

Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

3 January 2023

Letter of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to Mr. Lawrence Greenspon

Dear Mr. Greenspon,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. I would like to thank you for the opportunity to make this written submission, which I hope will provide some clarification in the present case.

1. I was appointed as UN Special Rapporteur in 2017. My mandate has been invited to gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while countering terrorism, and to report regularly to the Human Rights Council and General Assembly about, *inter alia*, identified good policies and practices, as well as existing and emerging challenges and present recommendations on ways and means to overcome them. My mandate was created by the Commission on Human Rights (the predecessor of the Human Rights Council) in Resolution 2005/80 and has been regularly renewed by State consensus since then. The role of my mandate is to give concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism to States, and other stakeholders, including international organizations. My mandate also identifies, exchanges and promotes best practices on measures to counter terrorism that respect human rights and fundamental freedoms. In this context, my mandate has submitted *amicus curiae* briefs to national and regional courts on issues of human rights protection in the context of countering terrorism.
2. As the UN Special Rapporteur, I have a direct interest, and specific expertise, in the issues raised in these proceedings. In my reports, I have consistently addressed the legal obligations that arise in respect of women and children associated with the Islamic State and other non-state groups operative in the northern Syrian Arab Republic and Iraq, including in my country assessments concerning France¹, Belgium², Kazakhstan³, Uzbekistan⁴ and the Maldives⁵. A range of human rights

¹ A/HRC/40/52/Add.4.

² A/HRC/40/52/Add.5.

³ A/HRC/43/46/Add.1.

⁴ A/HRC/49/45/Add.1.

⁵ Preliminary Findings of the Special Rapporteur following the visit to Maldives, available here: <https://www.ohchr.org/en/press-releases/2022/05/maldives-un-expert-cautiously-welcomes-government-commitment-bringing>.

issues that arise in respect of women and children have been raised in interactive dialogues with the UN General Assembly and the Human Rights Council (in 2017, 2018, 2019, 2021, 2022). I am also a member of the United Nations Global Counter-Terrorism Coordination Compact supported by the UN Office of Counter-Terrorism, and I was a member of the Working Group that produced the “*Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*” (2018). I have also taken a joint position with the UN Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC), the UN Special Representative of the Secretary-General on Children in Armed Conflict (SRSG-CAC) and UN Special Representative of the Secretary-General on Violence Against Children (SRSG-VAC) on the rights of children and the responsibilities of States for women and children in northern Syrian Arab Republic. I have been a formal intervenor in several legal proceedings in cases involving the repatriation of women and children from the northern Syrian Arab Republic including *The Queen (on the application of Shamima Begum)* and *the Special Immigration Appeals Commission* (2020)⁶ and at the European Court of Human Rights in the case of *H.F. and M.F v. France* (2022)⁷. I have also issued numerous position papers and legal views concerning the legal obligations of States in respect of their nationals in the northern Syrian Arab Republic including regarding the practice of citizenship stripping⁸, the treatment of male adolescents and juveniles detained in North-East Syria⁹, and on the application of extra-territorial jurisdiction by States in respect of their nationals being arbitrarily detained in conditions that meet the threshold of torture, human and degrading treatment under international law¹⁰.

3. As Special Rapporteur, I am of the view that the urgent return and repatriation of foreign fighters and their families from conflict zones is 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. This process also requires a thorough individual evaluation of each man, woman and child from their human rights perspective, including cases involving gender-based violence and persecution against women who return from Syria and Iraq, including via third countries. An effective return process includes holding individuals accountable for violations of national and international law for serious and systematic crimes committed in Syria and Iraq as appropriate and commensurate with the available evidence. There must also be recognition that women and children somehow associated with ISIS may have experienced extreme and significant human rights violations and gender-based violence during and prior to their detention. Given the geopolitical fluidity of the region and the metastatic growth of non-State armed groups also designated as terrorists in the region, repatriations are critical to States’ long-term security interests. The current situation cannot be reconciled with any position that States who are leaving their nationals in the camps and prisons in North-East Syria

⁶ <https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Submissions26Oct2020.pdf>

⁷ https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Final-Amicus_Brief_SRCT_SRSsummex.pdf

⁸ <https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families>

⁹ <https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families>

¹⁰ <https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families>

are effectively addressing international threats to peace and security, notably terrorism and violent extremism.

4. As Special Rapporteur, I have issued communications to the Canadian Government in respect of its nationals detained in the northern Syrian Arab Republic, stressing the urgent need for repatriation, pointing out the practical pathways to achieve this end¹¹, and identifying particular individuals where the urgent humanitarian return is viewed as an imperative¹². I note my experience of working with multiple States that have secured the return of their nationals, many in large numbers.¹³ While I accept the reality that the non-state actor must consent to and support such repatriation, I highlight that the non-state actor has consistently indicated its willingness to support and enable repatriations. This is the position that has been shared with my mandate in discussions with States which were in the process of negotiating repatriations for their nationals or who have successfully done so. Evidence of this consistent position of the non-state actor can be found in the very recent successful repatriations to a range of countries.¹⁴ I have also consistently requested that governments assume the necessary responsibility for their nationals, given the undue burden their detention poses on an entity currently engaged in ongoing hostilities with multiple Parties¹⁵.
5. In my communications to the Canadian government, I have consistently stressed that all its nationals, primarily women and children, are deprived of their liberty without a legal basis, absent any form of legal process, in what now appears to be a ‘cradle to grave’ cycle of indefinite, arbitrary detention. The living conditions are unequivocally inhumane — constituting 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. Humanitarian organizations have documented the multiple death of children, many from preventable diseases.¹⁶
6. As Special Rapporteur, I take the position that there is no meaningful possibility for international human rights law-complainant trials to take place in the northern Syrian Arab Republic. I highlight that the Canadian citizens that might be

¹¹ [CAN 1/2021](#)

¹² [CAN 2/2020](#); [CAN 8/2021](#) and [CAN 3/2022](#). See also <https://www.ohchr.org/en/press-releases/2020/05/canada-urged-repatriate-orphaned-five-year-old-girl-held-syrian-camp?LangID=E&NewsID=25899>

¹³ The UN Special Rapporteur has briefed Parliamentary committees and groups in closed and open meetings, including in Sweden and Australia; she has engaged with a large number of Member States through briefings in New York and Geneva as well as bilaterally through closed meetings and communications (<https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families>), and has held numerous meetings with security officials on the issue of repatriation.

¹⁴ Since October 2022, at least eight countries have brought nationals home: 659 to Iraq, 17 to Australia, 4 to Canada, 58 to France, 12 to Germany, 40 to the Netherlands, 38 to Russia, and 2 to the UK. In November, Spain showed its willingness to repatriate at least 16 nationals by year’s end. See Human Rights Watch “Syria: Repatriations Lag for Foreigners with Alleged ISIS Ties”, 12 December 2022.

¹⁵ Syria: UN experts profoundly concerned for missing and injured children after January attack on ISIL prison, 1 April 2022 (<https://www.ohchr.org/en/press-releases/2022/04/syria-un-experts-profoundly-concerned-missing-and-injured-children-after>).

¹⁶ [CAN 1/2021](#)

concerned in these legal proceedings are being detained by a non-State actor which is not a legally recognized entity to conduct such trials for serious violations of international law consistent with required due process standards. Absent a fundamental change in international law, which I view as highly improbable, States will not be designating non-state armed groups as suitable legal or political entities to undertake legally binding proceedings for their nationals. I see absolutely no support in State practice for the sub-contraction of trials concerning grave breaches of international law to non-state armed groups. Holding out such a possibility as likely would be misleading to this Court.

7. I highlight the obvious point that Canadian children should not under any circumstances be subject to legal proceedings, given the requirements of the Convention on the Rights of the Child that demands that the “best interest” test be the primary determinant of the child’s treatment. I take the view that Canadian children detained in these camps and detention facilities are first and foremost victims of terrorism consistent with the Convention on the Rights of the Child, Security Council Resolution 2427 (OP20), and the UN General Assembly Resolution 60/1. I state clearly that no Canadian child held in this camp has had any or adequate legal basis to justify their detention; none were legally represented in any administrative process placing them there; no ‘best interest’ test was or could have been adequately applied to place them there; no assessment of their protection or other needs has been conducted; no child has meaningful exit from this camp unless and until he/she is repatriated to Canada. The stigma of detention, notwithstanding that it is arbitrary and capricious, has made the prospect of their return more difficult by circular stigmatizing logic of having been detained, including inadvertently by legal proceedings that define them by association with adults as ISIS-assumed family member. I highlight my prior findings with other UN Special Procedure mandate holders that many of the women and children held in the camps were trafficked, groomed or coerced to Syria.¹⁷
8. As Special Rapporteur, I also clearly and firmly hold that there is no infrastructure to support the processing of Canadian nationals for trials in the northern Syrian Arab Republic. I highlight for the Court the ongoing hostilities taking place on the territory of the northern Syrian Arab Republic,¹⁸ including ongoing incursions by another State (Turkey) and the ongoing instability of the military situation. In this regard, I recommend that the Court take due regard for the ISIS attack which took place in January 2022 on al-Hassakah camp leading to the estimated death or disappearance of at least 100 children.¹⁹ To the best of my knowledge, only Syrian nationals have been tried by courts in North-East Syria in trials that do not comply with fair trials standards, and the ongoing instability in the region and proximity to the camps make an augmentation and amelioration of trial proceedings highly unlikely in any foreseeable future.
9. In my capacity as Special Rapporteur, I also caution the Court against viewing any such proceedings, were they to be held, as functioning in line with Canada’s international law obligations including its international human rights and humanitarian law commitments. I recall the obligations of fair trial contained in

¹⁷ [CAN 8/2021](#); [TUN 6/2021](#); [CHE 4/2021](#)

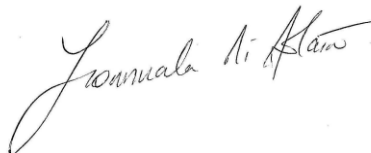
¹⁸ <https://news.un.org/en/story/2019/10/1049201>

¹⁹ Syria: UN experts profoundly concerned for missing and injured children after January attack on ISIL prison, 1 April 2022 (<https://www.ohchr.org/en/press-releases/2022/04/syria-un-experts-profoundly-concerned-missing-and-injured-children-after>).

the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Neither of these treaties envisages non-state entities, no matter the size or scope of territory they control, carrying out human rights' compliant trials. Moreover, I highlight the specific obligations from Common Article Three of the Four Geneva Conventions which require that any acceptable legal proceedings under the law of armed conflict provide at a minimum "judicial guarantees which are recognized as indispensable", and more specifically, sentencing or executions without previous judgements pronounced by a regularly constituted court. Additional Protocol II of 1977 stipulates, concerning offences committed in connection with a non-international armed conflict, that no sentence may be passed, and no penalty executed in the absence of a conviction previously pronounced by a court offering the essential guarantees of independence and impartiality. In addition, it spells out the procedural safeguards that must be respected (Art. 6).

10. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, I take the clear view that these fundamental, *jus cogens* guarantees of fair trial cannot be delivered by the non-state actor currently in control of the territory of the northern Syrian Arab Republic given the complexity of the military situation on the ground, the lack of resources including judicial, technical and legal capacity in the territory concerned. I flag for the Court that while previously²⁰, there was what can best be described as political 'flirtation' with the possibility of local trials in the northern Syrian Arab Republic by some States with third-country nationals detained, no serious or meaningful political /legal conversations concerning the possibility of trials by a non-state actor in the northern Syrian Arab Republic are taking place at the United Nations, or to my knowledge in other international multilateral fora. I consider the possibility of any such trials as entirely remote and in the realm of the fanciful.

Yours sincerely,



Fionnuala Ní Aoláin

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

²⁰ <https://www.aljazeera.com/news/2019/3/25/sdf-calls-for-international-tribunal-for-isis-detainees;>
[https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/.](https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/)