Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on trafficking in persons, especially women and children

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(Please use this reference in your reply)

15 December 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants; Working Group on Arbitrary Detention; Special Rapporteur on contemporary forms of slavery, including its causes and consequences and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 52/20, 51/8, 51/15 and 53/9.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 60 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights law and standards.

In this connection, we would like to bring to the attention of Member States of the European Union information we have received concerning **the proposed New Pact on Migration and Asylum of the EU (hereinafter the Pact), and other relevant legislative proposals contained in the new Migration and Asylum Package which may have negative impact on the human rights of migrants and asylum seekers, including children and those in vulnerable situations**.

In this communication, we do not aim at providing a comprehensive analysis of the Pact and its compatibility with international human rights law and standards.

Delegation of the European Union

Ms. Ursula von der Leyen, President of the European Commission
Ms. Roberta Metsola, President of the European Parliament;
Mr. Charles Michel, President of the European Council

We focus on those aspects of the reform proposals falling within the scope of the mandates entrusted to us by the Human Rights Council with the aim of highlighting major issues.

According to the information received:

On 23 September 2020, the European Commission unveiled a new Migration and Asylum Package[1] introducing a common EU framework on migration and asylum to harmonize approaches among EU Member States. The package includes the EU Pact on Migration and Asylum, a roadmap for its implementation, five legislative proposals (namely Screening Regulation; amended Asylum Procedure Regulation; Crisis Regulation; Asylum and Migration Management Regulation; and amended Eurodac Regulation), four Recommendations (namely on situations of crisis; resettlement; humanitarian admission and complementary pathways; search and rescue operations by private vessels; and facilitation of irregular entry), and Guidance on various aspects of the Pact.

The proposed package requires the endorsement by Member States in the Council of the EU and the enaction of the proposed legislation by the European Parliament. The negotiations on the Pact are ongoing. The adoption of the complete package is expected by April 2024.

"Legal fiction of non-entry"

The package introduces the "legal fiction of non-entry" in the Screening Regulation and Asylum Procedures Regulation which considers individuals as "not authorised to enter the territory" of any EU Member States despite being physically present in the territory of the EU. The attempt to deny the physical presence of irregular migrants and asylum seekers in the territory of EU Member States and border areas risks placing EU law in variance with international human rights and refugee laws as States cannot revoke their obligations towards persons under their jurisdiction, including due process, the obligation of non-refoulement, protecting the best interests of the child and protection against arbitrary deprivation of liberty.

We stress that States' obligations under international human rights law as enshrined in the Universal Declaration of Human Rights and all the core international human rights treaties require that human rights be at the centre of migration and asylum governance , including in response to large and mixed movements.[2] In his report on "means to address the human rights impact of pushbacks of migrants on land and at sea", the preceding Special Rapporteur on the human rights of migrants notes that "States are responsible for border governance on their territory, and for any operations elsewhere where they exercise effective control or authority over an area, place, individual(s) or transaction.[3] The transnational nature of some State actions in the context of governing international borders does not exempt States from fulfilling positive human rights obligations, nor from accountability; rather, the responsibility of multiple States may be implicated in certain cases, for instance on the high seas,

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[1] See Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020 (europa.eu)

[2] See principle 1 in the Office of the United Nations High Commissioner for Human Rights (OHCHR) and Global Migration Group publication entitled Principles and Guidelines, on the human rights protection of migrants in vulnerable situations, pp. 21–22.

[3] See A/70/303, paras. 11–13.

and elsewhere when States act extraterritorially.[4] The Special Rapporteur highlights that "States increasingly externalize border governance measures, including by physically keeping arriving migrants, including registered asylum seekers, away from State territory. … Once migrants are held in extraterritorial processing centres, accessing guarantees to an individualized procedure and judicial remedy, even if these exist in law, becomes difficult."

Regarding interceptions at sea and protection of victims of trafficking in persons and persons at risk of trafficking, we also wish to bring to your Excellency's attention the report of the Special Rapporteur on trafficking in persons, especially women and children to the Human Rights Council on "Refugee protection, internal displacement and statelessness" where the Rapporteur recalls that the positive obligations on the State to identify and protect victims of trafficking or persons at risk of trafficking arise also in the context of interceptions at sea and the duty to rescue persons in distress at sea. In this context she recalled the recommendation of the UN Human Rights Committee to review policy and practices during interceptions at sea, including on-water assessments, to ensure that all persons under the State's jurisdiction who are in need of international protection have access to fair and efficient asylum procedures within the territory of the State, including access to legal representation, where appropriate, and to legal remedies[5]. She also highlighted, drawing on the Human Rights Committee's jurisprudence, the evolving functional concept of jurisdiction, and more specifically the special relationship of dependency that may arise in such contexts, and its relevance in determining whether persons directly affected by decisions taken by the State, in a manner that was reasonably foreseeable in the light of relevant legal obligations, are subject to its jurisdiction.[6] (see further references in the report of the Special Rapporteur on trafficking in persons, A/HRC/53/28, para 39).

As it also highlighted in the report of the Special rapporteur on trafficking in persons to the Human Rights Council this year, EU Member States are under "obligations arising under the Convention on the Rights of the Child and its Optional Protocols with regard to effective control exercised by a State outside of its borders, including in international waters or other transit zones where States put in place migration control mechanisms, which must be applied with respect to children who come under the State's jurisdiction, including while attempting to enter its territory[7]. In this context the Special Rapporteur on trafficking in persons further highlighted the findings of the Committee on the Rights of the Child, which held that the State exercised jurisdiction ratione personae over the children who were the subject of the communication under consideration, and had the capability and the power to protect the rights of the children in question[8]. As such, the obligation arising under article 35 of the Convention on the Rights of the Child, to take all appropriate national, bilateral and multilateral measures to prevent, inter alia, the traffic in children for any purpose

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4 The extraterritorial applicability of human rights obligations is firmly established; the decisive criterion for jurisdiction (and hence responsibility) is not whether a person is within the territory of the State, but whether or not the State exercises effective control over the person. See Human Rights Committee, general comment No. 31 (2004), para. 10.

5 CCPR/C/AUS/CO/6, para. 34 b

6 Human Rights Committee, *A.S. et al. v. Italy* (CCPR/C/130/D/3042/2017); Aphrodite Papachristodoulou, "The ban-opticon of migration: technologies at maritime borders and extraterritorial jurisdiction" (2022).

7 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families / No. 22 (2017) of the Committee on the Rights of the Child, para. 12

8 Committee on the Rights of the Child, *S.B. et al. v. France* (CRC/C/89/D/77/2019-CRC/C/89/D/79/2019-CRC/C/89/D/109/2019), paras. 1.4, 3.9 and 6.4.

or in any form, applies and imposes positive obligations on the State to ensure identification, assistance and protection and non-refoulement" (A/HRC/53/28, para 40).

Pre-entry screening procedure – automatic detention of individuals

The Pact would allow for the automatic application of immigration detention of all migrants and asylum seekers, including children (please refer to the section below on "*border procedures – immigration detention of children*"). The Screening Regulation introduces a mandatory screening procedure "at the external borders of the Member States of all third-country nationals who have crossed the external border in an unauthorised manner, of those who have applied for international protection during border checks without fulfilling entry conditions, as well as those disembarked after a search and rescue operation, before they are referred to the appropriate procedure" as per Article 1. The screening is to be completed within five days and is extendable by a further five days in vaguely defined "exceptional circumstances" and/or "disproportionate numbers" where the "capacities of the Member State to handle screenings are exceeded for reasons beyond its control such as crisis situations." During this period, individuals are not permitted to enter the territory of the states and should be kept in locations at or in proximity to the external border or transit zones as per Article 3 of the Screening Regulation. Article 6 of the Screening Regulation outlines six different elements which are included in the screening process: (a) preliminary health and vulnerability check (b) identification (c) registration of biometric data in the appropriate databases (d) security check (e) the filling out of a debriefing form and (f) referral to the appropriate procedure.

In this connection, we wish to recall that, according to international human rights law, detention for immigration purposes should be a measure of last resort, only permissible for adults for the shortest period of time, with the possibility of administrative and judicial review and when no less restrictive measure is available. If not justified as reasonable, necessary and proportional, nor reassessed as it extends time, the use of this measure may amount to arbitrary detention, prohibited by article 9 of the UDHR and article 9.1 of the International ICCPR. The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but "must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (ICCPR/C/21/Rev.1/Add. 13 (2004), para. 10).

We would also like to refer to the Revised deliberation No. 5 on deprivation of liberty of migrants issued by the Working Group on Arbitrary Detention (Annex, A/HRC/39/45), where the Working Group stressed that in the context of migration proceedings, "alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure". Commitment by Member States to use immigration detention only as a measure of last resort and work towards alternatives to detention was reaffirmed through the adoption of the Global Compact for Safe, Orderly and Regular Migration (objective 13, A/RES/73/195).

We would like to bring to your attention the report of the Special Rapporteur on torture (A/HRC/37/50), in which he concluded that "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 (para. 25)," The Special Rapporteur further emphasised that detention of migrants should never be used as a means of deterrence, intimidation, coercion or discrimination (para. 73).

Furthermore, we would like to bring to your Excellency's attention the obligation of the application of the principle of non-punishment as enshrined in Council of Europe Convention on Action against Trafficking in Human Beings, article 26, as well as in domestic legislation and in case law of regional and domestic courts. As a principle, it is essential to the object and purpose of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, namely, to protect and assist victims of trafficking with full respect for their human rights, and without discrimination. It is also set out in full in the Principles and Guidelines for Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR). As stated by the Special Rapporteur on trafficking in persons in her report to the Human Rights Council in 2021, A/HRC/47/34, States should ensure that the principle of non-punishment is applied by all relevant domestic authorities, including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or official, as soon as there are reasonable grounds to believe that a person has been trafficked, and for any unlawful activity carried out by a trafficked person as a direct consequence of their trafficking situation, regardless of the gravity or seriousness of the offence committed (para 55 and 57). In particular, regarding the prohibition to hold victim of trafficking or potential victims of trafficking in detention, the Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking principle 7 provides that, "trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

We highlight Article 31, the non-penalisation provision of the 1951 Convention Relating to the Status of Refugees, which provides: "Refugees unlawfully in the country of refuge: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Moreover, it appears National Human Rights Institutions, civil society and non-governmental organisations' access to screening locations is not explicitly guaranteed. Article 8 (4) provides that "Member States may authorise relevant and competent national, international and non-governmental organisations and bodies to provide third country nationals with information under this article during the screening according to the provisions established by national law."

Considering that civil society organizations play an active role in providing services, assistance and representation to migrants and asylum seekers, including victims of trafficking, we stress that it is essential to facilitate and ensure their access to pre-screening locations to provide independent assistance, evaluation and support to migrants and asylum seekers in need of information and legal advice.

In the report of the Special Rapporteur on the human rights of migrants on right to freedom of association of migrants and their defenders, he "has received information demonstrating increasing hostility towards migrants and civil society organizations that work to protect migrants' rights. In many countries, this hostility has resulted in the imposition of new restrictions in law and in practice on freedom of association for migrants and their defenders" (A/HRC/44/42). In some countries, human rights defenders working in the context of migration are subjected to judicial harassment including criminal prosecution. States must ensure that the rights of human rights defenders are not violated or curtailed because of the work they do. States should "provide, in law and in practice, a safe, accessible and enabling environment for individuals and organizations that work to promote or protect the human rights of migrants."[9]

Pre-entry screening procedure – health and vulnerability check of individuals

Importantly, Article 9 of the Screening Regulation establishes the rules concerning the health check and the identification of third-country nationals with vulnerabilities and special reception or procedural needs at the external borders. It provides that health and vulnerability checks will only be done if there are no relevant indications and/or circumstances concerning the "general state" of the third-country national. Recital 27 of the proposal provides that special attention "should be paid to individuals with vulnerabilities, such as pregnant women, elderly persons, single parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors. In case of a minor, information should be provided in a child-friendly and age-appropriate manner."

The proposal also states that health checks should indicate the need for immediate care or isolation on public health grounds, whereas the vulnerability assessment should identify special reception requirements for persons in vulnerable situations, such as victims of torture, victims of trafficking in persons, or contemporary forms of slavery. In the case of children, "support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities." The proposed Regulation requires people to receive timely and adequate support in view of their physical and mental health. However, those subject to screening within States territories, as per Article 5, will only be subject to a preliminary medical examination (Article 9(4)).

Overall, the above-mentioned provisions do not provide for mandatory medical care assessments, examinations and referrals. The proposal considers a health examination unnecessary "[I]f it is clear from the circumstances that such examination is not needed, in particular because the overall condition of the person appears to be very good, the examination should not take place and the person concerned should be informed of that fact. […] With regard to third-country nationals apprehended within the territory, the preliminary medical examination should be carried out where it is deemed necessary at first sight" (Recital 26).

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[9] OHCHR Principles 18 on the human rights protection of migrants in vulnerable situations.

We wish to emphasize that effective health and vulnerability assessments require sufficient time and resources, and allocation of trained personnel, with capacity and skills to identify victims of trafficking and persons at risk of trafficking. We refer to the Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195), in particular to objective 7, according to which States commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with obligations under international law. In addition, under objective 12, States are committed "to increase legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants for the purpose of identifying and facilitating access to the appropriate referral procedures, in accordance with international law."

To this end, we stress that mandatory and comprehensive vulnerability checks should be conducted on every migrant, with their consent, as soon as possible so that those in vulnerable situations, including children, pregnant or nursing women, older persons, persons with disabilities, victims of contemporary forms of slavery, victims of trafficking, victims of rape, sexual, physical or psychological violence, trauma, torture and ill-treatment, and those fleeing conflicts, can be identified promptly and referred to appropriate services and protection bodies.

Protection of asylum seekers and refugees with disabilities must be ensured, in accordance with the Convention on the Rights of Persons with Disabilities, ratified by the European Union on 23 December 2010, and recognizing the social model of disability which recognizes "that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" (see Preamble of the Convention on the Rights of Persons with Disabilities, para (e)).

As recognized in EU law, specifically the Reception Conditions Directive (Recast), Recital 35, full respect for the fundamental rights guaranteed by the Charter of Fundament Rights of the European Union must be ensured. "In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.

Pre-entry screening procedure – trafficking in persons

While we acknowledge the reference to the need to involve national rapporteurs on trafficking in persons in screening processes in the proposed regulation (article 6), we would like to recall the Special Rapporteur's on trafficking in persons findings in her report to the Human Rights Council on "Refugee protection, internal displacement and statelessness", where she indicated that mechanisms that effectively identify victims of trafficking or persons at risk of trafficking are regrettably not systematically included in these processes and/or officials appointed to perform them are not trained on risks of trafficking in persons or in the protection needs of victims, (A/HRC/53/28, para 16). In particular she noted in her report that "At many border crossings and in camps, displaced person settings, hotspots and reception centres, there are limited or no procedures in place for early identification, and a lack of safe

shelters or specialized services for trafficked persons." (A/HRC/53/28, para 15). Similarly, the Committee on the Elimination of Discrimination against Women in General Recommendation No. 38 in relation to mixed migration flow hotspots pointed out at the lack of appropriate and confidential spaces for trained staff and interpreters, who can promptly assess indicators of vulnerability and provide adequate support, to carry out identification (CEDAW/C/GC/38 para. 38). While the proposal mentions the need to include national rapporteurs on trafficking, it does not include details on measures to reinforce the capacity of first responders to effectively detect vulnerabilities to trafficking and refer to appropriate protection mechanisms or to improve the facilities in which the screening takes place, which are often, as repeatedly highlighted by the mandate of the Special Rapporteur on trafficking not conducive to an adequate assessment of a victim or potential victim of trafficking needs (see as well A/HRC/38/45, para 16). In this regard the Special Rapporteur also recalled that to facilitate victims' identification during search and rescue operations and at disembarkation points, Member States should create safe and confidential spaces to carry out individual interviews and allocate sufficient resources to ensure that places for arrival, disembarkation, reception centres and settings meet human rights standards for reception and assistance in accordance with the OHCHR and Global Migration Group Principles and Guidelines on the human rights protection of migrants in vulnerable situations (A/HRC/38/45, para 73 d-e)

In this regard we wish to recall that there is a positive obligation to identify and protect victims of trafficking in persons, as established in the international instruments on trafficking in persons, which also apply to the European Union Member States, including article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and article 10 and 12 of the Council of Europe Convention on Action against Trafficking in Human Beings, ratified by EU Member States.

The positive obligations to identify and protect victims of trafficking in persons have also been recognized by the consistent jurisprudence of the European Court of Human Rights, based on article 4 of the European Convention on Human Rights on the prohibition of slavery. In the case of Rantsev v. Cyprus and Russia, the European Court of Human Rights, recalling the previous interpretation of Siliadin v. France, further stated regarding positive obligations stemming from article 4 ECHR, that:

"As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking (see, mutatis mutandis, Osman, cited above, § 115; and Mahmut Kaya v. Turkey, no. 22535/93, § 115, ECHR 2000-III). In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (see, mutatis mutandis, Osman, cited above, §§116 to 117; and Mahmut Kaya, cited above, §§ 115 to 116)."

Regarding protection of victims, the Court in Rantsev v. Cyprus and Russia also recalled the obligation to provide for the physical safety of victims while in the territory and the need to provide adequate training to law enforcement and migration authorities: “It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking (see paragraphs 153 to 154 above). States are also required to provide relevant training for law enforcement and immigration officials (see paragraph 155 above)”.

We highlight, S.M v Croatia, in which the European Court of Human Rights set out the positive obligations placed upon the State, and the importance of not placing responsibility on the victim: “In this connection it is important to stress that, in accordance with their procedural obligation, the authorities must act of their own motion once the matter has come to their attention. In particular, they cannot leave it to the initiative of the victim to take responsibility for the conduct of any investigatory procedures.” Further, in S.M. v. Croatia, the Court highlighted the specific impact of trauma on victims of trafficking and contemporary forms of slavery, citing the conclusions of the Council of Europe monitoring body, the Group of Experts on Action against Trafficking (GRETA): “[…] it has already been recognised in the work of GRETA and other expert bodies that there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account.”

As has been noted by the European Court of Human Rights in a series of cases, Article 4 ECHR requires States to adopt a range of measures to prevent trafficking and to protect the rights of victims: “Protection measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.” (V.C.L. and A.N. v. United Kingdom, Apps. No. 74603/12 and No. 77587/12, para. 153).

The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation no.38 on trafficking in women and girls in the context of global migration (2020) states at paragraph 78 that “The identification of victims or presumed victims and their referral to assistance services are to be performed by multidisciplinary teams, including professionals from all relevant fields, the composition of which can be adapted to the circumstances of the case, and should not be exclusively led by law enforcement or immigration authorities or be linked to the initiation or outcome of criminal proceedings, but based on the personal and social vulnerabilities of the victims and potential victims”. The Special Rapporteur on trafficking in persons already raised in 2018 in the report to the Human Rights Council (A/HRC/38/45) on “Early identification, referral and protection of victims or potential victims of trafficking in persons in mixed migration movements”, that States should “establish dedicated and standardized procedures for the identification of indicators of vulnerability and assistance of victims and potential victims of trafficking through referral to protection services in areas of arrival of large influxes of people, in addition to international protection and child protection schemes. Implement individual screening and assessment procedures as soon as possible after migrants arrive. Ensure that experts in identification are present at

borders to complete human rights-based screenings and referrals" (para. 73.a).

Finally, we also wish to draw attention that while reference throughout the screening processes proposed Regulation to trafficking in persons is made, further clarification would be welcome in relation to application of article 3 regarding to who the screening applies and article 14 regarding outcome of screening and referral to return procedures, in relation also to application of article 6 of Regulation (EU) 2016/399, which sets in subparagraph 5(c) that "third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations", taking into account above exposed international obligations to identify and protect victims of trafficking in persons.

Border procedures –immigration detention of children

The proposed Pact lacks an explicit prohibition of immigration detention of children under the age of 18, including unaccompanied and separated children and children travelling with their families.

The Pact proposes a threshold of 12 years old which is contrary to the Convention on the Rights of the Child's definition: "a child means every human being below the age of eighteen years" (article 1 of the CRC). We would like to stress that migrant children, regardless of their or their parents' migration status, should be considered as children first and foremost. They should be entitled in law and in practice to all the rights enshrined in the Convention on the Rights of the Child. The Committee on the Rights of the Child has clearly stated that the immigration detention of any child is a violation of children's rights and always contravenes the principle of the best interest of the child[10]. This position has been affirmed by joint General Comment 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. Several special procedures mandate holders have also stressed that immigration detention of children should be prohibited (para. 11, Annex, A/HRC/39/45; para. 73, A/HRC/37/50; and para. 46, A/HRC/30/37). In its Revised Deliberation No. 5 on deprivation of liberty of migrants, the Working Group on Arbitrary Detention stresses that the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.

In his report on "[E]nding immigration detention of children and providing adequate care and reception for them" (A/75/183), the preceding Special Rapporteur on the human rights of migrants urges States to "ensure that the child's best interest is the guiding principle in the design and implementation of migration policies and a primary consideration in all actions and decisions that concern each migrant child, including decision-making on migration procedures and the consideration of alternative care and reception solutions".

As stated in the guidance of the United Nations High Commissioner for Human Rights on the protection of the human rights of migrants in vulnerable situations, a formal procedure to determine the best interests of the child should be conducted with certain safeguards. For example, such safeguards should include the

[10] See report of the 2012 day of general discussion, Committee on the Rights of the Child, para 32: https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf.

meaningful participation of authorities responsible for child protection, as well as the right of the child to be heard and to have competent and independent legal representation (A/HRC/37/34, principle 6, guideline 6). In particular, a child should not be returned if such return would result in the violation of their fundamental human rights, and where a return is deemed not to be in the child's best interests, families should be kept together in the country of residence.

We further wish to emphasize that unaccompanied migrant and asylum-seeking children should have access to the national child-care system on an equal basis as national children and enjoy all relevant safeguards with regard to the protection of children. States should appoint a guardian or legal representative as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State.

We recall the obligation to ensure that the child's best interests must be a primary consideration in accordance with Article 24 EU Charter of Fundamental Rights, as well as with the CRC and the ECHR. As currently drafted, the proposed Regulation does not comply with the obligations arising under the CRC, ratified by all EU Member States, or the European Convention on Human Rights. Further, it does not comply with the requirements of protection of unaccompanied and separated children, as stated in the Committee on the Rights of the Child (CRC Committee), General comment no 6 (2005) – Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6.

We recall Article 4 of the UN Trafficking in Persons Protocol, which provides: "Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.". We recall that Article 3(d) of the UN Trafficking in Persons Protocol defines a child as " any person under eighteen years of age."

Effective remedy automatic suspensive effect of appeals in asylum and return procedures

In addition, the Pact fails to provide sufficient remedies against immigration orders including the automatic suspensive effect of appeals, which means individuals may be deported before a decision on their appeal is taken. Article 54(7) of the Asylum Procedures Regulaion provides for the possibility not to grant a suspensive effect in case of an appeal against a decision rejecting a subsequent application or finding it inadmissible. Recital 66a of the Asylum Procedures Regulation provides that "[I]n order to discourage abusive or last minute subsequent applications, Member States should be able to provide in national law that applicants should have no right to remain during that period in the case of rejected subsequent applications, with a view to preventing further unfounded subsequent applications." These provisions fall short of relevant international human rights law and standards, including the right to remedy.

Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language and therefore may fail to understand why they are detained, and/or be aware of grounds on which removal orders are based and/or ways to challenge the legality of their detention. The Special Rapporteur on the

human rights of migrants has been made aware that migrants in detention are frequently denied key procedural safeguards, such as judicial oversight, prompt access to a lawyer, interpretation/translation services, necessary medical care, means of contacting family or consular or diplomatic representatives and ways of challenging detention. The Special Rapporteur would however like to stress that consular authorities should only be contacted if this is requested by the detained migrant. In particular, asylum-seekers should not be brought to the attention of their consular authorities without their knowledge and consent.

Judicial review is crucial so that the powers of the state, including to detain, can be kept within the bounds of the law and human rights standards. Migrants should be enabled to challenge any decision relating to their 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, in line with Article 2 of ICCPR.

The Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court also state that the right to challenge the lawfulness of detention before a court is an independent human right. It applies to all non-nationals, including migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty. Therefore, failure to provide for this right in law and practice, without delay on the lawfulness of detention and release, constitutes a human rights violation as per Article 9(4) of the ICCPR.

Return procedures – safeguards against irreparable harm, including refoulement

While it is advisable to accelerate the processing of subsequent applications, in the absence of any appropriate procedural safeguards that explicitly require individual assessment on the circumstances and protection needs, such return procedures may entail high risk of *refoulement*. Individuals, who do not qualify for refugee entitlements, but under international human rights law, there are substantial grounds for believing that they would be at risk of death torture, ill-treatment or other irreparable harm upon return, including victims of contemporary forms of slavery and trafficking in persons.

The Pact indicates that all people who arrive or reside in the EU irregularly and whose asylum applications are unsuccessful or no longer have a right to remain will be immediately returned or be deported. Article 14 of the Screening Regulation notes individuals who do not apply for international protection or do not fulfill entry requirements during the screening procedure will be subject to return or refusal of entry. While individuals whose application for international protection is rejected during the border procedure and no longer have a right to remain, will be issued a return decision or a refusal of entry and channeled into a 'return border procedure' (Article 41a of the Asylum Procedures Regulation), which can take another 12 weeks of detention. Article 35a of the Asylum Procedures Regulation requires Member States to use a return decision as a part or at the same time of the decision rejecting the application for international protection. The Pact excludes essential safeguards and considerations which ensure national residence permits and other humanitarian grounds which are available under the Schengen Borders Code and national legal

frameworks. The only way for an applicant to lodge an appeal against a return decision would be to prove their eligibility for other permits or demonstrate the risk of refoulement but that in itself presents substantial practical challenges. Overall, the total duration of detention could last for a total of 24 weeks or even 40 weeks in "situations of crisis". The grounds for detention could be further expanded including situations in which migrants are not cooperating or express intent not to comply with the return measures.

States should ensure that all border governance measures taken at international borders, including those addressing irregular migration, are in accordance with the principle of *non-refoulement*. The principle of *non-refoulement* forms an essential and non-derogable protection under international human rights, refugee, humanitarian and customary law. Under international human rights law, the principle of *non-refoulement* is explicitly guaranteed in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). In the context of the prohibition against torture and other forms of ill-treatment, the principle of non-refoulement is applicable to all situations with no exceptions, and to all human beings, without discrimination, regardless of their entitlement to refugee status. International human rights bodies, regional human rights courts, and national courts have also found this principle to be an implicit guarantee flowing from the obligation to respect, protect and fulfil human rights contained within other international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The principle is reaffirmed by the Human Rights Committee in its General Comment No. 20 on article 7 of the ICCPR. Moreover, the Revised Deliberation No. 5 of the Working Group on Arbitrary Detention on deprivation of liberty of migrants states that the principle of *non-refoulement* must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.

We highlight the obligation under the Convention on the Rights of the Child (CRC), to respect and ensure the rights set forth in the CRC to each child within a State's jurisdiction without discrimination of any kind. (Article 2). The Convention on the Rights of the Child provides that: "[…] non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non- State actors or whether such violations are directly intended or are the indirect consequence of States parties' action or inaction." (CMW/C/GC/3-CRC/C/GC/22, para 46).

We highlight Article 14 of the Trafficking in Persons Protocol (the Palermo Protocol), which provides: "1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."

It should be noted that the principle of *non-refoulement* has been interpreted to apply to a wide range of risks of irreparable harm and should be applied to prevent the return of persons in cases of risk of serious human rights violations. These risks

include to the rights to life, integrity or freedom of the person, and of torture and ill-treatment.[11] Individuals facing deportation should have access to a fair, individualized examination of their particular circumstances, and to an independent mechanism vested with the authority to review appeals of negative decisions.

In addition, under certain circumstances, the individual assessment of the risk of irreparable harm can include, among other elements, access to or the level of enjoyment of economic and social rights. (A/HRC/47/30, para. 42). As an inherent element of the prohibition of torture and other forms of ill-treatment, the prohibition of *refoulement* is characterized by its absolute nature without any exception and overrides not only national immigration laws but also contradicting international obligations, such as those of extradition treaties (A/HRC/37/50, para. 37). Therefore, any steps taken to legalize policies effectively resulting in the removal of migrants without an individualized assessment in line with human rights obligations and due process are squarely incompatible with the prohibition of collective expulsions and the principle of *non-refoulement* (A/HRC/50/31, para. 70).

We draw your attention to OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders. Guideline 9, which states that returns or removals should not violate the principle of non-refoulement and/or the prohibition of collective expulsion. In the case of forced returns, the Guideline calls on States to ensure that return procedures are not carried out at all costs but are interrupted where the human rights of the migrant are compromised, and that migrants whose rights are violated during return processes can file complaints.

Moreover, the proposals also do not ensure that children would only be returned when it is in their best interests. Heightened consideration must also be given to children in the context of *non-refoulement*, whereby the best interests of the child must be the paramount consideration in any actions or decisions taken by the State.

Screening procedure within the territory

Furthermore, Article 5 in the proposed Screening Regulation extends the application of screening procedures to all individuals apprehended within state's territory where there is no indication that they have crossed the external border in an authorised manner. In this context, the screening will be conducted at any "appropriate location" within the territory of a state for three days (subject to extension in situations of exceptional circumstances).

This provision may lead to racial profiling and appears to be at odds with EU commitments under the EU Action Plan Against Racism, which provides "countering discrimination by law enforcement authorities" and avoiding "profiling that results in discrimination". We draw your attention to Article 7 of the UDHR and article 26 of the ICCPR which guarantee the right to equality before the law and non-discrimination. In addition, the European Convention of Human Rights recognises non-discrimination (article 14). These rights apply to all non-nationals, including migrants, regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty.

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[11] See OHCHR, "The principle of non-refoulement under international human rights law", available at www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciplenonrefoulementUnderInternationalHumanRightsLaw.pdf.

Conclusion

In view of the above-mentioned observations, **we urge Member States of the EU to address the issues raised in this letter in its further discussion, negotiation and adoption of the Pact to bring it in line with relevant international human rights law and standards**. We wish to stress that addressing irregular migration ultimately relies on enhancing and increasing the availability and accessibility of safe pathways for regular migration. On the other hand, any migration governance measures, including those aimed at addressing irregular migration, shall not adversely affect the enjoyment of the human rights and dignity of migrants. Human rights apply to everyone, including all migrants notwithstanding their nationality, age, gender, migratory status, or other attribute. States' obligations under all the core, applicable international human rights treaties require that human rights be at the centre of their efforts to govern migration in all its phases. This includes ensuring that screening and border governance measures respect, inter alia, the principle of equality and non-discrimination, the principle of *non-refoulement*, the right to seek asylum, the right to life, the prohibition of torture, the promotion of gender equality, and the rights and best interests of the child. Crossing an international border in an unauthorized manner is an administrative matter in nature, and it does not deprive migrants of their human rights entitlements, including due process guarantees.

We call on Member States of the EU to amend the Pact to ensure that **immigration detention is used as a measure of last resort for adults, subject to administrative and judicial review**. We urge Member States of the EU to prescribe in law human rights compliant alternative to immigration detention of adults. A clear distinction should be made between adults and children. Every child, regardless of their migratory status, should be considered as a child first and foremost. We urge Member States of the EU to include **an explicit prohibition of immigration detention of children under 18 years old and their families**. We further call Member States of the EU to provide human rights-based, non-custodial, community-based reception and care for all migrant and asylum-seeking children, under the age of 18, and their families. We also stress that **mandatory and comprehensive vulnerability checks** be conducted on every migrant, with their consent and human rights compliant, as soon as possible so that those in vulnerable situations, including children, pregnant or nursing women, older persons, persons with disabilities, victims of contemporary forms of slavery, victims of trafficking, victims of rape, sexual, physical or psychological violence, trauma, torture and ill-treatment, and those fleeing conflicts, can be identified promptly and referred to appropriate services and protection bodies and ensured effective protection against refoulement. We urge the Member States of the EU to ensure appropriate procedural safeguards in place, with **individual and objective risk assessment** of the circumstances and protection needs of individuals, to prevent irreparable harm and refoulement.

We highly recommend that you consult the OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders and the Global Compact for Safe, Orderly and Regular Migration. We look forward to receiving further information on the issues mentioned in this letter, and we stand ready to cooperate with you to enhance the protection of the human rights of all migrants, asylum seekers and refugees in the EU.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all matters brought to our attention, we would be

grateful for your observations on the following matters:

1. Please provide any additional information and/or comments you may have on the above-mentioned observations.

2. Given that the Pact is currently under negotiation, please indicate any concrete and immediate plans to address the questions raised in this letter, as well as other matters raised by civil society and legal experts with the aim of bringing the Pact in line with international human rights and refugee law, particularly with regard to the right to liberty, the principle of non-refoulement, the rights of the child, and other aspects mentioned in the present communication.

3. Please provide information on the status of the reform process and any recent consultation(s) on the Pact with civil society and other relevance stakeholders, including lawyers' associations and representatives of migrants, asylum seekers and refugees as well as victims of contemporary forms of slavery and trafficking in persons and the outcome of such consultation(s), including issues mentioned in this letter.

4. Please specify any measures planned to amend the Pact to ensure that immigration detention is used as a measure of last resort for adults only for the shortest period of time, subject to judicial authorization and judicial review.

5. Please provide information on measures taken or to be taken towards ending immigration detention of children and their families, as well as efforts made to provide effective protection, adequate care and non-custodial reception for migrant children under 18 years old.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from the European Union will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Gehad Madi
Special Rapporteur on the human rights of migrants

Matthew Gillett
Vice-Chair of the Working Group on Arbitrary Detention

Tomoya Obokata
Special Rapporteur on contemporary forms of slavery, including its causes and consequences

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children