



Kingdom of the Netherlands

OHCHR
Office of the High Commissioner for Human
Rights

Attn Ms Beatriz Balbin
Chief Special Procedures Branch
Geneva

registry@ohchr.org

Date: 12 April 2021

Ref. AL NLD 1/2021

Permanent Representation of
the Kingdom of the Netherlands

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Dear Ms Balbin,

On behalf of the Kingdom of the Netherlands I would like to respond to the joint letter 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, dated 26 January 2021.

Through a Joint Communication (AL NLD 1/2021), the above-mentioned mandate holders brought to the attention of the Kingdom of the Netherlands information concerning a registration and verification exercise in Al-Hol and Al-Roj camps located in Northeast Syria.

The Kingdom of the Netherlands wishes to reiterate its support to the OHCHR and its Special Procedures Branch. The Kingdom of the Netherlands considers the UN human rights mandate holders to form a unique and fundamental mechanism in the promotion and protection of human rights worldwide. Their statements and guidance on a broad range of human rights implications play a pivotal role in alerting the international community to human rights issues and serve as useful tools for state governments to ensure human rights based approaches.

The Kingdom of the Netherlands shares your concern with regard to the camps in Northeast Syria. We are aware of the extremely dire conditions in the camps, and the lack of access to basic services as shelter, health, food, water, education,

mental health and psychosocial support (MHPSS) and protection. The Kingdom of the Netherlands is concerned about the limited humanitarian access to the camps and continues to monitor the situation in the region. In this context, the Kingdom of the Netherlands provides financial assistance to a number of international humanitarian organisations active in Syria, including the Dutch Relief Alliance, ICRC, OCHA, UNICEF and partners.

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The Kingdom of the Netherlands does not have any form of diplomatic representation in Syria. It closed its embassy in Damascus in 2012 and does not maintain diplomatic relations with the Assad regime. The Kingdom of the Netherlands does not provide consular assistance to Dutch citizens in Syria. Nor does it have formal relations with the Syrian Democratic Forces, who are responsible for the management of the camps Northeast Syria.

As a result, the Kingdom of the Netherlands did not request and was not informed, nor aware, of a registration, data-collection and relocation exercise that allegedly took place in Al-Hol and Al-Roj camps. Furthermore, the Kingdom of the Netherlands did not receive any information from the camp authorities about the results of the exercise. In response to the Mandate Holders questions, the Kingdom of the Netherlands wishes to outline that, in principle, human rights treaties have a limited scope of application in the sense that these treaties apply to the persons on the territory or within the jurisdiction of the state parties.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) stipulates:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...].

Article 2 of the Convention on the Rights of the Child (CRC) provides:

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

Article 1 of the European Convention on Human Rights (ECHR) entails:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The European Court of Human Rights (ECtHR), and UN treaty bodies, such as the Human Rights Committee and the Committee on the Rights of the Child have interpreted the notion of jurisdiction in two ways. The first is state control over a territory in which the victim of a human rights violation is located, and second as the direct exercise by a state of authority, power or control over the individual, by one or more state agents.

The Kingdom of the Netherlands holds the position that the fact that certain women and children in the Al-Hol and Al-Roj camps have the Dutch nationality, cannot establish jurisdiction under the mentioned human rights treaties and cannot trigger the obligation for the Kingdom of the Netherlands to protect the rights of these women and children. In order to substantiate its position, the

Kingdom of the Netherlands will discuss hereunder the relevant case law of the ECtHR, the recent view of the Committee on the Rights of the Child and domestic case law, in particular a recent judgment of the Dutch Supreme Court.

The European Convention on Human Rights

The Kingdom of the Netherlands is a Contracting Party to the ECHR and is obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.

The ECtHR has held that the basis for jurisdiction is essentially territorial,¹ and that other bases of jurisdiction are accepted only in exceptional cases depending on the particular circumstances of the case. These other exceptional bases for jurisdiction entail 1) state agent authority and control and 2) effective control over an area.² The ECtHR has identified three ways in which state agent authority and control could be exercised. These are a) acts of diplomatic and consular agents present on foreign territory in accordance with international law, when these agents exert authority and control over others; b) when a Contracting State, through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government; and c) in certain circumstances, the use of force by a State's agents operating outside its territory. With regard to effective control over an area, the ECtHR considered that this exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory.³

Currently the case of *H.F. and M.F. v. France* is pending before the ECtHR. The applicants in the case are the parents of a French citizen who travelled with her partner to the area in Syria that was at the time controlled by the so-called Islamic State and the Levant. In the period the couple stayed in that area, two children were born. Since February 2019, the mother and the children are staying in the Al-Hol camp. The Kingdom of the Netherlands was granted leave to intervene in this case and submitted its written observations on 13 July 2020. The argumentation of the Government in the intervention and in general is that, on the basis of the above mentioned case law, it must be concluded that the women and children in the Al-Hol and Al-Roj camps are not within the jurisdiction of France. The conditions by which extra-territorial jurisdiction by a State is determined (either 'state agent authority and control' or 'effective control by a state over an area') are not fulfilled.

The Convention on the Rights of the Child

On 30 September, the Committee on the Rights of the Child adopted its view in *L.H. et al. v. France* (communications no. 79/2019 and no. 109/2019). The communications were brought by the grandparents of children with the French nationality whose parents allegedly collaborated with ISIL. Some of the children were born in the Syrian Arab Republic, while others travelled there with their parents. The children are staying in the Al-Roj, Ain Issa and Al-Hol camps in

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¹ *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 61, ECHR 2001-XII.

² *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 133 - 140, ECHR 2011.

³ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 138, ECHR 2011.

Syrian Kurdistan, which are under the control of the Kurdish forces. The authors of the communication (grandparents) alleged that 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 and 37 of the Convention on the Rights of the Child. The CRC agreed with the grandparents and decided that France had to take action with regard to its French nationals. The Kingdom of the Netherlands does not agree with this.

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According to the Kingdom of the Netherlands, the criteria for establishing jurisdiction under the CRC and other human rights treaties as outlined above do not encompass nationality. Hence, there is no legal argument to conclude that, solely on the basis of the fact that these children possess the French nationality, the children were within the jurisdiction of France on the basis of the CRC. Furthermore, Article 2 of the CRC obliges the states parties to respect the rights of the Convention to each child within their jurisdiction irrespective of, amongst others, the child's national origin. The Kingdom of the Netherlands, however, has no jurisdiction over the children in the camps in Syria. Even if, hypothetically speaking, the criteria for establishing jurisdiction under human rights treaties, including the CRC, were fulfilled, and these children were within the jurisdiction of the Government or any other state party to the CRC, it would be contrary to the general principle as outlined in the CRC, the ICCPR, the ECHR and in many other human rights treaties, to use nationality as a basis to offer human rights protection.

Domestic case law

Lastly, the Kingdom of the Netherlands wishes to mention that its position that the women and children in the camps in Syria are not within the jurisdiction of the Kingdom of the Netherlands is also confirmed in a recent judgement of the Dutch Supreme Court.⁴ This case also concerned the question whether the Netherlands is obliged to repatriate women and children with the Dutch nationality residing in the Al-Roj and Al-Hol camps in northern Syria. With respect to jurisdiction, the women and children argued that every person with the Dutch nationality or any other special connection with the Netherlands and whose human rights are endangered, falls within the jurisdiction of the Netherlands if the acts or omissions of the Netherlands have consequences for them. According to the women and children, this would apply regardless of the fact that these persons are outside the territory of the State of nationality, in this case the Netherlands. The Dutch Supreme Court could not follow this line of argumentation and decided that this would establish a general exception to the main rule that jurisdiction is essentially territorial. The Dutch Supreme Court found that it could not accept this argumentation as this is not reconcilable with the criterion in human rights law that exceptions to the main rule that jurisdiction is essentially territorial can only be accepted in exceptional circumstances and that the question whether such exceptional circumstances exist depends on the factual circumstances of each individual case. Ultimately, the Dutch Supreme Court decided that, in this case, such exceptional circumstances did not arise and the Court ruled that the Netherlands did not have jurisdiction under the ECHR, the ICCPR and the CRC.

⁴ Dutch Supreme Court, no. 19/05666, 26 July 2020. See also: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2020:1148> (last visited on 23 February 2021).

The Kingdom of the Netherlands continues to support humanitarian aid in Syria through international organisations and, within the framework of its policies and abilities, to concern itself with and monitor the situation of its citizens abroad.

The Kingdom of the Netherlands trusts that the information provided above will be acknowledged by the Special Procedures mandate holders.

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Yours Sincerely,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke, followed by a small dash.

Monique van Daalen
Ambassador
Permanent Representative