the application of international human rights law.[119]

Interpreting and defining what constitutes as being *within the jurisdiction* of a state is relatively uncomplicated when it comes to the application of a human rights treaty within the territorial boundaries of a state party.[120] When it comes to the extraterritorial application of a human rights treaty, meaning its application in situations where the individual affected by the alleged rights-violation was located outside the territorial borders of the violating state at the material time,[121] interpreting the concept of jurisdiction becomes more difficult.[122]

Limiting the application of human rights treaties to situations occurring within the sovereign borders of the state would exclude scenarios where states violate human rights without having control over the territory and result in the lack of protection of the rights of affected individuals. Examples of situations which would fall outside a purely territorial concept of jurisdiction under international human rights law include extraterritorial deprivation of life, as well as killings by third parties abroad, and killing, torture and other ill-treatment in the context of extraterritorial detention. Such a restrictive conceptualisation of jurisdiction under international human rights law would

[119] Ibid 862 – 863.
[120] Cf. e.g. Lawson (n 73) 83, 87.
[121] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 8; Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (n 111) 858.
[122] Cf. Lawson (n 73) 83, 87.

contradict the principle of universality in the human rights regime.[123] The concept of jurisdiction in international human rights law has not, however, been interpreted as exclusively territorial by international courts and other international treaty bodies. At least two approaches to extraterritorial jurisdiction can be discerned in international jurisprudence, especially in the case law of the ECtHR.[124]

3.3 Extraterritorial jurisdiction under the European Convention on Human Rights

As noted in the previous section, article 1 ECHR establishes the exercise of jurisdiction as a prerequisite for the application of the treaty, and thus for any state obligations to arise under it.[125] Interpreting article 1 ECHR following the rules of treaty interpretation in article 31 (1) VCLT, that is, by looking at the ordinary meaning of the word, in the context of international law and in light of the object and purpose of the ECHR, the ECtHR has found that the concept of jurisdiction under article ECHR is primarily territorial. As such, it is presumed to be exercised by the contracting states within their respective territories.[126] In certain exceptional circumstances, jurisdiction can be exercised outside the states' territories when the actions of the state are performed or produce effects outside its territory. The ECtHR has developed two models of extraterritorial jurisdiction: one focusing on the exercise of control over territory (the spatial model) and the other focusing on the exercise of control over persons (the personal model).[127]

[123] Cf. Milanović, *Extraterritorial Application of Human Rights Treaties* (n 62) 55, 118, 123.
[124] Ibid 54.
[125] Cf. European Court of Human Rights 'Guide on article 1 of the European Convention on Human Rights: Obligation to Respect Human Rights – Concepts of "jurisdiction" and imputability' (last updated 31 December 2020) (Guide on article 1 ECHR) para. 1.
[126] *M.N. and others v. Belgium* App no 3599/18 (ECtHR [GC], 5 March 2020) paras. 98 – 99.
[127] Guide on article 1 ECHR (n 125) paras. 34, 36.

3.3.1 The spatial model

The spatial model conceives jurisdiction as the effective overall control of an area. It is the approach with the most support in the treaty practice of states, and it is well-established in the jurisprudence of the ECtHR. The standard was set in the case of *Loizidou v. Turkey,*[128] a case situated in the context of the Turkish occupation of Northern Cyprus where the applicant was denied access to her properties by Turkish forces. The Turkish government argued, i.a., that the matter did not fall within Turkish jurisdiction but within the jurisdiction of the Turkish Republic of Northern Cyprus (TRNC). The ECtHR found, noting that it was at this point only called upon to determine whether the claims fell *within the jurisdiction* of Turkey despite the actions taking place outside of Turkish sovereign territory,[129] that:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - *it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control* whether it be exercised directly, through its armed forces, or through a subordinate local administration.[130]

The exercise of control by the Turkish Government was derived from the occupation of Northern Cyprus by Turkish armed forces and the establishment of the TRNC.[131] In the judgment on the merits, the ECtHR affirmed that Turkey had exercised control over the relevant areas of Northern Cyprus through the TRNC, adding *overall* to the effective control formula, and noting that it was not necessary to show that Turkey had exercised detailed control over the area. The ECtHR held that the exercise of overall

[128] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 127.
[129] *Loizidou v. Turkey* (preliminary objections) App no 15318/89 (ECtHR, 23 February 1995) paras. 10, 55, 61.
[130] Ibid para. 62 (emphasis added).
[131] Ibid para. 63.

control was evident from the 'large number of troops engaged in active duties' in the area.[132] In later case law, the ECtHR has clarified that whether a state exercises effective control through a local subordinate administration depends on the state's military, economic and political support to that administration which provides the state influence and control over the region.[133]

Examining the components of the spatial approach to jurisdiction, the *effective control over an area*, the "area" could potentially encompass anything from whole territories to prison facilities or smaller places. To properly define it, it ought to be understood in functional sense as an area over which the state has the possibility to exercise a sufficient degree of control.[134] "Control" refers to the factual circumstances of the case and whether the state exercised *de facto* control rather than whether the state had a legal right to exercise control. Hence it encompasses lawful as well as unlawful exercise of control over an area. The control must, furthermore, be exercised by state agents. The "overall" requirement means that the state does not need to exercise detailed control over the policies and actions of the actor whose conduct directly violated the right(s) of the individual for the jurisdictional threshold to be reached. The "effective" requirement generally requires the presence of armed forces on the ground, but is best understood as a spectrum, ranging from the establishment of a de facto government to less permanent control. Where on the spectrum the degree of control falls ought to depend on the consequences of the control exercised, and so the "effective" requirement, as well as the requirement of control, should be understood in a functional sense. Thus, if a state is obliged to secure all conventional rights, it should have the degree of control over the territory or area to realistically be able to do so.[135] Following the spatial model, when the state does not have effective overall control over a territory or an area, it does not exercise jurisdiction, has

[132] *Loizidou v. Turkey* (merits) App no.15318/89 (ECtHR [GC]18 December 1996) para. 56.
[133] *Al-Skeini and Others v. the United Kingdom* (n 70) 139.
[134] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 54 -55.
[135] Ibid. 135, 137, 141.

no human rights obligations, and in extension, there is no extraterritorial human rights protection in relation to the individuals within that area.[136]

Applying the spatial model to the situation of Swedish women and children detained in the Syrian Arab Republic, Sweden would have to exercise effective overall control over the al Hol and al Roj camps for the jurisdictional threshold to be reached. That the al Hol and al Roj camps are under the control of the Syrian Democratic Forces (SDF) is undisputed by both NGO:s and UN representatives. Sweden would have to exercise control over the al Hol and al Roj camps in a way which meets the standard set in *Loizidou,* where the ECtHR as noted exemplified that effective overall control may be exercised either directly, through a state's armed forces or through a subordinate local administration. In *Loizidou,* Turkish armed forces had occupied Northern Cyprus and established a subordinate administration (the TRNC), and was deemed to exercise overall control due to the number of armed forces on active duty in the relevant area. Sweden has evidently not occupied any territories in Syria nor are any members of the Swedish armed forces present in the al Hol and al Roj camps.

The UN Special Rapporteurs suggested that Sweden is capable of influencing the circumstances of its nationals in the al Hol and al Roj camps (cf. section 1.1), so does that potential ability to influence the actions of the SDF meet the criteria of spatial jurisdiction? Hardly. The SDF cannot be considered as a Swedish subordinate local administration; there are neither allegations to this effect nor any indications of a relationship of economic, political and military support from Sweden to the SDF. Having the ability to communicate and to negotiate with a foreign entity cannot be conceived as that group being a subordinate local administration of the negotiating state. Hence, Sweden does not exercise effective overall control over the al Hol and al Roj camps and therefore does not have jurisdiction over the women and children in al Hol and al Roj under the spatial model.

[136] Ibid. 170 – 171.

3.3.2 The personal model

The personal model conceives jurisdiction as the exercise of authority and control of the state over individuals.[137] Personal jurisdiction was first conceptualised by the European Commission of Human Rights (the Commission) in its decisions in the *Cyprus v. Turkey*[138] cases where it found that:

> …the High Contracting Parties are bound to secure the said rights and freedoms *to all persons under their actual authority and responsibility,* whether that authority is exercised within their own territory or abroad.[139]

The Commission found, in subsequent decisions, that whenever there was a potential violation of a substantive ECHR right, the state had jurisdiction over the potentially affected individual. Defining control (and thus jurisdiction) over an individual as the ability to substantively violate his or her right(s), renders the concept of jurisdiction limitless. Consequently, jurisdiction loses its function as a threshold criterion.[140]

The ECtHR rejected this limitless definition of personal jurisdiction in the case of *Banković and Others v. Belgium and Others,*[141] which concerned airstrikes conducted by the North Atlantic Treaty Organisation (NATO) on the territory of the Free Yugoslavian Republic. During a bombing of a radio- and tv-station, 16 people were killed and another 16 injured.[142] The applicants argued as to the admissibility that the bombings had brought the deceased and injured in question within the jurisdiction of the NATO member states that had been part of the operation (who were also states parties to the ECHR). To this effect the applicants argued that the effective control-test developed in

[137] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 173; cf. Guide on article 1 ECHR (n 125) para. 47.
[138] *Cyprus v. Turkey* (dec.) App nos 6780/74 and 6950/75 (Commission Decision, 26 May 1975); cf. Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 181.
[139] Ibid para. 8 (emphasis added).
[140] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 173, 182.
[141] *Banković and Others v. Belgium and Others* (decision on the admissibility) App no. 5220/99 (ECtHR [GC], 12 December 2001).
[142] Ibid paras. 6 – 11.

Loizidou could be modified, so that that the positive obligation under article 1 ECHR to secure convention rights would be proportionate to the level of control exercised over the affected rights. This approach would mean that the states exercised effective control and thus had jurisdiction over the rights affected by the action in question.[143]

The ECtHR noted that the alleged jurisdictional link between the applicants and the respondent states was the act of bombing itself, which was performed or had effects outside the territories of the respondent states. The question to be answered, therefore, was whether the applicants and their deceased relatives had been brought within the jurisdiction of the respondent states as a result of the bombings. The ECtHR went on to answer the question in the negative. Essentially, the ECtHR agreed with the respondent Governments' position that the applicants' interpretation of jurisdiction under article 1 ECHR would amount to a 'cause-and-effect' notion of jurisdiction. The ECtHR argued that such an approach would lead to the outcome that *anyone adversely affected* by a state party's action would fall within the jurisdiction of that state, and that such an interpretation would render the notion of jurisdiction devoid of any purpose.[144]

The ECtHR reiterated the 'essentially territorial nature of jurisdiction' in the case of *Medvedyev and Others v. France*. In doing so, it noted that the spatial model of jurisdiction established in *Loizidou* did not encompass what it called instantaneous acts such as the bombings in the *Banković* case.[145] Though excluding so-called instantaneous extraterritorial acts from the range of actions which may amount to the exercise of jurisdiction, it is possible that *non*-instantaneous acts may still amount to the exercise of jurisdiction. An example would be violations of rights occurring in extraterritorial detention, where effective control over the relevant territory or area under the *Loizidou* standard is not exercised.[146] This is in line with the ECtHR development of

[143] Ibid paras. 46 – 47.
[144] Ibid paras. 54, 75, 82.
[145] *Medvedyev and Others v. France* App no 3394/03 (ECtHR [GC], 29 March 2010) para. 64.
[146] Cf. Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 187.

the personal model after *Banković,* because though it rejected the 'cause-and-effect' approach presented in *Banković,* it has not completely abandoned the personal model of jurisdiction. It revisited the model in the case of *Issa and Others v. Turkey.*[147]

Issa concerned the arrest, detention, ill-treatment and subsequent killing of Iraqi nationals during a Turkish military operation conducted in northern Iraq. The ECtHR noted that while jurisdiction under article 1 ECHR must be understood as primarily territorial, in line with the concept of jurisdiction in general international law, jurisdiction is nevertheless not restricted to the national territory of the states parties. In exceptional circumstances, states' actions performed or producing effects outside their territories may amount to the exercise of jurisdiction under article 1 ECHR.[148] Thus, the ECtHR stated that states parties may also be accountable for violating the rights and freedoms of individuals:

> …who are *in the territory of another State* but who are found to be *under the former State's authority and control through its agents operating* – whether lawfully or unlawfully – in the latter State.[149]

The ECtHR supported this conclusion with reference to the case of *Lopez Burgos v. Uruguay* before the HRC (which will be discussed in section 3.4), stating that states cannot be allowed to commit acts outside its territory that would amount to a violation had it been committed within its own territory.[150] This approach to the personal model was reaffirmed in several cases following *Issa.*[151]

In *M.N. and Others v. Belgium,* an admissibility decision from 2020, the ECtHR clarified the notion of state actions 'producing effects' outside its

[147] *Issa and others v. Turkey* App no 31821/96 (ECtHR, 16 November 2004, made final 30 March 2005).
[148] Ibid paras. 4, 66 – 68.
[149] Ibid para. 71 (emphasis added).
[150] Ibid.
[151] Milanović, *Extraterritorial Application of Human Rights Treaties* (n 65) 184.

territory. The case concerned Syrian nationals who applied for visas at the Belgian diplomatic/consular representation in Beirut, applications which were denied by Belgian authorities.[152] The ECtHR held that 'the mere fact that' a decision to refuse a visa application 'impacted on the situation of persons resident abroad' could not be considered an exercise of jurisdiction.[153] This decision reaffirmed the *Banković* rejection of a 'cause-and-effect' notion of jurisdiction.

Given that the personal model as construed by the ECtHR requires the exercise of authority and control over individuals by state agents, does Sweden have jurisdiction under the personal model in relation to Swedish women and children detained in the al Hol and al Roj camps? As there is no evidence of Swedish state agents operating in the al Hol and al Roj camps whose actions would be able to bring women and children within Swedish jurisdiction the answer must be no. The ECtHR has time and again rejected a limitless personal model, most recently in *M.N. and Others.* Sweden does not exercise authority or control over individuals in the al Hol and al Roj camps and thus does not have jurisdiction under the personal model.

3.4 Extraterritorial jurisdiction under the International Covenant on Civil and Political Rights

The jurisdictional clause in article 2 (1) ICCPR differs from the ones found in both the ECHR and the CRC, as it requires states to respect and ensure the Covenant rights 'to all individuals within its territory and subject to its jurisdiction'.[154] There are two possible interpretations of this provision and its use of the connective 'and'. The first is that individuals must be both within the territory of a state party *and* subject to its jurisdiction for them to have rights under the Covenant against the state and for the state to have corresponding obligations towards them. As noted by Dominic McGoldrick,

[152] *M.N. and Others v. Belgium* (n 126) paras. 11ff.
[153] Ibid para. 112.
[154] Article 2 (1) ICCPR, emphasis added.

such an interpretation could lead to results which, in the words of article 32 VCLT, would be 'manifestly absurd' as some rights presume that the individual is outside the state's territory when the right is exercised. The other interpretation is that states have obligations under the Covenant both to individuals within their territory *and* towards individuals subject to their jurisdiction, even when they are situated outside of the state's territory.[155] The HRC has opted for the second interpretation, noting that states are obliged to respect and ensure the Covenant rights to individuals within their power or effective control, whether the individual is situated within their territory or not.[156]

The HRC has elaborated on situations where states exercise extraterritorial jurisdiction under the Covenant in its jurisprudence. One such situation is when the state exercises effective jurisdiction and effective control over an occupied area through its military forces within that area.[157] This approach is equivalent to the notion of spatial jurisdiction developed by the ECtHR and, similarly, Sweden cannot be considered to exercise jurisdiction over women and children in al Hol and al Roj based on this approach under the ICCPR.

Another situation when states exercise extraterritorial jurisdiction under the Covenant is through its state agents operating abroad. This was established in *Lopez Burgos v. Uruguay.* The case concerned Mr. Lopez who had allegedly been kidnapped by Uruguayan security and intelligence forces in Argentina and subsequently detained in Buenos Aires in secret for two weeks. The HRC concluded that the actions of Uruguayan state agents places Lopez under Uruguayan jurisdiction, stating that 'it would be unconscionable' to interpret the concept of jurisdiction under article 2 (1) ICCPR so that states are allowed 'to perpetrate violations of the Covenant on the territory of another State,

[155] Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 47- 48.
[156] HRC, 'General Comment No. 31' (n 86) para. 10.
[157] Cf. HRC, 'Concluding observations of the Human Rights Committee – Israel', UN Doc CCPR/C/79/Add.93 (18 August 1998) para. 10.

which violations it could not perpetrate on its own territory'.[158] The approach to jurisdiction taken by the HRC in *Lopez Burgos* is equivalent to the personal model of jurisdiction developed by the ECtHR and as it, too, focuses on the actions of state agents operating abroad. As previously concluded, Sweden does not have state agents operating in the al Hol and al Roj camps. Thus, Sweden does not exercise jurisdiction based the personal model as defined under the ICCPR either.

3.5 Extraterritorial jurisdiction under the Convention on the Rights of the Child

Though article 2 (1) CRC is largely discussed in terms of its general principle of non-discrimination, it also functions as a general jurisdictional clause for the CRC, requiring the states parties to respect and ensure the Convention rights to all children within their jurisdiction. State jurisdiction under the CRC is not limited to the territory of the states parties but extends to children situated outside the state's territory when the state is considered to exercise jurisdiction over the child.[159] Since the individual petition mechanism under the CRC is fairly new,[160] its jurisprudential body is relatively thin. However, in a very recent admissibility decision, the Committee elaborated on the concept of jurisdiction under the CRC in relation to children detained in Syria.

3.5.1 The case of L.H. and Others v. France

In *L.H. and Others v. France* the Committee on the Rights of the Child had to decide whether the CRC applied extraterritorially to children of French nationality (France being a state party) currently detained in the al Roj, al Hol and Ain Issa camps in Syria.[161] The applicants were L.H., L.H. and D.A., grandparents of the children concerned. They argued that the French

[158] *Delia Saldias de Lopez v. Uruguay,* Communication No. 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) paras 2.2, 12.3, 13.
[159] Tobin (n 94) 55 – 56.
[160] The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure entered into force on 14 April 2014.
[161] Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No. 79/2019 and No. 109/2019. *See annex III.*

Government had not taken necessary measures to repatriate the children to France, and through this omission to act violated several CRC articles, namely articles 2 (obligation to take positive measures to ensure the respect of the Conventional rights); 3 (obligation to guarantee children necessary protection when parents or legal guardians are unable to do so); 6 (obligation to ensure the right to life, survival and development of children); 20 (obligation to provide children with special protection in the context of deprivation of their family environment); 24 (obligation to ensure access to medical care); and 37 (obligation to protect children from unlawful detention).[162]

Regarding the question of extraterritorial jurisdiction, the applicants argued that the continued presence of the children in the camps was a direct result of France's decision not to repatriate them. Referencing jurisprudence of the ECtHR, the applicants further argued that an individual may be brought within the jurisdiction of a state when the state takes action within its territory that affects the situation of individuals outside its territory. They argued that this interpretation of the notion of jurisdiction complies with public international law, which defines jurisdiction as the state's lawful power to act by legislative, executive and judicial means. They contended that the state is considered to have jurisdiction over its nationals even when said nationals are not present within the national territory. Additionally, the applicants argued that France had decisive influence over the Kurdish authorities currently detaining the children, as the French government had worked to stabilize areas freed from ISIL control in the Syrian Arab Republic and thus developed a military and diplomatic relationship with the Kurdish authorities. France therefore exercised a military and political influence over the Kurdish authorities.[163]

The French Government denied that it exercised jurisdiction over the children in question. The French Government argued that it has agreed to the obligations under the CRC only in situations falling within its sovereignty and

[162] Ibid paras. 1.1, 3.1.
[163] Ibid paras. 2.12, 2.13, 2.15.

competence and over which it can be considered to likely exercise effective control. As to the present case, the Government argued that the children concerned are not under the effective control of France, neither through its agents nor through any local authority over which France would have effective control. Rather, the children are under the control of the Kurdish forces, over which the French Government does not exercise control.[164]

In comparison to the spatial and personal model established both in the case law of the ECtHR and the HRC, the applicants' arguments can be understood as appealing both to the personal model of jurisdiction through the argument that the French state's actions produced effects extraterritorially, and to the spatial model through the argument that France exercises sufficient control over the Kurdish forces (i.e. the SDF). In both the jurisprudence of the ECtHR and the HRC, the personal model requires actions of state agents. The 'cause-and-effect' approach to the personal model has, as discussed in section 3.3.2, been rejected by the ECtHR as recently as 2020 in the *M.N. and Others* decision. The spatial model requires effective control over territory exercised either directly or through a subordinate local administration, the latter determined with reference to military, economic and political support that provides influence over the relevant area. This requirement can scarcely be met by a regular diplomatic or military relationship. As argued in section 3.1.1 regarding Sweden's alleged influence over the SDF, it is not a question of ability to communicate with another actor but of controlling it. Based on the spatial and personal models of jurisdiction, the applicants' arguments have little support. So, what did the Committee decide?

The Committee first noted that it had to determine whether France had personal jurisdiction over the children in question, and that the notion of jurisdiction under the CRC is not limited to territory. Referencing an analysis on extraterritorial jurisdiction conducted by two UN Special Rapporteurs, the Committee stated that a state party may also have jurisdiction when acts are

[164] Ibid paras. 4.1, 4.3 – 4.5.

performed or produce effects outside its national territory.[165] The Special Rapporteurs' analysis will be discussed in detail in section 3.5.2.

As to the circumstances of the case at hand, the Committee noted that the French Government had been informed of the extremely precarious situation of the children detained in the al Roj, al Hol and Ain Issa camps. The Committee held that that the deplorable conditions of the detention environment posed an imminent risk of irreparable harm to the lives of the children, their mental and physical integrity and their development. Though recognising that the camps are under the effective control of the SDF, the Committee argued that the French Government had the capability and the power to protect the rights of the children by repatriating them or providing other consular responses. The Committee concluded that France exercised jurisdiction over the children and declared the case admissible.[166]

Though alluding that it was applying a personal model of jurisdiction, the Committee did not approach jurisdiction in the way that the personal model has been defined by the ECtHR or the ICCPR. Neither did it apply a spatial model of jurisdiction. This departure from existing jurisprudence on jurisdiction has been criticised. As Marko Milanović has rightly noted, an application of either the spatial or personal model of jurisdiction would have led to the conclusion that the children were not within French jurisdiction. Milanović notes that the *L.H. and Others* decision seems to endorse the 'cause-and-effect' notion of jurisdiction rejected by the ECtHR in *Banković,* as *L.H. and Others* concerns a decision of the French state (to *not* repatriate) producing effects outside French territory. He notes that the applicants' approach to jurisdiction would create a situation where a decision not to protect human rights in a specific case would trigger an obligation to protect them. As he points out, the ECtHR rejected this approach in the *M.N. and Others* case (discussed in section 3.3.2).[167]

[165] Ibid para. 9.6.
[166] Ibid paras 9.7, 10 – 11.
[167] Marko Milanović, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' (10 November 2020) on EJIL: Talk!

Milanović also criticised the central role that nationality played in asserting jurisdiction in *L.H and Others.* Had the children not been French nationals, France would not have had a duty to protect their rights under the CRC, and as Milanović pointed out, France had the same *capability* to intervene in favour of all children in the camps as it had for its nationals. Making nationality a normative foundation of the application of human rights would, he argued, be contrary to the universality of human rights and lead to arbitrary results because of states' different legislation concerning nationality.[168]

This critique is not to be disregarded. Indeed, the Committee seems to have taken an approach which puts it at odds with the well-established jurisprudence of the ECtHR and the HRC. It is also difficult to oppose the point made that a decision *not* to act cannot reasonably create an obligation to act, when such an obligation did not exist before the decision had been made and would not have arisen without it. As previous sections have shown, too, nationality has not been considered as a normative foundation for the application of human rights and as a sole basis it does undoubtedly does not fit well with the idea of human rights universality. In the following sections it will be argued, however, that there are grounds for carving a path for a different approach to jurisdiction which is not necessarily guilty of these faults.

3.5.2 The approach of the United Nations Special Rapporteurs

To properly understand the Committee's reasoning in *L.H. and Others v. France*, it is necessary to discuss the legal analysis conducted by the UN Special Rapporteurs that was referenced in the decision. The Special Rapporteur on the promotion and protection of human rights while countering terrorism and the Special Rapporteur on extrajudicial, summary or arbitrary executions published in 2020 a legal analysis of the extraterritorial jurisdiction of states over children and their guardians in, i.a., camps in

<www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> accessed 2021-02-02.
[168] Ibid.

Syria.[169] In the opinion of the Special Rapporteurs, states have a positive obligation:

> … to take necessary and reasonable steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law. This includes /…/ torture or cruel, inhuman or degrading treatment…[170]

Though reiterating that state jurisdiction under international human rights law is primarily considered to be territorial, the Special Rapporteurs noted that jurisdiction may also be exercised when a state actions are performed or have effects outside the national territory of the state. The Rapporteurs noted that two models of jurisdiction, spatial and personal, have been established in the case law of the ECtHR. They concluded that any acts or omissions that could engage states jurisdiction over their nationals detained in Syria would fall under the personal model.[171]

The Rapporteurs then noted that international human rights law recognises situations of extraterritorial detention, use of force by state agents, actions by consular and diplomatic agents abroad and the exercise of executive, legislative and administrative powers abroad as capable of constituting the exercise of jurisdiction. They noted that the relevant jurisprudence of international human rights bodies focus on the extent of state control over the applicant or the applicant's rights. The extent of the control exercised is considered determinative of the which extraterritorial obligations the state may have.[172]

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[169] United Nations Human Rights Special Procedures, 'Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic' (2020) <www.ohchr.org/EN/Issues/Terrorism/Pages/Research-papers-and-Inputs.aspx> accessed 2020-01-29.
[170] Ibid para. 3.
[171] Ibid paras. 8 – 10.
[172] Ibid paras. 11 – 12.

Returning to the context of women and children detained in Syria, the Rapporteurs argued that when there is a close connection between the state's action and the repercussions for the individual, it is likely that the state has exercised jurisdiction. The Rapporteurs argued, further, that acts which impact individual rights in a *direct and reasonably foreseeable manner* may constitute an exercise of jurisdiction. They concluded that states, therefore, may have extraterritorial obligations to protect human rights where they have the capacity to do so. Based on this reasoning, states may have jurisdiction over their detained nationals in Syria due to the impact their acts have over the rights of these individuals. In such cases, states have an obligation to act with due diligence to protect the affected rights from violations by state agents as well as third parties.[173] The Special Rapporteurs, summarily, found that to the extent that states' actions directly impact the rights of an individual detained in the camps in Syria, the individual is brought within the jurisdiction of the state in relation to the specific right affected.[174]

The Special Rapporteurs noted that the states of nationality are not only best posited to ensure the protection of the human rights of their nationals currently detained in Syria, but also have the 'only tenable legal claim to protect their citizens' and the capacity to realise such claims. They then concluded that states have de facto control over the human rights of children and their guardians currently detained in Syria, and therefore positive obligations to prevent violations of their nationals' human rights in the camps. As one factor of determining the de facto control of states over such rights, the Rapporteurs noted the extent to which a state has the ability to end violations of individual rights by exercising or refusing positive interventions, but also the extent to which other states or non-state actors exercise control over the relevant right(s).[175]

The Special Rapporteurs began their report with reiterating the established models of jurisdiction and proposed that their findings would fall within the

[173] Ibid paras. 13 – 17.
[174] Ibid para. 34.
[175] Ibid paras. 35 – 36.

personal model of jurisdiction. However, the arguments made by the Rapporteurs are dangerously close to the 'cause-and-effect' notion that, as discussed in section 3.3.2, has been cut from the personal model by the ECtHR. Trying to fit their argumentation within the personal model does, therefore, make it vulnerable to a quick dismissal based on the *Banković* and *M.N. and Others* cases.

Neither the spatial or personal models of extraterritorial jurisdiction support the findings of the Committee in *L.H. and Others* nor the Special Rapporteurs' findings. Their arguments build largely upon states' capabilities and can be understood as adopting a 'functional' approach to jurisdiction.[176]

3.6 An alternative: the functional model

An alternative to the spatial and personal models of jurisdiction was proposed by Judge Giovanni Bonello in his concurring opinion in the case of *Al-Skeini v. the United Kingdom* before the ECtHR. Judge Bonello argued that a state should be considered to exercise jurisdiction under article 1 ECHR when it has the power to perform or not perform any of five functions he identified as primordial ways to ensure observance of human rights under the ECHR. He identified these five functions as: the power to violate or not violate human rights through state agents; to put in place systems to prevent human rights violations; to investigate alleged human rights violations; to punish those who commit human rights violations and; to compensate victims of human rights violations. When this 'functional' jurisdiction is exercised, states have both positive and negative obligations under the ECHR. In support of this, Judge Bonello argued that jurisdiction arises from the fact that states, by ratifying the ECHR, have assumed the obligations under the ECHR and have the capability fulfil them.[177] This functional approach, he argued, best fits both the universality of human rights and the object and purpose of the ECHR; to ensure effective human rights protection. A strictly territorial or geographical

[176] Cf. Milanović, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' (n 167).
[177] *Al-Skeini and Others v. the United Kingdom* (n 70), Concurring Opinion of Judge Bonello paras. 10 – 13, 19.

limitation of the application of the ECHR, without regards to states' capacity to perform these essential functions extraterritorially, would not fit its purpose.[178] Judge Bonello's functional jurisdiction may be criticised as overly broad, leading to the imposition of politically unacceptable obligations upon states, or becoming the cause-and-effect notion of jurisdiction rejected in *Banković.* Yuval Shany has, therefore, re-conceptualised Bonello's original reading of functional jurisdiction by adding two limitations.[179]

Shany argues that the discussion on the concept of jurisdiction and the extraterritorial application of human rights treaties reflects the fundamental tension between universalism and particularism underpinning international human rights law in general. The tension relates i.a. to what the purpose of human rights is taken to be; either to uphold universal values or to serve as a defence against totalitarianism. Following this tension, two tenable positions on the role of states within international human rights law is discernible: either to serve as tools for the implementation of universal values, or to actualise inter-state agreements which limit states' powers over individuals. As to the concept of jurisdiction, a universalist approach holds that states must take necessary measures to ensure the effective protection of rights both within and outside their territory. In contrast, a particularist or state-centric approach holds that states are primarily responsible for upholding rights-protection within their territories and opts for a restrictive extraterritorial application of human rights obligations. According to Shany, a more expansive, and universalist, reading of jurisdiction better serves the object and purpose of human rights treaties in general.[180]

Shany thus argues in favour of functional jurisdiction, meaning that jurisdiction depends on the state's functional capacity to comply with or violate human rights norms. This 'return to universalism', he argues, requires states to uphold human rights wherever in the world they are operating and whenever they are able to do so. He proposes to limit the application of

[178] Ibid paras. 8 – 9.
[179] Shany (n 31) 47, 67 – 68.
[180] Ibid 48 – 49.

functional jurisdiction based on either the intensity of power relations or the existence of special legal relationships.[181] Limiting functional jurisdiction to a certain intensity of power relations means that individuals over whom a state exercises power extraterritorially fall within the jurisdiction of the state, if the state's act or omission has a potential impact upon the individual which is direct, significant and foreseeable. Indirect, insignificant or unexpected impact would not trigger this notion of jurisdiction. Limiting functional jurisdiction to the existence of special legal relationships means that states have jurisdiction over individuals with whom they have a relationship that renders the state particularly well situated to protect the rights of those specific individuals. Shany exemplifies such relationships as when states have either physical control over the individual or control over the territory where the individual is situated. He adds that other special legal relationships are included, too, but does not elaborate on which relationships these may be.[182]

Under Shany's functional jurisdiction, states that are particularly well-situated to protect human rights should do so either because the impact of their acts or omissions is direct, significant and foreseeable or because the legal context creates a legitimate expectation that the state should protect the right(s) in question. By limiting the application accordingly, mere ability to protect human rights does not entail an obligation to do so, and the functional reading of jurisdiction fulfils the need of political acceptability and legal certainty that the 'cause-and-effect' notion lacks. He concludes that the functional approach serves the universalist rationale of human rights and leaves a state-centric approach focused on borders and territories behind, focusing instead on the relationship between states and individuals.[183]

The reasoning of the Committee of the Rights of the Child in the *L.H. and Others* decision and the reasoning of the Special Rapporteurs in their legal analysis is almost an exact application of the functional approach as conceptualised by Shany. The references to direct and foreseeable impact as

[181] Ibid 47, 66 – 68.
[182] Ibid 68 – 69.
[183] Ibid 70 – 71.

well as the states of nationality being best situated capability-wise and holding the only legal claim to intervene in favour of their nationals in the Rapporteurs' analysis are especially similar to Shany's reasoning. However, the Committee and the Rapporteurs seem to add nationality as a legal relationship capable of reaching the jurisdictional threshold. There is nothing in Shany's account that would expressly exclude nationality as a special legal relationship capable of triggering functional jurisdiction, indeed, he leaves the legal relationship more open for interpretation than perhaps the other limitation of power relations. As criticised by Milanović regarding the *L.H. and Others* decision, using nationality as a normative foundation for the application of human rights law would be contrary to the notion of universality. Shany himself justifies his account of functional jurisdiction on universality. This raises the question whether nationality can be read into Shany's account of functional jurisdiction without contradicting the universality of human rights.

Arguably, nationality plays different roles and thus leads to different outcomes when applied to the personal and the proposed functional models of jurisdiction respectively. Milanović criticised nationality as a but-for-condition in a decision which was vague on which jurisdictional foundation it was built upon. Adding nationality as a limitation to the personal model of jurisdiction limits the model to only apply when states exercise, through its agents, control over its own nationals abroad. That indeed would be to diminish the universality claim of human rights. The functional model as conceptualised by Shany, however, does not limit the exercise of jurisdiction to apply only to states' nationals abroad, as nationality is only one of many legal relationships which can trigger the jurisdictional threshold.

It was noted previously that the *L.H. and Others* decision may contradict the ECtHR's findings in *M.N. and Others*, namely that a decision not to repatriate would trigger an obligation to repatriate the children in *L.H.* When the *L.H.* decision is read as an application of the personal model, it reads as though the alleged jurisdictional link between France and the French children is based on the decision not to repatriate them, the decision being an action of the state

producing effects extraterritorially. As held in *M.N. and Others* and as noted by Milanović, such a decision cannot create a jurisdictional link which would not have been present if the authorities had not made a decision. Under the personal model, the approach by the Committee on the Rights of the Child and the Special Rapporteurs is faulty in this regard. However, under a functional model the jurisdictional link is not created by the decision not to repatriate but exists already based on the special legal relationship between the state and the children of that state's nationality. Both the Committee in *L.H. and Others* and the Special Rapporteurs in their analysis invited unnecessary criticism by trying to fit their approach to jurisdiction within the personal model.

Returning to the question of Sweden's potential jurisdiction over Swedish women and children in al Hol and al Roj, the functional model would arguably find that Sweden exercises jurisdiction. Sweden has the capacity to protect its nationals from human rights violations in the al Hol and al Roj camps. In fact, it could be argued that Sweden has the capability to protect all individuals in al Hol and al Roj, regardless of their nationality. However, subject to the first of Shany's limitations, Sweden exercises functional jurisdiction only over the individuals whose rights its acts or omissions have direct, significant, and foreseeable impact on.

Here, the concepts of jurisdiction in general international law and international human rights law may once again overlap. Sweden retains a measure of prescriptive and adjudicative jurisdiction over nationals when they are abroad; this follows the concepts of jurisdiction under domestic law and general international law. If one takes the approach that the enactment of domestic jurisdiction abroad can constitute the exercise of power in a way that triggers jurisdiction under international human rights law, which Shany arguably does and which much of the jurisprudence discussed in this thesis so far also does, Sweden has the capacity to impact the rights of its nationals detained in al Hol and al Roj in a way that is significant, foreseeable and direct. It is significant because the rights affected are fundamental human rights such as the prohibition of inhuman or degrading treatment which was

discussed in section 2.3. The impact is foreseeable in that Sweden is aware of the alleged violations and its capability to intervene. The impact is direct in that the omission to act is the main contributor to the continued detention, seeing as the AANES has stated that it will not release foreign nationals unless they are repatriated to their states of origin.

Sweden also exercises functional jurisdiction under Shany's second limitation. Here, nationality would serve as the special legal relationship making Sweden particularly well-situated to repatriate its nationals. Following Shany's arguments to this effect, Swedish nationals have a legitimate expectation that their human rights should be protected by their state of nationality when it has the capacity to do so, perhaps especially when the most fundamental human rights are at stake. One may interject that women and children suspected of terrorist crimes cannot legitimately expect protection of their own human rights if they have violated the human rights of others. The only response to such an argument is that human rights are not conditional upon reciprocity. The universality of human rights stems from their inherency in each human being and cannot be diminished by any individual's actions.

4 International counter-terrorism obligations

4.1 Introduction

As noted in section 1.4.1, the detention of women and children affiliated with ISIL in the al Hol and al Roj camps is a consequence of international terrorism. This connection between the continued detention of Swedish women and children and international terrorism can be confirmed by the position of the Swedish Government that women suspected of terrorism crimes should face criminal proceedings 'close to the evidence and victims' of the crimes (cf. section 1.1). This, in practice, requires their continued detention in the al Hol and al Roj camps awaiting such proceedings. Additional connections can be discerned when considering the situation from a human security perspective. The positive obligations to protect and prevent inhuman or degrading treatment in international human rights law, as discussed in chapter 2, are from a human security perspective tools of safeguarding individual security (cf. section 1.4.1). Individual security, in turn, is a necessary condition for both national and international security. The universality of human rights is, from the same perspective, considered as a bulwark against human rights violations within, especially, international counter-terrorism efforts where human rights are often traded off in the name of security.

This chapter will discuss the third sub-question posed in section 1.2, namely whether Sweden's obligation to bring suspected terrorists to justice requires Sweden to repatriate its nationals from the al Hol and al Roj camps. It will do so by analysing said obligation, as established in the United Nations counter-terrorism framework (section 4.2) and the Council of Europe counter-terrorism framework (section 4.3) from a human security perspective.

4.2 The United Nations framework

The United Nations General Assembly (UNGA) adopted by consensus a global counter-terrorism strategy (the UN Strategy) in 2006 with a view to promote a counter-terrorism approach that is comprehensive, coordinated, and consistent across the national, regional and the international levels.[184] The UN Strategy was adopted through an UNGA resolution, which is not a legally binding document per se, but may have some normative value nonetheless. UNGA resolutions have political effect in that they often concern the political interests of the international community or, in some cases, of certain groups of powerful states.[185] Through the UN Strategy, the UN members states resolved i.a. to implement all UNGA resolutions on measures to combat terrorism and on the protection of human rights in the fight against terrorism as well as to implement all UN Security Council (UNSC) resolutions relating to international terrorism.[186]

The UN Strategy recognises several conditions as being conducive to terrorism, conditions which the UN member states resolved to take measures to address. Such conditions include prolonged and unresolved conflicts, the lack of the rule of law, and human rights violations. The member states also resolved to take various measures to ensure respect for human rights for all and for the rule of law, noting that protecting human rights and taking effective counter-terrorism measures are not conflicting but rather complementary and mutually reinforcing goals. Accordingly, the development and maintenance of an effective rule of law-based justice system is key to ensure that perpetrators, financiers and supporters of, and participants in, terrorist acts are brought to justice with due respect to human rights. To this effect the UN's role in strengthening the international legal

[184] United Nations Global Counter-Terrorism Strategy, A/Res/60/288, 2.
[185] Eckart Klein and Stefanie Schmal, 'Functions and Powers Article 10' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* Vol I (3rd edn, Oxford University Press 2012) 480 – 481, 487.
[186] A/Res/60/288 (n 184) 3.

system and promoting the rule of law and respect for human rights as the basis of the fight against terrorism, was reaffirmed.[187]

The UN Strategy, though not legally binding, indicates how the international community considers an effective international, regional and national counter-terrorism approach should be constructed. It implies several measures which have been made into legal obligations both under the auspices of the UN and the Council of Europe; measures to bring perpetrators to justice; measures to prevent terrorism; and that measures need to be undertaken in accordance with international human rights law. Importantly, the UN Strategy notes that upholding international human rights law and the rule of law are fundamental parts in constructing effective counter-terrorism measures. This approach is in line with a human security perspective, emphasising the importance of human rights as a necessary condition for security; be that individual, national or international. As the following discussion will show, a human security perspective is discernible in the relevant UNSC resolutions.

The UNSC has the primary responsibility for the maintenance of international peace and security, and its decisions are binding upon UN members states.[188] Whether a resolution issued by the UNSC contains decisions that are legally binding for the UN member states is determined through interpretation of the wording, genesis, legal basis and context of the adoption of the resolution.[189] Terms such as "urges" and "invites" does not imply a binding effect, the use of "decides" is clearly binding, while the use of "calls upon" and "endorses" is simply unclear. Resolutions may, accordingly, contain both binding and non-binding parts.[190] A textual interpretation of UNSC resolutions is

[187] A/Res/60/288 (n 184) 4, 9.
[188] Articles 24 – 25 of the Charter of the United Nations; cf. Anne Peters, 'Article 25' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* Vol I (3rd edn, Oxford University Press 2012) 795.
[189] Peters (n 188) 792.
[190] Security Council Special Research Report, 'Security Council Action Under Chapter VII: Myths and Realities' (23 June 2008) 9 <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report%20Chapter%20VII%2023%20June%2008.pdf> accessed 2021-03-27.

generally preferred by the member states, meaning that the wording of the relevant resolution takes precedence over potential aims of the resolution, though a more purposive approach has been advocated in legal scholarship. Actions and discussions held within the UNSC prior to the conclusion of a resolution, as well as any reports by the UN Secretary-General that the resolution may be based upon, may be considered in the interpretation but will under a textual approach not be definitive.[191]

4.2.1 United Nations Security Council resolution 1373 (2001)

In UNSC resolution 1373, adopted in 2001, the UNSC *decided* that member states shall ensure that individuals who participate in the planning, perpetration, preparation, financing of, or support, terrorist acts are brought to justice.[192] The resolution thus creates a legal obligation for member states to ensure that perpetrators, financiers and supporters of terrorist acts are brought to justice. This obligation is perhaps the most pertinent of the obligations arising from the UNSC resolutions that will be discussed in this chapter, and it has, as will be shown in the following, been reaffirmed several times.

4.2.2 United Nations Security Council resolution 2178 (2014)

UNSC resolution 2178 (2014) addresses the 'acute and growing' threat posed by foreign terrorist fighters (FTF:s) joining groups such as ISIL. The UNSC considers in the preamble that FTF:s contribute to prolonging and intensifying conflicts, posing a threat not only to their states of origin and the states to which they travel, but to all regions and member states.[193] Accordingly, the UNSC *called upon* member states to, i.a., address the threat posed by FTF:s in accordance with their international legal obligations e.g. through

[191] Nico Krisch, 'Chapter VII Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* vol II (3rd edn, Oxford University Press 2012) 1264 – 65.
[192] United Nations Security Council (UNSC) resolution S/Res/1373 (2001) 2.
[193] UNSC resolution S/Res/2178 (2014) 2.

prevention of radicalization to terrorism, recruitment to terrorism including the recruitment of children, and developing and implementing both prosecutorial, reintegration and rehabilitation strategies for FTF:s returning to their state of origin. Referencing UNSC 1373 (2001), the UNSC furthermore *decided* that the member states shall ensure the criminalisation in their domestic legislation of several acts including the travelling from the state of nationality to another state for the purpose of perpetration, planning, preparation of or participation in terrorist acts. The UNSC stressed the need to implement the resolution in full, underscoring that the need was especially urgent with respect to FTF:s affiliated with ISIL.[194]

The obligation to bring perpetrators of terrorism crimes to justice established in resolution 1373 is complemented in resolution 2178 by an obligation to prevent terrorism through criminalising travel for terrorism purposes. Swedish women detained in the al Hol and al Roj camps due to their alleged affiliation with ISIL may in all likelihood be suspected of having committed this particular crime, regardless of any potential individual involvement in other terrorist activities. Sweden is under an obligation under international law to bring these women to justice, if not for other terrorist crimes, then for travelling for terrorism purposes.

The Swedish Government has taken the position that the Swedish women suspected of perpetrating terrorist crimes should be prosecuted close to the evidence and victims of the crimes, and 'noted with interest' the AANES' intent to conduct such criminal proceedings. Arguably, the Swedish Government not only shirks its obligation to bring terrorists to justice by taking this approach, but also loses legitimacy from a human security perspective. This because, while the AANES may have de facto control over certain areas in Syria due to the ongoing conflict in the country, it is still a non-state armed group and it lacks a legal system which can maintain the rule of law and uphold human rights. Conducting criminal proceedings within a rule of law-based justice system cannot be substituted by the Swedish

[194] Ibid paras. 4, 6 (a), 10.

Government ‘stressing the importance’ of upholding the rule of law in dialogues with the AANES (cf. section 1.1). The importance of maintaining the rule of law and the respect of human rights underpins the UN counter-terrorism strategy as a whole, the framework to which the UNSC resolutions discussed belong. Indeed, from a human security perspective, trading off human rights and rule of law values in the name of security is a systematic fault with previous security approaches that has served to increase conditions leading to terrorism. Leaving women and children in the al Hol and al Roj camps to await prosecutorial measures outside a functioning legal system will result in the continued violations of their fundamental human rights and will, therefore, only be counter-productive to the counter-terrorism effort at large.

In the present case, the only way the Swedish government can fulfil its obligation to bring suspected terrorists to justice is arguably to repatriate Swedish women suspected of terrorism crimes from the al Hol and al Roj camps for the purposes of investigating, prosecuting and sanctioning their alleged crimes committed abroad in Swedish courts. This approach is further supported by a human security perspective.

4.2.3 United Nations Security Council resolution 2396 (2017)

UNSC resolution 2396 (2017) emphasises the threat posed by FTF:s as they return to their states of origin or relocate to third states, acknowledging that such returnees have e.g. attempted and participated in attacks in their countries of origin and that returnees may further support acts or activities of groups such as ISIL in their countries of origin. The UNSC also recognised, in the preamble of the resolution, that FTF:s may travel with family members who were either brought to conflict zones or born in conflict zones. Regarding family members, the UNSC underscored the importance of investigating these individuals for involvement in terrorist or other criminal activities, and of taking appropriate measures aimed at not only prosecution but also rehabilitation and reintegration of these individuals. The UNSC specifically noted that children may be especially vulnerable to radicalization and in need

of special care such as post-trauma counselling. Furthermore, children's dignity must be respected, and children must be treated in accordance with their rights under international law.[195] As part of the preamble, these are observations which serve to provide context and do not place any specific obligations upon the member states. The observations serve to note the current development of the situation and as justification of the need to develop further counter-measures to address these issues. It is clear that the UNSC recognises the need to properly address not only the potential criminal liability of returning FTF:s and their spouses, but also to see to the reintegration of returning individuals whatever their level of involvement in terrorist crimes has been.

Turning to prosecution, rehabilitation and reintegration strategies, the UNSC *called upon* member states to develop and implement tailored prosecution, rehabilitation and reintegration strategies which take into consideration both returning FTF:s and their spouses and children. In doing so, the UNSC emphasised that the member states are obliged under resolution 1373 (2001) to bring individuals participating in the planning, perpetration, preparation and financing or supporting of terrorist acts to justice. Regarding women and children specifically, the UNSC emphasised that those associated with FTF:s, who return or relocate from conflict zones, may have had different roles such as supporters, facilitators or perpetrators of terrorist acts and therefore require tailored prosecution, rehabilitation and reintegration strategies.[196] In emphasising the already established obligation to bring terrorists to justice, the UNSC is signalling the importance of developing tailored prosecution, rehabilitation and reintegration strategies. As already discussed, addressing the terrorist threat within the rule of law and human rights-based system that all democratic states by necessity proscribe to is vital from a human security perspective. In calling upon member states to put in place reintegration and rehabilitation strategies, the UNSC can be seen to recognise that not only prosecutorial measures can address the situation of returning FTF:s and their

[195] UNSC resolution S/Res/2396 (2017) 2 – 3.
[196] Ibid para. 30.

spouses and children. All these measures, of course, require the individuals to be present within the territory of the state.

Resolution 2396 recognises that international peace and security is not only threatened by FTF;s, but also by women family members who may have facilitated or supported them, and by the continued radicalisation of children. That especially children are at risk of becoming further radicalised within the al Hol and al Roj camps is yet another indicator that the repatriation of children is a necessity to effectively address the threat posed by FTF:s and their involvement in the Syrian conflict. Additionally, both resolutions 2178 and 2396 references that measures need to be taken in accordance with the member states' international legal obligations, including international human rights law. Resolution 2396 emphasises the need to respect children's rights. Though the resolutions themselves do not place any additional legal obligations upon the member states to uphold their obligations under human rights law, posing such an obligation would have been unnecessary as member states are bound by their international legal obligation regardless of what a UNSC resolution may say on the subject. Upholding human rights law has been identified by both the UNGA and the UNSC as fundaments of an efficient counter-terrorism strategy. Respecting and protecting the human rights of the women and children detained in the al Hol and al Roj camps is the first step in securing both international and national security, namely by basing that in individual security. By not repatriating Swedish women and children, Sweden contributes to continued human rights violations and to prolonging and exacerbating the conflict in Syria. This, in turn, undermines the counter-terrorism effort and poses a threat not only to the individual security of women and children detained in al Hol and al Roj, but also to Swedish national security and international peace and security.

4.3 The Council of Europe framework

The international counter-terrorism strategy and the obligations stemming from the discussed UNSC resolutions are reinforced by similar obligations and measures within the European legal framework. The Council of Europe

adopted in 2018 a new counter-terrorism strategy (the CoE Strategy) aimed at improving the member states' abilities to prevent and combat terrorism while upholding and respecting human rights and the rule of law.[197] Through the CoE Strategy, the Council of Europe also works to ensure that human rights, the rule of law and democracy are respected in all counter-terrorism measures. The main goal of the Council of Europe and its members states in relation to the counter-terrorism strategy is threefold: to *prevent* terrorism i.a. through criminal law and law enforcement measures, to *prosecute* terrorists i.a. by ensuring that offences committed in Europe or abroad are investigated and individuals responsible for terrorism offences are brought to justice in accordance with human rights and the rule of law, and to *protect* all individuals within the member states' territories against terrorism.[198] As a means of protecting citizens and the society as a whole from terrorism, the CoE Strategy recognises the benefit of states establishing de-radicalisation programmes which are specifically tailored toward returning foreign terrorist fighters as well as reintegration programmes for de-radicalised individuals. The CoE Strategy specifically recognises that an increasing number of women have left their states of nationality to join terrorist organisations abroad, and that the return of such women, and their children, is currently affecting numerous CoE member states.[199]

The CoE Strategy thus sets out, like the UN Strategy, to provide a forum for discussion and a coordinated approach to counter-terrorism for its member states. The CoE Strategy expressly notes that terrorism crimes committed abroad are included in the CoE Strategy as crimes whose perpetrators must be brought to justice. Though the CoE Strategy itself is not legally binding, it is an approach agreed upon by the member states who through the CoE Strategy have recognised key constitutive elements of counter-terrorism

[197] Cf. Council of Europe Press Release (Strasbourg 4 July 2018) Ref. DC 103(2018) <https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016808c19ea> accessed 2021-04-06.
[198] Council of Europe Counter-Terrorism Strategy (2018 – 2022), CM (2018)86-addfinal (4 July 2018) 2 – 3 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808afc96> accessed 2021-04-06.
[199] Ibid 13 – 15.

measures. Like the UN Strategy, it emphasises the importance to take counter-terrorism measures in accordance with rule of law and human rights principles. The emphasis on human rights and the rule of law, as well as the need to protect all individuals within the territories of member states, indicates that human security principles underpin the CoE Strategy. It expressly recognises the situation of returning FTF:s and their spouses and children, and the need to tailor counter-terrorism and preventative measures towards the needs of returning women and children. As a general policy framework, how to do this is not addressed in the CoE Strategy, and it does not address the situation of women and children still detained in Syria specifically.

The CoE Strategy is based on the legal framework and standards relating to the prevention and combating of terrorism that already exist within the Council of Europe.[200] The main legal instrument within the Council of Europe counter-terrorism framework is the 2005 Warsaw Convention on the Prevention of Terrorism (WCPT), accompanied by an additional protocol (AP).[201] The convention and its AP will be discussed in the following.

4.3.1 The Warsaw Convention on the Prevention of Terrorism

The WCPT states in its preamble that it is the primary obligation of the states parties to prevent and prosecute terrorism offences and ensure that such offences are properly punished. The preamble also emphasises that all measures to prevent and suppress terrorist offences must respect i.a. 'the rule of law and democratic values, human rights and fundamental freedoms'.[202] According to article 2 WCPT, the purpose of the Convention is to enhance the states parties' efforts to prevent terrorism through national measures and international co-operation.

[200] Council of Europe Press Release (n 197).
[201] Council of Europe, Counter-terrorism <www.coe.int/en/web/counter-terrorism> accessed 2021-04-06.
[202] 2005 Warsaw Convention on the Prevention of Terrorism, preamble.

In articles 5 through 9, the Convention obliges states parties to criminalise several acts in their national criminal legislation, including recruitment and training for terrorism (articles 6 – 7). Article 9 obliges states parties to criminalise acts as constituting ancillary offences, including participation as an accomplice in an offence established in article 5 to 7 (subparagraph a) and the intentional contribution to the commission of an offence established in articles 5 to 7, by group of persons acting with a common purpose (subparagraph c). Additionally, article 14 WCPT obliges states parties to enable the establishment of their jurisdiction over offences set forth in the convention, i.a. when the offence is committed by a national of the state (subparagraph c). This possibility is notably established in the Swedish Criminal Code.[203] An obligation to investigate suspected terrorist crimes is established in article 15 WCPT but limited to situations when the individual is present on the territory of the state. Thus, the obligation to investigate does not apply in the extraterritorial setting. Regardless of Sweden's extraterritorial jurisdiction (discussed in chapter 2), this obligation is not directly applicable to the situation at hand but would require that the women (and children) suspected of terrorist crimes were present on Swedish territory to apply.

The additional protocol (AP) to the WCPT, done in 2015 and entered into force in 2017, supplements the WCPT provisions relating to the criminalisation of certain acts (article 1 AP). Its preamble emphasises the threat posed by foreign fighters traveling from their state of nationality to commit, contribute to or participate in terrorist offences in other states, and references UNSC resolution 2178 (2014) which, as discussed above, obliges member states to criminalise travel for terrorist purposes. The AP accordingly adds several acts which the states parties (to the AP) must criminalise in addition to the ones set forth in the WCPT.

Article 2 AP obliges states to criminalise the participation in the activities of an association or group with the purpose of committing or contributing to the

[203] Cf. Section 2 paragraphs 2 (1) and 3 (1) Brottsbalk (1962:700).

commission of terrorist offences when participation is unlawful and intentional. Article 4 obliges states to criminalise traveling from one's state of nationality or residence with the purpose to commit, contribute to or participate in a terrorist offence, or to provide or receive training for terrorism.

The WCPT and the AP create legal obligations upon states to criminalise certain acts as terrorism offences, mirroring the obligation to criminalise certain acts imposed by the UNSC resolutions; indeed, the AP refers to the implementation of UNSC resolution 2178 and is a measure in the regional implementation of the relevant UNSC resolutions. Notably, Sweden has implemented the WCPT and its AP and the obligation to criminalise travel for terrorism purposes established in UNSC resolution 2178 in its domestic law.[204] The WCPT and the AP can be seen as providing the tools with which the obligation to bring suspected terrorists to justice established in UNSC resolution 1373 can be fulfilled. However, it is up to the states themselves to make use of the tools available to them.

The WCPT underlines that it is the states who bear the primary responsibility for bringing suspected terrorists to justice. To this effect the obligation to enable the establishment of states' jurisdiction over crimes committed by their nationals abroad adds to the means by which states must seek to bring terrorists to justice. However, the obligation is only to enable the establishment of jurisdiction. Sweden is not obliged to actually exercise its adjudicative jurisdiction over e.g. Swedish women or children detained in the al Hol and al Roj camps and suspected of terrorist crimes. Neither is Sweden obliged to investigate any suspected crimes unless the suspect is present within its territory due to the territorial limitation on the duty to investigate posed by article 14 WCPT. However, to fulfil the obligation to bring suspected terrorists to justice, Sweden needs to make use of the tools available to it. This means that Sweden has to exercise its adjudicative jurisdiction over crimes committed abroad by their nationals, and it has to investigate these

[204] See para. 1 Lag (2010:299) om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet, cf. i.a. paragraph 4 concerning recruitment for terrorism and paragraph 5 (b) concerning travel for terrorism purposes.

crimes. To do this, Sweden needs to repatriate Swedish women suspected of terrorist crimes such as travel for terrorism purposes and perpetration or financing of terrorist crimes. That repatriation should be a means to fulfil the obligations under the WCPT is also in line with the object and purpose of the treaty, which following the preamble and article 2 in which the purpose of the WCPT is stated, is to both prevent terrorism offences and to prosecute perpetrators of terrorism offences.

Children, to the extent they may be suspects, also need to be repatriated for prosecutorial purposes. However, as emphasised in the UNSC resolutions discussed previously, children should be met by tailored prosecutorial measures and above all be dealt with within reintegration and rehabilitation frameworks. Additionally, both the WCPT and the AP emphasise the need to respect international human rights law and the rule of law. As has already been discussed, international human rights law and rule of law principles underpinning counter-terrorism measures arguably requires the repatriation of women and children from al Hol and al Roj to be effective.

5 Repatriation: the only way forward

5.1 Introduction

This thesis set out to clarify the extent of Sweden's international legal obligations towards Swedish women and children currently detained in the al Hol and al Roj camps in north-eastern Syria. To this end, it asked if Sweden has to repatriate women and children of Swedish nationality from the camps to fulfil its international human rights and counter-terrorism obligations. In answering these questions, the scope of positive obligations under the prohibition of inhuman or degrading treatment and the extraterritorial application of international human rights law were analysed in chapters two and three, and the scope of international and regional counter-terrorism obligations was analysed in chapter four. This chapter will further discuss the findings of chapters two through four, striving to answer the research question posed in section 1.2.

5.2 Embracing universality

Though the situation of detained women and children with suspected links to ISIL in the al Hol and al Roj camps is extraordinary it is not, as pointed out by the UN Secretary-General António Guterres, unique. Similar situations are arising in other parts of the world and, as the phenomenon of foreign terrorist fighters is by no means exclusive to the conflict in Syria nor is it going to disappear with the demise of ISIL in Syria, such situations will likely continue to occur in the future. The detention of women and children in the al Hol and al Roj camps has, as UN representatives and NGO:s report, resulted in continuous human rights violations, including violations of the prohibition of inhuman or degrading treatment.

Two models of extraterritorial jurisdiction can be discerned as well-established in the jurisprudence of international and regional human rights

bodies: the spatial and the personal models. Following an analysis of the two, it became clear that Sweden does not exercise jurisdiction under either the spatial or the personal model. This thesis has shown that the current state of international human rights law relating to its extraterritorial application cannot properly address the situation of women and children detained in the al Hol and al Roj camps. The situation of women and children detained in the camps illustrate that there is a need to develop another approach to the extraterritorial application of international human rights law in order to properly realise the universalist claim of human rights and render them not illusory but practical and effective human rights. The universalist claim holds that if human rights in morality are universal, their legal enforcement should, to the largest extent possible, also be universal. This thesis has adopted this approach throughout. It is submitted that international human rights law has to evolve and adapt to the challenges posed by the situation of women and children detained in al Hol and al Roj, and any similar situations in the future.

The way forward is to take a universalist approach to the extraterritorial application of international human rights law. The functional model of jurisdiction as conceptualised by Yuval Shany offers a solution under which states exercise extraterritorial jurisdiction when they have the capacity to directly, significantly and foreseeably impact rights or when there is a special legal relationship between the state and the affected individual making the state especially well-situated to protect the individual's human rights. It is submitted that in the case of Swedish women and children detained in al Hol and al Roj camps, nationality serves both as the connection through which Sweden may directly, significantly and foreseeably impact their rights and as a legal relationship whereby Sweden is especially well situated to safeguard their rights. This functional model was adopted by the Committee on the Rights of the Child in *L.H. and Others v. France* as well as by the UN Special Rapporteurs in their legal analysis on state jurisdiction over women and children detained in Syria. This indicates that the UN is embracing this universalist approach. In their attempts to fit the functional model within the personal model of jurisdiction, however, the Committee and the Rapporteurs

opened the door to unnecessary criticism as the functional model is a concept that cannot readily be fit within the confines of the personal model.

A point of criticism of the role that nationality played in the *L.H. and Others* decision and in the Special Rapporteur's analysis needs to be reiterated at this point. Does the dependency on nationality as the normative foundation for the application of international human rights law contradict the universality claim? The obvious answer is yes. This criticism was called for as the Committee on the Rights of the Child tried to fit their functionality-reasoning within the personal model of jurisdiction. Making nationality a criterion for when states exercise jurisdiction under the personal model, as it has been conceptualised by human rights courts and bodies today, would limit extraterritorial human rights protection to apply only when states deal with their own nationals abroad. However, under the functional model nationality is only one of the ways in which a jurisdictional link may be established. The functional model, which is based on states' capacity to impact human rights and the universalist claim that they should protect human rights when having that capacity, encompasses the jurisdictional links envisioned in the spatial and personal model as well. If a state exercises effective control over an area or over an individual, then it is in a position to directly, foreseeably and significantly impact the human rights of that individual. The functional model is thus more extensive than the spatial and personal models, not less so.

From a universalist point of view, human rights should not only be *respected* but also *protected* extraterritorially. The obligation to protect human rights is a so-called due diligence obligation of states to take reasonable measures to protect individuals from human rights violations. In the case of Swedish women and children detained in the al Hol and al Roj camps, one of the most fundamental human rights is being continuously violated as women and children are subjected to inhuman or degrading treatment. As the prohibition of inhuman or degrading treatment safeguards one of the most fundamental values underpinning the whole human rights regime, namely human dignity, interpreting the scope of positive obligations under the prohibition extensively is justified also in the extraterritorial context.

As positive human rights obligations are construed as due diligence obligations, they only require states to act in ways that are deemed necessary and reasonable to protect human rights from being violated by private parties. What is considered reasonable and necessary as opposed to undue burdens must be determined on a case-by-case basis. In the situation of women and children detained in al Hol and al Roj, it can be argued that both a universalist approach to human rights, the protected fundamental value of human dignity, and a human security perspective, justifies an extensive reading of the extent of positive obligations in this case.

The analysis of the prohibition under article 3 of the ECHR showed that the ECtHR has considered the positive obligation of states under article 3 as quite extensive, especially regarding children and other vulnerable individuals. In the domestic context, physical removal of children from their home has been considered as a necessary measure to fulfil the positive obligation to protect individuals from being subjected to inhuman or degrading treatment. The HRC has emphasised the concept of human dignity as the core value safeguarded by the prohibition of inhuman treatment in article 7 ICCPR, further motivating an extensive interpretation of the positive obligations under article 7 in this case. When it comes to children's rights, an extensive interpretation is further supported by the best interest of the child-principle which demands that the outcome which best safeguards the best interest of the child be chosen over other alternatives. It can hardly be disputed that the continued detention and inhuman or degrading treatment of children in the al Hol and al Roj camps is *not* in the best interest of these children.

It is possible to consider other alternatives than repatriation to address the situation of Swedish women and children detained in al Hol and al Roj. However, these are arguably more costly and less reasonable than repatriation. One alternative, for instance, could be for Sweden to assume control over the camps and therefore be able to ensure that treatment is humane. Significant economic and other resources would undoubtedly be required to achieve this. Additionally, Sweden would be likely to have to assume control not only over the situation of Swedish women and children

but over all women and children detained in the camps. However admirable that would be, it is not the most reasonable measure available. Another alternative could be to remove Swedish women and children from al Hol and al Roj and detain them elsewhere, but in better conditions. Again, such a measure would require significant resources and is likely more demanding than repatriation. For Sweden to fulfil its positive obligations under the prohibition of inhuman or degrading treatment established in articles 3 ECHR, 7 ICCPR and 37 CRC, Sweden has to take action. Repatriation of Swedish women and children, in this situation, is the only way to fulfil this obligation. It is an extensive measure, but justifiably so.

5.3 Connecting human rights and human security

The universality of human rights plays a role in the human security perspective adopted throughout this thesis as well. The universality of human rights serves as a bulwark against arbitrary enforcement and abuse of human rights. Within the human rights framework, the obligation to protect individuals from human rights violations can be understood from a human security point of view as an appeal to individual security. The universalist approach to human rights and the human security perspective both consider the protection of individual rights and individual security as a primary function of the state, which both perceptions consider to exist for the benefit of the individual rather than the other way around (cf. section 1.5.1 – 2). Trading off human rights in the pursuit of security is a practice which human security theorist argue has increased within counter-terrorism efforts post-9/11 and has served to increase rather than decrease the terrorist threat. Additionally, practices of disregarding or allowing human rights violations in counter-terrorism efforts undermines the legitimacy of states as proponents of the rule of law and human rights regimes.

As individual security is perceived as a necessary condition for national and international security, protecting the human rights of individuals is a core feature in a human security approach. The continued human rights violations

in the al Hol and al Roj camps undermine individual security and any efforts to solve the conflict in Syria. Human rights violations, lack of rule of law and prolonged conflicts are recognised by both the UN General Assembly and Security Council as conditions conducive to terrorism. Applying a human security perspective to counter-terrorism measures is needed to properly address these conditions. A human security perspective can furthermore be discerned in the counter-terrorism efforts both at the UN and the Council of Europe levels. Relevant UNSC resolutions and Council of Europe regulations recognise the need to take counter-terrorism measures in line with human rights law and rule of law principles.

When considered from a human security perspective, the obligation to bring suspected terrorists to justice must be fulfilled with a view to respect the human rights, including fair trial and due process rights, of the individual suspects. However, Sweden is not following this approach. Leaving Swedish women suspected of terrorism crimes in the al Hol and al Roj camps to face whatever prosecutorial means the AANES, a non-state actor without a rule of law and justice-based legal system, decides to move forward with will only result in continued human rights violations. It also undermines Sweden's legitimacy within the counter-terrorism effort and within the human rights regime. Additionally, by not repatriating Swedish women for prosecutorial purposes Sweden is shirking its responsibility to bring suspected terrorists to justice. Sweden is choosing to trade off human rights in the name of security, a strategy which only undermines individual security and therefore also national and international security.

Repatriating Swedish women for prosecutorial purposes is necessary for Sweden to fulfil its obligation to bring suspected terrorists to justice. Repatriation of women for other purposes, such as rehabilitation, de-radicalisation, and reintegration, serves individual, national and international security in the long run. Children, as especially vulnerable to radicalisation when subjected to prolonged conflicts and human rights violations, as children in the al Hol and al Roj camps are, should be repatriated as a measure to prevent future terrorism.

6 Conclusion

This thesis has clarified the extent of Sweden's international human rights and counter-terrorism obligations, as related to the issue of repatriation, towards women and children of Swedish nationality detained in the al Hol and al Roj camps in north-east Syria. It has shown that the two established models of extraterritorial jurisdiction under international human rights law, the spatial and the personal models, fail to address the situation of women and children in the al Hol and al Roj camps. It has argued that a new, functional, model of jurisdiction is developing in the jurisprudence of the Committee of the Rights of the Child and that under this functional model, Sweden has jurisdiction over women and children of Swedish nationality detained in al Hol and al Roj. The functional model should be accepted because it best serves the universality of human rights, the concept of human dignity, and human security.

The thesis has furthermore shown that Sweden's positive obligations under the prohibition of inhuman or degrading treatment, as established in the ECHR, the ICCPR, and the CRC, require Sweden to take positive action to protect Swedish women and children from inhuman or degrading treatment in the al Hol and al Roj camps. Arguably, the only way to fulfil this obligation is to repatriate said women and children.

Lastly, this thesis has shown that Sweden's obligation to bring suspected terrorists to justice, as established in UNSC resolution 1373 and reaffirmed through subsequent UNSC resolutions and the WCPT, can only be fulfilled by repatriating Swedish women and children suspected of terrorism crimes from the al Hol and al Roj camps. Additionally, it has illuminated how the human rights violations occurring in the al Hol and al Roj camps creates conditions thar are conducive to terrorism in the future. Sweden's failure to repatriate its nationals undermines individual security and therefore also national and international security. It also risks undermining Sweden's legitimacy as a human rights and rule of law-abiding actor.

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Annex I

NATIONS UNIES
DROITS DE L'HOMME
HAUT-COMMISSARIAT

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 26 January 2021

A/TO: Her Excellency
Ms. Anna Jardfelt
Ambassador Extraordinary and Plenipotentiary
Permanent Representative
Permanent Mission of Sweden
to the United Nations Office and other international organizations in Geneva

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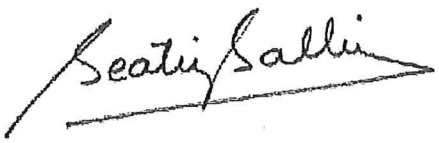
DE/FROM: Beatriz Balbin
Chief
Special Procedures Branch
OHCHR



FAX: [redacted]

TEL: [redacted]

E-MAIL: [redacted]

REF: AL SWE 1/2021

PAGES: 27 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right to food; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the human rights to safe drinking water and sanitation; and the Working Group on discrimination against women and girls.

I would be grateful if this letter could be transmitted at your earliest convenience to Her Excellency Ms. Ann Christin Linde, Minister for Foreign Affairs.

UNITED NATIONS
HUMAN RIGHTS
SPECIAL PROCEDURES
SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
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Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right to food; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the human rights to safe drinking water and sanitation; and the Working Group on discrimination against women and girls

REFERENCE:
AL SWE 1/2021

26 January 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the right to food; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the human rights of migrants; Special Rapporteur on minority issues; Special Rapporteur on the right to privacy; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences; Special Rapporteur on the human rights to safe drinking water and sanitation; and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 40/16, 42/22, 44/5, 32/8, 43/14, 43/6, 43/8, 37/2, 34/35, 43/22, 43/20, 44/4, 41/17, 42/5 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning a registration and verification

Her Excellency
Ms. Ann Christin Linde
Minister for Foreign Affairs

exercise in Al-Hol and Roj camps located in North-East Syria where your nationals, primarily women and children, are currently deprived of their liberty. In these makeshift locked camps made up of unstable tent-like structures which collapse in strong winds or flood with rain or sewage, hygiene is almost non-existent: limited drinking water is often contaminated, latrines are overflowing, mounds of garbage litter the grounds, and illnesses including viral infections are rampant. Food, water, health care and essential non-food supplies are provided by under-resourced humanitarian groups and organisations. According to the Kurdish Red Crescent, at least 517 people, 371 of them children, died in 2019, many from preventable diseases, in Al-Hol camp alone. In August 2020, eight children under the age of five died in that camp in less than a week, with four caused by malnutrition-related complications and the others were due to dehydration from diarrhoea, heart failure, internal bleeding and hypoglycaemia, according to UNICEF. Covid-19 has increased these difficulties, with a reduction in the number of workers operating in the camp.

According to the information received:

A 'registration and verification exercise' by Camp Administration authorities took place in early June 2020 in Al-Hol for all third country nationals, which include individuals from your country. It is alleged that a similar exercise had also taken place in Roj in May 2020.

During this process, all third country nationals, approximately 700 families, mostly women and children over the age of 10, housed in the Annex in Al-Hol, were required to provide personal information which included their country of origin, DNA samples (through the drawing of blood), finger or palm prints, and facial, iris, or retina and other biometric data. Further, in order to proceed with the registration, families were asked to leave their tents together with several other families in the annex and stay in the reception area of the main camp, and were not allowed to return to their tents until the registration of all the families of their group was finalised, which could last up to 24 hours. A request by UNHCR for protection oversight of the reception area was denied.

Also during that exercise, all humanitarian actors delivering essential, life-saving goods and services to those individuals deprived of their liberty in the camps were denied access to the camp during the entirety of the exercise, in complete disregard of the key international law obligation to allow humanitarian access to organisations carrying out principled humanitarian action. All humanitarian actors were barred from entering the camp, including medical personnel, without any forewarning, and a request by UNHCR for a two-week pause in the exercise, to allow humanitarian actors to find solutions to ensure the continuation of the provision of humanitarian aid, was denied. Those individuals concerned by the exercise were told that they would be provided with only drinking water and bread during the exercise. Medical staff were also denied access to the camp. Referrals for serious medical cases were to be done by the military, and that at least three requests for referrals, including one involving severe child malnutrition, were denied by camp administration. At the same time, more than 1,000 additional military officers, presumably Syrian Democratic Forces (SDF), were present in the camp during the exercise.

A note was circulated by camp authorities to the residents informing them that this exercise would be "in compliance with human rights" although no specific as to which mechanisms, processes and actions would be taken to that end. Other informal statements, reportedly by camp authorities, informed that the registration operation was designed to "improve security and control within the camp and the surrounding area by moving tents apart, disrupt radicalisation activities, prevent the operation of sharia courts, prevent criminal activities including assassinations and the smuggling of people and material; and confirm numbers and identities of individuals housed within it".

Potentially linked to this registration, data-collection and relocation exercise, we have recently been made aware of an extension or the creation of an additional campsite in Roj camp, to which approximately 200 families, mostly third country nationals from European States, have been moved. In some of the reports, it is stated that these families are considered as high security threats, although no information is available on the basis or legal foundation upon which such an assessment would be made. It remains unclear whether your Excellency's Government has been informed of this exercise and material change in detention circumstances for your nationals. Such information appears to be exchanged either informally, through the good offices of humanitarian organizations, or by direct information sharing between the SDF and certain governments.

Without pre-judging as to the accuracy of the information received, it is our view that the allegations relating to the 'registration and verification' exercise itself and the manner in which it was carried out, as well as the move of several families to an enlarged camp raise very serious human rights concerns. These concerns are, in our view, relevant to your government whose nationals are present in the camps and who have either undergone the registration and verification exercise or have been displaced. They are also relevant given the concern about the use/purpose of the information collected in such exercise.

Humanitarian access

We express our serious concern that essential humanitarian access and protection were jeopardized in the implementation of the registration operation. Indeed, the denial of access of humanitarian actors to the camp — absent advance warning—, the authorities refusing a request by UNHCR for a two-week pause on the exercise to enable humanitarian actors to organise themselves to maintain a modicum of aid; the provision of water and bread alone during the period of the exercise, including to a large number of children raise deep concerns regarding the implementation of the most basic of survival rights and protections for your vulnerable nationals.

Humanitarian actors play a critical life-saving role in providing humanitarian aid and assistance, including food and medical services, to all those individuals deprived of their liberty and living in squalid conditions in the camps in North East Syria.

In line with this, we wish to recall that the State's obligation to allow access to humanitarian services is contemplated by international law in several legal

instruments[1]. In this regard, a State has two sets of obligations: a positive obligation to agree to and facilitate such services and a negative obligation not to impede the offer and provision of humanitarian services to individuals and populations in need. International humanitarian law clearly imposes an obligation to respect and protect humanitarian actors. Parties to an armed conflict must protect civilian humanitarian actors, not just from attack, but also from harassment, intimidation, arbitrary detention and any other activities that might impede their work. Protecting humanitarian actors is an indispensable condition for the delivery of essential care. Under this framework, when the civilian population is not adequately supplied, no party to an armed conflict may arbitrarily withhold consent to offers of legitimate humanitarian services from an impartial humanitarian body.[2]

Furthermore, we are deeply concerned by the dire, and sometimes fatal, conditions children are facing in these camps. Several UN bodies have insisted on the obligation imposed to all parts of a conflict to provide special protection to children and respect the civilian and humanitarian character of camps and settlements. In its general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, the Committee on the Rights of the Child noted that for rights to be meaningful, effective remedies must be available to redress violations (para. 24).

Another vulnerable group that can be severely impacted by the conditions of detention in these camps and the lack of humanitarian aid are women deprived of liberty. Such deprivation could produce a disproportionate effect on women's health, including specifically their reproductive health, and on living conditions and would constitute an act of violence against them. It should be considered that both causes and consequences of the deprivation of liberty of women are gendered. Additionally, they experience their confinement in specific ways and are often at risk of heightened gender-based discrimination, stigma, and violence. How women experience this deprivation will also differ, not only because of gender dynamics, but also because of characteristics, such as age, disability, race or ethnicity or socioeconomic status, that combine to produce distinct forms of discrimination and vulnerability.

In addition the situation of those individuals deprived of their liberty in the camps is also addressed by international human rights law. In this regard, we highlight in particular the right to food, to health and to an adequate standard of living, as well as the absolute prohibition of torture, inhumane and degrading treatment as guaranteed under the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights.

It is our assessment that these rights absolutely fail to be adequately provided to those individuals held in the camps. The failure to provide access to those in charge of delivering humanitarian assistance only compounds the abuses and violations of fundamental rights, including the non-derogable right to life and the right to be free from torture, inhuman and degrading treatment that are taking place on a daily basis in the camps, increasing human suffering and, potentially, the number of unlawful deaths, particularly of women, girls and children.

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1 Article 3(2) of the four Geneva Conventions, article 18 AP II and UNSC resolution 2175 para.3.

2 Ibid.

We therefore reiterate that humanitarian services should never be denied. Humanitarian actors assist States in meeting their obligations to protect and fulfil the inherent right to life, without discrimination, and to prevent the arbitrary deprivation of life. By preventing or otherwise deterring those services through their criminalization, for instance, or other measures, States violate their obligation to prevent, combat and eliminate arbitrary killings and the deprivation of life[3].

The heightened military presence in the camps to oversee the registration exercise, included over 1,000 additional military officers, is also a cause for concern. Intensified military presence in these camps can raise the fears of those deprived of their liberty and create additional tensions within the camps. We are concerned that the excessive militarization in the camps could also be linked to violence against women and are among the risks specifically faced by women in these camps. We are also very concerned about reports that women who have been displaced to the newly created space in Roj camp have not been able to contact anyone, including their families, about their situation, to confirm their presence, whereabouts or wellbeing, since having been transferred. There are also suggestions of an extended incommunicado quarantine period upon transfer from Al-Hol to Roj, as a result of COVID-19. This may amount to incommunicado detention which is prohibited under international law. [4]

Collection and use of biometric data

Regarding the collection and use of markers related to the physiological characteristics during the 'registration and verification exercise' we note that UN Security Council 2396 (2017) requires States to "develop and implement systems to collect biometric data (...) in order to responsibly and properly identify terrorists, including foreign terrorist fighters" in compliance with all their obligations under international law. Indeed, the resolution affirms that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures and are an essential part of a successful counter-terrorism effort. The resolution confirms the importance of respect for the rule of law so as to effectively prevent and combat terrorism. We stress that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization to violence and fosters a sense of impunity. Where such data is being collected by a non-State entity on your country's nationals and as it may be shared with other States, or accessed by either the territorial State of collection or by other States directly or indirectly, we stress that particular obligations lie with the country of nationality to seek to prevent the collection, storage use or transfer of such data in ways that would be inconsistent with international human rights law.

Biometrics data provides for a singularly useful tool for accurate and efficient identification and authentication of a person,[5] and is therefore particularly sensitive. There are human rights implications to the use at each stage of data usage, including collection, retention, processing and sharing. Indeed, the use of biometrics data can seriously impact on the right to privacy (article 17, ICCPR), which functions as a

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3 Saving life is not a crime", Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/73/314): https://undocs.org/A/73/314.

4 CCPR/C/CG/35, paras. 35 and 56.

Certain biometric markers, including finger- and palm prints, facial/ iris scans, may be less reliable in case of children. For this reason (among others), their collection and use is not always appropriate in the case of children. UNICEF has developed guidelines biometrics and children: https://data.unicef.org/resources/biometrics/.

gateway right to the protection of a range of fundamental rights. Mass collection also creates a need for secure systems for data storage and processing to mitigate the risk of unauthorized access. The unique transborder aspects of data collection, use, storage and transfer make the obligations of states of nationality in respect of their citizens' rights particularly acute.

Further, due to its sensitive character, biometric data, should always be collected and handled in line with recognized data protection principles, including the principles of lawfulness and fairness, transparency in collection and processing, purpose limitation, data minimization, accuracy, storage limitation, security of data and accountability for data handling. While applying data protection rules in an amended format to national security processes may be warranted, such adjustments must not lead to curtailed safeguards, insufficient transparency or inadequate oversight. Importantly, the principle of purpose limitation must be respected. Purpose limitation requires data to be collected with a specific, defined and legitimate purpose in mind (purpose specification) and not used for a purpose that is different from or incompatible with the original purpose (compatible use). In the particular case of children, "the best interest of the child" must be respected throughout the process and the assessment of the necessity and the proportionality of the measures must be strict. In this case, it seems entirely unclear, based on the information available to us, how collection of data on your Excellency's minor nationals can meet any best interest test in these circumstances.

We recognise the use of biometric data may be uniquely helpful and serve the interest of the child in a number of instances. This includes cases when such data is employed to prove the child's parentage and reunite them with their family or with the aim of using such parentage information to ascertain the child's nationality in view of their repatriation. At the same time, we would like to stress our concerns related to data usage and, in particular, long-term retention of biometric data of minors based on the child's family affiliation. Data collection and retention, if carried out by a non-State entity to serve the security interests of third party States when it is for monitoring or surveillance purposes, should in normal circumstances be based, among others, on a threat assessment, and the necessity for the data to be retained and for children to be included in databases or watch lists would be human rights proofed. In these circumstances, the clear and present dangers to your Excellency's minor nationals cannot be overstated. Collection, retention and treatment of data belonging to children must always comply with the safeguards contained in the Convention on the Rights of the Child and, in particular, with the requirement that any relevant measures be "in the best interest of the child". Relevant measures must also be subject to independent oversight. Such oversight should include review by a public authority specifically tasked with protecting the rights of the child (such as an ombudsperson) or ensure that experts duly specialized in children's rights are part of the oversight body's composition.

Furthermore, the Special Rapporteur on the right to privacy has cautioned that the processing of biometric data should be undertaken only if there are no other less intrusive means available and only if accompanied by appropriate safeguards, including scientifically recognized methods, and strict security and proportionality protocols.[6] Relevant authorities must pay due regard to data minimization by restricting collection and processing measures to data that is necessary or relevant for accomplishing the legitimate purpose for which data was collected.

[6] A/HRC/43/52, para. 48 (v).

We have serious concerns that in the case of the registration and verification exercise, respect for these principles and requirements was entirely lacking. We are concerned about the lack of information regarding measures taken to ensure informed consent prior to providing data, or to protect the data collected and ensure its confidentiality or on measures taken to manage the data in line with standards of data protection, taking into consideration a possible trans-border aspect that increases opacity and further reduces control and oversight of these practices and accountability for violations of human rights.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has taken the view that States must avoid any form of cross-border counter-terrorism cooperation that may facilitate human rights violations or abuses. States must also be mindful that state responsibility under international law may be triggered through the sharing of information that contributes to the commission of gross human rights violations. Cross-border intelligence-sharing arrangements raise particular human rights concerns. International human rights mechanisms have repeatedly warned against such arrangements falling short of international human rights norms and standards, particularly the lack of a human rights-compliant legal basis and of adequate oversight.[7] Private or sensitive information concerning individuals shared with foreign intelligence agencies without the protection of a publicly available legal framework and without proper safeguards, make the operation of such regimes unforeseeable for those affected by it. It states the obvious that the situation in which your nationals find themselves, specifically indeterminate detention in makeshifts tents with few material resources and under the control of a non-State actor does not make the materialization of these protections likely. *Thus, the collection of intimate and private data in these circumstances makes the responsibilities of states toward their nationals detained in these camps all the more compelling, to exert all available resources and influences to ensure the protection of their nationals.*

In this respect, we are gravely concerned at the lack of clarity and opacity concerning the reasons for which such information was collected, and whom they will ultimately benefit, contrary to the key principles of purpose limitation and compatible use, existence of a legitimate aim, and respect for the principles of proportionality and necessity, which cannot be evaluated given the lack of transparency. Where governments benefit from the collection of such data, particularly in the intelligence or security realm there is a corresponding necessity to ensure that human rights obligations are optimized in these sub-optimal circumstances. This is compounded by an apparent lack of legal basis, which cannot be replaced by an open letter to residents, as well as an absence of any oversight and safeguards for your nationals in these detention sites.

Biometric data collection and non-discrimination

International human rights law is based on the premise that all persons, by virtue of their humanity, should enjoy all human rights without discrimination on any grounds. The prohibition on racial discrimination has achieved the status of a peremptory norm of international law and as an obligation *erga omnes* which is enshrined in all core human rights treaties.

[7] See e,g. A/69/397 and A/HRC/13/37

The use of emerging digital technologies exacerbate and compound existing inequities, many of which exist along racial, ethnic and national origin grounds. In some cases, this discrimination is direct, and explicitly motivated by intolerance or prejudice. In other cases, discrimination results from disparate impacts on groups according to their race, ethnicity or national origin. And in yet other cases, direct and indirect forms of discrimination exist in combination, and can have such a significant holistic or systemic effect as to subject groups to racially discriminatory structures that pervade access to and enjoyment of human rights in all areas of their lives.

In her report to the Human Rights Council (A/HRC/44/57), the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlighted that examples from different parts of the world show that the design and use of different emerging digital technologies can be combined intentionally and unintentionally to produce racially discriminatory structures that holistically or systematically undermine enjoyment of human rights for certain groups, on account of their race, ethnicity or national origin, in combination with other characteristics.

In her report to the General Assembly (A/75/590), the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance addresses the impact of and concerns resulting from the use of emerging digital technologies on migrants, stateless persons, refugees and other non-citizens including the risk of racial and ethnic profiling in border enforcement. Data collection and the use of new technologies, particularly in such contexts characterized by steep power differentials, raise issues of informed consent and the ability to opt out. It is unclear what happens to the collected biometric data and whether affected groups have access to their own data. In this context [Al-Hol Camp], the affected population have no control over how the data collected from them is shared. The rise of "surveillance humanitarianism", whereby increased reliance on digital technologies in service provision perversely results in the exclusion of refugees and asylum seekers from essential basic necessities such as access to food. Conditioning food access on data collection removes any semblance of choice or autonomy on the part of refugees – consent cannot freely be given where the alternative is starvation. In the current context of conflict, potential harms around data privacy are often latent and violent in conflict zones, where data compromised or leaked to a warring faction could result in retribution for those perceived to be on the wrong side of the conflict. Data may be shared in ways that increased their risk of *refoulement*, increasing their vulnerability to human rights violations in the event of forcible and other forms of return of these groups to a country where their safety is at risk.

Specific impact on women and children due to their alleged association with terrorist groups

We are gravely concerned that the verification and collection exercise also targets women and children, a concern made particularly acute given the particularly harsh situation faced by women and children deprived of their liberty, due to their alleged links to terrorist groups.

At the outset, we note that the human rights impact surrounding data collection practices are likely to be amplified in case of groups and persons who are already marginalized or discriminated against, including women, children, members of minorities and groups and persons in vulnerable situations, such as persons affected

by armed conflict and other types of violence.

We are particularly mindful of the critical need to understand that women's and girls' association with terrorist groups is highly complex. It involves a range of factors, including their age, and backgrounds, and States must be mindful of the potential for coercion, co-option, grooming, trafficking, enslavement and sexual exploitation when examining their agency, or lack thereof. States must always undertake individualised assessments pertaining to the specific situation of women and girls.[8] States must be conscious of the gender-specific traumas than can be experienced by women and girls, as well as the various human rights violations that they are subjected to in the context of their detention and the impact of those conditions on their mental and physical health. Adequacy of alternatives to detention for persons in vulnerable situations and in particular, victims of trafficking is critical. Victims or potential victims of trafficking should not be placed under detention or any alternative to it, they should be promptly identified and referred to the appropriate services for early support and long term assistance. It is imperative that State responses do not perpetuate or contribute to further victimisation of those who have already experienced profound violence and trauma.[9]

Furthermore, we would like to draw the attention of your Excellency's Government to the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking; States have an international obligation not only to identify traffickers but also to identify victims of trafficking. It is highlighted that a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. The Recommended Principles and Guidelines state, therefore, that such victims must be provided with protection, not punishment, for unlawful acts committed as a direct consequence of being trafficked. Recommended Principle 7, concerning protection and assistance to victims of trafficking, provides that "trafficked persons shall not be detained, charged or prosecuted." Recommended Principle 8 prescribes that States shall ensure victims of trafficking "are protected from further exploitation and harm and have access to adequate physical and psychological care."

In addition, with regards to women deprived of liberty, the Working Group on Discrimination against Women and Girls expressed in its thematic report (A/HRC/41/33) that measures to combat terrorism and corresponding national security measures sometimes profile and target women, in particular those from certain groups and sometimes even women human rights defenders. It has further recommended States to ensure that measures addressing conflict, crisis, terrorism, and national security incorporate a women's rights focus and do not instrumentalise women's deprivation of liberty for the purposes of pursuing government aims. As highlighted in its thematic report on Health and Safety (A/HRC/32/44), the Working Group stresses that women's safety should be addressed as an integral aspect of women's health. Women's exposure to gender-based violence in both the public and private spheres, including in conflict situations, is a major component of women's physical and mental ill health and the destruction of their well-being, and constitutes a violation of their human rights.

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8 See in particular CTED Trends Report on the Gender Dimensions of the Response to Returning Foreign Terrorist Fighters (2019) and UNDP/ICAN, Invisible Women (2019).

9 The UN Global Compact/CTITF Working Group on promoting and protecting human rights and the rule of law while countering terrorism, "Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters" (2018)

The fact that children were included in this exercise is also a cause for profound concern. We remind your Excellency's government that children deprived of their liberty in Al-Hol and other places in North East Syria remain acutely vulnerable to violence and abuse. Children held in these camps are victimised on multiple ground and continue to be denied the protection to which they are entitled under international humanitarian and international human rights law. Indefinite detention without any process or review constitutes in itself a serious violation of human rights law. From the conditions of their detention and the lack of basic care, sufficient food, shelter from the elements, safe water, adequate sanitation medical services and education to risks of harassment, violence, exploitation and sexual and other forms of abuse, the impact of their situation on their most basic rights is not only severe but complete. As a result of repeated exposure to violence and insecurity, children exhibit signs of trauma, including psychological and behavioural disorders, as well as chronic fatigue and acute stress.[10]

We have been informed that families of foreign ISIL fighters, including women and children, suffer discrimination on the basis of their alleged affiliation with the group, in violation of international humanitarian law, facing restrictions on their movements and access to (sometimes refusal of) medical facilities, as well as harassment, abuse and looting of tents by camp guards.[11] Inside camps in areas under the control of the SDF, "foreign children with familial links to ISIL fighters continued languishing in despair while increasingly vulnerable to abuse, years after they were brought into the country".[12] The United Nations Global Study on Children deprived of liberty[13] has highlighted that "the trauma experienced by minors (and adults) has not stopped with the physical liberation from ISIS. For some, placement in detention centres or segregated IDP camps not only prolongs physical isolation and deprivation but also solidifies their new identity as 'IS families'".[14] Many children carry the stigma of association, whether they were involved or not, and face rejection, and reprisals from their home communities, which might lead into re-recruitment by armed groups.[15] Children should not have to carry the terrible burden of simply being born to individuals related to or associated with designated terrorist groups[16].

Due process and security

We wish to highlight our concerns about the lack of clarity around the purpose of the exercise, particularly as it has been reported that reasons for the verification and collection exercise appear to relate to the security situation in the camp (improve security and control within the camp and the surrounding area by moving tents apart, disrupt radicalisation activities, prevent the operation of sharia courts, prevent criminal activities including assassinations and the smuggling of people and material). Notwithstanding the security concerns that can exist in a precarious environment, we note the difference of treatment in this respect between 'third country nationals' and other individuals detained in the camps. We respectfully recall the key principles of equality and non-discrimination, which require that a justification be provided for difference of treatment between categories of individuals apparently in a similar

10 A/HRC/43/CRP.6, para. 3.
11 A/HRC/43/57, para. 61.
12 A/HRC/43/57, para.96-97
13 See https://omnibook.com/Global-Study-2019
14 Joana cook and Gina Vale, 'From Daesh to Diapora: Tracing the women and Minors of Islamic State", ICSR, 2018, p.53, quoted in the Global Study on Children deprived of their Liberty y, p. 606.
15 Global Study on Children deprived of their Liberty, p. 607.
16 UNCRC, article 2.2.

situation. Significant threats to the security of the camp can emanate from 'third country nationals' and other individuals detained in the camps. The difference between the two groups does not appear immediately, or without objective justification, as relevant to the determination of requisite measures to address a security threat in the camp. The discriminatory character of the exercise would also deprive it of other fundamental requirements of necessity and proportionality. Indeed, the singling out of a category of individuals for this exercise cannot be seen as either necessary or proportionate if other individuals who are in the same situation are not treated alike.

The Special Rapporteur on trafficking has raised in her previous reports specific concerns about the use of profiling techniques.[17] We would like also to remind that the OHCHR Recommended Principles and Guidelines on Human Rights at Borders (2014), provides that measures taken to address irregular migration, or to counter terrorism, human trafficking or migrant smuggling, shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked. Further the Guidelines provide that: "States and, where applicable, international and civil society organizations, should consider: [...] (2) Ensuring that non-discrimination provisions in legislation are applicable to all border governance measures at international borders; (3) adopting or amending legislation to ensure that respect, protection and fulfilment of all human rights, including mandatory protection and assistance provisions, are explicitly included in all border related legislation, including but not limited to legislation aimed at addressing irregular migration, establishing or regulating asylum procedures and combating trafficking in persons and smuggling of migrants."

Consequently, we have serious and grave concerns about the legitimacy of the aim of the exercise and its purpose, concerns that are compounded by the lack of an objective justification for the sole inclusion of third country nationals, including women and children. We fear that this exercise was in fact aimed at identifying third country nationals who may pose a security risk, and evaluating the degree of that risk, information that could be further communicated and used by states of origin, as a basis for deciding the further course of action for their nationals, including trial and repatriation, or children's separation from their families, including that of male children for further detention. These concerns are compounded by recent reports indicating that the individuals transferred to Roj were the ones apparently identified as posing a high-security risk, although the legal and practical basis for such a determination is not shared nor is any legal process available to challenge it.

Determining the security risk posed by individuals and using any ensuing classification as a basis for measures that can significantly impact human rights is likely to be fundamentally arbitrary and at odds with basic principles of due process. The implications of widespread assumptions about the threat posed by any individual transferred to a camp, in circumstances where there is no clarity about the basis for the transfer, and no way in which these transfers could be either prevented or contested, will inevitably lead to increasing and continuing stigmatisation of these families. This would raise very serious human rights questions related to due process, the right to a fair trial, the treatment of individuals, including the absolute prohibition of arbitrary detention. And the right to physical integrity, as well as the arbitrary deprivation of nationality and freedom of movement, including the right to enter one's

[17] A/HRC/38/45 para 67.

country, the right to a family life, and the deprivation or denial of other rights based on the data collected.

Under international law as well as under UN Security Council resolutions, States have obligations to hold individuals accountable for the serious and systematic crimes committed in Syria and Iraq, while strictly complying with the right to a fair trial. We take the view that this cannot be currently done in the region, given the profound fair trial and rule of law concerns about judicial systems in Iraq and Syria and the implications should trials be conducted by a non-State actor in the region. While recognising that there are some advantages to trials occurring near evidence, victims and witnesses, the reality is that in the absence of fair and thorough procedures, there will not be effective justice in the region, most particularly for the victims of such crimes.[18] UN reports find that basic fair trial standards were not respected in terrorism-related trials in Iraq, thus placing defendants at a serious disadvantage and compromising the trial outcomes and the justice process as a whole.

There is no substitute for fair trial and meaningful accountability. Weak and compromised accountability undermines the rights of victims and contributes to further instability in the region and beyond. There is an absolute obligation on States whose nationals are subject to the mandatory death penalty in patently unfair trial settings to vindicate and protect their legal rights. Governments also have a duty to protect the absolute prohibition of torture and of refoulement.

There is an urgent need for justice, truth and reparation for all of the victims of the very serious violations of human rights and humanitarian law that have occurred in the region. States that can deliver justice in accordance with international human rights law therefore have a responsibility to prosecute individuals against whom there is sufficient evidence of criminal behaviour, and sanction them appropriately through fair trials that comply with due process.

We are extremely concerned at the continued detention, on unclear grounds, of these women and children in these camps. We wish to remind your Excellency's government of the prohibition of arbitrary detention,[19] recognised both in times of peace and armed conflict, and that together with the right of anyone deprived of liberty to bring proceedings before a court in order to challenge the legality of the detention, are non-derogable[20] under both treaty law and customary international law. Arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations that a State may invoke pursuant to derogation are already factored into the arbitrariness standard itself. Thus, a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end. Further, administrative security detention presents severe risks of arbitrary deprivation of liberty.[21] We are mindful of the exceptional circumstances of the deprivation of liberty of these individuals. We remain nonetheless deeply concerned that in the present case, none of these conditions - which remain applicable in the most extreme situations - appear to

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18 https://news.un.org/en/story/2020/01/1056142;

19 UN Human Rights Committee, General Comment 35, para. 12.

20 Human Rights Committee, general comment No 29 (2001) on derogation during a state of emergency, paras. 11 and 16. See also Draft Principles and Guidelines on remedies and procedures on: The right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court without delay, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, Principle 4.

21 UN Human Rights Committee, General Comment 35, para. 15.

be respected and that no steps towards assessing individual risk or terminating or reviewing the legality of detention, have been taken, despite many of these individuals being in the camps for a year and a half.

We highlight that, according to international law, children are considered vulnerable and in need of special protection based on their age. Consequently, States must treat children, including children related to or associated with designated terrorist groups, primarily as victims when devising responses, including counter-terrorism responses.[22] International law is very clear concerning the detention of children. In all cases, detention should be used as a measure of last resort and for the shortest amount of time possible, in conformity with the best interest of the child also taking into account the extreme vulnerability and need for care of unaccompanied-minors.[23] Children who were detained for association with armed groups should be recognised as victims of grave abuses of human rights and humanitarian law, recovery and reintegration and, where possible, family reunification should be prioritized.[24] In this respect, we also note the fundamental right to a child's family life, which includes the right to not be arbitrarily separated from their parents and to maintain contact with their parents if separation occurs (article 9 UNCRC). States should always place the child at the centre of considerations, and help ensure their rights, even when the child is considered a potential security risk, [25] or where the child's interests conflict with the State's perceived security interests. States and other parties to the armed conflict must not detain children illegally, or arbitrarily, including for preventive purposes.[26] In line with UN Security Council resolution 2427, States should adopt and implement standard operating procedures for the immediate and direct handover of children from military custody to appropriate child protection agencies. All States have a fundamental duty always to take measures in the best interest of the child, and to respect, protect and fulfil the rights of children that are immediately impacted, particularly the right to life, and the right to be free of inhumane and ill treatment and all forms of physical and mental violence, neglect, and exploitation. Children who were detained for association with armed groups should be recognised as victims of grave abuses of human rights and humanitarian law, recovery and reintegration and, where possible, family reunification should be prioritized.[27]

Duty to act with due diligence to protect the rights of nationals deprived of their liberty in the camps

We would wish to highlight a few points that may be of relevance regarding issues raised in this communication and impact on any further course of action. In our view, States have a duty to act with due diligence and take positive steps and effective measures to protect vulnerable individuals, notably women and children, located outside of their territory where they are at risk of serious human rights violations or abuses, and where their actions or omissions can positively impact on these

22 See United Nations Office on Drugs and Crime (UNODC), Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System (Vienna, 2017), chap. 2.
23 CCPR/C/CG/35, para. 18.
24 Global Study on Children deprived of their Liberty , p. 615.
25 UN Counterterrorism Centre, "Handbook on Children affected by the FTF Phenomenon", 2019, para. 62.
26 Global Study on Children deprived of their Liberty, p. 615.
Global Study on Children deprived of their Liberty , p. 615.

individual's human rights.[28] It is also inherent in a State's obligation to take positive preventive operational measures to protect the right to life.[29] This is also rooted in the need to avoid allowing a State to perpetrate violations on the territory of another State that it could not perpetrate on its own,[30] which is a guiding principle when considering extra-territorial jurisdiction. A state's responsibility may be engaged on account of acts which are performed, or which produce effects, outside its national borders, or which have sufficiently proximate repercussions on rights guaranteed under international human rights law, even if those repercussions occur outside its jurisdiction.[31] This is particularly relevant, where a State's actions and omissions can impact on and provide protection to rights that are essential to the preservation of values enshrined in international treaties and customary international law, human dignity and the rule of law and amount to jus cogens or non-derogable customary law norms.[32]

Such an approach is already grounded in many well-established aspects of international human rights law, such as existing prohibitions relating to the transfer of individuals between jurisdictions where there is a risk of exposure to treatment that is contrary to fundamental human rights, and in a State's positive obligation to provide effective protection to children and other vulnerable persons and to take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[33]

It is also inherent in a State's obligation to take positive preventive operational measures to protect the right to life,[34] namely that a State may exercise control over a person's rights by carrying out activities which impact them in a direct and reasonably foreseeable manner, meaning that a State's responsibility to protect may thus be invoked extra-territorially in circumstances where that particular State has the

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28 For the full position on this issue, see Submission by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on arbitrary, summary and extra-judicial executions in the case of H.F. and M.F. v. France (Application no. 24384/19) before the European Court of Human Rights, https://www.ohchr.org/Documents/Issues/Terrorism/SR/Final-Amicus_Brief_SRCT_SRSsummex.pdf.

29 ECtHR, *Opuz v Turkey*, Application No 33401/02, 2009; ECtHR, *Osman v United Kingdom*, Application No. 23452/94 (1998), Z and Others v the United Kingdom [GC], Application no 29392/95 (2001) and Talpis v. Italy, 41237/14.

30 Lopez Burgos v. Uruguay, Communication No. 052/1979, 29 July 1981, para. 12.3.

31 See ECtHR, Soering v. The United Kingdom, 7 July 1989, app. no. 14038/88; ECtHR, Drozd and Janousek v. France and Spain, 26 June 1992, app. no. 12747/87; ECtHR, Ilascu and Others v. Moldova and Russia (48787/99) (2004), paras. 317 and 330-31; and Al-Skeini and Others v. United Kingdom, para. 131. See also Human Rights Committee Vidal Martins v. Uruguay, Communication No. 57/1979, 23 March 1982, para. 7, concerning State jurisdiction over nationals living abroad in relation to the State's exercise of the power to issue a passport.

32 One example of the link between prevention and obligations beyond the principle of jurisdiction can be found in the exclusionary rule contained in article 15 of the CAT and included in article 3 of the ECHR: judicial and administrative authorities of states parties are prevented from invoking information extracted by torture in any proceedings, irrespective of the facts of where and by whom the respective act of torture was perpetrated. According to Manfred Nowak, "in the age of globalization, these extraterritorial obligations of the CAT become increasingly important and may also serve as a model for other human rights treaties. To some extent, recently adopted UN Conventions on the Protection of All Persons from Enforced Disappearance and on the Rights of Persons with Disabilities have been modelled on the extraterritorial obligations of the CAT and confirm this global trend". Manfred Nowak, 'Obligations of states to prevent and prohibit torture in an extraterritorial perspective' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania Press 2010).

33 Article 3 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ECtHR, Soering v. the United Kingdom, Application No. 14038/88, 1989; ECtHR, Saadi v. Italy [GC], Application no. 37201/06, 2008, ECtHR, Othman (Abu Qatada) v. the United Kingdom, Application No. 8139/09, 2012.

34 ECtHR, *Opuz v Turkey*, Application No 33401/02, 2009; ECtHR, *Osman v United Kingdom*, Application No. 23452/94 (1998), Z and Others v the United Kingdom [GC], Application no 29392/95 (2001) and Talpis v. Italy, 41237/14.

capacity to protect the right to life against an immediate or foreseeable threat to life.

The sustained reporting and investigation on the situation in the camps – from UN bodies, including the International Independent Commission of Inquiry on the Syrian Arab Republic,[35] NGOs, National Human Rights Institutions,[36] the media[37] and national judicial bodies[38] renders it impossible for any State to argue convincingly that they do not know the risks to the mental and physical integrity of those individuals held in northern Syrian Arab Republic, the foreseeable harm, and the seriousness of the harm.

Both Al-Hol and Roj camps, which are run and administered by a non-State actor representing the Kurdish authority, were established as a response to a humanitarian catastrophe to host individuals who were displaced from former ISIL-controlled territory. We have received information in relation to sustained contact of a number of States with camp authorities and interventions regarding foreign nationals in the camps.[39] These are reflected in the ability to return some nationals to their countries of origin, or to sufficiently impact on camp authorities to allow or deny family members from accessing individuals in the camps. This, in our view, reveals the exercise of de facto, or constructive jurisdiction[40] over the conditions of their nationals held in camps specifically because they have the practical ability to bring the detention and attendant violations to an end through repatriation.[41] We have received information indicating that the SDF have expressed their willingness to assist governments in repatriating their citizens from the camp. As these 'camps' now appear to function as detention and security facilities for over an approximate 10,000 women and children, including your nationals, your legal obligations as a result of the continued detention of your nationals are more significant.

In practical terms, a number of actions and measures can be taken in order to positively protect the fundamental rights of the individuals held in the camps, as the Special Rapporteur on the promotion and protection of human rights and fundamental

35 https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx. In August 2020, the Commission of Inquiry reported that it had reasonable grounds to believe that - in holding tens of thousands of individuals in Hawl camp and its annex, the majority of them children, for 18 months with no legal recourse - the Syrian Democratic Forces have held individuals in inhuman conditions and that the on-going internment of these individuals continues to amount to unlawful deprivation of liberty. A/HRC/45/31, para. 80.

36 Commission Nationale Consultative des Droits de l'Homme, Opinion on the French Under-Age Nationals Detained in Syrian Camps, 24 September 2019.

37 See e.g. https://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html

38 Both the United Kingdom's Special Immigration Appeals Commission and the Court of Appeal of England and Wales have recently accepted that the conditions in both Roj and Hawl were sufficient desperate that they met the threshold of inhuman or degrading treatment for the purposes of article 3 of the ECHR. United Kingdom SIAC, Shamima Begum v. the Secretary of State, Appeal No: SC/163/2019, 7 February 2020, para. 130. See also [2020] EWCA Civ 918 Case No: T2/2020/0644,T3/2020/0645 and T3/2020/0708, Court of Appeal on appeal from SIAC (T2/2020/ 0644) (sitting also as a divisional court in CO/798/2020) (T3/2020/0708) and on appeal from the administrative Court (T3/2020/0645) Shamima Begum v. SIAC and Secretary of State for the Home Department and (1) the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism and (2) Liberty, 9 July 2020, para. 11.

39 This information was gathered by RSI in the course of interviews conducted on the ground in the camps in early February 2020. This information will be published in a forthcoming report from RSI, due for release at the end of October 2020. See also Commission Nationale Consultative des Droits de l'Homme, Opinion on the French Under-Age Nationals Detained in Syrian Camps, 24 September 2019, pp.8-9.

40 Note also the position of the French Commission Nationale Consultative des Droits de l'Homme: "The CNCDH thus considers that the French nationals detained in the camps come under France's jurisdiction in the meaning of article 1 of the ECHR", Opinion on the French Under-Age Nationals Detained in Syrian Camps, 24 September 2019, p.8.

41 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to the 75th session of the General Assembly, October 2020. See https://undocs.org/A/75/337.

freedoms while countering terrorism has, in the context of her country work, seen operationalized first hand. These include returning individuals to their country of origin, either directly or through counterparts (other States, non-State actors or humanitarian actors) present in the camps. We outline that under the Palermo Protocol (article 8(1)), State Parties shall facilitate and accept, with due regard to the safety of the person, the return of their nationals when they were victims of human trafficking. The same duty is imposed for individuals who had only the permanent right of residence at the time of entry into the territory of the receiving State. Partnerships can be optimized in tracing, identifying and delivering the practical means to extract individuals from territories under the control of non-state actors and ensure their safe return to home countries.[42] A number of steps can be taken to ascertain nationality, obtain assistance from state and non-state actors to move individuals from camps and assist in air transport, and to provide humanitarian assistance and medical care before, during and after transit.[43]

The provision of consular assistance and the delivery of identity documents, either directly or through counterparts, can also have a positive impact on the rights of those individuals in the camps, bearing in mind nonetheless that the remedial nature of both diplomatic protection and effective consular assistance frequently means that it cannot effectively prevent an irreparable harm from being committed. [44] Conversely, withholding essential life-saving protection from an individual on the grounds of their purported crime, or on the grounds of the purported crimes of their spouses or parents, would violate both the State's obligation to protect the right to life and the prohibition against discrimination. The attribution of criminal behaviour to children, particularly very young children in the camps, underscores the problematic logic of state positioning in this regard. While cognisant of the difficulties at a practical level that States may encounter in exercising their authority and duties in the camps, these do not, however, displace the jurisdictional question, but will have to be taken into account when it comes to assessing the proportionality of the acts or omissions complained of.[45]

Finally we recall that the Special Rapporteur on the promotion and protection of human rights while countering terrorism considers the urgent return and repatriation of foreign fighters and their families from conflict zones as the only international law-compliant response to the increasingly complex and precarious human rights, humanitarian and security situation faced by those women, men and children who are detained in inhumane conditions in overcrowded camps, prisons, or elsewhere in northern Syrian Arab Republic and Iraq. Such return is a comprehensive response that amounts to a positive implementation Security Council resolutions 2178 (2014) and 2396 (2017) and is considerate of a State's long-term security interests.[46]

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which

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42 A/HRC/43/46/Add.1.

43 Preliminary Findings of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to Kazakhstan: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24637&LangID=E.

44 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Visit to France, 8 May 2019, A/HRC/40/52/Add.4, para. 47. "*The Special Rapporteur wishes to emphasize the important role that effective consular assistance plays as a preventive tool when faced with a risk of flagrant violations or abuses of human rights, while also noting that the remedial nature of diplomatic protection proceedings*".

45 ECtHR, Sargysan v. Azerbaidjan, Application No. 40167/06, 2017, para. 150.

46 https://www.ohchr.org/Documents/Issues/Terrorism/PositionSRreturnsFFsOct2019.pdf

cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide any additional information and/or comment(s) you may have on the above-mentioned transfer of families to the newly-extended camp in Roj and on the legal basis for their transfer and detention. Please provide any information you may have on the measures your Government has taken to maintain contact and ensure their well-being since the transfer.

3. Please clarify whether your Government was informed about the registration, data-collection and relocation exercise and its purpose.

4. Please explain whether your Government has been informed by the authorities carrying out this exercise about the next step following their relocation to the other camp.

5. Please explain whether your Government was in any way involved in requesting this exercise, or if the data collected or assessments made were communicated to your Government.

6. Please explain what data-protection measures are available in your national legal system to protect against the exploitation and use of such data collected, stored, and used by other State actors with whom data was shared as well as non-state actors against your nationals.

7. Kindly also explain how the collection of biometric data has complied with medical ethics, the adequate provision of information and with people's right to informed consent.

8. Please provide information on the actions taken by your government to protect the rights of children from your country being held in Al-Hol and Roj camps to prevent irreparable harm to the lives, health and security.

9. Please provide any information available on specific measures taken to protect women and girls against acts of gender-based violence they may face within the detention facilities and in the camps and to ensure their access to health services, specifically in relation to their reproductive health.

10. Please indicate the steps that your Excellency's Government has taken, or is considering to take, to ensure access to an effective remedy, including through domestic judicial mechanisms, for your nationals being held in Al-Hol and Roj camps who may be victims of human

rights abuses, including trafficking in persons.

11. Please provide any information you may have about the basis for the transfer of families from Al-Hol to Roj, and the measures your Government has taken maintain contact and ensure their well-being since the transfer.

12. Please explain the measures that your government might have taken to ensure that the rights of your citizens mentioned in this communication were respected in this exercise.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information at hand is sufficiently reliable to indicate a matter warranting prompt attention. We also believe that the wider public should be alerted to the potential human rights implications of the above-mentioned allegations. Any public expression of concern on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

We would like to inform that a similar communication has been sent to other countries whose nationals are also in detention in Al-Hol and Raj camps.

A copy of this communication has been sent to the Syrian Arab Republic and the UNHCR.

Please accept, Excellency, the assurances of our highest consideration.

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

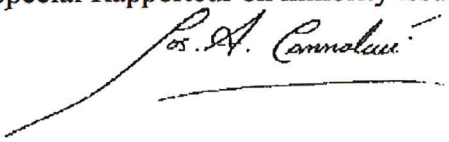
Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Michael Fakhri
Special Rapporteur on the right to food

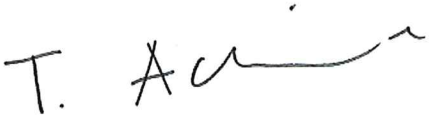
Balakrishnan Rajagopal
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Felipe González Morales
Special Rapporteur on the human rights of migrants

Fernand de Varennes
Special Rapporteur on minority issues



Joseph Cannataci
Special Rapporteur on the right to privacy



E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Mama Fatima Singhateh
Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children

Dubravka Šimonovic
Special Rapporteur on violence against women, its causes and consequences

Pedro Arrojo-Agudo
Special Rapporteur on the human rights to safe drinking water and sanitation

Elizabeth Broderick
Chair-Rapporteur of the Working Group on discrimination against women and girls

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we respectfully call your Excellency's Government's attention to the relevant provisions enshrined in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). More specifically we consider the international human rights standards applicable under article 26 of the ICCPR, article 2 of the ICESCR and article 1 of the ICERD which prohibit discrimination; article 14 of the ICCPR and 10 of the UDHR which guarantee the right to fair criminal proceedings; article 17 of the ICCPR which prohibits arbitrary and unlawful interference with one's privacy. We also consider several protective norms contained in the United Nations Convention on the Rights of the Child (UNCRC) and in several General Assembly and United Nations Security Council's resolutions on this matter.

Humanitarian access:

We would like to refer your Excellency's government to the international law obligation to allow humanitarian access to principled humanitarian actors and to allow principled humanitarian action,[47] so that these actors are able to respond to the needs of civilians where neither the government nor a non-State party to the conflict is able to do so. In this regard, the Security Council has also urged parties to allow full unimpeded access by humanitarian personnel to all people in need of assistance.[48]

We would like to remind that pursuant article 6 of the ICCPR, every human has the inherent right to life. Therefore, saving lives should never be a crime[49]. Under international human rights law, the inalienable right to life entails a negative obligation on the State not to engage in acts, such as the prohibition, criminalisation, or impediment of humanitarian actions, which would jeopardise the enjoyment of that right. Acts prohibiting or otherwise impeding humanitarian services violate the obligation of States to respect the right to life. Any death linked to such prohibition would constitute an arbitrary deprivation of life, which engages the responsibility of the State[50].

In relation to this, we also wish to recall that the Human Rights Committee recognised that the right to life should not be interpreted narrowly, noting that it places not only negative obligations on States (e.g. to not kill), but also positive obligations (e.g. to protect life), to ensure access to the basic conditions necessary to sustain life. It has affirmed that measures that restrict access to basic and life-saving services, such as food, health, electricity and water and sanitation are contrary to article 6 of the ICCPR that protects the right to life. For instance, denying access to

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47 The rules applicable in non-international conflicts are Common article 3(2) of the four Geneva Conventions and article18 AP II. Customary international law rules apply alongside these treaty provisions. According to the ICRC's study of customary rules of international humanitarian law, these treaty provisions are mirrored in customary law and the rules regulating humanitarian relief operations are essentially the same in both international and non-international armed conflict.

48 UNSC resolution 2175, para. 3.

49 "Saving life is not a crime", Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/73/314): https://undocs.org/A/73/314.

Ibid.

water, through disconnections or otherwise, can be deemed to be in violation of the right to life. Likewise, the failure of States to provide access to health care, including through restrictions on health-care providers may violate the right to life[51].

Furthermore, the United Nations Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) encourages States to cooperate with non-governmental organisations in training law enforcement, immigration and other relevant officials (article 10(2)). The Palermo Protocol also encourages States to provide for the recovery of victims of trafficking in persons in cooperation with non-governmental organizations (article 6(3)). Cooperation with non-governmental organizations is similarly encouraged in the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (Principle 6(1) and (2)).

We also wish to stress that the Security Council has resolved, through a certain number of resolutions, that the protection of children from armed conflict is an important aspect of any comprehensive strategy to resolve conflict, and should be a priority for the international community.[52] Likewise, the Security Council has called upon parties to armed conflict to respect the civilian and humanitarian character of camps and settlements, and to take into account the particular needs of women and girls, including in their design.[53] The General Assembly and other UN bodies have repeatedly called for special protection afforded to children by all parties to conflict.[54] The Secretary-General identified six grave violations during armed conflict, based on their suitability for monitoring and verification, their egregious nature and the severity of their consequences on the lives of children,[55] whose legal basis lies in relevant international law, including international humanitarian law, international human rights law and international criminal law. Denial of humanitarian access, care and protection to children is one such violation. Denial of humanitarian access to children and attacks against humanitarian workers assisting children are prohibited under the 4th Geneva Convention on the protection of Civilian Person in time of War and its Additional Protocols I and II.[56] Moreover, it is a principle of customary international law that parties to conflict must allow and facilitate aid that is impartial and conducted without adverse distinction to any civilian population in need, subject to their

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51 Saving life is not a crime", Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/73/314): https://undocs.org/A/73/314.

52 See, for example, United Nations Security Council Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012).

53 See United Nations Security Council Resolution 1325 (2000), para. 12, and similar subsequent resolutions 1820 (2009); 1888 (2009); 1889 (2010); 1960 (2011); 2106 (2013); 2122 (2013); 2242 (2015), 2467 (2019), and 2493 (2019).

54 UN General Assembly Declaration, A World Fit For Children, appended to A/Res/S-27/2 (2002) which was unanimously adopted. See also A/RES/62/141 (2008), A/RES/63/241 (2009).

55 S/2005/72. See also UNSCR 1612 (2005) that tasks the UN Secretary-General to implement the monitoring mechanism (para. 3).

56 Art. 23, 24, 38, 108 and 142 Geneva IV; art. 18 AP II. Such a denial of access may constitute a war crime: see article 8(2)(b)(c)(e) of the Rome stature

57 Customary Rule 55 "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control" in: International Committee of the Red Cross (Henckaerts, Doswald-Beck eds.), Customary International Humanitarian Law Vol. 1: Rules, Cambridge University Press (2005), p. 193. See also: art. 55 Geneva IV.

control.[57]

We respectfully recall that the particular rights applicable to children, protected under the UN Convention on the Rights of the Child (UNCRC) and its Optional Protocols, state that children must always be treated primarily as victims and the best interest of the child must always be a primary consideration. Under the UNCRC, children have the right to life (article 6); physical and mental wellbeing, care and protection, and to prevent the abduction of, the sale of or trafficking in children for any purpose or in any form (articles 3, 19, 36 and 35); birth registration, name and nationality (article 7); identity (article 8); play, leisure and culture (article 31); and an adequate standard of living (article 27), all of which are severely impaired in the camps. We stress, in particular, the right to health (24(2)), notably through the provision of adequate nutritious foods and clean drinking-water, health care for mothers and the right to a standard of living adequate for the child's development. States must ensure that the rights provided for in the CRC are respected and that appropriate measures are taken to protect and care for the child (article 3), to the maximum extent of available resources and, where needed, within the framework of international co-operation (article 4). States also have an obligation to take all appropriate legislative and administrative measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mistreatment or exploitation, including sexual abuse (article 19).

Furthermore, according to the General Recommendation of the Committee on the Elimination of all forms of Discrimination Against Women (General Recommendations No. 19, 28, 30 and 35)[58], conflict- related violence happens everywhere, and detention facilities are places with a very high risk for women to be exposed to violence. Such acts constitute a breach of the Convention on the Elimination of all forms of Discrimination Against Women to which your Excellency's Government is a party to and which provides that States have an obligation to prevent, investigate, prosecute and punish such acts of gender-based violence. The Working Group on Discrimination against Women and Girls emphasizes in its report on Women Deprived of Liberty (A/HRC/41/33) that women's deprivation of liberty is a significant concern around the world and severely infringes their human rights.

As per the conditions of the detention in the camps, we would like to draw the attention of your Excellency's Government to paragraph 27 of General Assembly Resolution 68/156, which, "[r]eminds all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished". Holding persons incommunicado violates their right

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[57] Customary Rule 55 "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control" in: International Committee of the Red Cross (Henckaerts, Doswald-Beck eds.), Customary International Humanitarian Law Vol. 1: Rules, Cambridge University Press (2005), p. 193. See also: art. 55 Geneva IV.

General recommendation No. 19 -- eleventh session, 1992 violence against women; General recommendation No. 28 -- forty-seventh session, 2010 - The Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28); General recommendation No. 30 (fifty-sixth session, 2013) on women in conflict prevention, conflict and post-conflict situations (CEDAW/C/GC/30); General recommendation No. 35 -- sixty-seventh session on gender-based violence against women, updating general recommendation No. 19 (CEDAW/C/GC/35).

to be brought before a court under article 9 (3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant. Judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.

Collection and use of biometric data:

The use of biometrics data can seriously impact on the right to privacy (article 17, ICCPR), which functions as a gateway right to the protection of a range of fundamental rights. As one of the foundations of democratic societies, it plays an important role for the realization of the rights to freedom of expression, opinion, peaceful assembly and association[59]. It can also have adverse impacts on the right to equal protection of the law without discrimination, the rights to life, to liberty and security of person, fair trial and due process, the right to freedom of movement, the right to enjoy the highest attainable standard of health, and to have access to work and social security. As such, any such interference to the right to privacy must be implemented pursuant to a domestic legal basis that is sufficiently foreseeable, accessible and provides for adequate safeguards against abuse. Any restriction must be aimed at protecting a legitimate aim and with due regard for the principles of necessity, proportionality, and non-discrimination.

Biometric data collection and non-discrimination

Under international human rights law, the principles of equality and non-discrimination are codified in all core human rights treaties. Article 1 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The Convention aims at much more than a formal vision of equality. Equality in the international human rights framework is substantive and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat de facto, unintentional or indirect racial discrimination.

Article 26 of the International Covenant on Civil and Political Rights states that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The International Covenant on Economic, Social and Cultural Rights also prohibits discrimination on these grounds.

The International Convention on the Elimination of All Forms of Racial Discrimination articulates a number of general State obligations that must be brought to bear in the specific context of emerging digital technologies. It establishes a legal commitment for all States parties to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity

[59] General Assembly resolutions 68/167 and 73/179, stress in particular that there may be particular effects on women and children and those who are vulnerable and marginalized. See also report of the UN High Commissioner for Human Rights, A/HRC/27/37.

with this obligation. Instead, States parties must pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.

Specific impact on women and children due to their alleged association with terrorist groups

Article 2 of the UNCRC protects the right of children to be free from discrimination, including on the basis of the activities or status of their parents. Policy responses that lead to a lowering of children's human rights protection because their parents or family were related to or associated with terrorist groups violate this key principle of international law. Further, States are to give special consideration to children who have been affected by their parents' conflict with the law, including those parents accused or convicted of being foreign fighters. States are to ensure that these children are treated as victims and do not have their rights infringed upon because of their parents' status.[60] In line with UN Security Council Resolution 2427 (2018), States should recognise that children who are detained for association with armed groups are first and foremost victims of grave abuses of human rights and international humanitarian law.

In its resolution 2331 (2016), the Security Council recognized the nexus between trafficking, sexual violence, terrorism and transnational organized crime. The resolution also laid a crucial normative framework for tackling previously unforeseen threats to international peace and security, including the use of sexual violence as a tactic of terrorism by groups that traffic their victims internally, as well as across borders, in the pursuit of profit and with absolute impunity. The resolution sets out that the link emerges from the implication of terrorist groups in the trafficking of women and girls in conflict-related areas and from the fact that trafficking serves as an instrument to increase the finances and power of those organized criminal groups.

Due process and security

The right to fair criminal proceedings is safeguarded by article 10 of the UDHR article 14 of the ICCPR In particular, we wish to highlight that equality before the law and the principle of equality of arms are key requirements of a fair trial, in criminal and civil proceedings.[61] This demands that resort to 'secret' evidence, intelligence information and information collected, preserved and shared by the military to be used as evidence be strictly limited, and outright excluded when it does not allow the defendant to be in a position to defend themselves effectively, in full respect of this principle.

The Convention on the Rights of the Child provides that States shall take all feasible measures to ensure the protection and care of children affected by armed conflict, and all appropriate measures to promote the physical and psychological recovery and social reintegration of child victims of armed conflict.[62] According to the European Court of Human Rights, measures applied by the State to protect children against acts of violence falling within the scope of articles 3 and 8 ECHR should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such

[60] UN Counterterrorism Centre, "Handbook on Children affected by the FTF Phenomenon", 2019, para. 63.
[61] Human Rights Committee, General Comment 32, para. 13.
[62] UNCRC articles 38-39.

serious breaches of personal integrity.[63]

Duty to act with due diligence to protect the rights of nationals deprived of their liberty in the camps

The determination of whether States have acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or should have known of the risks; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm. [64] This duty to act with due diligence to ensure that the lives of their nationals are protected from irreparable harm to their life or to their physical integrity applies where acts of violence and ill-treatment are committed by state actors or other non-State actors party to a conflict.[65]

[63] Söderman v. Sweden [GC], no. 5786/08, § 81, ECHR 2013

[64] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, para. 63. See also ECtHR: Opuz v Turkey, Application No 33401/02, 2009; Osman v United Kingdom, Application No. 23452/94 (1998), Z and Others v the United Kingdom [GC], Application no 29392/95 (2001) and Talpis v. Italy, 41237/14 (2017).

[65] See the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, 20 August 2019, A/74/318: https://undocs.org/A/74/318.

Annex II

Government Offices of Sweden

Stockholm
26 March 2021
UD2021/01294

Ministry for Foreign Affairs
Director-General for Legal Affairs

The Special Rapporteurs and
Working Groups signatories to
the Joint Communication
AL SWE 1/2021

Office of the High Commissioner
for Human Rights
Palace of Nations
CH-1211 GENEVA 10
Switzerland

Communication from Special Procedures
Reference: AL SWE 1/2021

Mesdames and Sirs,

1. I have the honour of referring to your letter of 26 January 2021 in which the Swedish Government is invited to submit certain observations regarding the situation in the al-Hol and Roj camps located in northeast Syria. In response to the invitation, I have the privilege, on behalf of the Swedish Government, to submit the following.

1. General position of the Government

2. Initially, the Government wishes to clarify that it strongly opposes any claims or suggestions that it is not engaging with the situation, or not actively working to find a solution. This is an issue of the highest priority for the Government.

3. The humanitarian situation in northeast Syria is of great concern and the needs after the ravages perpetrated by Daesh are extensive. Camps such as al-Hol and Roj are no exception, and the Government remains particularly concerned about the situation of the children there. Accordingly, the Government has continually worked to support efforts to try to help children in northeast Syria. When it comes to children linked to Sweden, the Government's goal is for them to be brought to Sweden. The Government furthermore wishes to emphasise that

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a number of the humanitarian actors working in the camps to make life more bearable for children do so with financial support from Sweden.

4. At the same time, the Government would like to underline that women with Swedish citizenships that are held in the camps may have committed serious crimes, including associating with Daesh. Accountability for the serious crimes committed in Syria and Iraq is a long-standing priority for the Government. The Government holds that there are strong advantages of trials occurring near evidence and victims. The intent of the Autonomous Administration of North and East Syria (hereinafter 'AANES'), which is responsible for the camps, to investigate and, if possible, prosecute women suspected of crimes in local courts, has therefore been noted with interest by the Government.

5. The Government also finds it pertinent to clarify that due to the security situation, the Ministry for Foreign Affairs advises against all travel to Syria since 2011. The freedom of movement of foreign missions in Syria is circumscribed and restrictions apply to the Swedish Embassy's ability to assist Swedes in a crisis situation.

6. Lastly, it should be clear from the onset that the Government does not concur with the far-reaching claims in the Communication about Sweden's legal responsibility for its citizens in the camps. This position will be developed below.

2. Jurisdiction and Sweden's legal obligations

7. The Government notes that it is indicated in the Communication that Sweden has a responsibility to act in a certain way in order to fulfil its obligations under international human rights law. The Government, while not wishing to underestimate the legitimate concerns that are raised concerning the situation in the al-Hol and Roj camps, disagrees with these far-reaching assertions concerning Sweden's legal obligations. At the centre of this issue is the concept of jurisdiction.

8. The exercise of jurisdiction in accordance with relevant human rights instruments is a necessary condition for a State to be held responsible for acts or omissions. However, as will be presented below, such jurisdiction is lacking with regard to Sweden in the present case.

9. Under international human rights law, jurisdiction is mainly limited to the territory of the relevant State. It is clear that the women and children in the al-Hol

and Roj camps are not present on Swedish territory. However, in exceptional circumstances and clearly defined and limited situations this obligation can also apply outside the territory of the state concerned (*Banković and Others v. Belgium and Others*, (dec.) [GC], no. 52207/99, § 67, ECHR 2001-XII). This is the case in particular in a situation where a State, directly or indirectly, exercises *de jure* or *de facto* effective control over persons in detention (see, for example, *J.H.A. v. Spain* before the Committee Against Torture, Communication No. 323/2007, Decision of 10 November 2008, para. 8.2, which concerned persons on board a vessel).

10. The issue of jurisdiction is not merely a formality since it is closely connected with the issue of control. An obligation on the State to take measures in a situation where the State does not exercise necessary control would be exorbitant and serve no legitimate purpose.

11. In the Communication, a substantial part of the legal analysis concerns the concept of jurisdiction and consists of references to the case-law of the European Court of Human Rights. The Government therefore finds reason to elaborate on how the Court has assessed the issue of jurisdiction, with the Grand Chamber case of *M.N. and Others v. Belgium* (no. 3599/18, Decision on 5 May 2020) as a point of reference.

12. In *M.N. and Others* the Court concluded that in all cases where it has attributed extraterritorial jurisdiction it has done so with reference to specific facts that justified a finding that the State concerned was exercising jurisdiction extraterritorially.

13. One exception to the main rule of territorial jurisdiction occurs where a State exerts effective control over an area outside its national territory. The obligation to secure the relevant rights and freedoms in such an area derives from the fact of such control, whether it be exercised directly or through a subordinate local administration (*M.N. and Others v. Belgium*, cited above, § 103). Thus, a State might exercise jurisdiction extraterritorially when, in an area outside its national territory, it exercises public powers such as authority and responsibility in respect of the maintenance of security (§ 104).

14. Further, the use of force by a State's agents operating outside its territory may, in certain circumstances, bring persons who thereby find themselves under the control of the State's authorities into the State's jurisdiction. The same conclusion has been reached where an individual is taken into the custody of State agents

abroad. Equally, extraterritorial jurisdiction has been recognised as a result of situations in which the officials of a State operating outside its territory, through control over buildings, aircraft or ships in which individuals were held, exercised power and physical control over those persons (§ 105). Jurisdiction may also arise from the actions or omissions of a State's diplomatic or consular officials when, in their official capacity, they exercise abroad their authority in respect of that State's nationals or their property (§ 106). Lastly, specific circumstances of a procedural nature have been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory (§ 107).

15. With reference to the Court's summary of its case-law in *M.N. and Others v. Belgium*, the Government concludes that the situation for Swedish citizens in the al-Hol and Roj camps in northeast Syria can in no way be compared with the cases in which the Court has attributed extraterritorial jurisdiction. In this regard, the Government finds it pertinent to clarify that the Court's restrictive view of extraterritorial jurisdiction is also in line with any reasonable interpretation of this concept under other international human rights instruments.

16. Sweden does not exert effective control over the relevant territory in northeast Syria, either directly or indirectly. Neither does Sweden exert any control over camps, buildings or vessels in which individuals are held. There can be no ambiguities concerning the fact that no use of force by Swedish State agents has taken place in or around the camps. Furthermore, no actions or omissions of Swedish diplomatic or consular officials exercising their authority have occurred that could justify the finding of extraterritorial jurisdiction in the present case. Finally, there are no specific circumstances of a procedural nature that could serve as grounds for making an exception to the main rule that jurisdiction is limited to the territory of the relevant State.

17. As far as the Government understands the Communication, it is nonetheless asserted that Sweden can be attributed some sort of "*de facto* or constructive jurisdiction". This assertion seems to rely on the conclusion that Sweden would have a practical possibility to solve the situation through repatriation. However, the Government strongly opposes the notion that a hypothetical possibility to impact a situation can be equated with having control in such a way that jurisdiction can be attributed. Furthermore, as has been elaborated on above, such an extensive interpretation of the concept of extraterritorial jurisdiction lacks support in international human rights law.

18. The Government appreciates that the Communication is structured with clear references to the cited case-law. However, the legal framework of the present communication consists, to a substantial degree, of fragmentary quotes from cases where the relevant findings clearly relate to a specific context. There are also a number of references to *inter alia* third-party interventions, including in ongoing cases, and position papers which are clearly not legitimate sources of law. Consequently, the Government holds that the legal analysis is flawed and creates a distorted view of Sweden's obligations under international human rights law, and wishes in particular to emphasise the following.

19. The Government agrees with the notion, expressed in the Communication, that states should take positive preventive measures to protect the right to life. However, this obligation is obviously connected to the question of jurisdiction, which becomes evident when looking at the case-law referred to in the Communication. The cases of *Opuz v. Turkey* (no. 33401/02, ECHR 2009) and *Talpis v. Italy* (no. 41237/14, 2 March 2017) both concern failure by domestic authorities to comply with their duty to protect individuals from domestic violence eventually leading to the murder of family members. Likewise, the other two cases referred to in the Communication essentially concern the failure of domestic authorities to take adequate protective measures despite clear warning signs (*Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII and *Z. and Others v. the United Kingdom* [GC], no. 23392/95, ECHR 2001-V).

20. The case-law referred to in the Communication in support of the obligation to take positive protective measures is thus clearly distinguishable from the case at hand, as it concerns situations within the territories of the relevant States and under the jurisdiction of the domestic authorities.

21. The Communication furthermore recalls the need to avoid allowing a State to perpetrate violations on the territory of another state that it could not perpetrate on its own. In this regard, the Government obviously refutes any claims that Sweden could be held responsible for perpetrating human rights violations in connection with the situation in the al-Hol and Roj camps. This issue is closely linked to that of extraterritorial jurisdiction and the Government takes note of the fact that the case-law referred to in the Communication concerns an individual who was kidnapped in Argentina by members of the Uruguayan security and intelligence forces (*Lopez Burgos v. Uruguay* before the Human Rights Committee, Communication No. 52/1979, Decision of 29 July 1981). At the risk of stating the

obvious, the Government nonetheless finds reason to clarify that the Communication of *Lopez Burgos* and the principles that can be derived from that case are not relevant to the situation at hand.

22. Furthermore, the Government does not in any way object to the assertion in the Communication that a State's responsibility under international human rights law may be engaged even if repercussions occur outside its jurisdiction. However, the Government once more finds reason to emphasise that the situation at hand differs significantly from the cases referred to in the Communication in which this principle has been applied. The landmark case of *Soering v. the United Kingdom* (7 July 1989, Series A no. 161) before the European Court of Human Rights concerned the question of extradition from the United Kingdom to the United States and the risk of *refoulement*. It is true that the potential repercussions would have occurred outside the territory of the State held responsible, but the applicant in question was in the United Kingdom and undeniably under the control of British authorities. Neither does any of the other cases referred to in the Communication render any support for the assertion that Sweden can be held responsible for any actions or omissions with repercussions outside its jurisdiction, i.e. in the al-Hol and Roj camps (*Drozd and Janousek v. France and Spain*, 26 June 1992, Series A no. 240; *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; and *Vidal Martins v. Uruguay* before the Human Rights Committee, Communication No. 57/1979, Decision of 23 March 1982).

23. In this context, the Communication also underlines the special importance of existing prohibitions on the transfer of individuals between jurisdictions where there is a risk of exposure to treatment that is contrary to fundamental human rights, and a State's positive obligation to provide effective protection to children and vulnerable persons and take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. The Government is in full agreement with the above. However, the cases referred to in the Communication (*Soering v. the United Kingdom,* cited above; *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008; and *Othman (Abu Qatada) v. the United Kingdom,* no. 8139/09, ECHR 2012 extracts) all concern the transfer of individuals from a territory in which the transferring State clearly has jurisdiction. In other words, the cases referred to in the Communication concern a scenario which is completely different from the case at hand.

24. Reference is furthermore made to the case of *Al-Skeini and Others v. the United Kingdom* (no. 55721/07, Judgment of 7 July 2011) before the European Court of

Human Rights. The Government therefore finds it pertinent to clarify that in that case, the Court reiterated that acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (§134). As has been elaborated on above, the Government holds that it must be considered evident that Sweden does not in any way 'exert authority and control' over individuals in the al-Hol and Roj camps.

25. In the above, the Government has elaborated on its position that extraterritorial jurisdiction is an exception that can only be applied in specific and clearly defined situations. Furthermore, the Government considers that the case-law referred to in the Communication does not support the far-reaching conclusions on extraterritorial jurisdiction in the present case. On the contrary, the Government holds that the circumstances in these cases are so different from the situation at hand that they showcase why it is unreasonable to attribute extraterritorial jurisdiction.

26. Accordingly, the Government holds that there is no support for the assertion that Sweden exercises, directly or indirectly, *de jure* or *de facto* effective control over individuals in the al-Hol and Roj camps. It is thus unreasonable, and in contradiction with fundamental principles of public international law, to attribute jurisdiction to Sweden in the present situation.

27. Finally, the Government wishes to clarify that its position on the question of jurisdiction and Sweden's legal obligations applies both to the exercises in May and June 2020 and the current situation of an alleged obligation to remedy the situation by repatriating citizens. The Government holds that Sweden cannot be attributed jurisdiction in any of these scenarios. However, and as will be expanded on below, it is even more unreasonable to claim that Sweden had jurisdiction in relation to the exercises in May and June 2020.

3. Additional observations and clarifications

3.1 The exercises in May and June 2020

28. The Government or Swedish authorities were neither consulted nor received advanced notice of the so-called registration and verification exercises that took place in May and June 2020 in the al-Hol and Roj camps. Nor were they consulted about the transfer of some women and children from the al-Hol camp to the Roj

camp that took place in connection with these exercises. On 10 June 2020, the Government became aware of the exercises – albeit not in detail – through information in the local Syrian media. On 22 June 2020, Government representatives received information from local representatives of the AANES that an exercise had been completed and that the overall purpose of the exercise had been to improve the security situation in the camps.

29. Accordingly, the exercises were not carried out at the request of Sweden. Furthermore, the Government had no opportunity to try to ensure that the interests of Swedish citizens were taken into account in connection with the exercises, as it was unaware of the execution of the exercises at the time.

30. As far as the Government is aware, Swedish authorities have not obtained information collected in any exercise in question.

31. Since the data in question has not been processed by Swedish authorities or an entity under the control of the Government, the Government fails to understand the relevance of the request for information on data protection measures in Swedish national legislation. The Government's firm view is that it cannot in any way be responsible for the processing of personal data – albeit being data regarding Swedish citizens – performed outside of Sweden. Nonetheless, the Government wishes to submit the following regarding data protection measures in general in Swedish national legislation.

32. In Sweden there is a constitutional and general right to privacy protection (see Chapter 2, Article 6, second paragraph in the Instrument of Government). More detailed provisions on how personal data may be processed are provided in the EU General Data Protection Regulation (GDPR). GDPR is complemented in Swedish law by the 2018 Data Protection Act and sector-specific rules on how personal data may be processed in different areas. A corresponding legal framework, based on EU Directive 2016/680, applies to the processing of personal data by The Swedish Police and other Swedish authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

33. Swedish citizens have a number of rights under these legal frameworks provided that they are applicable. In short, these rights mean that they should be

informed about when and how their personal data is processed and citizens should also be able to exercise a certain amount of control over their own data.

3.2 Repatriation

34. In line with what has been stated in the above, the Government holds that Sweden is under no legal obligation to repatriate its citizens currently located in the al-Hol and Roj camps. The Government wishes to reiterate that women in the camps may have committed serious crimes, including associating with Daesh. Under these circumstances, the Government is not under any obligation to explore the possibilities to repatriate the women.

35. As stated above, the Government continues to prioritise efforts to try to help children in northeast Syria. The goal is for the children with links to Sweden to be brought to Sweden, if and when possible.

36. In this context, the Government wishes to draw attention to the fact that the general position of the AANES has been to not allow children to be separated from their mothers in the camps. Swedish authorities have explored the possibility of repatriating children with the consent of their mothers.

37. Swedish authorities have made a particular effort to localise and help kidnapped or orphaned children in the camps in northeast Syria. This work has included facilitating the successful repatriation of several orphaned children from the camps.

3.3 Other questions raised in the Communication

38. In response to some of the other questions raised in the Communication, the Government wishes to emphasise the following.

39. Sweden provides substantial financial support to several of the organisations operating in the camps that are working to make the humanitarian situation more bearable. The aid is not targeted at any particular nationality but is entirely needs-based and in line with humanitarian principles. Furthermore, organisations that Sweden supports have a special focus on protecting women and girls.

40. In addition, Sweden has contributed to the work carried out by the European Institute of Peace (EIP), in the form of both core support and targeted support

from the Ministry for Foreign Affairs. This includes efforts to better understand and map children's vulnerability and needs.

41. Sweden is in dialogue with the AANES about *inter alia* their prosecution initiative and has continuously stressed the importance of respecting the principle of the rule of law in this work, including the need for impartial and independent tribunals as well as adequate safeguards with regard to the right to a fair trial. The work of the EIP, mentioned above, has included an academic review of the international legal principles and rules that must be met in order for credible and fair prosecution to be possible. This report has been submitted to the AANES.

42. Lastly, the Government wishes to reiterate that the consular work of the Swedish authorities is constantly ongoing. The general security situation in northeast Syria makes this work difficult. However, the Government is in dialogue with the AANES regarding the humanitarian situation in the camps, and in order to receive information on the status and whereabouts of Swedish citizens in the camps. In addition, staff from the Swedish Ministry for Foreign Affairs visited the al-Hol and Roj camps in October 2020. This consular visit presented an opportunity to meet with Swedish citizens in the camps and gain a better understanding of the humanitarian situation there. Subsequently, so called "Reports of concern" were made to the relevant social services in Sweden.

4. Summary

43. The Government wishes to express its gratitude to the signatories of the Communication for raising awareness of the humanitarian situation in northeast Syria, including the al-Hol and Roj camps. This is an issue of the highest priority for the Government and the signatories can rest assured that the Government will continue to prioritise efforts to try to help children in northeast Syria, aiming, *inter alia*, at bringing children with links to Sweden back, if and when possible.

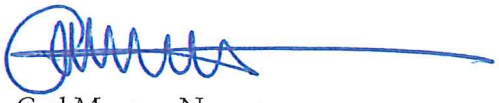
44. At the same time, the Government recognises the complexity of the situation and wishes to reiterate that women in the camps may have committed serious crimes, including associating with Daesh. The importance of accountability for the serious crimes committed in Syria and Iraq must be acknowledged.

45. While appreciating the references to key principles of international human rights law, the Government respectfully disagrees with the legal reasoning and conclusions in the Communication, in particular concerning the fundamental

concept of jurisdiction and Sweden's legal obligations. However, regardless of any legal obligation under international human rights law, the Government will continue its work to improve the humanitarian situation in northeast Syria, including the al-Hol and Roj camps.

46. Finally, the Government wishes to clarify that it remains at the disposal of the Special Rapporteurs and relevant Working Groups, should any further information be requested.

Please accept, Mesdames and Sirs, the assurances of my highest consideration.



Carl Magnus Nesser
Ambassador, Director-General for Legal Affairs

Annex III

United Nations CRC/C/85/D/79/2019–CRC/C/85/D/109/2019

Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No. 79/2019 and No. 109/2019*, **

Communications submitted by:	L.H., L.H., D.A, C.D. and A.F. (represented by counsel, Mr. Pradel)
Alleged victims:	S.H., M.A, A.A., J.A., A.A., R.A., L.F., A.F., S.F., N.F. and A.A.
State party:	France
Dates of communications:	13 March and 25 November 2019 (initial submissions)
Date of adoption of decision:	30 September 2020
Subject matters:	Repatriation of children whose parents are linked to terrorism activities; protection measures; right to life; access to medical care; unlawful detention
Procedural issue:	Extraterritorial jurisdiction
Articles of the Convention:	2, 3, 6, 20, 24 and 37
Articles of the Optional Protocol:	5 (1)–(2) and 7 (e)–(f)

1.1 The authors of the communications are L.H., L.H. and D.A., acting on behalf of their grandchildren (S.H., born in 2017; M.A., born in 2013; A.A., born in 2014; J.A., born in 2016; A.A., born in 2017; R.A., born in 2018) and C.D. and A.F., acting on behalf of L.F., born in 2003; A.F., born in 2006; S.F., born in 2011; N.F., born in 2014; and A.A., born in 2017. All the children are nationals of France whose parents allegedly collaborated with the so-called Islamic State in Iraq and the Levant (ISIL). Some of the children were born in the Syrian Arab Republic while others travelled there with their parents at a young age. They are currently held in the Roj, Ain Issa and Al-Hol camps in Syrian Kurdistan, which are under the control of Kurdish forces. The authors allege that the Government of France did not take the measures necessary to repatriate the children to France, which they claim constitutes a violation of articles 2, 3, 6, 20, 24 and 37 of the Convention. The

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

** The following members of the Committee participated in the examination of the communications: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.

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authors are represented by counsel. The Optional Protocol entered into force for the State party on 7 January 2016.

1.2 On 27 March and 4 December 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, denied the authors' request for interim measures consisting in the repatriation of the children to France. The Committee requested the State party, however, to take the diplomatic measures necessary to ensure the protection of the right to life and integrity of the children, including access to any medical care that they may need.

Facts as submitted by the authors

Communication No. 79/2019

2.1 According to the authors, S.H.'s parents left France for the Syrian Arab Republic in April 2016 in order to join the jihad. On 14 November 2017, S.H. was born in the Syrian Arab Republic. On 21 January 2018, the family attempted to leave the Syrian Arab Republic but was arrested by Kurdish militiamen. S.H. and his mother were separated from the father and have been held at Ain Issa camp, which is under the control of Kurdish forces, since then. The mother managed to contact her parents in France and described the deplorable sanitary conditions in which she and S.H. had been living.

2.2 On 7 January 2013, M.A. was born in France. On 17 May 2014, M.A. and her parents left France for the Syrian Arab Republic. In the Syrian Arab Republic, M.A.'s mother gave birth to four other children: A.A., born on 7 June 2014; J.A., born on 7 February 2016; A.A., born on 5 April 2017; and R.A., born on 30 October 2018. On 30 October 2017, M.A.'s grandmother lost contact with her daughter and grandchildren. At the end of November 2018, M.A.'s mother managed to regain contact with the grandmother and informed her that she had been imprisoned by Kurdish forces for seven and a half months, along with her five children, and that they were now being held at Roj camp. She also informed her of the very difficult conditions of detention in the camp and the lack of medical care. J.A. suffers from asthma attacks and A.A. from violent stomach aches.

Communication No. 109/2019

2.3 L.F., A.F. and S.F. were born in France in 2003, 2006 and 2011 respectively. According to the authors, the parents of the children were progressively radicalized and left France with the children, going first to Jordan, in August 2012, then to Egypt, in May 2013, and then to the Syrian Arab Republic, on 23 November 2013. In the Syrian Arab Republic, the fourth sibling, N.F., was born on 2 May 2014. After the death of their father, their mother married a national of the Syrian Arab Republic who subsequently also passed away. A.A. was born from this second union on 18 January 2017. On 31 May 2019, the children's mother informed her parents that she was in the Syrian Arab Republic, in the Roj camp, with her youngest son, A.A. Her four other children had first been accommodated in the family of her second husband, before being transferred to the Roj camp in August 2019. The children's mother had suffered a serious injury to her right ear during bombing raids, causing total deafness in that ear. A.F. suffers injuries to his left foot, requiring rehabilitation. Neither have received the necessary medical care, as it is not available in the camp. The authors are in regular contact with their daughter (the children's mother) and granddaughter L.A. by telephone and through social media. The authors fear that 16-year-old L.A. may be married to a man against her will.

Both communications

2.4 The authors stress that they have kept the State party informed of developments regarding the situation of their children and grandchildren and of their location in the Syrian Arab Republic.

General context as provided by the authors

2.5 The authors submit that, since the beginning of 2018, a number of nationals of France have fled ISIL and surrendered to the Kurdish forces in Rojava, an autonomous

Kurdish territory in north-eastern Syrian Arab Republic, in the hope of returning to France. Among these individuals are parents who are now detained in Al-Hol, Ain Issa and Roj camps with their children. The children detained in the camps have no detention documents and are not subject to any local legal proceedings, as Syrian Kurdistan is not a State. The authorities of Syrian Kurdistan have alerted the French authorities that they will not issue any proceedings or orders against the detainees in the camps.

2.6 On 9 October 2019, the Government of Turkey launched a military offensive against the Kurdish forces in Rojava following the withdrawal of United States military troops. Fighting, air raids and artillery fire in north-eastern Syrian Arab Republic resulted in the death of several dozen civilians, as well as the displacement of thousands more to areas adjacent to the Syrian border. According to the Kurdish authorities, 785 members of ISIL, including French women and children, escaped from the then unguarded Ain Issa camp.[1] On 13 October, Kurdish forces concluded an agreement with the government of Bashar Al-Assad on the deployment of its armed forces near the Turkish border in order to repel the offensive.[2] On 22 October, Turkey pledged not to resume its military offensive in northern Syrian Arab Republic in return for a commitment from the Russian Federation to ensure the withdrawal of Kurdish forces along the border.[3] On 30 October, the full withdrawal of Kurdish forces from the northern Syrian border with Turkey was announced.[4] However, the question of control over the Kurdish camps was not raised. Thus, while the camps in northern Syrian Arab Republic are currently under the control of Kurdish forces, this situation is likely to change, rendering the fate of all French nationals, including children (of whom it is estimated there are between 270 and 320),[5] uncertain.

On the question of repatriation

2.7 At the beginning of 2018, Syrian Kurdish leaders repeatedly expressed their wish to see all foreign nationals detained in the camps repatriated to their States of nationality.[6] As at the date of the initial communication, States such as Canada, the Netherlands, Portugal and the Russian Federation were organizing the repatriation of their nationals. The head of the Kurdish judiciary system, Abdulbasset Ausso, stressed that foreign jihadists should be tried in their own countries and that States of origin should take responsibility for their nationals. Human Rights Watch also recalled that women who had returned to Iraq and the Syrian Arab Republic had not been officially charged with any crime by the Kurdish authorities, who were keeping them on the understanding that their States of origin would repatriate them.

2.8 In March 2018, the Chief of Staff of the President of France, Emmanuel Macron, replied to the authors that, as regards French minors in Iraq or the Syrian Arab Republic, they were entitled to the protection of the State and may be cared for in accordance with the rules concerning the protection of minors and repatriated persons, provided that their criminal responsibility had been ruled out by the local authorities. In addition, early in 2018, the President gave assurances that the situation of those children would be dealt with on a case-by-case basis. Despite those statements, no explicit measures of protection or repatriation have been taken by the State party to protect French children arbitrarily detained in Syrian Kurdistan. By a letter dated 26 February 2019, the President's Chief of Staff refused to grant the repatriation of the children represented by the authors. The authors stress that the State party nevertheless maintains regular contact with representatives of the Kurdish forces in Rojava, which, although not a State, has a

[1] Le Nouvel Osbervateur and Agence France Presse, "Syrie: près de 800 proches de membres de l'EI ont fui un camps de déplacés", 13 October 2019.

[2] Radio France International, "Syrie: accord entre les Kurdes et Damas contre l'offensive turque", 13 October 2019.

[3] Ibid., "Syrie: ce que prévoit l'accord conclu par Poutine et Erdogan", 22 October 2019.

[4] L'Express and Agence France Presse, "Les Kurdes ont achevé leur retrait du nord de la Syrie", 30 October 2019.

[5] Anne-Bénédicte Hoffner, "En Syrie, l'avenir incertain des djihadistes français", La Croix, 29 October 2019.

[6] Gwendoline Debono, "Syrie: les Kurdes ne veulent plus garder les dijihadistes français de Daech", *Europe1*, 13 April 2018.

permanent representation in Paris. The Kurdish authorities have already made it clear that they do not have the means to feed and care for the French women and children detained in the Roj, Ain Issa and Al-Hol camps in Syrian Kurdistan.

Humanitarian conditions of the children in the camps

2.9 The authors emphasize that the children in the prison camps controlled by Kurdish forces, many of whom are under 6 years of age, are barely surviving, are in a war zone, face inhuman sanitary conditions and lack basic needs (water, food and health care), putting them at imminent risk of injury or death.[7] They live in extremely precarious conditions, confined in tents. The authors point out that, according to the World Health Organization, at least 29 children in Al-Hol camp died of hypothermia during the winter of 2018–2019, as their families fled from the last remaining ISIL compound.[8]

Exhaustion of domestic remedies

2.10 The authors note that they have made several formal requests for the State party to repatriate the children, without success.

2.11 The authors argue that the State party's domestic remedies are unavailable and ineffective in the context of all requests for protection and/or repatriation of children and their mothers. The courts would declare themselves incompetent, since the Administrative Court of Paris declared itself incompetent in the context of an application for interim measures, considering that the subjects of the complaint were a diplomatic matter rather than the administrative responsibility of the State party. The decision to implement the protection measures was thus described by the Administrative Court as an "act of government" that was beyond the control of the administrative judge. Hence, no French court would have jurisdiction to rule on the position of France towards French children detained in Kurdish camps.

State party's jurisdiction

2.12 In communication No. 109/2019, the authors argue that the continued presence of children in the camps under the control of the Kurdish forces has its "unique origin" in the decision of France not to repatriate them. The authors also argue that the State party may exercise its jurisdiction extraterritorially in some circumstances. This possibility has been confirmed by a significant number of cases before the European Court of Human Rights where two situations can be distinguished:

(a) Acts performed outside the national territory: when individuals located outside the national territory benefit from the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as a result of an "extraterritorial act of the State", such as in the case of military intervention on foreign territory;

(b) Acts producing effects outside the national territory: when individuals situated outside the national territory benefit from the rights guaranteed by the European Convention on Human Rights as a result of a purely national act of the State aimed at them and which directly affects their legal situation.[9]

[7] Luc Mathieu and Chloé Pilorget-Rezzouk, "Jihadistes et leurs familles: le défi du retour", *Libération*, 31 January 2019; Sophie Parmentier, "Enfants de djihadistes en Syrie: 'Il faut les sauver, et il y a urgence!'", 27 December 2018.

[8] Le Figaro and Agence France Presse, "Syrie, le froid hivernal a tué 29 enfants (ONU)", 31 January 2019.

[9] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011), p. 8: "extraterritorial application does not require an extraterritorial state act but solely that the individual concerned is located outside the state territory, while the injury to his rights may as well take place inside it."

2.13 The authors contend that this distinction is anchored in the case law of the European Court of Human Rights.[10] Furthermore, the European Court of Human Rights has held that the application of extradition formulated by one State to the authorities of another State created a jurisdictional link between the State that issued the request and the individual who was the subject of the request. Thus, an act performed exclusively on national territory could be regarded as an exercise of jurisdiction within the meaning of article 1 of the European Convention on Human Rights.[11] In *Nada v. Switzerland*, decisions by administrative authorities not to authorize the entry of an individual into a national territory gave rise to a jurisdictional link with that individual. Consequently, a State may exercise its jurisdiction within the meaning of article 1 of the European Convention on Human Rights when, through acts taken on its territory, it directly affects the situation of individuals outside its national territory.[12] This interpretation is in compliance with public international law, since it recognizes the existence of a specific legal bond between a State and its nationals. State jurisdiction is defined as "its lawful power to act and hence to its power to decide whether and, if so, how to act, whether by legislative, executive or judicial means" and a State is deemed to have jurisdiction over its nationals wherever they may be.[13] The authors add that such an analysis is in line with the very broad jurisdiction that the French authorities have to prosecute alleged perpetrators of criminal offences committed abroad,[14] which is driven by the objective of protecting French nationals.

2.14 The authors add that the decision not to grant their requests has not been justified by any material or legal impossibility to carry out the repatriations. The authors emphasize that the children have not been detained as a direct consequence of the control of the authorities in north-eastern Syrian Arab Republic over the camps and individuals in question, but, rather, that their detention has its "unique origin" in the measures taken by the State party, namely the decision not to repatriate the children and their mothers. Yet, the State party has repatriated at least 17 French children, including 15 orphans, from the Syrian Arab Republic since March 2019.[15]

2.15 The authors also recall that the established jurisprudence of the European Court of Human Rights on extraterritoriality retains the "link of responsibility" for the fate of the nationals of States parties by virtue of the "decisive influence" they have over the authority detaining or holding them, even outside the limits of their national territory in a part of another State.[16] Thus, the European Court of Human Rights does not require the direct participation of the agents of the State party but verifies, among other things, whether the State "did not act to prevent the violations allegedly committed".[17] With regard to the conflict in Iraq and the Syrian Arab Republic, the State party has been intervening in

[10] European Court of Human Rights, *Ilascu and others v. Moldova and Russia*, application No. 48787/99, judgment of 8 July 2004, para. 314; *Drozd and Janousek v. France and Spain*, application No. 12747/8726, judgment of 26 June 1992, para. 91; *Sejdovic v. Italy*, application No. 56581/001, judgment of 1 March 2006.

[11] The auhtors cite European Court of Human Rights, *Stephens v. Malta (No. 1)*, application No. 11956/07, judgment of 21 April 2009.

[12] European Court of Human Rights, *Nada v. Switzerland*, application No. 10593/08, judgment of 12 September 2012, paras. 121–122.

[13] Bernard H. Oxman, "jurisdiction of States", entry in *Max Planck Encyclopedia of Public International Law*; European Court of Human Rights, *Cyprus v. Turkey*, application No. 25781/94, judgment of 10 May 2001.

[14] See articles 689–693 of the Code of Criminal Procedure. See also Court of Cassation, Criminal Chamber, case No. 17-86.640 of 12 June 2018, according to which the extraterritorial jurisdiction rules of French criminal law allowing direct victims, of French nationality, to obtain in France the prosecution of the perpetrators of an offence committed abroad and compensation for any harm resulting from the said offence, are explained by the principle that France is obliged to ensure the protection of its nationals (see www.courdecassation.fr/jurisprudence_2/qpc_3396/1598_12_39336.html).

[15] See https://uk.ambafrance.org/Rapatriement-de-12-enfants-mineurs-orphelins-ou-isoles. See also Elise Vincent and Nathalie Guibert, "La France a rapatrié de Syrie 5 enfants orphelins de djihadistes", *Le Monde*, 15 March 2019.

[16] European Court of Human Rights, *Ilascu and others v. Moldova and Russia* and *Sargsyan v. Azerbaidjan*, application No. 40167/06, judgment of 16 June 2015, para. 128.

[17] Ibid., *Ilascu and others v. Moldova and Russia*, para. 393.

northern Syrian Arab Republic as part of the Chammal military operation since 2015.[18] The State party therefore works to stabilize areas freed from the control of ISIL in northern Syrian Arab Republic[19] and for the structuring of "governance" in that area. To this end, France has established a military and diplomatic partnership with the Syrian Democratic Forces, in particular in the establishment of a dialogue with Turkey[20] within the framework of a "common fight" against terrorism. In this context, the State party was also able to repatriate the French children (see para. 5.5 below), thanking the Syrian Democratic Forces for their cooperation, which made that outcome possible.[21] In addition, the State party has supported a certain number of opposition groups, particularly Kurdish groups, as they have been deemed reliable partners in the fight against ISIL.[22] Therefore, the authors argue that the State party exercises a military and political influence – not merely support – in this area with regard to the control of the situation of French children and their mothers detained by the Syrian Democratic Forces, which results from the treaty obligations binding France.[23]

Complaint

3.1 The authors argue that, by its inaction, the State party is violating articles 2, 3, 6, 20, 24 and 37 of the Convention on the Rights of the Child. They assert that the State party failed: to take positive measures to ensure respect for the rights set forth in the Convention (art. 2); to guarantee that children receive the necessary protection and care in the event that their parents or other legal guardians are unable to do so (art. 3); to ensure the right to life and the survival and development of children (art. 6); to provide them with special protection in the context of deprivation of their family environment (art. 20); to ensure access to medical care (art. 24); and to protect them from unlawful detention (art. 37).

3.2 The authors stress that the State party was well informed of the deplorable sanitary conditions in which the children found themselves. The State party was also aware that the children were detained in an area of armed conflict and that they were exposed to the risk of death and serious injury, including by virtue of the fact that the camps did not benefit from any medical support, raising the risk of disease and illness, in addition to the injuries from which some of them already suffered. The authors argue that, in spite of all this, the State party refused to implement any necessary measures.

3.3 The authors request that the State party: (a) identify, as soon as possible, children born in France or of French parents present in the Al-Hol, Ain Issa and Roj camps; (b) provide the children with food, water and medical care; (c) repatriate them to French territory; (d) assist the children through child protection services upon their arrival on French territory; and (e) when appropriate, provide any other measures to protect them.

State party's observations on admissibility

4.1 In its submissions of 28 May 2019 and 5 February 2020, the State party considers that both communications are inadmissible for lack of standing and because of the State party's lack of jurisdiction over the children.

4.2 The State party refers to article 5 of the Optional Protocol and argues that the authors have not established that they are acting with the consent of the children or their mothers. According to the State party, the mothers remain the children's legal guardians

[18] See www.defense.gouv.fr/layout/set/print/content/download/523399/8773207/version/1/file/20170713+Dossier+de+presse+op%C3%A9ration+Chammal+FEV+18+VF.pdf. See also Security Council resolution 2249 (2015).

[19] Defender of Rights decision No. 2019-129 of 22 May 2019 concerning the retention of French children and their mothers in the camps under the control of the Syrian Democratic Forces in northern Syrian Arab Republic.

[20] See www.elysee.fr/emmanuel-macron/2018/03/30/entretien-du-president-de-la-republique-avec-une-delegation-syrienne.

[21] See www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/evenements/actualites-2019/article/communique-du-ministere-de-l-europe-et-des-affaires-etrangeres-15-03-19.

[22] See www.senat.fr/compte-rendu-commissions/affaires-etrangeres_archives.html#Session2019.

[23] Defender of Rights decision No. 2019-129 of 22 May 2019.

and their consent is therefore required, especially in light of the request for the repatriation of the children. Regarding communication No. 79/2019, the State party adds that the authors did not produce any family records attesting to their relationship to the subjects of the communication.

4.3 The State party recalls that the Committee must verify that the children, and not the authors, fall within the jurisdiction of a State party. A reverse analysis would lead, de facto, to giving the Convention universal applicability, contrary to its text. The State party argues that it has only agreed to respect the rights set forth in the Convention in situations that fall within its sovereignty and competence and over which it is likely to have effective control. The State party adds that it may not be held accountable for situations that it did not create, over which it has no effective control and which are the actions of other States or non-State actors.

4.4 The State party refers to article 29 of the Vienna Convention on the Law of Treaties, to the decision of the European Court of Human Rights in *Banković and others v. Belgium*[24] and to the jurisprudence of the Committee against Torture.[25] It argues that in public international law the concept of jurisdiction is primarily territorial, unless a different intention appears from the treaty or is otherwise established, and that the extraterritorial jurisdiction of a State stems from the effective control it is likely to exercise outside its borders.[26] The State party refers to the jurisprudence of the European Court of Human Rights,[27] the International Court of Justice[28] and the Inter-American Commission on Human Rights[29] and recalls that, in order for children to come under the jurisdiction of the State party, the authors must demonstrate that they are under the effective control of France, either through its agents or through a local authority over which France would have such great control as to cause that authority to in fact be dependent on it.

4.5 In the present instance, the State party notes that the authors have not provided any evidence that France exercised effective control over the camps in north-eastern Syrian Arab Republic. Conversely, the authors themselves acknowledge that the children are being held by and are under the control of Kurdish forces. The State party notes that, firstly, France does not exercise any control or authority over the children through its agents, as the camps in north-eastern Syrian Arab Republic are under the sole control of foreign authorities. Secondly, the State party refutes the argument that France exercises any territorial control over the camps in northern Syrian Arab Republic. Although France is one of the members of an international coalition that maintains an operational partnership and contacts with the Syrian Democratic Forces in the fight against ISIL, it does not mean that it has effective control over the camps in north-eastern Syrian Arab Republic. Nor does it mean that there is a relationship of dependence such as to make the Syrian Democratic Forces a subordinate local administration. Such an interpretation would amount to extending the jurisdiction of France to any territory controlled by a State with which it maintains relations or a military partnership.

4.6 Regarding communication No. 109/2019, the State party further argues that, on the question of the extraterritorial effect of a domestic decision, the jurisprudence cited by the authors is irrelevant as it concerns different situations and does not demonstrate the existence of a new criterion for the exercise of the State's extraterritorial jurisdiction. According to the State party, it is wrong for the authors to assume that there is a well-

[24] Application No. 52207/99, decision of 12 December 2001, paras. 59 and ff.

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

[26] The State party refers to joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017), para. 12; general comment No. 31 (2004) of the Human Rights Committee; European Court of Human Rights, *Al Skeini and others v. United Kingdom*, application No. 55721/07, judgment of 7 July 2011, para. 138; Inter-American Commission on Human Rights, *Djamel Ameziane v. United States*, 20 March 2012, para. 30.

[27] *Al Skeini and others v. United Kingdom*, para. 134.

[28] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, paras. 109–111.

[29] *Djamel Ameziane v. United States*, paras. 30–35.

established distinction between acts performed outside the national territory and acts producing effects outside the national territory. The latter acts would, according to the authors, be likely to bring under the jurisdiction of a State party all individuals outside the territory of that State on whom they would have an effect. The State party therefore contests the argument that the Convention is intended to apply to the children because of the alleged decision of the Government of France not to repatriate them. Thus, the State party emphasizes that the European Court of Human Rights has never affirmed the principle that individuals located outside the territory of a State party would come under the latter's jurisdiction merely and solely as a consequence of a national decision.

4.7 Regarding the authors' arguments on the existence of a jurisdictional link, the State party argues that the authors confuse two concepts: according to the jurisprudence of the European Court of Human Rights, the jurisdictional link between the applicants and the State whose responsibility is sought is not based on the nationality of the applicants but on the initiation of civil or criminal proceedings under domestic law. Moreover, it is not apparent from the principles of public international law, the provisions and jurisprudence of the European Court of Human Rights, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights or any other treaty that a link has been established between jurisdiction and nationality. In this connection, the State party notes that the authors confuse the notion of personal jurisdiction of the State – i.e., the well-established powers that the State exercises over its nationals abroad by reason of the link of nationality – and that of extraterritorial jurisdiction of the State – i.e., the legal conditions under which a State may be held responsible for acts performed or producing effects outside its borders. The authors are therefore not justified in asserting that the children detained in north-eastern Syrian Arab Republic fall under the jurisdiction of the State party solely on the ground that they have French nationality. Furthermore, the State party notes that this approach would introduce discrimination because it would afford enhanced protection for nationals of a State party located abroad, a protection not afforded to non-nationals. Such a situation would be contrary to the logic of the Convention system, which is to protect all individuals against violations of the Convention by States parties, regardless of their nationality.

4.8 The State party emphasizes that to accept the reasoning put forward by the authors would be tantamount, de facto, to accepting universal State jurisdiction, as the mere fact that the State party had not acted on their request for repatriation would have the effect of extending the jurisdiction of France over the children detained in north-eastern Syrian Arab Republic and making the French authorities responsible for the ill-treatment they allegedly suffered there. According to the State party, this argument would thus mean that any citizen could request the intervention of his or her State of nationality, on account of the situation he or she is experiencing in the territory of another sovereign State, for the first State to become responsible, by reason of its refusal to intervene, for potential violations of the Convention committed in or by the second State. This conception signifies that a State would be exercising jurisdiction over a situation taking place abroad, over which it has no control, on the sole ground that the violation persists by its alleged inaction. Under this approach, States would have positive obligations to intervene and put end to all violations of children's rights committed in other States, when requested to do so, including through the use of military means. Such an approach would pose serious problems under international law, since it would be likely to contradict the principle of sovereignty of the State in which the alleged violation was committed. Furthermore, it would potentially extend the jurisdiction of States parties beyond what they have undertaken to do by ratifying the Convention.

Authors' comments on the State party's observations

5.1 On 28 August 2019 and 5 March 2020, the authors submitted their comments in response to the State party's observations. The authors recall that, to date, the three camps in northern Syrian Arab Republic remain under the control of Syrian Kurdish forces. They also reiterate that domestic remedies have been exhausted as there is no available and effective remedy that would compel the State party to implement the necessary protective measures.

5.2 The authors recall that, in accordance with article 5 of the Optional Protocol, communications may be submitted by or on behalf of an individual or group of individuals. The authors are direct ascendants of the children (grandparents). The consent invoked by the State party is not a criterion that is apparent either from the Committee's jurisprudence or from any provision in the Convention. This would make the Convention practically impossible to apply to separated children in a conflict zone. On the contrary, article 5 (2) of the Optional Protocol specifies that communications submitted on behalf of individuals shall be with their consent unless the author can justify acting on their behalf without such consent. In the present case, the communications concern children aged between 2 and 16 years who are unable to understand what is at stake and could not, in any way, express an opinion or give consent. In addition, the lack of means of communication (smartphone, computer or even paper) makes it impossible for a consent to be materially presented in front of the Committee. The mothers did, however, through telephone calls, give their consent to the authors for the communications to be presented. Finally, the admissibility must be assessed primarily on the basis of the best interest of the child, and these communications clearly serve the best interests of the children as the aim is to end their detention in deplorable and life-threatening conditions.

5.3 Concerning communication No. 79/2019, the authors recall that the need for a family record book to certify filiation with the children's mothers is not a formal requirement for the means of proving filiation between the children and their parents. Nonetheless, the authors submit the family records attesting to their relationship with M.A., A.A., J.A., A.A., R.A. and S.H.

5.4 Regarding the jurisdiction of the State party, the authors emphasize that not only did the State party deny the repatriation request but it also refused to put an end to a situation – to which only it could decide to put an end – of serious violations of the fundamental rights of French minors, despite multiple alerts on the matter.

5.5 On 26 September 2019, the authors of communication No. 79/2019 submitted a report adopted by the National Consultative Commission on Human Rights in plenary assembly. The Commission concluded that the continued refusal to repatriate all the children of French nationality detained in the Rojava camps would be a clear violation of fundamental rights and a serious attack on the values of the French Republic, including its Constitution, and to the best interests of the children. The Commission therefore called upon the State party to return the children and the parents currently with them to French soil as soon as possible.

State party's additional observations

6. In its submission of 17 December 2019, regarding communication No. 79/2019, the State party informed the Committee that, on 9 December 2019, S.H. and his mother were subjected to an administrative expulsion by the Turkish authorities to France. On his arrival in France, S.H. was placed by the competent judicial authority, the Children's Social Welfare Office, into care. As a result, S.H. was no longer being held in a camp controlled by the Syrian Democratic Forces and is no longer being subjected to alleged violations of the rights enshrined in the Convention. The State party therefore requests the Committee to declare the communication inadmissible concerning S.H. as manifestly ill-founded under article 7 (f) of the Optional Protocol to the Convention.

Authors' additional observations

7. In their submission of 20 July 2020 regarding communication No. 79/2019, the authors argue that the communication should not be declared inadmissible with regard to S.H. They argue that S.H. had been arbitrarily detained for almost two years in Ain Issa camp, in conditions that affected his psychological and physical integrity, without any measures of protection taken by the State party, despite multiple requests from his family. S.H. and his mother were then expelled by the Kurdish forces from the Ain Issa camp and had to hide from other armed groups. They eventually managed to flee to Turkey. It was only then that the State party accepted their repatriation to France, in line with the "Cazeneuve protocol", according to which French nationals arrested in Turkey on their return from the Syrian Arab Republic must be handed over to the French authorities.

According to the authors, the State party cannot argue the inadmissibility of the communication in that regard since France was forced by the Turkish authorities to repatriate S.H. The effects produced by the violations of the Convention remain and the authors request the Committee to declare articles 2, 3, 6, 20, 24 and 37 admissible in respect of S.H.

Third-party submissions

8.1 At the Committee's invitation, three experts[30] from the Consortium on Extraterritorial Obligations and a group of 31 experts from different universities submitted a third-party intervention on 10 June 2020 on the issue of extraterritorial human rights obligations.

Submission by the Consortium on Extraterritorial Obligations

8.2 The experts first referred to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and noted that a State has obligations to respect, protect and fulfil economic, social and cultural rights in situations over which its acts or omissions bring about foreseeable effects on their enjoyment, whether within or outside their territory.[31] They added that international law prohibits enforceable extraterritorial jurisdiction unless explicitly permitted by customary law or an international treaty.[32] Under international customary law, States have the right, and perhaps even the duty, to protect their own nationals, and the protection of children is a priority.[33] In addition, the exercise of prescriptive (regulatory) or adjudicative extraterritorial jurisdiction is permitted only to the extent that there is a sufficient connection between the State exercising it and the extraterritorial event being regulated or adjudicated.

8.3 In the present case: (a) there is an omission by the State party to adopt measures as soon as possible and up to its maximum available resources to protect and fulfil the children's rights; (b) the damage was foreseeable; (c) the State party is in a position to exercise decisive influence or to take measures; (d) the State party is entitled to exercise jurisdiction in the present case since it can extend its authority; (e) the State party has the obligation to protect the children, ensuring that they enjoy their human rights, which might include rescuing them from the camps; and (f) the State party's obligation to protect the rights of the children should not be left to the will of other States.

8.4 The experts concluded that the Committee had to decide based on the best interests of the children. Not admitting the case would lead to the alleged victims not having access to justice. The experts added that there was no inadmissibility ground concerning jurisdiction of the State party or of the Committee. Finally, the State party could adopt measures based on principles of international cooperation or pursue diplomatic measures that would ensure the respect of international principles on States' sovereignty. The intervening third party thus recommended that the Committee find the case admissible.

[30] Ana María Suárez Franco (FIAN International), Mark Gibney (University of North Carolina at Asheville, United States of America, and Raoul Wallenberg Institute in Lund, Sweden) and Neetu Sharma (Centre for Child and the Law at the National Law School of India University, India).

[31] See www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf.

[32] Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, judgment of 7 September 1927.

[33] Andrew W.R. Thomson, "Doctrine of the protection of nationals abroad: rise of the non-combatant evacuation operation", *Washington University Global Studies Law Review*, vol. 11 No. 3 (2012).

Joint submission by a group of 31 academics[34]

8.5 The experts noted that, under the Convention on the Rights of the Child, extraterritorial jurisdiction was not excluded and that in the *travaux préparatoires* it is indicated that territoriality was expressly excluded from the Convention.[35] States parties to the Convention do have obligations in respect of children's rights beyond their territories.[36] In the migration context, the Committee held that, under the Convention, States should take some extraterritorial responsibility for the protection of children who were their nationals outside their territory by devising child-responsive consular policies and services[37] or even by taking measures "to assist the safe, voluntary and dignified return of Syrian children".[38] The link between the State party and the children through their French nationality is not contested by the State party. Furthermore, there are examples of States extending their jurisdiction in relation to children affected by terrorism.[39] In addition, multiple entities of

[34] Authors: Wouter Vandenhole and Gamze Erdem Türkelli (Law and Development Research Group, University of Antwerp, Belgium), Meda Couzens (Western Sydney University, Australia, and University of KwaZulu-Natal, South Africa) and Ton Liefaard and Chrisje Sandelowsky-Bosman (Leiden Law School, Leiden University, the Netherlands). Signatories: Karin Arts (International Institute of Social Studies at The Hague, part of Erasmus University Rotterdam, the Netherlands), Warren Binford (Willamette University College of Law, United States), Laura Carpaneto (University of Genoa, Italy), Pablo Ceriani Cernadas (Universidad Nacional de Lanús, Argentina), Aoife Daly (European Children's Rights Unit, University of Liverpool, United Kingdom of Great Britain and Northern Ireland), Bina D'Costa (Department of International Relations, Australian National University, Australia), Ellen Desmet (Ghent University, Belgium), Jaap E. Doek (Vrije Universiteit Amsterdam, the Netherlands), Nicolás Espejo Yaksic (Center for Constitutional Studies of the Supreme Court of Mexico and Exeter College, Oxford University, United Kingdom), Michael Garcia Bochenek (Institute for the Study of Human Rights, Columbia University, United States), Kathryn Hollingsworth (Newcastle University, United Kingdom), Ursula Kilkelly (School of Law, University College Cork, Ireland), Thalia Kruger (University of Antwerp, Belgium), Sara Lembrechts (University of Antwerp, Belgium), Jernej Letnar Černič (Faculty of Government and European Studies, New University, Slovenia), Laura Lundy (School of Social Sciences, Education and Social Work, Queen's University, Belfast, United Kingdom), Nicholas Munn (University of Waikato, New Zealand), Manfred Nowak (Global Campus of Human Rights, Venice, Italy), Noam Peleg (Faculty of Law, University of New South Wales, Australia), Peter R. Rodrigues (Leiden University, the Netherlands), Kirsten Sandberg (Department of Public and International Law, University of Oslo, Norway), Julia Sloth-Nielsen (Leiden University, the Netherlands, University of the Western Cape, South Africa), Helen Stalford (European Children's Rights Unit, University of Liverpool, United Kingdom), Rebecca Thorburn Stern (University of Uppsala, Sweden), Tara Van Ho (School of Law and Human Rights Centre, University of Essex, United Kingdom) and Jinske Verhellen (Department of Interdisciplinary Study of Law, Private Law and Business Law, Ghent University, Belgium).

[35] In an early draft of article 2 (1), the applicability of the Convention on the Rights of the Child was explicitly linked to jurisdiction and the territory of a State. The territoriality condition was eventually deliberately left out of the text of article 2 and its final version only reflects the concept of jurisdiction, indicating that jurisdiction under the Convention was not intended by the drafting parties to be exclusively territorial. Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child. Article 2: The Right of Non-Discrimination* (Martinus Nijhoff Publishers, 2008); Maarten den Heijer and Rick Lawson, "Extraterritorial human rights and the concept of 'jurisdiction'", in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Malcolm Langford and others, eds., (Cambridge University Press, 2013); Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, 1992).

[36] See, among others, Den Heijer and Lawson, "Extraterritorial human rights and the concept of 'jurisdiction'"; Detrick, *The United Nations Convention on the Rights of the Child*; and Wouter Vandenhole, "Economic, social and cultural rights in the CRC: is there a legal obligation to cooperate internationally for development?", *International Journal of Children's Rights*, vol. 17, No. 1 (2009) pp. 23–63.

[37] Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child, paras. 17 (e) and 19.

[38] CRC/C/SYR/CO/5, para. 47.

[39] Rik Coolsaet and Thomas Renard, "Foreign fighters and the terrorist threat in Belgium", Royal Institute for International Relations, 10 January 2020; Germany, Higher Administrative Court of Berlin and Brandenburg, decision of 6 November 2019 on the repatriation of German members of ISIL; The New Arab, "Syrian Kurds repatriate Islamic State orphans to Austria", 3 October 2019; Australia, Counter-Terrorism (Temporary Exclusion Orders) Act 2019, sects. 10 (3)–(4).

the United Nations have recommended that Member States enable the return of foreign fighters and their families, including children.[40]

8.6 The question is whether a State's failure to take action to protect the rights of its nationals who are children abroad can give rise to international legal responsibility for violations of rights enshrined in the Convention, which is de facto a different issue from the issue of the existing jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. An approach would be to take territoriality out of the question, as Judge Giovanni Bonello suggested in his concurring opinion on *Al Skeini and others v. United Kingdom*. In summary, Judge Bonello noted that "jurisdiction arises from the mere fact of having assumed [human rights] obligations and from having the capability to fulfil them (or not to fulfil them)".

8.7 In the view of the experts, the nature of the extraterritorial obligations incumbent upon the State party could be construed as similar to that which characterize situations where concurrent jurisdiction is being exercised over a territory by multiple States. Thus, although the State party does not have effective control in the area, it has positive obligations to take all appropriate measures and pursue all legal and diplomatic avenues at its disposal to protect the rights of the children.[41]

8.8 The intervening third party concludes that the following contextual aspects should be taken into account: (a) the serious risk of irreparable harm to and the situation of extreme vulnerability of the children; (b) the inability of the parents to protect their children; (c) the territorial State's inability or unwillingness to assume jurisdiction over the children; (d) the State party's ability to protect its nationals through the exercise of its right to diplomatic protection; and (e) the fact that the factors mentioned prevent an excessive extension of the extraterritorial jurisdiction of the State of nationality by limiting it to exceptional situations. The experts are therefore of the view that the Committee should develop a flexible and child-rights focused approach to the extraterritorial application of the Convention that responds to the increasingly complex contexts, legal and factual, and that takes into account the extreme stakes for the children in question. Such an approach could be based on the pillars formulated by the Committee in its general comment No. 16 (2013), special features of the Convention and contextual factors.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

9.2 The Committee notes the authors' statement that domestic remedies are unavailable and ineffective in the context of all requests for protection and/or repatriation of children and their mothers. The Committee also notes that this has not been challenged by the State party. Therefore, the Committee considers that there is no obstacle to the admissibility of the communication under article 7 (e) of the Optional Protocol.

9.3 The Committee notes the State party's uncontested statement that S.H. and his mother were repatriated from Turkey to France on 9 December 2019. In light of this information, the Committee considers that the communication based on the State party's failure to repatriate S.H. has become moot and its consideration should therefore be discontinued.

9.4 The Committee notes the State party's argument that the authors have not established that they acted with either the children's or their mothers' consent, contrary to the requirements of article 5 of the Optional Protocol. The Committee notes the authors' argument that: (a) the communications concern children aged between 2 and 16 years who are unable to understand what is at stake and have been unable to give consent; (b) the lack

[40] A/HRC/40/28, para. 66; A/HRC/40/52/Add.4, para. 47.
[41] European Court of Human Rights, *Ilascu and others v. Moldova and Russia*.

of means of communication makes it impossible for consent to be materially presented to the Committee; (c) the mothers did, through a telephone call, give their consent to the authors for the communications to be presented; and (d) the communications clearly serve the best interests of the children as the aim is to end their detention in deplorable and life-threatening conditions. The Committee recalls that, pursuant to article 5 (2) of the Optional Protocol, where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent." The Committee does not endorse the authors' assessment that the children's age would not allow them to give consent for the authors to act on their behalf before the Committee. Except for the youngest children, all other children should be presumed to be able to form an opinion and provide their consent in that regard. However, the Committee notes that, in the particular circumstances of the present cases, the children have limited communication with the authors, through their mothers, who have also as guardians, provided consent telephonically. There is no realistic possibility for them to provide written consent, and the communications appear to be submitted in their best interests and with the aim of protecting and promoting their rights. Therefore, the Committee considers that article 5 of the Optional Protocol does not constitute an obstacle to the admissibility of the present communications.

9.5 As to the issue of jurisdiction, the Committee notes the State party's argument that it cannot be held accountable for situations that it did not create, over which it has no effective control and that are the actions of other States or non-State actors, solely on the ground that the children are its nationals. The State party further argues that the children are not under the jurisdiction of the State party because they are not under the effective control of the State party, either through its agents or through a local authority over which the State party has control.

9.6 The Committee is being called upon to determine if the State party has competence *ratione personae* over the children detained in the camps in north-eastern Syrian Arab Republic. The Committee recalls that, under the Convention, States have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State's jurisdiction to "territory".[42] A State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders.[43] In the migration context, the Committee has held that under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection.[44] In its decision on *C.E. v. Belgium*, the Committee considered that Belgium had jurisdiction to ensure the rights of a child located in Morocco who had been separated from a Belgian-Moroccan couple that had taken her in under the *kafalah* system.[45]

9.7 In the present case, the Committee notes that it is uncontested that the State party was informed by the authors of the situation of extreme vulnerability of the children, who were detained in refugee camps in a conflict zone. Detention conditions have been internationally reported as deplorable and have been brought to the attention of the State party's authorities through the various complaints filed by the authors at the national level.[46] The detention conditions pose an imminent risk of irreparable harm to the children's lives, their physical and mental integrity and their development. The Committee recognizes that the effective control over the camps was held by a non-State actor that had made it

[42] Territorial jurisdiction was deliberately left out of article 2 (1) of the Convention. See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Volume 1*, (New York, United Nations, 2007), pp. 332–333.

[43] A/70/303, para. 33; www.ohchr.org/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf, para. 8.

[44] Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), paras. 17 (e) and 19.

[45] CRC/C/79/D/12/2017.

[46] See the conference room paper submitted by the Independent International Commission of Inquiry on the Syrian Arab Republic to the Human Rights Council at its forty-third session. Available at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session43/Pages/ListReports.aspx.

publicly known that it did not have the means or the will to care for the children and women detained in the camps and that it expected the detainees' countries of nationality to repatriate them. The Committee also notes that the Independent International Commission of Inquiry on the Syrian Arab Republic has recommended that countries of origin of foreign fighters take immediate steps towards repatriating such children as soon as possible.[47] In the circumstances of the present case, the Committee observes that the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. These circumstances include the State party's rapport with the Kurdish authorities, the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syrian Kurdistan since March 2019.

10. In light of the above, the Committee concludes that the State party does exercise jurisdiction over the children who are the subject of communications No. 79/2019 and No. 109/2019 and that the authors' claims under articles 2, 3, 6, 20, 24 and 37 of the Convention have been sufficiently substantiated. The Committee declares the communications admissible.

11. The Committee therefore decides:

(a) That consideration of communication No. 79/2019 should be discontinued in respect of S.H.;

(b) That communications No. 79/2019 and No. 109/2019, filed on behalf of the remaining children, are admissible insofar as they raise issues under articles 2, 3, 6, 20, 24 and 37 of the Convention;

(c) That the present decision shall be transmitted to the author of the communication and, for information, to the State party.

[47] Ibid., para. 99 (c).