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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

### **Note by the Secretariat\***

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, prepared pursuant to Council resolution 34/19.

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\* The present document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B.

## Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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## I. Introduction

1. The present report has been prepared pursuant to Human Rights Council resolution 34/19.

## II. Activities relating to the Mandate

2. Throughout 2017, the Special Rapporteur participated in a number of thematic consultations, workshops and events on torture in the context of migration, disability-specific forms of deprivation of liberty, extra-custodial use of force and on procedural safeguards to prevent torture and other cruel, inhuman or degrading treatment or punishment.

3. From 28 to 30 August 2017 and from 4 to 6 September 2017, the Special Rapporteur held expert consultations on the topic of the present report in Geneva and Mexico City, with the support of the Association for the Prevention of Torture and the Ibero-American University. A general call for submissions in response to a thematic questionnaire on the topic of the present report was also opened from 1 to 30 September 2017.

4. The Special Rapporteur transmitted 137 communications, jointly with other mandates or individually, on behalf of individuals exposed to torture and other ill-treatment.

5. The Special Rapporteur conducted a country visit to Serbia and Kosovo<sup>1</sup> from 13 to 24 November 2017. The preliminary observations on the visit can be consulted on the official website of the Special Rapporteur<sup>2</sup>. The full report will be presented at the 40th session of the Human Rights Council.

## III. Migration-Related Torture and Ill-Treatment<sup>3</sup>

### A. Background

6. Throughout history, people have left their homelands in search of protection, better lives and new horizons, thus making an invaluable contribution to the human quest for economic development, social evolution and cultural exchange. While some aspects of international migration may give rise to serious logistic, humanitarian, demographic, financial or even security challenges, the phenomenon as a whole is neither a "threat" requiring military defence, nor a global "state of emergency" justifying derogation from the applicable normative frameworks, but is a long-standing global governance issue which must be addressed in full compliance with human rights and the rule of law.

7. Today, approximately 258 million people, or roughly 3% of the world's population, live outside their State of origin or habitual residence and, therefore, can be described as (international) "migrants", regardless of their personal status or motivation.<sup>4</sup> Of these, approximately 10%, or about 25 million people, have fled their country as refugees, whereas an additional 40 million people have been forcibly displaced within their countries and may well become migrants in the future.<sup>5</sup> As political, social, economic and

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<sup>1</sup> Reference to Kosovo shall be understood in full compliance with UNSC Resolution 1244 (1999) and without prejudice to the status of Kosovo.

<sup>2</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22453&LangID=E>

<sup>3</sup> For the purposes of this report, the term "ill-treatment" refers to cruel, inhuman or degrading treatment or punishment other than torture.

<sup>4</sup> UN\_DESA\_Population\_Division, *International\_Migration\_Report\_2017\_[Highlights]*; WGAD, *Revised\_Deliberation\_No.5(AdvEditedVersion\_07.02.2018)*, §6; A/69/CRP.1, 23.07.2014, p.4.

<sup>5</sup> See: <http://www.unhcr.org/globaltrends2016/>. See also: A/RES/71/1(19.09.2016), §20.

environmental factors continue to drive people away from their homes, these figures are likely to rise.

8. While the vast majority of migrants move through safe and regular pathways, increasingly restrictive and obstructive migration laws, policies and practices of States have pushed growing numbers of migrants outside official immigration and admission procedures and towards irregular routes and methods marked by lack of transparency and oversight, corruption, violence and abuse. In response to increasing numbers of such "irregular"<sup>6</sup> migrants arriving at their borders, many States have initiated an escalating cycle of repression and deterrence designed to discourage new arrivals, and involving measures such as the criminalisation and detention of irregular migrants, the separation of family members, inadequate reception conditions and medical care, and the denial or excessive prolongation of status determination or habeas corpus proceedings, including expedited returns in the absence of such proceedings. Many States have even started to physically prevent irregular migrant arrivals, whether through border closures, fences, walls and other physical obstacles, through the externalisation of their borders and procedures, or through extra-territorial "pushback" and "pullback" operations, often in cooperation with other States or even non-State actors. In addition to their direct impact on the rights and safety of irregular migrants, these laws, policies and practices have also given room to an almost uncontrolled growth of abusive practices on the part of a wide variety of individuals seeking to exploit irregular migration for personal gain, including corrupt State officials, criminals and private citizens.

9. As a consequence, throughout their journey and even upon arrival at their country of destination, irregular migrants experience increasing uncertainty, danger, violence and abuse, including an escalating prevalence of torture and ill-treatment at the hands of both State officials and non-State actors. Numerous studies have shown that, apart from often-lifelong physical effects, torture survivors suffer disproportionately from posttraumatic stress disorder (PTSD), anxiety, depression, disassociation, disorientation and self-isolation, with grave long-term consequences.<sup>7</sup> According to a study involving more than 12'000 participants, depending on the context, the confirmed prevalence of torture victims among irregular migrants ranges up to 76%, with the overall average being 27%.<sup>8</sup> Even when discounting widespread underreporting and focusing exclusively on recognized refugees and asylum seekers, this extrapolates to a staggering 7 million victims of torture, thus raising serious questions as to the compatibility of current laws, policies and practices with the universal prohibition of torture and ill-treatment.

10. In addressing this trend, the present report aims to: (a) recall the broad range of international legal obligations flowing from the prohibition of torture and ill-treatment; (b) examine the legal implications of these obligations for some of the most prevalent laws, policies and practices employed by States in response to irregular migration; and (c) provide recommendations with a view to supporting States in addressing irregular migration in full compliance with these obligations, avoiding protection gaps and preventing impunity for violations. Given that the discussed policies and practices are generally well documented in the public domain, and in order to avoid any perception of contextual bias, reference to individual State practice and related jurisprudence will be made only in support of points of law and not, in principle, in support of points of fact.

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<sup>6</sup> The term "irregular migrants" or, more accurately, "migrants in irregular situations", includes all migrants failing to comply with the regular domestic immigration legislation of their current transit or destination State, including asylum-seekers.

<sup>7</sup> Heeren, Mueller, et al., "Mental\_health\_of\_asylum-seekers:\_a\_cross-sectional\_study\_of\_psychiatric\_disorders", *BMC Psychiatry*(2012),\_12:114; Carswell, Blackburn, Barker, "The\_relationship\_between\_trauma,\_post-migration\_problems\_and\_the\_psychological\_wellbeing\_of\_refugees\_and\_asylum\_seekers", *Int'l Journal of Social Psychiatry*, 2011\_Mar; 57(2):107-19.

<sup>8</sup> Sigvardsson et al., "Prevalence\_of\_torture\_and\_other\_war-related\_traumatic\_events\_in\_forced\_migrants:\_A\_systematic\_review", in: *TORTURE*, Vol. 26,\_No. 2(2016), pp. 41-73.

## B. Legal Framework

11. The absolute and non-derogable prohibition of torture and ill-treatment has been codified in a wide range of universal and regional instruments and, today, is recognized as part of customary international law. Furthermore, the prohibition and its applicability “at any time and in any place whatsoever”<sup>9</sup> can be derived directly from a general principle of law, namely “elementary considerations of humanity, even more exacting in peace than in war.”<sup>10</sup> No exceptional circumstances whatsoever, whether a state or threat of war, internal political instability or any other public emergency, including when triggered by large and sudden movements of migrants, may be invoked as a justification for torture and ill-treatment.<sup>11</sup> Today, the prohibition of torture has attained undisputed peremptory status (*ius cogens*).<sup>12</sup>

12. In order to give practical effect to the prohibition, international law establishes both positive and negative obligations for States. In positive terms (duty to ensure), States must proactively take effective legislative, administrative, judicial or other measures to prevent acts of torture and ill-treatment in any territory under their jurisdiction and whenever they exercise, directly or indirectly, *de jure* or *de facto* effective control over any person wherever located in the world.<sup>13</sup> This duty requires not only the prevention of violations on the part of State officials, but also includes a well-established due diligence obligation of States to prevent mistreatment by private actors, or by organs of third States operating within their jurisdiction.<sup>14</sup>

13. In negative terms (duty to respect), States must refrain from engaging in, or knowingly contributing to, any act of torture or ill-treatment, whether through acts or omissions, whenever they exercise their power and authority, including each time they bring a person within their jurisdiction by exercising control or influence over a place, person, or process outside their borders. Moreover, under both customary and treaty law, States are under an absolute and non-derogable obligation not to expel, return or extradite any person, regardless of their entitlement to refugee status or subsidiary protection, to another State's jurisdiction or any other territory where there are substantial grounds for believing that they would be in danger of being subjected to torture or ill-treatment (non-refoulement).<sup>15</sup> On the extraterritorial application of the prohibition of torture and ill-treatment more generally, the Special Rapporteur endorses and reiterates the conclusions reached by his predecessor.<sup>16</sup>

14. Regarding the context of migration it should be specifically recalled that States must respect and ensure the right to be free from torture and ill-treatment without any discrimination,<sup>17</sup> and that the intentional infliction of severe pain or suffering “for any reason based on discrimination of any kind”, including based on migration status, invariably amounts to torture, regardless of whether it is inflicted by or at the instigation of State officials themselves, or merely with their consent or acquiescence.<sup>18</sup>

15. Furthermore, in all their decisions, acts and omissions, States must interpret and perform their international obligations in good faith,<sup>19</sup> that is to say, in compliance with both the letter and the spirit of the law. With regard to the absolute and non-derogable right of migrants not to be subjected to torture and ill-treatment, this entails that States cannot

<sup>9</sup> Common Art.3 Geneva Conventions (1949).

<sup>10</sup> ICJ, *Nicaragua v. USA* (1986), pp.14, 112.

<sup>11</sup> Art.2.2. UNCAT.

<sup>12</sup> ICJ, *Belgium v. Senegal* (20.07.2012), §99; HR Council Resolution 8/8; A/RES/72/163.

<sup>13</sup> Art.2(1) UNCAT; CAT/C/GC/2(24.01.2008), §§3, 16; CCPR/C/21/Rev.1/Add.13(26.05.2004), §10.

<sup>14</sup> CAT/C/GC/2(24.01.2008), §§17-19; IACtHR, *Velásquez Rodríguez v. Honduras*, Jgmt\_29.07.1988; ECtHR, *Z. et al. v. UK* (No.\_29392/95), Jgmt\_10.05.2001, §73; ACHPR, *Human Rights NGO Forum v. Zimbabwe* (No.245/2002),\_15.05.2006), §143.

<sup>15</sup> Art.3 UNCAT; Art.7 ICCPR.

<sup>16</sup> A/70/303.

<sup>17</sup> Articles 2(1), 7 and 26 ICCPR; CAT/C/GC/2(24.01.2008), §§7, 20.

<sup>18</sup> Art.1 UNCAT.

<sup>19</sup> Art.26 and 31(1) VCLT.

lawfully engage in any activity, or conclude any agreement with other States or non-State actors, the foreseeable consequences of which would undermine or defeat the very object and purpose of that right, or of any of the ancillary rights designed to give it effect in practice, such as the rights to leave any country or territory, to seek and enjoy asylum, not to be detained arbitrarily, and to have individual rights and duties determined in a due process proceeding.<sup>20</sup>

16. In addressing the consequences of torture and ill-treatment, States must ensure that survivors obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.<sup>21</sup> Wherever States receive allegations or otherwise have reasonable ground to believe that an act of torture or ill-treatment has been committed within their jurisdiction, they have a duty to investigate, prosecute, and punish the perpetrators.<sup>22</sup> In case of "serious" (i.e. "gross or systematic") breaches of the peremptory prohibition of torture in one State, all other States are not only entitled, but also legally obliged: (a) to cooperate to bring such abuse to an end through any lawful means at their disposal, (b) not to recognize as lawful any situation created by such violations, and (c) not to aid or assist in maintaining any such situation.<sup>23</sup> Depending on the context, the perpetration or participation in acts of torture and ill-treatment may also amount to a war crime or a crime against humanity and, as such, would be subject to universal jurisdiction and exempted from any statute of limitations.

## C. Migration-related Detention

17. In many parts of the world, States increasingly resort to the criminalization of irregular migration, and to deprivation of liberty as a routine or even mandatory response.<sup>24</sup> States detain migrants in both criminal and administrative detention regimes which aim to criminalize and punish breaches of immigration laws or, respectively, to carry out administrative procedures related to arrival, asylum, overstay, residence or return.

### 1. Deprivation of liberty

18. In generic terms, "deprivation of liberty" or "detention" includes any placement of persons in public or private custodial settings which they are not permitted to leave at will.<sup>25</sup> In practice, this may include, for example, prisons or purpose-built detention facilities, closed reception or holding centers, shelters, guesthouses, camps, but also temporary facilities, vessels and private residences. Regardless of the name given to a particular placement or accommodation and its categorization in national law, the decisive question for its qualification as "deprivation of liberty" is whether or not migrants are free to leave.<sup>26</sup> In practice, the possibility to leave must not be a merely theoretical option to be exercised at some point in the future, but must be practicable and available at any time. For example, holding migrants at an international border, an offshore facility or an airport transit zone and refusing their immigration while granting them the theoretical right to leave to any other country or territory of their choice still amounts to deprivation of liberty for such time as they are being held, and entitles all affected migrants to the full protection afforded to persons deprived of their liberty under international law.<sup>27</sup>

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<sup>20</sup> Arts.8-10; 13(2); 14(1) UDHR; Arts.9; 12(2); 13; 14 ICCPR.

<sup>21</sup> Art.14 CAT.

<sup>22</sup> Arts.4-9; 12-13 UNCAT.

<sup>23</sup> ILC, Art.40(2), 41(1) and (2) ASR; World\_Summit\_Outcome, A/RES/60/1, 24.10.2005, §§138-139.

<sup>24</sup> A/HRC/17/33, §§12, 19. UNHCR Report, "Beyond\_Detention", 2016.

<sup>25</sup> See also the treaty definition in Art.4 OPCAT.

<sup>26</sup> UNHCR, Guidelines\_on\_the\_Applicable\_Criteria\_and\_Standards\_relating\_to\_the\_Detention\_of\_Asylum-Seekers\_and\_Alternatives\_to\_Detention\_(2012), §5-7.

<sup>27</sup> ECtHR, *Amuur\_v.\_France*\_(No.19776/92), Jgmt\_25.06.1996, §§48-49.

## 2. Treatment and conditions of detention

19. Although any detention of migrants must "take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons",<sup>28</sup> in reality the practice is often the opposite. Numerous press and stakeholder reports have described the appalling physical and hygiene conditions under which migrants are being detained in all regions of the world, including in off-shore processing centres. Depending on the context, problems may range from extreme overcrowding to prolonged solitary confinement, and from insufficient access to food, water and medical care to deliberate abuse by State officials, private guards, or fellow detainees, including torture and ill-treatment, systematic extortion, sexual abuse, and even enslavement. Even torture and ill-treatment of migrant children has been reported to be widespread, ranging from various forms of sexual abuse to being "tied up, gagged, beaten with sticks, burned with cigarettes, given electric shocks, and placed in solitary confinement, causing severe anxiety and mental harm".<sup>29</sup>

20. It is clear that any detention regime which, as a matter of deliberate policy or as a consequence of negligence, complacency or impunity, subjects or exposes migrants to treatment or conditions of detention grossly inconsistent with universally recognized standards, most notably the "Nelson Mandela Rules",<sup>30</sup> is incompatible with the prohibition of torture and ill-treatment,<sup>31</sup> regardless of economic or budgetary considerations.<sup>32</sup> As a general rule, the threshold of prohibited ill-treatment will be reached sooner with regard to migrants with an irregular status or with other vulnerabilities.<sup>33</sup> Moreover, ill-treatment or grossly inadequate detention conditions can even amount to torture if they are intentionally imposed, encouraged or tolerated by States for reasons based on discrimination of any kind,<sup>34</sup> including based on immigration status,<sup>35</sup> or for the purpose of deterring, intimidating, or punishing migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to "voluntary" return, providing information or fingerprints, or with a view to extorting money or sexual acts from them.

## 3. Prolonged or indefinite detention

21. Great concern also arises with regard to the use of procedures that are of a nature or deliberate design to render migrant detention potentially indefinite, to maximize uncertainty, unpredictability and frustration, or to prompt affected migrants to withdraw their requests for asylum, subsidiary protection or other stay and agree to "voluntary" return in exchange for their release. Where migrants are held under a regime of administrative detention outside the criminal justice system, they often do not benefit from essential procedural safeguards such as access to an interpreter and to legal counsel and the right to an effective legal remedy and periodic review. As a result, such migrants are often deliberately kept in a legal "limbo" with no realistic prospect of release or alternative measures, and no practical means of influencing the process and its duration. In other contexts, where unauthorized entry is criminalized, pre-trial detention often is automatically imposed until the conclusion of legal proceedings, which in practice regularly leads to prolonged if not indefinite detention. In both cases, where migrants are accompanied by family members, they are often detained separately from their spouses and even their children, generally on the pretext of administrative regulations, with the withdrawal of their

<sup>28</sup> CCPR, GC\_No.35(2014), §18.

<sup>29</sup> A/HRC/28/68(05.03.2015), §60.

<sup>30</sup> A/RES/70/175 (17.12.2015), particularly Rule 43(1).

<sup>31</sup> ECtHR, *MSS v. Belgium and Greece*(No.30696/09), Jgmt 21.01.2011, §233; ECtHR, *Kalashnikov v. Russia* (No.47095/99), Jgmt\_15.07.2002, §102; CCPR, *Mukong v. Cameroon*, No.458/1991(21.07.1994), §9.4; IACtHR, *Suárez Rosero v. Ecuador*, Jgmt\_12.11.1997, §91; IACtHR, *Montero-Aranguren et al v. Venezuela* (05.07.2006), §91; UNSRT(van Boven), Annual Report (e/cn.4/2004/56), 23.12.2003, §49.

<sup>32</sup> CCPR, *Mukong v. Cameroon*, No.458/1991(21.07.1994), §9.3.

<sup>33</sup> ECtHR, *Tarakhel v. Switzerland*(29217/12), Jgmt\_04.11.2014, §§118-119.

<sup>34</sup> Art.1 UNCAT.

<sup>35</sup> ECtHR, *Hode and Abdi v. UK*(No.22341/09),\_06.11.2012, §56.

requests for asylum, subsidiary protection or other stay and their "voluntary" return being the only realistic prospect of release and family reunification. Also, in many contexts throughout the world, migrant children are being routinely detained, both individually and together with their families. A particularly traumatic form of migration-related detention combining these elements is long-term offshore-confinement on isolated islands or extra-territorial enclaves.

#### 4. Arbitrariness of detention based solely on migration-status

22. Just as any other form of deprivation of liberty, any detention of migrants must be justified for each individual as lawful, necessary and proportionate in the circumstances and, in case of administrative or preventative detention, must be periodically re-assessed as it extends in time.<sup>36</sup> Provided that these generic conditions are met on an individual basis, "(a)sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. (...) The inability of a State party to carry out the expulsion of an individual (...) does not justify indefinite detention."<sup>37</sup>

23. On the particularly issue of migration-related detention of children it has been observed that "offences concerning irregular entry or stay cannot (...) have consequences similar to (...) the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development."<sup>38</sup> Accordingly, the detention of children based solely on their own or their parents' irregular migration status has authoritatively been found to be arbitrary.<sup>39</sup>

24. Applying this rationale more generally, the Special Rapporteur observes that breaches of immigration laws, as such, are essentially administrative in nature and do not constitute crimes against persons, property, or national security which might justify or require sanctions involving deprivation of liberty.<sup>40</sup> Moreover, the Refugee Convention even expressly prohibits the punishment of asylum seekers for having breached immigration rules in order to gain access to the protection of the territorial State.<sup>41</sup>

25. In sum, therefore, the margins of permissibility of migration-related detention are narrow, both in terms of substantive justification and in terms of duration, and the mere fact that detention is authorized by domestic law does not exclude its arbitrariness under international law. In the view of the Special Rapporteur, criminal or administrative detention based solely on migration status exceeds the legitimate interests of States in protecting their territory and regulating irregular migration and should be regarded as arbitrary.<sup>42</sup>

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<sup>36</sup> CAT, GC\_No.4\_(2017)\_Art.3, §12.

<sup>37</sup> CCPR, GC\_No.35\_(2014), §18.

<sup>38</sup> Joint\_GC\_No.4\_(CMW) and No.23\_(CRC)\_(2017), §10.

<sup>39</sup> WGAD, Revised\_Deliberation\_No.5(AdvEditedVersion\_07.02.2018), §40; Joint\_GC\_No.4(CMW) and No.23\_(CRC)\_(2017), §5; IACtHR, OC-21/14(19.08.2014), §154.

<sup>40</sup> CMW/C/GC/2 (28.08.2013), §§5, 24; A/HRC/23/46 (24.04.2013), §47.

<sup>41</sup> Art.31(1) Refugee Convention(1951).

<sup>42</sup> WGAD, Revised\_Deliberation\_No.5(AdvEditedVersion\_07.02.2018), §10.



## 5. Relationship between arbitrariness and torture or ill-treatment

26. While not every case of arbitrary detention will automatically amount to torture or ill-treatment, there is an undeniable link between both prohibitions. Already more than 30 years ago, the International Court of Justice held that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".<sup>43</sup> Moreover, experience shows that any form of arbitrary detention exposes migrants to increased risks of torture and ill-treatment.

27. The Human Rights Committee has repeatedly considered that "the combination of the arbitrary character of the [...] detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the [detainees] and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant."<sup>44</sup> Indeed, the experience of being subjected to detention that is neither necessary nor proportionate to serve any legitimate purpose, particularly in conjunction with its prolonged and potentially indefinite duration, and with the absence of any effective legal remedy has been shown to add significant mental and emotional stress to the already extremely vulnerable situation of irregular migrants, with many cases reported of self-harm, post-traumatic stress disorder, anxiety and depression. Thus, even factors that may not necessarily amount to ill-treatment when applied as an isolated measure and for a very limited period of time - such as unjustified detention, delayed access to procedural rights, or moderate physical discomfort - can cross the relevant threshold if applied cumulatively and/or for a prolonged or open-ended period of time.

28. In the view of the Special Rapporteur, as a general rule, the longer a situation of arbitrary detention and inadequate conditions lasts, and the less affected detainees can do to influence their own situation, the more intense their mental and emotional suffering will become, and the higher is the likelihood that the prohibition of ill-treatment has been breached. Depending on the circumstances, this threshold can be reached very quickly, if not immediately, for migrants in situations of increased vulnerability, such as children, women, older people, persons with disabilities, medical conditions, or torture trauma, and members of ethnic or social minorities including lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. In particular, the Special Rapporteur endorses and reiterates the view expressed by his predecessor that the deprivation of liberty of migrant children based solely on their own or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, is grossly disproportionate and, even in case of short term detention, may amount to cruel, inhuman or degrading treatment.<sup>45</sup>

29. In the view of the Special Rapporteur, detention based solely on migration-status, as such, can also amount to torture, most notably where it is being intentionally imposed or perpetuated for purposes such as deterring, intimidating, or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints, or with a view to extorting money or sexual acts, or for reasons based on discrimination of any kind, including discrimination based on immigration status.<sup>46</sup>

## D. Smuggling and Trafficking of Migrants

30. Much could be said about the often harsh and strenuous living conditions millions of migrants are exposed to in transit and destination States throughout the world, especially

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<sup>43</sup> ICJ, *USA v. Iran*, Jgmt(Merits)\_24.05.1980, §91.

<sup>44</sup> CCPR, *F.J. et al. v. Australia* (No.2233/2013, 22.03.2016), §10.6; CCPR, *F.K.A.G. et al. v. Australia* (No.2094/2011, 26.07.2013), §9.8; CCPR, *M.M.M. et al. v. Australia* (No.2136/2012, 25.07.2013), §10.7.

<sup>45</sup> A/HRC/28/68(05.03.2015), §80; ECtHR, *S.F. et al. v. Bulgaria* (No.8138/16), 07.12.2017.

<sup>46</sup> See also: CAT, GC\_No.4\_(2017)\_Art.3, §14.

those finding themselves in irregular situations. The difficulties and threats experienced by this particularly vulnerable and underprivileged population group may range from discriminatory laws, administrative obstruction and inadequate access to public services and resources, to corruption, threats, violence or indifference on the part of State officials, and from harassment and aggression on the part of the local population to systematic abuse and exploitation by criminal groups, often even in collusion with State officials. For the present purposes, two areas of particularly tragic practical relevance for the prohibition of torture and ill-treatment shall be explored, namely torture and ill-treatment occurring in connection with the activities of smuggling networks and, respectively, in connection with human trafficking including exploitation for ransom.

### **1. Torture and ill-treatment related to smuggling schemes**

31. In the course of his consultations and country visits, the Special Rapporteur has received numerous allegations of migrants being subjected to extortion and abuse by both border guards and criminals in all regions of the world. In particular, where no safe and regular pathways are available, migrants increasingly engage the services of smuggler networks, many of which allegedly operate in collusion with border officials. According to the most commonly reported pattern, involved border officials turn a blind eye on clandestine entries in return for receiving their share of the smuggling fees paid by migrants. In enforcement of this business model, migrants seeking to cross the border without a smuggling arrangement are either routinely turned away or, if they are caught trying to cross the border clandestinely, severely beaten, robbed of their possessions and forcibly removed back across the border without any assessment of their protection needs. While those who pay the smuggling fees are generally allowed irregular entry at first, many are subsequently stopped by police patrols waiting for them deeper into the territory at "meeting points" agreed with the smuggler networks, and are then returned to the border for immediate expulsion - again without any assessment of their protection needs.

### **2. Human trafficking including exploitation for ransom**

32. One of the greatest risks for migrants, particularly for unaccompanied children, single women and vulnerable men, is to fall victim to trafficking. Trafficking can occur at any point of the migrant journey and for a wide variety of purposes such as forced labour, slavery or servitude, all forms of sexual exploitation, forced adoption, child soldiering, begging, criminal activities and, arguably, also exploitation for ransom.<sup>47</sup> Children account for approximately 28 per cent of trafficking victims globally, with migrant children being extremely vulnerable to violence, abuse, and enslavement.<sup>48</sup>

33. Especially migrant women and girls are often subjected to sexual abuse, particularly when they travel alone. In some contexts, the probability of sexual abuse for single migrant women and girls is reported to be as high as 75%, ranging from sexual acts being demanded as "payment" for passage, food, water or shelter, to gang rapes, sexual slavery and forced prostitution.<sup>49</sup> LGBTI migrants are also particularly vulnerable to discrimination, violence, sexual abuse and humiliation.<sup>50</sup> Further, in many contexts, irregular migrants are being abducted for ransom. Hostages are deprived of food, water and sleep, and are subjected to forced labour, sexual abuse and torture until families are prepared to pay large amounts of ransom, often after being forced to witness the abuse of their loved ones through the phone.<sup>51</sup> In the context of trafficking, such abuse is practiced systematically for the purpose

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<sup>47</sup> UNODC, *Global Report on Trafficking in Persons* (2016), pp.26-31. Art.3\_UNTOC\_Trafficking\_Protocol\_(2000), in particular the words "at a minimum". M.O.Brhane, 'Trafficking in Persons for Ransom and the Need to Expand the Interpretation of Article 3 of the UN Trafficking Protocol', *Anti-Trafficking Review* (issue4, 2015), pp.120-141.

<sup>48</sup> NICEF, *Harrowing Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking-and-exploitation* (2017), pp.9, 21.

<sup>49</sup> A/HRC/31/57(05.01.2016),§31.

<sup>50</sup> A/HRC/31/57(05.01.2016),§§32-35; A/HRC/29/23(04.05.2015); A/HRC/35/36 (19.04.2017), §§14-15, 40.

<sup>51</sup> UNODC, *Global Report on Trafficking in Persons* (2016), p.62.

of exploitation, including exploitation for ransom. Migrants often also become victims of trafficking for organ removal for the purpose of medical transplantation. Organ trafficking and the trafficking of persons for the purpose of organ removal tender to a global black market controlled by transnational criminal networks<sup>52</sup> with the collaboration of specialized health professionals and local transplant hospitals and laboratories, which may be State-run and complicit in the crime, or privately-run as part of the trafficking network, in which case close links of organ trafficking networks with the police or organized crime are reported to prevail.<sup>53</sup>

34. All variations of human trafficking involve the intentional infliction of severe mental or physical pain or suffering. While the primary purpose of trafficking is exploitation, the infliction of pain and suffering is always instrumentalised for intermediate purposes such as coercion, intimidation, punishment and discrimination, all of which are defining elements of torture. Should one of these elements be missing, human trafficking generally will meet the threshold of other cruel, inhuman or degrading treatment or punishment. Thus, where human trafficking is carried out by or at the instigation or with the consent or acquiescence of State officials, it will breach the absolute and non-derogable prohibition of torture and ill-treatment.<sup>54</sup> In practice, perpetrators of torture and ill-treatment against migrants include not only smugglers and traffickers, but also border guards, militias and police and, in various contexts, there is evidence of corruption and collusion between State officials and traffickers.<sup>55</sup>

### 3. Relation to State policies of deterrence and criminalization

35. The business models of trafficking and abusive smuggling networks have entailed a significant increase in violence and ill-treatment suffered by migrants not willing or able to pay exorbitant smuggling fees, as well as by those falling victim to trafficking for the most cruel, inhuman and degrading purposes the human mind can conceive.

36. It cannot be stressed enough that the unrestrained growth of the migrant smuggling and trafficking business in many parts of the world has been made possible primarily by the increasingly restrictive, punitive and deterrence-based migration laws, policies and practices adopted by States, which have deprived millions of migrants of safe and regular migration pathways and pushed them into illegality, thus effectively preventing them from reporting even the gravest abuse to law enforcement authorities and from seeking their protection.

37. In order to put an end to the horrendous suffering caused by migrant trafficking and abusive smuggling, therefore, it is not enough for States to continue to fight corruption and crime, which may be a symptom of the underlying problem, but is not its root cause. In the view of the Special Rapporteur, the only way of dissolving the business models of migrant trafficking and abusive smuggling for good is to provide migrants with safe and regular migration pathways, and to ensure the effective protection of their human rights not only in theory, but also in practice.

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<sup>52</sup> EUP, Directorate-General\_for\_External\_Policies: Trafficking\_in\_Human\_Organs(2015), pp. 8-9, 20-22.

<sup>53</sup> UNODC, AssessmentToolkit:Trafficking\_in\_Persons\_for\_the\_Purpose\_of\_Organ\_Removal(2015), pp.30-37; EUP, Directorate-General\_for\_External\_Policies: Trafficking\_in\_Human\_Organs(2015), pp.21, 36-40, 43, 63-64.

<sup>54</sup> OSCE, Trafficking\_in\_Human\_Beings\_Amounting\_to\_Torture\_and\_other\_Forms\_of\_Ill-treatment(2013), pp.20-27; A/HRC/7/3(15.01.2008), §§56-58.

<sup>55</sup> UNICEF, Child\_Trafficking\_in\_Europe:\_A\_Broad\_Vision\_to\_Put\_Children\_First(2008), p.38; UNICEF, Harrowing\_Journeys:\_Children\_and\_youth\_on\_the\_move\_across\_the\_Mediterranean\_Sea,\_at\_risk\_of\_trafficking-and-exploitation(2017), pp.20, 24; OSCE, Trafficking\_in\_Human\_Beings\_Amounting\_to\_Torture\_and\_other\_Forms\_of\_Ill-treatment(2013), p.20.

## E. Non-Refoulement

38. In both customary and treaty law, the prohibition of torture and ill-treatment is further concretized by the principle of non-refoulement, which prohibits States from "deporting"<sup>56</sup> any person to another State's jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment.<sup>57</sup> The fault of refoulement lies in the deporting State taking action which it "knew or should have known"<sup>58</sup> would expose the person in question to a "foreseeable, personal, present and real" risk of torture or ill-treatment in a territory and by perpetrators beyond its control, regardless of whether they are officials of another State or non-State actors.<sup>59</sup>

39. The non-refoulement protection specifically against the risk of torture and ill-treatment is absolute and non-derogable and applies in all situations, including war and states of emergency, to all human beings without discrimination of any kind and, in particular, regardless of their entitlement to refugee status.<sup>60</sup> While refugee law limits non-refoulement protection to persons entitled to refugee status and allows for exceptions based on considerations of national or public security,<sup>61</sup> no limitation or exception whatsoever is permissible where deportation would expose the person in question to a real risk of torture or ill-treatment. As an intrinsic component of the peremptory prohibition of torture, the prohibition of refoulement trumps not only national immigration laws, but also contradicting international obligations, such as under extradition treaties.<sup>62</sup>

40. In order to give effect to the prohibition on refoulement, States must inform concerned migrants of an intended deportation in a timely manner and enable them to appear in person before a competent, impartial and independent judicial or administrative body in order to challenge the removal decision and to seek "international protection",<sup>63</sup> prior to the envisaged deportation, and in an individualized, prompt and transparent proceeding affording the required interpreter services and all other essential procedural safeguards including the suspensive effect of an appeal.<sup>64</sup> Collective deportations without such individual examination are inherently irreconcilable with the prohibition of refoulement.<sup>65</sup> Likewise incompatible with procedural requirements of the prohibition of refoulement are so-called "fast-track" screenings carried out by non-specialist border officials at the point of interception on land or at sea and without the presence of legal counsel or the possibility of an effective appeal.

41. In determining whether there is a real risk of torture or ill-treatment in an individual case, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of

<sup>56</sup> The term "deportation" is here used for any removal of persons from the jurisdiction of a State without their genuine, fully informed and valid consent, including expulsions, extraditions, forcible returns, forcible transfers, renditions, rejections at the frontier, pushbacks and any other similar acts. Similar: CAT, GC\_No.4\_(2017)\_Art.3, §4.

<sup>57</sup> Art.3(1) UNCAT; CAT, GC\_No.4\_(2017)\_Art.3, §§15-17, 26, 28-29; CCPR, GC\_No.20(10.03.1992), §9; CCPR/C/21/Rev.1/Add.13(26.05.2004), §12; CRC/GC/2005/6 (01.09.2005), §27.

<sup>58</sup> CAT/C/34/D/233/2003, §13.4; ECtHR, *Hirsi\_Jamaa\_et\_al.\_v.\_Italy*(No.27765/09), Jgmt 23.02.2012, §131.

<sup>59</sup> CAT, GC\_No.4\_(2017)\_Art.3, §§11, 30; CAT/C/44/D/322/2007(03.06.2010); CAT/C/22/D/120/1998(25.05.1999), §6.5; ECtHR, *N.\_v.\_Finland*(No.38885/02)\_2005, §164; ECtHR, *J.K.\_and\_Others\_v.\_Sweden*(No.59166/12)\_2016, §80.

<sup>60</sup> CAT, GC\_No.4\_(2017)\_Art.3, §§9-10.

<sup>61</sup> Art.33 Refugee Convention(1951).

<sup>62</sup> See also: CAT, GC\_No.4\_(2017)\_Art.3, §25. A/RES/62/61,08.01.2008, Art.26, 41(2).

<sup>63</sup> "International protection" here refers to protection not only under refugee law, but also under human rights law and, if applicable, international humanitarian law.

<sup>64</sup> CAT, GC\_No.4\_(2017)\_Art.3, §13, with references; CCPR/C/88/D/1416/2005(10.11.2006) §11.8; CCPR/C/93/D/1461(31.07.2008), §12.7.; A/70/303, §43.

<sup>65</sup> CAT, GC\_No.4\_(2017)\_Art.3, §13; OHCHR, "Expulsions\_of\_aliens", Discussion Paper(2006), p.15; Art.4 Protocol\_4 ECHR.

gross, flagrant or mass violations of human rights".<sup>66</sup> Thus, the State proposing to expel an individual must engage with any evidence available to it, but must also make its own assessment, taking into account all relevant considerations including both a wider range of personal factors and the general human rights situation in the destination State or territory.<sup>67</sup> For the purposes of non-refoulement, any torture or ill-treatment which the concerned persons or their families were exposed to in the past or would be exposed to upon deportation, "constitutes an indication that the person is in danger of being subjected to torture".<sup>68</sup>

42. In order for the required risk assessment to be effective, it must take into account vulnerabilities, in particular pre-existing psychological trauma that may affect a person's ability to effectively engage with standard procedures. This is particularly relevant where asylum proceedings and similar risk assessments rely on credibility assessments, which have been demonstrated to produce false negatives when applied to persons with psychological trauma.<sup>69</sup> Whenever the applicant makes an arguable case of past torture, the State will have to rigorously examine the claim in line with recognized standards for effective investigation and documentation of torture and ill-treatment as provided in the "Istanbul Protocol" and, in particular, its principles guiding forensic medical evaluations.<sup>70</sup>

43. In substantive terms, the mere existence of domestic laws or the ratification of human rights treaties does not disprove an individual risk of torture or ill-treatment.<sup>71</sup> The decisive criteria for identifying such a risk will always be the particular circumstances and prospects of the affected individual. This does not mean that the source of that risk needs to be individualized, such as a personal stigmatization or membership in a particular political party, ethnic group or social minority,<sup>72</sup> but it can also be found in a general situation of violence exposing the individual in question to a real risk of ill-treatment.<sup>73</sup> Similarly, systemic shortcomings in the receiving State have been found to give rise to a risk of "indirect refoulement" (also "chain refoulement"), by which the receiving State would further expel a deportee to yet another State or territory without the benefit of a sufficient assessment of the risk of torture or ill-treatment prevalent in the final destination State.<sup>74</sup>

44. States must interpret and perform the principle of non-refoulement in good faith and, therefore, cannot lawfully pass any law or regulation, engage in any policy or practice, or conclude any agreement with other States or non-State actors, which would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement which they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control.<sup>75</sup> While the prohibition of refoulement is clear and straightforward as a matter of law, several practices introduced by States as part of recent migration policies point towards a deliberate erosion of good faith compliance with this cornerstone protection against torture and ill-treatment.

## 1. Deliberately harsh reception conditions

45. For example, States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to "voluntarily" return

<sup>66</sup> Art.3.2. UNCAT.

<sup>67</sup> For a non-exhaustive list of factors, see: CAT, GC\_No.4\_(2017)\_Art.3, §29(a)-(o).

<sup>68</sup> CAT, GC\_No.4\_(2017)\_Art.3, §28.

<sup>69</sup> <https://www.freedomfromtorture.org/sites/default/files/documents/JulietCohenRecallandCredibility.pdf>;

<sup>70</sup> Principles\_on\_the\_Effective\_Investigation\_and\_Documentation\_of\_Torture\_and\_Other\_Cruel,\_Inhuman\_or\_Degrading\_Treatment\_or\_Punishment,\_annexed\_to: A/RES/55/89(04.12.2000) and E\_CN\_4-RES-2000-43(20.04.2000)

<sup>71</sup> ECtHR, *Hirsi\_Jamaa\_v.\_Italy*(No.27765/09), 23.02.2012, §128.

<sup>72</sup> ECtHR, *Ergashev\_v.\_Russia*(No.49747/11), 16.10.2012.

<sup>73</sup> ECtHR, *Sufi\_and\_Elmi\_v.\_UK*(No. 8319/07\_and\_11449/07), 28.06.2011, §217.

<sup>74</sup> ECtHR, *MSS\_v.\_Belgium\_and\_Greece*(No.30696/09), Jgmt 21.01.2011, §§357-359; CAT, GC\_No.4\_(2017)\_Art.3, §12; CCPR/C/21/Rev.1/Add.13(26.05.2004),§12.

<sup>75</sup> A/HRC/25/60, §§40-58.

to their country of origin, regardless of their need of non-refoulement protection. This may include measures such as the criminalisation, isolation and detention of irregular migrants, the deprivation of medical care, public services and adequate living conditions, the deliberate separation of family members, and the denial or excessive prolongation of status determination or habeas corpus proceedings.<sup>76</sup>In the view of the Special Rapporteur, deliberate practices such as these amount to "refoulement in disguise" and are incompatible with the principle of good faith.

## 2. Readmission agreements

46. Readmission agreements are bilateral agreements that allow States to return migrants to a "safe" country, which, in turn, is obliged to accept (readmit) these returnees. Readmission agreements establish, in advance, a procedure allowing the expulsion of migrants without an individualized risk assessment based on the circumstances ruling at the time. Already by definition, therefore, readmission agreements circumvent migrants' due process rights and fall short of the procedural precautions States must take to ensure returnees will not be exposed to torture or ill-treatment. Moreover, in practice, States often make unrealistic blanket assessments, such as automatically equating democratic countries with "safe" countries, or conclude readmission agreements with States known to practice chain refoulement, or even torture and ill-treatment. In sum, the Special Rapporteur considers that, in the absence of an individualized risk assessment for each concerned migrant, deportation decisions taken on the basis of readmission agreements amount to collective expulsions incompatible with the procedural requirements of the prohibition of refoulement.

## 3. Diplomatic assurances

47. Diplomatic assurances are bilateral policy instruments by which a deporting State obtains assurances from the receiving State that the deported persons will not be subjected to torture or ill-treatment or transferred to another country where they would risk such abuse. Diplomatic assurances generally take the form of non-binding Memoranda of Understanding. Even where such assurances are binding, and even where they provide the deporting State with monitoring and verification rights, the principal interest of the deporting State normally is to continue deportations in the future, which makes any uncovering of violations and enforcement action extremely unlikely. In practice, the enforceability or compulsive force of diplomatic assurances depends entirely on the mutual self-interests of the involved States in light of their specific political, economic or military relations.

48. Diplomatic assurances have been, and continue to be, widely criticized for being used as a loophole undermining the principle of non-refoulement, including by this mandate,<sup>77</sup> the UN Committee against Torture<sup>78</sup> and civil society,<sup>79</sup> and are highly questionable from both legal and policy perspectives. First, diplomatic assurances cannot absolve the deporting State from conducting a rigorous and individualized risk assessment. Such proceedings must take into account that, in practice, diplomatic assurances are used predominantly where the deporting State already has serious concern that the receiving State will not respect the prohibition of torture and ill-treatment, which is precisely the decisive criterion for absolutely prohibiting any expulsion to that State. Properly understood, therefore, the intended use of diplomatic assurances in a particular case normally militates against the permissibility of that expulsion and makes it almost impossible for the deporting State to conclusively disprove a "real risk" of torture or ill-treatment.

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<sup>76</sup> CAT, GC\_No.4\_(2017)\_Art.3, §14.

<sup>77</sup> E.g. A/70/303, §69; A/76/316, §51.

<sup>78</sup> E.g. CAT/C/34/D/233/2003, §13.4. CAT, GC\_No.4\_(2017)\_Art.3, §20.

<sup>79</sup> E.g. Amnesty International, "Dangerous\_Deals:\_Europe's\_reliance\_on\_"diplomatic\_assurances" \_against\_torture" (12.04.2010); Human Rights Watch, "Still\_at\_Risk: \_Diplomatic\_Assurances\_No\_Safeguard\_Against\_Torture" (15.04.2005).

49. Second, even if diplomatic assurances were to be faithfully implemented by the receiving State, they express the expectation that the receiving State will only selectively comply with the prohibition of torture and ill-treatment, and signal the deporting State's complacency in this respect, thus severely jeopardizing one of the most fundamental norms of the international *ordre public* and squarely contradicting the principles and purposes of the United Nations. At best, this practice could result in a two-tier system of protection against torture and ill-treatment, under which only a select few would benefit from "enhanced" de facto protection under diplomatic assurances governed by political, economic or military rationales, whereas the protection of the great majority under applicable treaty law and jus cogens would become increasingly optional, thus severely weakening the universal prohibition of torture and ill-treatment and, ultimately, the rule of law.

50. In sum, the Special Rapporteur expresses grave alarm at the implicit complacency and acquiescence expressed by the use of diplomatic assurances for merely selective compliance with the prohibition of torture and ill-treatment. Moreover, where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return, diplomatic assurances, even in conjunction with post-return monitoring mechanisms, are inherently incapable of providing sufficient protection against such abuse.

#### 4. Direct arrival prevention ("pushbacks"& border closures)

51. Direct arrival prevention measures are carried out directly by the destination State and can be of active ("pushbacks") or passive (border closures) nature. "Pushbacks" are proactive operations aiming to physically prevent migrants from reaching, entering or remaining within the territorial jurisdiction of the destination State through direct or indirect exercise of effective control over their movement.<sup>80</sup> At sea, "pushbacks" essentially involve the interception of vessels carrying migrants inside or outside territorial waters, followed by immediate repatriation to their port of origin without, or with only summary, on-board screening for protection needs. On land, "pushbacks" are more likely to take place at or close to an international border, and usually involve the threat or use of force by border officials in order to prevent migrants from approaching or crossing the border, and to intimidate persons having successfully crossed the border before returning them to the country of departure. Here too, screening for protection needs will be summary or non-existent.

52. The same purpose, albeit through passive means, is pursued with border closures preventing unauthorized border crossing through physical obstacles such as fences, walls or trenches without reasonably accessible gates or passages. Border closures should be distinguished from operations or installations aiming to manage or guide arriving migrants to particular pathways, areas or border crossings and to ensure safe, orderly and regular processing without infringing their human rights. In practice, border closures are not an effective means of preventing arrivals, but tend to encourage smuggling, crime and police corruption, and to expose irregular migrants to extortion, violence, sexual abuse and trafficking.

53. International borders<sup>81</sup> are not exclusion or exception zones for human rights obligations. In particular, under both refugee law<sup>82</sup> and human rights law,<sup>83</sup> the principle of non-refoulement applies at all times, even when States operate or hold individuals

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<sup>80</sup> Oxfam, BCHR, MYLA, "A\_Dangerous\_'Game'", Briefing Paper (2017), p.4.

<sup>81</sup> "International borders" include all territorial and extraterritorial areas where States exercise border governance measures. See: OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, p.4.

<sup>82</sup> UNHCR, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations" (26.01.2007), §43; IACiHR, *Haitian\_Centre\_for\_Human\_Rights\_et\_al.\_v.\_USA* (No.10.675, Report\_51/96), OEA/Ser.L/V/II.95 Doc.7 rev. at 550(1997). §156.

<sup>83</sup> CCPR/C/21/Rev.1/Add.13(26.05.2004), §§10 and 12; A/70/303), §69.

extraterritorially, including on the high seas. The principle prohibits rejections at the frontier, as well as other measures that would compel a person "to return to or remain in a territory where his life, physical integrity or liberty would be threatened".<sup>84</sup> Given that "pushbacks" and border closures aim to exercise effective control over the physical movement of migrants, even if only through the direct prevention of such movement in a certain direction, the Special Rapporteur is of the view that such measures bring affected migrants within the jurisdiction of the operating State for the purposes of the prohibition of refoulement.

54. Both "pushbacks" and border closures amount to collective measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed in an individualized due process proceeding and, therefore, are incompatible with the prohibition of refoulement. In displaying complete indifference as to the grave risks which some of the affected migrants may be exposed to, "pushbacks" and border closures blatantly negate their human dignity in a manner which, in the view of the Special Rapporteur, is inherently degrading.

55. Last but not least, "pushbacks" often involve short-term periods of custody, during which migrants find themselves under the physical control of border guards and are being subjected to torture or ill-treatment with the intent of achieving a deterrent effect through punishment, intimidation, coercion or discrimination. The Special Rapporteur has received numerous reports of "pushbacks" involving beatings, dog attacks, and dousing with cold water at below zero temperatures. Even in the absence of physical custody, "pushbacks" routinely involve the threat or use of unnecessary, excessive or otherwise arbitrary force. In the view of the Special Rapporteur, the use of force for no purpose other than to deter or to prevent persons from entering a State's territory cannot be considered lawful, necessary or proportionate and, therefore, may well amount to ill-treatment or even torture.<sup>85</sup>

## 5. Departure prevention / indirect arrival prevention ("pullbacks")

56. "Pullback" operations are designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State. "Pullbacks" are carried out by retaining States or local armed groups, either in the interest of dictatorial regimes trying to prevent inhabitants from escaping (departure prevention), or at the instigation and on behalf of destination States desiring to prevent migrant arrivals without having to engage their own border authorities in unlawful "pushback" operations (indirect arrival prevention).

57. By their very nature, "pullbacks" prevent migrants from exercising their rights to leave any country or territory; not to be detained arbitrarily; to seek and enjoy asylum; and to have individual rights and duties determined in a due process proceeding. Moreover, when "pullbacks" forcibly retain migrants in situations where they are exposed to a real risk of torture and ill-treatment, any participation, encouragement, or assistance provided by destination States for such operations would be irreconcilable with a good faith interpretation and performance of the prohibition of torture and ill-treatment, including the principle of non-refoulement.<sup>86</sup> As part of jus cogens, these fundamental provisions trump all conceivable justifications for departure and arrival prevention under national or international law, including the law of the sea. Most notably, while both retaining States and supportive destination States often portray "pullbacks" as humanitarian operations aiming to "rescue" migrants in distress from overcrowded and unseaworthy vessels at sea, or to prevent them from embarking on such "unsafe journeys", or to "defeat the business

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<sup>84</sup> OAU Refugee Convention(1969), Art.II(3). See also: A/70/303, §42; CAT, GC\_No.4\_(2017)\_Art.3, §4; A/RES/2312(XXII), 14.12.1967, Art.3; OAU Refugee Convention(1969), Art.II(3); Cartagena Declaration on Refugees, 22.11.1984, III(5); Mexico\_Declaration\_on\_Refugees,16.11.2004, §7; CoE Resolution(67)14\_on\_Asylum\_to\_Persons\_in\_Danger\_of\_Persecution (29.06.1967),§2.

<sup>85</sup> A/72/178, §62(c); A/72/335, §33.

<sup>86</sup> Art.26, 31(1) VCLT; and Art.1(3); 2(1) UN Charter. See also Nora Markard, "The\_Right\_to\_Leave\_by\_Sea"(2016) 27(3) EJIL, pp.596-597, 606-607, 614-616.



model of smugglers and traffickers", the well-documented reality is that intercepted migrants are generally returned to their port of departure, where they are routinely detained or further deported to unsafe third States and, in both cases, exposed to a substantial risk of torture and ill-treatment, or even death, without access to an assessment of their protection needs or any other legal remedy.

58. States are responsible for internationally wrongful acts or omissions which are legally attributable to them, whether through direct imputation, joint responsibility, or complicity, and regardless of the lawfulness of such acts or omissions under domestic law.<sup>87</sup> Thus, States are responsible not only for territorial and extraterritorial violations committed by their own officials, or by contractors and other non-State actors under their instruction and control,<sup>88</sup> but also for knowingly aiding, assisting, directing, controlling or coercing other States in committing internationally wrongful acts.<sup>89</sup> In particular, States knowingly providing instructions, directions, equipment, training, personnel, financial assistance, or intelligence information in support of unlawful migration deterrence or prevention operations conducted by third States will incur legal responsibility for these violations. This also applies if such operations are conducted by non-State actors under their instructions and control.

59. In sum, in the view of the Special Rapporteur, destination States cannot circumvent their own international obligations by externalizing or delegating their migration control practices to other States or non-State actors beyond their jurisdictional control. Instead, any instigation, support, or participation on their part may give rise to complicity in, or joint-responsibility for, unlawful "pullback" operations and the resulting human rights violations, including torture and ill-treatment.

## F. Implications under International Criminal Law

60. As has been shown, throughout the world, migrants are subject to widespread and serious human rights violations, including not only torture, but also murder, enslavement, deportation and forcible transfer, arbitrary detention, rape, sexual slavery, enforced prostitution and other forms of sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts of a similar character. In many contexts, these violations are the direct or indirect result of deliberate policies and practices adopted by States with a view to deterring, punishing or controlling irregular migration. In other contexts, they are caused by criminal groups or aggressive behaviour on the part of the local population. For the most part, these violations follow a programmatic pattern that can only be described as systematic.

61. In view of the scale and gravity of these violations, and their irrefutable causal connection to the policies, practices and failures of States, the Special Rapporteur feels compelled to recall that widespread or systematic breaches of the most fundamental human rights engage not only the legal responsibility of States but also give rise to the possibility of individual criminal responsibility for crimes against humanity and war crimes before international and national courts. These crimes are well-established in customary international law, within the Statute of the International Criminal Court (ICC) and in many national legal systems.<sup>90</sup>

62. Significantly, criminal "intent" does not require that torture and ill-treatment be the desired purpose or outcome of a law, policy or practice. Under the ICC Statute, intent is already established when perpetrators are aware that, "in the ordinary course of events", their conduct or omissions will expose persons to torture and ill-treatment,<sup>91</sup> whereas under customary international law that threshold is even lower and only requires the perpetrators'

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<sup>87</sup> A/RES/62/61,08.01.2008, Art.1-3.

<sup>88</sup> A/RES/62/61,08.01.2008, Art.4-11.

<sup>89</sup> A/RES/62/61,08.01.2008, Art.16-19.

<sup>90</sup> Art.7(1) and 8 ICC Statute. For a database of relevant national law and jurisprudence, see: <https://www.legal-tools.org/>

<sup>91</sup> Art.30 ICC Statute.

awareness of "a substantial likelihood" that torture or ill-treatment would occur as a consequence of their conduct.<sup>92</sup> Moreover, crimes against humanity and war crimes can be committed not only through personal perpetration, but also through various forms of participation in the conduct of others, such as co-perpetration, complicity, instigation, joint criminal liability and superior responsibility.<sup>93</sup> Where persons have a legal duty to prevent torture and ill-treatment within their sphere of influence, culpable failure to do so may entail criminal responsibility by omission. Last but not least, neither official capacity<sup>94</sup> nor superior orders<sup>95</sup> provide immunity from prosecution, and both war crimes and crimes against humanity are subject to universal jurisdiction and exempt from statutes of limitation.<sup>96</sup>

63. These observations bring within the ambit of universal and lifelong international criminal liability not only officials, employees, contractors or private individuals directly inflicting torture and ill-treatment, but potentially also law makers, policy makers, judicial officials, military and civilian superiors and corporate managers responsible for shaping, organizing, assisting, promoting and implementing laws, policies and practices, including arrangements with other States and non-State actors, which knowingly create or maintain the circumstances in which these violations are committed. This also includes the culpable failure of military, civilian and corporate superiors to take all necessary and reasonable measures to prevent, repress, investigate and prosecute crimes which they knew, or should have known, were being committed or likely to be committed by their subordinates.<sup>97</sup>

## IV. Conclusions and Recommendations

### A. Conclusions

64. **Based on the preceding observations and considerations, and informed by broad stakeholder consultations, the Special Rapporteur, to the best of his personal judgment and conviction, comes to the following main conclusions:**

(a) **In the recent past, widespread and increasingly systematic human rights violations committed against migrants by State officials, criminals and private citizens have not only grown into a major global governance challenge, but have become one of the greatest human tragedies of our time.**

(b) **In this context, the Special Rapporteur salutes the broad range of individual and collective efforts undertaken by States, international organizations, civil society and private citizens throughout the world to protect the human rights and dignity of migrants and to alleviate their suffering without discrimination.**

(c) **While recognizing that States have the prerogative and duty to exercise jurisdiction over their international borders, the Special Rapporteur recalls in the strongest terms that they must do so in full compliance with human rights law, including the absolute and non-derogable prohibition of torture and ill-treatment.**

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<sup>92</sup> ECCC, *Prosecutor v. KAING\_Guek\_Eav alias "Duch"* (No.001/18-07-2007/ECCC/TC), Jgmt\_26.07.2010, §481; ICTR, *Prosecutor v. Nahimana et al.* (99-52-A), Jgmt 28.11.2007, §479; SCSL, *Prosecutor v. Brima et al.* (2004-16-A), Jgmt 22.02.2008, §§242-247.

<sup>93</sup> Art.25, 28 ICC Statute; CAT/C/GC/2(24.01.2008), §26.

<sup>94</sup> Art.27 ICC Statute.

<sup>95</sup> Art.33 ICC Statute; Art 2(3)\_UNCAT; CAT/C/GC/2(24.01.2008), §26.

<sup>96</sup> Art.29 ICC Statute. See also: Amnesty International, "Universal Jurisdiction: A Preliminary Survey of Legislation Around the World" (Updated 2012); UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (1974), and Rule 160 ICRC Customary International Humanitarian Law Study.

<sup>97</sup> CAT/C/GC/2(24.01.2008), §§7, 26.

(d) The primary cause for the massive abuse suffered by migrants in all regions of the world, including torture, rape, enslavement, trafficking and murder, is neither migration itself, nor organized crime, or the corruption of individual officials, but the growing tendency of States to base their official migration policies and practices on deterrence, criminalization and discrimination, rather than protection, human rights and non-discrimination.

(e) Migration laws, policies and practices that knowingly or deliberately subject or expose migrants to foreseeable acts or risks of torture or ill-treatment, or that knowingly or deliberately prevent them from exercising ancillary rights designed to protect them against such abuse, are conclusively unlawful and give rise to State responsibility for the ensuing harm, irrespective of the direct attributability of the relevant acts of torture or ill-treatment. Moreover, whenever States fail to exercise due diligence to protect migrants from violations on the part of private actors, to punish perpetrators or to provide remedies, they are acquiescent or complicit in torture or ill-treatment.

(f) The personal involvement of policy makers and other officials, of corporate managers and of private citizens in the shaping, promotion and implementation of such policies and practices may well amount to co-perpetration, complicity or other participation in crimes against humanity or war crimes and, therefore, may give rise to universal and life-long criminal responsibility under applicable customary and treaty law.

(g) While the following recommendations aim to assist States in preventing torture and ill-treatment in the context of migration and ensuring access to protection, redress and rehabilitation for victims, the global governance challenges posed by large and complex migration movements cannot possibly be resolved by individual States alone, but only through multilateral cooperation ensuring international peace and security, human rights, sustainable development, environmental protection and the rule of law in line with the United Nations Sustainable Development Goals (A/RES/70/1). The currently on-going work towards two global compacts on refugees and for safe, orderly and regular migration represents a timely and important opportunity for the international community to make a significant step forward in this respect.

## **B. Recommendations**

65. In addition to the general recommendations of the mandate,<sup>98</sup> and recognizing the impossibility of providing detailed guidance on every relevant aspect of migration policy, the Special Rapporteur would like to offer the following recommendations with a view to ensuring compliance with the prohibition of torture and ill-treatment, avoiding protection gaps and preventing impunity for violations in the context of migration:

(a) **National laws, policies and practices:** In order to protect migrants from exploitation and abuse at the hands of criminals, corrupt officials and private citizens, States should refrain from basing their migration laws, policies and practices, their public communication, and their agreements with other States or non-State actors, including corporate actors, on deterrence, criminalization and discrimination. Instead, States should focus on developing sustainable pathways for safe, orderly and regular migration based on protection, human rights and non-discrimination.

(b) **Duty to respect and ensure:** States further should take all necessary legislative, administrative, judicial and other measures to ensure that migrants will not, as a consequence of their laws, policies, practices or omissions, be subjected or exposed to acts or risks of torture or ill-treatment, or prevented from exercising ancillary rights designed to protect them against such abuse, such as the rights to

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<sup>98</sup> <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>

leave any country or territory, to seek and enjoy asylum and other forms of international protection, not to be detained arbitrarily, and to have individual rights and duties determined in a due process proceeding.

(c) **Migration-related detention:** States should refrain from policies of mandatory, prolonged or indefinite detention of migrants. Any migration-related detention should remain an exceptional measure and should be physically separated from detention related to the criminal justice system. Migrants, especially children, should never be detained solely because of their irregular migration status or the impossibility of their expulsion. The detention of migrants should never be used as a means of deterrence, intimidation, coercion or discrimination but, within the margins set by human rights law, should be subject to the same criteria as are applicable to nationals, including the requirements of legality, necessity, proportionality and, in the exceptional cases warranting administrative or preventative detention, periodic review. Furthermore, detention conditions and treatment must always align with international standards, most notably the "Nelson Mandela Rules", duly taking into account any personal vulnerability due to factors such as migration status, age, gender, disability, medical condition, previous trauma, or membership in a minority group. Independent national, international and non-governmental monitoring mechanisms, including civil society, National Preventive Mechanisms, the SPT, the Special Rapporteur and, in armed conflict, the ICRC, should be given full access to all places where migrants may be detained or accommodated, including extraterritorial vessels, off-shore facilities, and transit zones.

(d) **Due process rights:** States should enable migrants to claim international protection and to challenge any decision as to their detention, treatment or deportation before a competent, impartial and independent judicial or administrative body and in an individualized, prompt and transparent proceeding affording essential procedural safeguards, imperatively including accurate, reliable and objective interpretation services.

(e) **Victims of torture:** States should ensure that migrants having suffered torture or ill-treatment: (a) are identified as early as possible through adequate screening; (b) have access to an independent medical and psychological evaluation of allegations of past trauma in accordance with the Istanbul Protocol, (c) have access to adapted status determination proceedings taking into account their psychological trauma; (d) receive redress, including as full rehabilitation as possible; (e) are not deported to a State or territory where adequate rehabilitation services are not available or guaranteed. Rehabilitation may require the tracing of and reunification with family members, particularly for unaccompanied or separated children and other persons with specific vulnerabilities.

(f) **Data collection and firewalls:** States and other stakeholders working with migrants should develop reliable systems of representative data collection with a view to fostering a better understanding of the prevalence of victims of torture and ill-treatment among various migrant populations, the cause and circumstances of such abuse, the specific needs of the victims and their experience upon return. In doing so, States should establish systems that effectively protect personal rights, including firewalls between data collected for identification and protective purposes and data collected for the purposes of law enforcement and criminal justice.

(g) **Training of officials:** Officials or other persons tasked with the determination of refugee status and/or entitlement to subsidiary international protection should be appropriately trained in the conduct of the relevant assessments and the identification and documentation of signs of torture and ill-treatment, and should be aware that non-refoulement protection specifically against the risk of torture and ill-treatment is absolute and non-derogable and applies to all migrants regardless of their entitlement to refugee status, or of considerations of national or public security.

(h) **Non-refoulement:** States should refrain from any individual or collective deportation, transfer, or summary rejection of migrants without individualized risk

assessment, including through extradition or readmission agreements, diplomatic assurances, border closures or "pushback" operations. Similarly, States should refrain from instigating, encouraging, supporting or otherwise facilitating or participating in "pullback" operations conducted by other States or non-State actors in violation of the right of migrants to seek international protection.

(i) **Duty to prevent, investigate and prosecute:** States should take effective legislative, administrative, judicial or other measures to prevent any act of torture and ill-treatment in any territory under their jurisdiction, including in connection with migrant smuggling or trafficking, regardless of whether the perpetrators are State officials, or criminals, or both. To that effect, States should investigate, prosecute and punish any act of torture or ill-treatment, including attempts, complicity or other participation, and should cooperate to that effect with other States and with relevant international mechanisms and organizations.

(j) **Crimes against humanity and war crimes:** More particularly, States and the ICC-Prosecutor should examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights violations suffered by millions of migrants in all regions of the world, as a consequence of corruption and crime, but also as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement.

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