

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:
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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 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 instruments¹. 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

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

² Ibid.

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.

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 life³.

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

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>.

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 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

⁴ CCPR/C/CG/35, paras. 35 and 56.

⁵ 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/>.

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.

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

⁶ A/HRC/43/52, para. 48 (v).

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 makeshift 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.

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

⁷ See e.g. A/69/397 and A/HRC/13/37

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 that 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

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).

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.

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,

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)

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 liberty¹³ 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 groups¹⁶.

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 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

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.

¹⁷ A/HRC/38/45 para 67.

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 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

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

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-derogable²⁰ 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 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-

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.

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.

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 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

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.

²⁷ Global Study on Children deprived of their Liberty , p. 615.

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.

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 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 media³⁷ and

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.

³⁵ <https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/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

national judicial bodies³⁸ 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 jurisdiction⁴⁰ 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 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,

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>.

⁴² A/HRC/43/46/Add.1.

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 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-

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>

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 crime⁴⁹. 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 State⁵⁰.

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

⁴⁷ The rules applicable in non-international conflicts are Common article 3(2) of the four Geneva Conventions and article 18 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 life⁵¹.

Furthermore, the United Nations Protocol to Prevent, Suppress 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

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 statute

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

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 association⁵⁹. 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>.