**CMW: Draft General comment No. 5 (2020) on migrants’ rights to liberty and freedom from arbitrary detention**

**Comments by Special Rapporteur on trafficking in persons, especially women and children,**

**Siobhán Mullally**

Responding to the call for submissions by the Committee on the Rights of Migrant Workers regarding their Draft General comment No. 5 (2020) on migrants’ rights to liberty and freedom from arbitrary detention, the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, wishes to thank the Committee for the opportunity to make suggestions to the draft text. She welcomes the initiative of the Committee which also highlights one of the key issues in the implementation of a human rights and victim centred approach to combatting trafficking, namely the application of the non-punishment principle and the prohibition on detention of victims of trafficking.

The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR)[[1]](#footnote-1) recognised for the first time both that trafficking in persons could be aimed at the exploitation of the victims’ involvement in unlawful activities but also that victims might commit unlawful acts in the context of their status as trafficking victims. The Recommended Principles and Guidelines state, therefore, that such victims must be provided with protection, not punishment, for unlawful acts committed as a direct consequence of being trafficked.[[2]](#footnote-2) Recommended Principle 7, concerning protection and assistance to victims of trafficking, provides that “trafficked persons shall not be *detained, charged or prosecuted.*”[[3]](#footnote-3) Concerns have also been expressed by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) in relation to victims of trafficking in ‘transit zones’ in Hungary, and the failure to comply with obligations of assistance to victims in specialised accommodation facilities. [[4]](#footnote-4)

The 2014 Protocol to the ILO Forced Labour Convention (no.29), 1930, provides that States “take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties” on victims of forced or compulsory labour.

The Committee on the Rights of the Child, in its General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, stated that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.[[5]](#footnote-5)

In 2018, 11 UN Special Procedures mandate holders, including the UN Special Rapporteur on Trafficking in Persons, especially women and children, issued a Joint Statement addressed to the US Government, “The best interests of the child should be the paramount consideration, including in the context of migration management, and children should never be detained for reasons related to their own or their parents’ migration status”.[[6]](#footnote-6)

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that “within the context of administrative immigration enforcement … the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”[[7]](#footnote-7)

The obligation of non-punishment applies in the context of detention. Persons who are presumed or identified as trafficking victims must be removed from detention as soon as possible and granted appropriate assistance and protection in specialised facilities. The non-punishment principle, ensures that victims of trafficking are not punished and/or detained for crimes that they were compelled to commit. It is central to recognising that victims and survivors are rights holders, and that the obligation of non-punishment applies without discrimination. To combat impunity, and to ensure accountability for the serious human rights violation that is trafficking, we need to ensure that we are targeting the perpetrators of the crime of trafficking, not the victims. Guarantees of non-punishment will also facilitate victims of trafficking participating in criminal proceedings and supporting criminal investigation processes, without fear of prosecution. As such, the non-punishment principle is also critical to ensuring accountability and to combating impunity.

The Special Rapporteur will also like to make specific suggestions to the text of the draft general comment:

* Regarding **paragraph 4,** the Special Rapporteur would like to suggest to add a specific reference to victims of trafficking among the other individuals in vulnerable situations.
* Regarding **paragraph 5** the Special Rapporteur suggests adding a reference to the misuse of anti-trafficking measures as a means to control and criminalize migration flows. On the contrary, the Special Rapporteur has continuously warned the international community that restrictive migration policies exacerbate or even create vulnerabilities to trafficking. The increasing trend towards criminalization of migration and related repressive policies is one of the driving factors of trafficking. See for example A/HRC/44/45 para. 6.
* In **paragraph 6**, the Special Rapporteur suggests, following the definition of trafficking in persons as in article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, to include all types of exploitation, exploitation including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
* Concerning **paragraph 13**, the Special Rapporteur suggests to have instead of some of the types of names given to detention centers, a non-exhaustive list of examples in which migrants, including victims and potential victims of trafficking may be placed or de facto restricted of their movement. Also, the Special Rapporteur has noted in her reports that in a number of countries, trafficked persons are detained in so-called closed shelters. While, this is intended as part of an assistance package, the Special Rapporteur noted that no other victims of crime are subjected to such restrictive measures for their own protection. See A/HRC/44/45 para. 7. It is also important to note the guarantee of non-discrimination in international human rights law, and its relevance to all actions to counter trafficking in persons.
* It should be noted that concern has also been expressed by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) about the use of ‘closed’ reception centre for child victims of trafficking as protection measures, citing paragraph 155 of the Explanatory Report to the Convention on Action against Trafficking in Human Beings, and Article 37(b) of the UN Convention on the Rights of the Child. [[8]](#footnote-8)
* In **paragraph 15**, similarly to the remark above, the Special Rapporteur suggests, adding after immigration detention includes “at a minimum” to underline the non exhaustive nature of the list of places.
* Regarding **paragraph 32**, in guaranteeing access to other forms of international protection processes, the Special Rapporteur suggests adding that States, whether that is the State at which territory’s migrants arrived, or the State that otherwise has jurisdiction over them, or if States reach agreements to transfer asylum seekers or other migrants who could benefit from other type of international protection process, for the processing of their cases, that they take into account when signing such agreements that States cannot dismiss their international obligations also in relation to the obligation of identification and protection of victims and potential victims of trafficking and should proactively search for vulnerabilities of migrants to risk of trafficking.
* In **paragraph 35**, the Special Rapporteur suggests adding to the human rights capacity building of personnel in detention centres, that the general comment includes also a reference to the need of personnel to be trained in detection of vulnerabilities to trafficking, in order to be able to early identify and refer to appropriate assistance services victims of trafficking, who should not be held in detention.
* Concerning **paragraph 37**, the Special Rapporteur suggests adding a reference to the use of profiling techniques in the identification of victims of trafficking through the use of standardized sets of indicators, which might not be comprehensive and might lose sight of other types of vulnerabilities not specifically listed. Excessive profiling can further stigmatize target groups. For the purposes of the present draft comment, the excessive use of profiling techniques may fail in the identification of victims not falling under the profiled categories and are at higher risk of being held in detention as migrants in irregular situation.
* In **paragraph 40**, the Special Rapporteur suggests to specifically add the increased vulnerability of migrants to trafficking in persons as a result of the criminalization of migration and security approach taken by many governments.
* **Paragraph 42** of the draft general comment brings as well an issue which has been a concern to the Special Rapporteur, the linkage between criminal proceedings and migratory process, and in the particular case of trafficking in persons, the link between criminal proceedings and formal identification of victims and access to support and assistance. The Special Rapporteur has continuously advocated for the establishment of firewalls between border police and/or law enforcement agents dealing with migratory issues with labour inspectorates, and other agencies or social actors who may be able to determine a person status as a victim of trafficking. See for example A/HRC/38/45 or more recently A/75/169.
* After **paragraph 53**, within section E. Principle of non-detention of persons in vulnerable situations, the Special Rapporteur suggests adding a new paragraph on the principle of non-punishment of victims of trafficking. Based on international and regional legal obligations, the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR) and the 2013 OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, the Special Rapporteur suggests to add a paragraph that summarizes the key points in the application of the non-punishment principle as lay out in the position paper published by the previous mandate holder, available at <https://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> , and in particular that: 1. It is critical to ensure that in all cases the non-punishment provision is practically applied from the starting point of the detection of the victim by the authorities in order to afford the trafficking victim effective and full protection; 2. In this regard, and a fortiori, States are recommended to introduce a mechanism operating at a very early stage in the investigation: in fact, non-punishment should be understood as a compulsory tool that is required to be applied by all the domestic authorities, whether investigative, prosecuting and judicial authorities - including the police, immigration and border officials, labour inspectorate and any other law enforcement agency or officials - when a situation triggering the application of non-punishment is first identified; and that 3. Such situation includes detention of a victim or potential victim of trafficking for irregular entry in the territory of the State or other migratory status related offences.
* In **paragraph 62** the Special Rapporteur would like to suggest to include clarifying language regarding the adequacy of alternatives to detention for persons in vulnerable situations and in particular, victims of trafficking. Victims or potential victims of trafficking should not be place under detention nor an alternative to it, they should be promptly identified and referred to the appropriate services for early support and long term assistance. In addition victims of trafficking should have access to residence status that is not conditional and not based on short-term permits, as recognized in several reports of the Special Rapporteur, in particular, A/75/169, para.22.
* Regarding the statement made by the Committee in the present draft to access to judicial guarantees, the Special Rapporteur would like to further reinforce this statement with the recommendations made by the mandate, in particular that States must ensure that trafficked and exploited persons can appeal against decisions of the competent authorities regarding the denial of early support and residence permits and facilitate their access to justice and remedies. In accordance with the principle of due diligence, States must ensure that trafficked persons are entitled to claim the full spectrum of remedies for human rights violations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to claim remedies, including compensation, should be ensured to all exploited persons through criminal, civil, administrative or labour law proceedings, irrespective of their presence or legal status in the country, including by providing for free legal counselling and representation, speeding up related procedures and establishing public funds for compensation, see A/75/169 para. 71.
* Finally, concerning **paragraph 81**, the Special Rapporteur suggests including, in addition to immigration proceedings, any other decision regarding also other forms of international protection.
1. Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002) (hereinafter “OHCHR Principles”). [↑](#footnote-ref-1)
2. *Ibid.*, Recommended Principle 7. [↑](#footnote-ref-2)
3. OHCHR Principles (above n. 5), Recommended principle 7. [↑](#footnote-ref-3)
4. Report on Hungary under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings [↑](#footnote-ref-4)
5. para. 61 [↑](#footnote-ref-5)
6. June 22 2018 UN experts to US: “Release migrant children from detention and stop using them to deter irregular migration”, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E [↑](#footnote-ref-6)
7. See A/HRC/28/68, para. 80 [↑](#footnote-ref-7)
8. GRETA stresses that, in line with Article 12.7 of the Convention, the accommodation of presumed child victims of trafficking has to be appropriate in terms of their specific needs. GRETA notes that the placement of a child in an institution pursuant to section 4-29 of the Child Welfare Act in practice amounts to detention and recalls paragraph 155 of the Explanatory Memorandum to the Convention and Article 37(b) of the UN Convention on the Rights of the Child, according to which any detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time. GRETA considers that the principle of the best interest of the child should be fully respected at all times and that the Norwegian authorities should keep under review the application of section 4-29 of the Child Welfare Act. *GRETA(2017)18 Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway: Second Evaluation Round*, at paragraph 117 [↑](#footnote-ref-8)