



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

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 (*Drozdz 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