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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, prepared pursuant to Council resolution 34/19.

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

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

Contents

I. Activities relating to the mandate

1. In 2017, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment participated in a number of thematic consultations, workshops and events on torture in the context of migration, disability-specific forms of detention, the extracustodial use of force and procedural safeguards against torture.

2. From 28 to 30 August 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 report was also opened from 1 to 30 September 2017.

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

4. The Special Rapporteur conducted a country visit to Serbia and Kosovo[1] from 13 to 24 November 2017.[2] The Special Rapporteur will present his report on that mission to the Human Rights Council at its fortieth session.

II. Migration-related torture and ill-treatment[3]

A. Background

5. 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. It is rather a long-standing global governance issue that should be addressed in full compliance with human rights and the rule of law.

6. Today, approximately 258 million people (some 3 per cent of the world population) live outside their State of origin or habitual residence and can therefore be described as "migrants" or "international migrants", regardless of their personal status or motivation.[4] Of these, approximately 10 per cent (some 25 million people) have fled their country as refugees, while an additional 40 million people have been forcibly displaced within their countries and may well become migrants in the future.[5] As political, social, economic and environmental factors continue to drive people away from their homes, these figures are likely to rise.

7. 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 often characterized by lack of

[1] References to Kosovo should be understood to be in the context of Security Council resolution 1244 (1999).

[2] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Preliminary observations and recommendations of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Nils Melzer, on the official visit to Serbia and Kosovo, 13 to 24 November 2017", press release, 27 November 2017.

[3] In the present report, the term "ill-treatment" refers to cruel, inhuman or degrading treatment or punishment other than torture.

[4] Department of Economic and Social Affairs, Population Division, "International Migration Report [Highlights]" (New York, 2017). See also OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (Geneva, 2014).

[5] See www.unhcr.org/globaltrends2016/. See also General Assembly resolution 71/1, para. 20.

transparency and oversight, corruption, violence and abuse. In response to the increasing numbers of such "irregular" migrants[6] arriving at their borders, many States have initiated an escalating cycle of repression and deterrence to discourage new arrivals involving measures such as the criminalization 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 arrivals, whether through border closures, fences, walls or other physical obstacles, through the externalization of their borders and procedures or extraterritorial "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 created space for an almost uncontrolled growth in abusive practices by a wide variety of individuals seeking to exploit irregular migration for personal gain, including corrupt State officials, criminals and private citizens.

8. 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. Besides often lifelong physical effects, torture survivors also suffer disproportionately from post-traumatic stress disorder, anxiety, depression, disassociation, disorientation and self-isolation, with grave long-term consequences. According to a study involving more than 12,000 participants, the confirmed prevalence of torture victims among irregular migrants (depending on the context) can be up to 76 per cent, with the overall average being 27 per cent.[7] Even when widespread underreporting and the focus on recognized refugees and asylum seekers only are discounted, this number can be extrapolated to a staggering 7 million victims of torture, thus raising serious questions about the compatibility of current laws, policies and practices with the universal prohibition of torture and ill-treatment.

9. In addressing this trend, the Special Rapporteur aims to recall the broad range of international legal obligations arising from the prohibition of torture and ill-treatment; 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 make 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 policies and practices discussed are generally well documented in the public domain, and in order to avoid any perception of contextual bias, reference to individual State practices and related jurisprudence will be made only in support of points of law and not, in principle, in support of points of fact.

B. Legal framework

10. The absolute and non-derogable prohibition of torture and ill-treatment has been codified in a wide range of universal and regional instruments, and is today recognized as part of customary international law. Furthermore, the prohibition and its applicability "at any time and in any place whatsoever"[8] can be derived directly from a general principle of law, namely, "elementary considerations of humanity, even more exacting in peace than in war".[9] 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 or ill-

[6] The term "irregular migrants" here includes all migrants failing to comply with the regular domestic immigration legislation of their current transit or destination State.

[7] Sigvardsdotter et al, "Prevalence of torture and other war-related traumatic events in forced migrants: A systematic review", *Journal on Rehabilitation of Torture Victims and Prevention of Torture*, vol. 26, No. 2 (2016), pp. 41–73.

[8] Geneva Conventions (1949), common article 3.

[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

treatment.[10] Today, the prohibition of torture has attained undisputed peremptory status (*jus cogens*).

11. In order to give practical effect to the prohibition of torture, 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 control over any person, wherever located in the world.[11] This duty requires not only the prevention of violations by 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.[12]

12. 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 that person's entitlement to refugee status or subsidiary protection, to another State's jurisdiction or any other territory where there are substantial grounds for believing that that person would be in danger of being subjected to torture or ill-treatment (non-refoulement). On the extraterritorial application of the prohibition of torture and ill-treatment more generally, the Special Rapporteur endorses and reiterates the conclusions reached by the previous mandate holder (see A/70/303).

13. With regard to 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,[13] and that the intentional infliction of severe pain or suffering "for any reason based on discrimination of any kind", including based on migration status, by definition 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.

14. Furthermore, in all their decisions, acts and omissions, States must interpret and perform their international obligations in good faith,[14] namely, 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, States cannot 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.[15]

15. 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.[16] Wherever States receive allegations or otherwise have reasonable grounds to believe that an act of torture or ill-treatment has been committed within their jurisdiction, they have a duty to investigate,

[10] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2.

[11] Convention against Torture, art. 2 (1). See also Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, paras. 3 and 16, and CCPR/C/21/Rev.1/Add.13, para. 10.

[12] Committee against Torture, general comment No. 2, paras. 17–19.

[13] International Covenant on Civil and Political Rights, art. 26. See also Committee against Torture, general comment No. 2, paras. 7 and 20.

[14] Vienna Convention on the Law of Treaties, arts. 26 and 31 (1).

[15] See Universal Declaration of Human Rights, arts. 8–10, 13 (2) and 14 (1). See also International Covenant on Civil and Political Rights, arts. 9, 12 (2) and 13–14.

[16] Convention against Torture, art. 14.

prosecute and punish the perpetrators.[17] In the case of "serious" (namely, "gross or systematic") breaches of the peremptory prohibition of torture in one State, all other States are not only entitled but also legally obliged to cooperate to bring such abuse to an end through any lawful means at their disposal; not to recognize as lawful any situation created by such violations; and not to aid or assist in maintaining any such situation.[18] Depending on the context, the perpetration of or participation in acts of torture or 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

16. 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 (A/HRC/17/33, paras. 12, 19).[19] States detain migrants in both criminal and administrative detention regimes that aim to criminalize and punish breaches of immigration laws or, respectively, to carry out administrative procedures relating to arrival, asylum, overstay, residence or return.

1. Deprivation of liberty

17. In general terms, "deprivation of liberty" or "detention" includes any placement of persons in public or private custodial settings that they are not permitted to leave at will.[20] In practice, such settings may include prisons or purpose-built detention facilities, closed reception or holding centres, shelters, guesthouses or 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. In practice, the possibility of leaving must not be a merely theoretical option to be exercised at some point in the future, but also practicable and available at any time. For example, holding migrants at an international border, in an offshore facility or in an airport transit zone and refusing them 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.

2. Treatment and conditions of detention

18. Although any detention of migrants must take place in "appropriate, sanitary, non-punitive facilities" and not in prisons,[21] in reality the opposite is often the case. Numerous press and stakeholder reports have described the appalling physical and hygiene conditions in which migrants are detained in all regions of the world, including in offshore 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, which may include acts of torture or ill-treatment, systematic extortion, sexual abuse and even enslavement. Even torture and ill-treatment of migrant children, ranging from various forms of sexual abuse to being tied up, gagged, beaten with sticks, burned with cigarettes, given electric shocks, or placed in solitary confinement, causing severe anxiety and mental harm, have been reported as widespread (A/HRC/28/68, para. 60).

[17] Ibid., arts. 4–9 and 12–13.

[18] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), arts. 40 (2) and 41 (1)–(2). See also General Assembly resolution 60/1, paras. 138–139.

[19] See also United Nations High Commissioner for Refugees (UNHCR), "Global Strategy: Beyond Detention 2014–2019", Geneva, August 2016.

[20] Optional Protocol to the Convention against Torture, art. 4.

[21] Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 18.

19. Any detention regime that, 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 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), is incompatible with the prohibition of torture and ill-treatment, regardless of economic or budgetary considerations.[22] The threshold of prohibited ill-treatment generally will be reached sooner with regard to migrants with an irregular status or with other vulnerabilities.[23] 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, including based on immigration status,[24] 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

20. Another cause for concern is 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 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 or 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 or its duration. In other contexts, where unauthorized entry is criminalized, pretrial detention is often automatically imposed until the conclusion of legal proceedings, which regularly leads to prolonged if not indefinite detention. In either case, 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 requests and their "voluntary" return being the only realistic prospect of release and family reunification. Also, in many contexts throughout the world, migrant children are 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 in extraterritorial enclaves.

4. Arbitrariness of detention based solely on migration status

21. 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.[25] Provided that these generic conditions are met on an individual basis, asylum 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

[22] See for example European Court of Human Rights, *MSS v. Belgium and Greece*, Application No. 30696/09, judgment 21 January 2011, para. 233; *Mukong v. Cameroon* (CCPR/C/51/D/458/1991), para. 9.3; and Inter-American Court of Human Rights, *Suárez-Rosero v. Ecuador*, judgment 12 November 1997, para. 91.

[23] European Court of Human Rights, *Tarakhel v. Switzerland*, Application No. 29217/12, judgment 4 November 2014, paras. 118–119.

[24] European Court of Human Rights, *Hode and Abdi v. UK*, Application No.22341/09, judgment 6 November 2012, para. 56.

[25] Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, art. 3, para. 12.

against national security. The decision must take into account 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.[26]

22. On the particular issue of migration-related detention of children, it should be noted 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.[27] Accordingly, the detention of children on the sole basis of their own or their parents' irregular migration status has authoritatively been found to be arbitrary (A/HRC/39/45, annex, para. 40).[28]

23. More generally, breaches of immigration laws are essentially administrative in nature and do not constitute crimes against persons, property or national security that might justify or require sanctions involving the deprivation of liberty.[29] Moreover, the Convention relating to the Status of Refugees 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.

24. In sum, therefore, the margins of permissibility of migration-related detention are narrow, in terms of both substantive justification and duration, and the mere fact that detention is authorized by national 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 (A/HRC/39/45, annex, para. 10).

5. Relationship between arbitrariness and torture or ill-treatment

25. 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, in the case of *USA v. Iran* (judgment of 24 May 1980), 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". Moreover, experience shows that any form of arbitrary detention exposes migrants to increased risks of torture and ill-treatment.

26. The Human Rights Committee has repeatedly considered that the combination of the arbitrary character of detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to detainees and the difficult conditions of detention cumulatively inflict serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.[30] Indeed, the experience of being subjected to detention that is neither necessary nor proportionate, particularly in conjunction with its prolonged and potentially indefinite duration, and with the absence of any effective legal

[26] Human Rights Committee, general comment No. 35, para. 18.

[27] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families / No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 10.

[28] See Inter-American Court of Human Rights, advisory opinion OC-21/14, 19 August 2014, para. 154.

[29] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, paras. 5 and 24; see also A/HRC/23/46, para. 47.

[30] *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 10.6.

remedy has been shown to add significant mental and emotional stress to the already extremely vulnerable situation of irregular migrants, leading to many cases of reported 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.

27. 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 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 a situation of increased vulnerability, such as children, women, older persons, persons with disabilities, medical conditions or torture trauma, or members of ethnic or social minorities, such as lesbian, gay, bisexual, transgender or intersex persons. In particular, 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 requirements of necessity and proportionality and, even in case of short-term detention, may amount to ill-treatment (A/HRC/28/68, para. 80).[31]

28. Detention based solely on migration status, as such, can even amount to torture, particularly where it is intentionally imposed or perpetuated for such purposes 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.[32]

D. Smuggling and trafficking of migrants

29. Much could be said about the often harsh and arduous living conditions to which millions of migrants are exposed in transit and destination States throughout the world, especially those finding themselves in an irregular situation. The difficulties and threats endured 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 in collusion with State officials. For the purposes of the present report, the Special Rapporteur examines below two areas of particularly tragic practical relevance for the prohibition of torture and ill-treatment, namely torture and ill-treatment inflicted in connection with the activities of smuggling networks and, respectively, in connection with human trafficking, including exploitation for ransom.

1. Torture and ill-treatment relating to smuggling schemes

30. In the course of his consultations and country visits, the Special Rapporteur 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 pathway is 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, complicit border officials turn a blind eye to clandestine entries in return for a share of the smuggling fees paid by migrants. In the enforcement of this business model, migrants seeking to cross the border without a smuggling arrangement are either turned away or, if they are caught attempting to cross the border clandestinely,

[31] See European Court of Human Rights, *S.F. and Others v. Bulgaria*, Application No. 8138/16, judgment 7 December 2017.

[32] Committee against Torture, general comment No. 4, art. 3, para. 14.

severely beaten, robbed of their possessions and forcibly removed back across the border, without any assessment of their protection needs. While those who pay smuggling fees are generally allowed irregular entry at first, many are subsequently stopped by police patrols waiting for them deeper inside the territory at "meeting points" agreed with the smuggler networks then returned to the border for immediate expulsion — again, without any assessment of their protection needs.

2. Human trafficking, including exploitation for ransom

31. One of the greatest risks run by migrants, particularly unaccompanied children, single women and vulnerable men, is that of human trafficking. Trafficking is possible at any stage of the migrant journey and for a wide variety of purposes, such as forced labour, slavery or servitude, all types of sexual exploitation, forced adoption, child soldiering, begging, criminal activities and, arguably, also exploitation for ransom. Children account for approximately 28 per cent of trafficking victims globally; migrant children are particularly vulnerable to violence, abuse and enslavement.[33]

32. Migrant women and girls are often subjected to sexual abuse, particularly when travelling alone. In some contexts, the probability of sexual abuse for single migrant women and girls is reported to be as high as 75 per cent, ranging from sexual acts being demanded as "payment" for passage, food, water or shelter, to gang rape, sexual slavery and forced prostitution (A/HRC/31/57, para. 31). Lesbian, gay, bisexual, transgender and intersex migrants are also particularly vulnerable to discrimination, violence, sexual abuse and humiliation. In many contexts, irregular migrants are abducted for ransom. Hostages may be deprived of food, water or sleep, or be subjected to forced labour, sexual abuse or torture until their family pays a large ransom, often after being forced to witness the abuse of their loved ones over the telephone.[34] In the context of trafficking, such abuse is practiced systematically for the purpose of exploitation, including exploitation for ransom. Migrants often also become victims of trafficking for the purpose of organ removal, for medical transplantation. Trafficking in human organs and the trafficking of persons for the purpose of organ removal are activities aimed at a global black market controlled by transnational criminal networks, 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, with close links to the police or organized crime.[35]

33. All varieties of human trafficking activity 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 instrumentalized for intermediate purposes, such as coercion, intimidation, punishment or discrimination, all of which are defining elements of torture. Should one of these elements be missing, human trafficking generally meets the threshold of other ill-treatment. Therefore, where human trafficking is carried out by or at the instigation or with the consent or acquiescence of State officials, it amounts to torture and ill-treatment as defined in human rights law.[36] In practice, perpetrators of torture and ill-treatment against migrants include not only smugglers and traffickers but also border guards, militias and the police; and in various contexts, there is evidence of corruption and collusion between State officials and traffickers.

[33] United Nations Children's Fund and International Organization for Migration, *Harrowing Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking-and-exploitation*, September 2017, pp. 9, 21.

[34] United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2016*, Vienna, p. 62.

[35] UNODC, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal*, Vienna, 2015, pp. 30–37.

[36] Organization for Security and Cooperation in Europe, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment*, Vienna, 2013, pp. 20–27; see also A/HRC/7/3, paras. 56–58.

3. Relation to State policies of deterrence and criminalization

34. The business models of trafficking and abusive smuggling networks have entailed a significant increase in the degree of violence suffered by migrants in all regions of the world. The Special Rapporteur cannot stress enough, however, that this trend is a direct consequence of the increasingly restrictive, punitive and deterrence-based migration laws, policies and practices adopted by States that have deprived millions of migrants of safe and regular migration pathways and pushed them into illegality, thus effectively preventing them from reporting such abuse to law enforcement authorities and from seeking protection.

35. In order to put an end to the 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 are not its root cause. In the view of the Special Rapporteur, the only definitive way to dismantle the business models of migrant trafficking and abusive smuggling 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.

E. Non-refoulement

36. 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"[37] 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.[38] The fault of refoulement lies in the deporting State taking action which it "knew or should have known"[39] 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.[40]

37. Non-refoulement protection specifically against the risk of torture and ill-treatment is absolute and non-derogable, and applies in all situations, including war or states of emergency, to all human beings without discrimination and, in particular, regardless of their entitlement to refugee status. While non-refoulement protection under refugee law extends only to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no such limitation or exception is permissible where deportation would expose a person to a real risk of torture or ill-treatment. As an intrinsic component of the peremptory prohibition of torture, the prohibition of refoulement overrides not only national immigration laws but also contradicting international obligations, such as those of extradition treaties.[41]

38. Consequently, States must inform concerned migrants of any intended deportation in a timely manner and allow them to appear in person before a competent, impartial and independent judicial or administrative body in order to challenge the removal decision and

[37] The term "deportation" refers here to any removal of persons from the jurisdiction of a State without their genuine, fully informed and valid consent, such as in the case of expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the border, pushback or any other similar act. See also Committee against Torture, general comment No. 4, art. 3, para. 4.

[38] Convention against Torture, art. 3 (1); see also Committee against Torture, general comment No. 4, art. 3; Human Rights Committee, general comments No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 9, and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

[39] See *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.4; sea also European Court of Human Rights, *Hirsi Jamaa et al. v. Italy*, Application No. 27765/09, judgment 23 February 2012, para. 131.

[40] Committee against Torture, general comment No. 4, art. 3, paras. 11, 30. See European Court of Human Rights, *J.K. and Others v. Sweden*, Application No. 59166/12, judgment 23 August 2016, para. 80.

[41] Committee against Torture, general comment No. 4, art. 3, para. 25.

to seek "international protection" [42] prior to the envisaged deportation, and in an individualized, prompt and transparent proceeding affording interpreter services and all other essential procedural safeguards, including the suspensive effect of an appeal. [43] Collective deportations without such individual examination are irreconcilable with the prohibition of refoulement.[44] The same applies to "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.

39. In determining whether there is a real risk of torture or ill-treatment in an individual case, the competent authorities are to take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[45] Thus, before expelling a person, States must examine all available evidence and make an individual assessment, taking into account both a wider range of personal factors and the general situation of human rights in the destination State or territory. For the purposes of non-refoulement, any torture or ill-treatment to which the person concerned or his or her family were exposed in the past or would be exposed to upon deportation constitutes an indication that the person is in danger of being subjected to torture.[46]

40. 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 who have experienced psychological trauma. Whenever the applicant makes an arguable case of past torture, the State will have to examine the claim in accordance with recognized forensic standards, such as those provided for in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).

41. The mere existence of national laws or the ratification of human rights treaties does not disprove an individual risk of torture or ill-treatment;[47] rather, 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 risk needs to be individualized, such as a personal stigmatization or membership in a political party, ethnic group or social minority, but it can also be found in a general situation of violence exposing an individual to a real risk of ill-treatment.[48] Similarly, systemic shortcomings have been found to give rise to a risk of "indirect" refoulement (also called "chain refoulement") by which the receiving State would further expel a deportee to yet another State or territory without a sufficient assessment of the risk prevalent at the final destination.[49]

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[42] "International protection" here refers to protection not only under refugee law but also under human rights law and, if applicable, international humanitarian law.

[43] Committee against Torture, general comment No. 4, art. 3, para. 13; see also *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.8.

[44] Committee against Torture, general comment No. 4, art. 3, para. 13. See OHCHR, "Expulsions of aliens in international human rights law", discussion paper, September 2006 (available from www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf), p. 15, and Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4.

[45] Convention against Torture, art. 3.2.

[46] Committee against Torture, general comment No. 4, art. 3, paras. 28–29.

[47] European Court of Human Rights, *Hirsi Jamaa v. Italy*, Application No. 27765/09, judgment 23 February 2012, para. 128.

[48] European Court of Human Rights, *Ergashev v. Russia*, Application No. 49747/11, judgment 16 October 2012, and *Sufi and Elmi v. UK*, Applications Nos. 8319/07 and 11449/07, judgment 28 June 2011, para. 217.

[49] European Court of Human Rights, *MSS v. Belgium and Greece*, Application No. 30696/09, judgment 21 January 2011, paras. 357–359. See also Committee against Torture, general comment No. 4, art. 3, para. 12, and Human Rights Committee, general comment No. 31, para. 12.

42. States must interpret and apply the principle of non-refoulement in good faith; they may therefore not pass laws or regulations, engage in policies or practices, or conclude agreements with other States or non-State actors that would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement that 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 (A/HRC/25/60, paras. 40–58). While the prohibition of refoulement is clear and straightforward, several practices introduced by States as part of recent migration policies indicate a deliberate erosion of good-faith compliance with this cornerstone protection against torture and ill-treatment.

1. Deliberately harsh reception conditions

43. States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to "voluntarily" return to their country of origin, regardless of their need for non-refoulement protection. This approach may include measures such as the criminalization, 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. Deliberate practices such as these may amount to "refoulement in disguise" and are incompatible with the principle of good faith.

2. Readmission agreements

44. Readmission agreements are bilateral agreements that allow States to return migrants to a "safe" country, which, in turn, is obliged to accept (readmit) the returnees. Readmission agreements establish in advance a procedure allowing the expulsion of migrants without an individualized risk assessment based on the circumstances obtaining at the time. By definition, therefore, readmission agreements circumvent due process rights and fall short of the procedural precautions States should 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 the absence of an individualized risk assessment for each migrant, deportation decisions taken on the basis of readmission agreements amount to collective expulsion, which is incompatible with the prohibition of refoulement.

3. Diplomatic assurances

45. Diplomatic assurances are bilateral policy instruments by which a deporting State obtains assurances from the receiving State that 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 memorandums of understanding. Even where such assurances are binding and provide the deporting State with monitoring and verification rights, the principal interest of the deporting State is normally to continue deportations in the future, which makes the identification of violations or enforcement action extremely unlikely. In practice, the enforceability or compulsive force of diplomatic assurances depends entirely on the mutual self-interests of the States involved in the light of their specific political, economic or military relations.

46. Diplomatic assurances have been widely criticized for being used as a loophole undermining the principle of non-refoulement, including by the previous mandate holder (see A/70/303, para. 69), the Committee against Torture[50] and civil society,[51] and are highly

[50] See *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.4, and Committee against Torture, general comment No. 4, art. 3, para. 20.

questionable from both legal and policy perspectives. First, diplomatic assurances cannot exempt 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 is seriously concerned 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. 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 conclusively to disprove a "real risk" of torture or ill-treatment.

47. Second, even if diplomatic assurances were to be faithfully implemented by the receiving State, they reflect the expectation that the receiving State will comply only selectively with the prohibition of torture and ill-treatment, and the deporting State's acquiescence in this regard, thus severely jeopardizing one of the most fundamental norms of international law 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, while 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.

48. In sum, the Special Rapporteur expresses his 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 the required protection.

4. Direct arrival prevention: "pushbacks" and border closures

49. Direct arrival prevention measures are carried out directly by the destination State and can have an active ("pushbacks") or passive (border closures) nature. Pushbacks are proactive operations aimed at physically preventing 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. 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 at or close to an international border, and usually involve the threat or actual use of force by border officials 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.

50. The same purpose, albeit through passive means, is pursued with border closures that prevent unauthorized border crossing by means of 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 the risk of trafficking.

51. International borders are not exclusion or exception zones for human rights obligations. In particular, under both refugee law and human rights law, the principle of

[51] See Amnesty International, *Dangerous Deals: Europe's Reliance on "diplomatic Assurances" against Torture*, London, 2010, and Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, 2005.

non-refoulement applies at all times, even when States operate or hold individuals extraterritorially, including on the high seas.[52] 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 the life, physical integrity or liberty of that person would be threatened.[53] 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, such measures arguably bring affected migrants within the jurisdiction of the operating State for the purposes of prohibiting refoulement.

52. 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 are therefore incompatible with the prohibition of refoulement. In displaying complete indifference to the grave risks to which some of the affected migrants may be exposed, pushbacks and border closures blatantly negate their human dignity in a manner that should be regarded as inherently degrading.

53. 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 subjected to torture or ill-treatment, dispensed 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. The use of force for no purpose other than to deter or to prevent persons from entering a State's territory generally cannot be regarded as lawful, necessary or proportionate, and may therefore well amount to ill-treatment or even torture (A/72/178, para. 62 (c)).

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

54. "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 the behalf of destination States desiring to prevent migrant arrivals without having to engage their own border authorities in unlawful pushback operations (indirect arrival prevention).

55. 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 or ill-treatment, any participation, encouragement or assistance provided by destination States for such operations would be irreconcilable with a good-faith interpretation and implementation of the prohibition of torture and ill-treatment, including the principle of non-refoulement.[54] As part of jus cogens, these fundamental provisions override 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, to

[52] UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 43. See CCPR/C/21/Rev.1/Add.13, paras. 10, 12.

[53] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II (3). See also Committee against Torture, general comment No. 4, art. 3, para. 4.

[54] See Vienna Convention on the Law of Treaties, arts. 26, 31(1). See also Charter of the United Nations, arts. 1(3), 2(1), and Nora Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries", *European Journal of International Law*, vol. 27, No. 3, (August 2016), pp. 596–597, 606–607, 614–616.

prevent them from embarking on such "unsafe journeys", or to "defeat the business 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 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.

56. States are responsible for internationally wrongful acts or omissions that are legally attributable to them, whether through direct imputation, joint responsibility or complicity, and regardless of the lawfulness of such acts or omissions under national law. 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, but also for knowingly aiding, assisting, directing, controlling or coercing other States in committing internationally wrongful acts.[55] 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 incur legal responsibility for these violations. This also applies if such operations are conducted by non-State actors under their instructions and control.

57. In sum, 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; rather, 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

58. 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 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 be described as systematic.

59. In the light of the scale and gravity of these violations and their causal connection to the policies, practices and failures of States, it should be recalled that widespread or systematic breaches of the most fundamental human rights engage not only the legal responsibility of States but may also give rise to 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 Rome Statute of the International Criminal Court and in many national legal systems.[56]

60. Significantly, criminal "intent" does not require that torture and ill-treatment be the desired purpose or outcome of a law, policy or practice. Under article 30 of the Rome 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, whereas under customary international law that threshold is even lower and only requires the perpetrators' awareness of "a substantial likelihood" that torture or ill-treatment would occur as a consequence of their conduct.[57] Moreover, crimes against humanity and

[55] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), arts. 1–11 and 16–19.

[56] Rome Statute of the International Criminal Court, arts. 7 (1) and 8. For a database of relevant national law and jurisprudence, see www.legal-tools.org/.

[57] See Extraordinary Chambers in the Courts of Cambodia, *The Prosecutor v. Kaing Guek Eav alias Duch*, No. 001/18-07-2007-ECCC/TC, judgment 26 July 2010, para. 481; International Criminal Tribunal for Rwanda, *The Prosecutor v. Nahimana et al*, case ICTR-99-52-A, judgment 28 November

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.[58] 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[59] nor superior orders[60] provide immunity from prosecution, and both war crimes and crimes against humanity are subject to universal jurisdiction and exempt from statutes of limitation.[61]

61. These observations bring within the ambit of universal criminal liability not only officials, employees, contractors or private individuals directly inflicting torture and ill-treatment, but potentially also lawmakers, policy, judicial officials, military and civilian superiors and corporate managers responsible for shaping, organizing, assisting, promoting and implementing laws, policies and practices, and also for making arrangements with other States and non-State actors that 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 that they knew, or should have known, were being committed or likely to be committed by their subordinates.

III. Conclusions and recommendations

A. Conclusions

62. **On the basis of the observations and considerations made above, and informed by broad stakeholder consultations, the Special Rapporteur, to the best of his personal judgment and conviction, comes to the conclusions set out below.**

63. **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.**

64. **The Special Rapporteur salutes the broad range of individual and collective efforts made 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.**

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

66. **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, nor the corruption of individual officials, but**

2007, para. 479; and Special Court for Sierra Leone, *The Prosecutor v. Brima et al*, case No. SCSL-2004-16-A, judgment 22 February 2008, paras. 242–247.

[58] See Rome Statute, arts. 25 and 28, and Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 26.

[59] Rome Statute, art. 27.

[60] See ibid., art. 33; Convention against Torture, art. 2 (3); and Committee against Torture, general comment No. 2, para. 26.

[61] See Rome Statute, art. 29; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross (Cambridge, United Kingdom, Cambridge University Press, 2005), Rule 160.

the growing tendency of States to base their official migration policies and practices on deterrence, criminalization and discrimination rather than on protection, human rights and non-discrimination.

67. **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, regardless 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 by private actors, to punish perpetrators or to provide remedies, they are acquiescent or complicit in torture or ill-treatment.**

68. **The personal involvement of policymakers 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 criminal responsibility under applicable customary and treaty law.**

69. **While the recommendations below are aimed at assisting 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 accordance with the Sustainable Development Goals. The currently ongoing 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 take a significant step forward in this respect.**

B. Recommendations

70. **In addition to the general recommendations made by the mandate holder,**[62] **and recognizing that it is not possible to provide detailed guidance on every relevant aspect of migration policy, the Special Rapporteur makes the recommendations below 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.**

71. **In order to protect migrants from exploitation and abuse, including 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.**

72. **With regard to the duty to respect and ensure, States should take all legislative, administrative, judicial and other measures necessary 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 leave any country or territory, to seek and enjoy asylum and other forms of international protection, not to be detained arbitrarily, and to have their individual rights and duties determined in a due process proceeding.**

[62] See www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf.

73. **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 relating to the criminal justice system. Migrants, especially children, should never be detained solely because of their irregular migration status or because they cannot be expelled. 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 those 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 should always comply with international standards, in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), taking duly 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 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur and, in cases of armed conflict, the International Committee of the Red Cross, should be given full access to all places where migrants may be detained or accommodated, including extraterritorial vessels, off-shore facilities and transit zones.**

74. **With regard to due process rights, States should allow migrants to claim international protection and to challenge any decision relating 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.**

75. **States should ensure that migrants having suffered torture or ill-treatment (a) are identified as early as possible through adequate screening; have access to an independent medical and psychological evaluation of allegations of past trauma, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol); have access to adapted status determination proceedings, taking into account their psychological trauma; receive redress, including as full rehabilitation as possible; and 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.**

76. **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 in 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, such as firewalls between data collected for identification and protective purposes and data collected for the purposes of law enforcement and criminal justice.**

77. **Officials and 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.**

78. **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.

79. **With regard to the 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, 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.**

80. **More particularly, States and the prosecutor from the International Criminal Court should examine whether investigations into 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.**