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Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Report on means to address the human rights impact of
pushbacks of migrants on land and at sea*****Report of the Special Rapporteur on the human rights of migrants,
Felipe González Morales***Summary*

The present report, submitted in accordance with Human Rights Council resolution 43/6, provides an account of the activities undertaken by the Special Rapporteur on the human rights of migrants, Felipe González Morales, during the reporting period. It also provides a thematic study on means to address the human rights impact of pushbacks of migrants on land and at sea.

The practice of “pushbacks” is widespread and exists along most migration routes. Pushbacks manifest an entrenched prejudice against migrants and demonstrate a denial of States’ international obligations to protect the human rights of migrants at international borders. The report provides an examination of current pushback practices and trends and an analysis of their impact on the human rights of migrants. The Special Rapporteur concludes that, in the absence of an individualized assessment for each migrant concerned and other procedural safeguards, pushbacks result in human rights violations incompatible with States’ obligations under international human rights law, in particular, the prohibition of collective expulsion and refoulement.

* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter’s control.



I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 43/6. It contains information on the activities of the Special Rapporteur on the human rights of migrants, since the submission of his report to the General Assembly at its seventy-fifth session (A/75/183). The thematic section consists of a study on means to address the human rights impact of pushbacks of migrants on land and at sea.

II. Activities of the Special Rapporteur

2. On 2 July 2020, the Special Rapporteur participated in a conference on defending the human rights of migrants during the coronavirus disease (COVID-19) pandemic, organized by University Carlos III of Madrid.

3. On 16 July, he took part in a webinar on the impact of COVID-19 on children deprived of liberty, convened by Defence for Children International and other institutions.

4. On 28 July, he delivered a presentation at a conference entitled COVID-19, Migration and Human Rights: Impact and Solutions, held by the Institute for the Study of Human Rights at Columbia University.

5. On World Day against Trafficking in Persons, 30 July, he participated in a conference entitled Combating Human Trafficking: Addressing Root Causes and Safeguarding the Rights of Survivors of Trafficking, held by the International Organization for Migration Sri Lanka mission.

6. On 11 August, at the invitation of the Ministerio Público Tutelar of the City of Buenos Aires, he attended a webinar with the Chief General Adviser on Human Rights and Child Migration.

7. On 14 August, he gave a lecture on the role of lawyers and law firms in the current Latin American migration context, organized by a pro bono association of lawyers from the Americas.

8. On 25 August, he took part as a panellist in a webinar entitled Employer-tied Visas, convened by the Cross-Regional Center for Refugees and Migrants, the Migrant Forum in Asia and the Global Research Forum on Diaspora and Transnationalism.

9. On 4 and 8 September, he presented his report on the right to freedom of association of migrants and their defenders at two events held in collaboration with the International Center for Not-for-Profit Law and the Programme on Migratory Affairs of the Ibero-American University Mexico City, respectively.

10. On 16 September, he gave a lecture on current trends in migration and human rights, at an event organized by Rutgers University.

11. On 28 September, he delivered a presentation on gender and migration at an event organized by the Human Rights Council on ways to integrate a gender perspective in its work and its mechanisms.

12. On 30 September, he gave a lecture on the human rights approach in European policies on migration and international protection, held by the Asociación Pro Derechos Humanos de España.

13. On 2 October, he took part as a panellist in a webinar on racism, xenophobia and the pandemic in Spain, organized by Rights International Spain.

14. On 5 October, he delivered a presentation on the impact of the use of private military and security services in immigration and border management on the protection of the rights of all migrants, during an event organized by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

15. On October 16, he gave a lecture entitled Challenges of Migration Policies from a Human Rights Perspective, at a conference held by the Universidad Austral de Chile, in Valdivia.
16. On 26 October, he gave a lecture entitled Migration Movements in South America, for the postgraduate programme on migration and asylum at the National University of Lanús, Buenos Aires.
17. On 28 October, he gave a lecture on current trends in international migration and their impact on the human rights of migrants, at the Zolberg Institute on Migration and Mobility at the New School for Social Research, New York.
18. On 29 October, he attended a webinar on access to justice for migrants, held by the International Organization for Migration Mexico mission and Sin Fronteras, and gave a lecture on the role and the work of his mandate at the law school of the University of Colorado Boulder.
19. On 4 November, he took part as a panellist in a webinar entitled Alternatives to Migratory Detention in the International Context, organized by the Cepaim Foundation (Valencia, Spain) and the Platform for International Cooperation on Undocumented Migrants.
20. On 10 November, he participated in a webinar held by the International Center for Not-for-Profit Law and Vuka! Allies to disseminate further his report on the right of freedom of association.
21. On 12 November, he spoke at a panel on gender and migration at the fourth Congress to Build Peace from a Gender Perspective, organized by the Ibero-American University in Tijuana, Mexico.
22. On 12 and 13 November, he took part in the regional review of the Global Compact for Safe, Orderly and Regular Migration for the Economic Commission for Europe (ECE) countries.
23. On 18 and 25 November, he attended conferences at University Carlos III of Madrid – the first entitled Multilateralism, Migration and the Global Compact and the second entitled Criminalization and Decriminalization of Migrations.
24. On 3 December, the Special Rapporteur, together with the Office of the Special Representative of the Secretary-General on Violence Against Children, the Permanent Mission of Colombia to the United Nations Office and other international organizations in Geneva, the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Detention Coalition, held an event to launch his report entitled Ending Immigration Detention of Children.
25. On 10 December, he was a keynote speaker at the thirtieth anniversary of the Institute for Human Rights at University Carlos III of Madrid, with a presentation entitled Human Rights in the World Today.
26. On 15 and 16 December, he took part in the second annual meeting of the United Nations Network on Migration, and on 17 December in a meeting of the Steering Committee of the Start-up Fund for Safe, Orderly and Regular Migration.
27. On 18 January 2021, he participated in the Global Forum on Migration and Development.
28. On 20 January, he spoke at a panel of the Frontier Dialogue on addressing structural racial and ethnicity-based discrimination through COVID-19 recovery plans.
29. On 24 February, he participated in the regional review conference of the Global Compact for Safe, Orderly and Regular Migration in the Arab States region.
30. On 10 March, he participated in the general debate for the Asia-Pacific regional review of implementation of the Global Compact for Safe, Orderly and Regular Migration.
31. On 25 March, at the invitation of the Inter-American Association of Public Defenders and Eurosocial, he took part in a webinar on access to justice for migrants.

III. Study on means to address the human rights impact of pushbacks of migrants on land and at sea

A. Introduction

32. Pursuant to Human Rights Council resolution 43/6, the Special Rapporteur on the human rights of migrants is mandated “to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation”.¹ In carrying out his mandate, the Special Rapporteur has decided to dedicate his report to the Human Rights Council at its forty-seventh session to addressing the human rights impact of pushbacks of migrants on land and at sea.² The Special Rapporteur is grateful for the observations and information submitted by a wide array of stakeholders.³

33. Pushback practices demonstrate a denial of States’ international obligations to protect the human rights of migrants at international borders. In the present report, the Special Rapporteur gives a working definition of pushbacks, based on an examination of current pushback practices and trends, including in the context of the coronavirus disease (COVID-19) pandemic, and provides an analysis of their impact on the human rights of migrants. In the report, he also presents views of States on challenges and obstacles that they face in ensuring access for migrants to due process and safeguards, including protection, at international borders.⁴ The Special Rapporteur also identifies and shares promising practices and initiatives that exemplify human rights-based border governance, and provides recommendations to States on how to better protect the human rights of migrants at international borders.

B. Pushbacks: context and a working definition

34. In the absence of an internationally agreed definition of “pushbacks” in the context of migration and for the purposes of the present report, the Special Rapporteur describes “pushbacks” as various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.

35. The present report uses “pushbacks” as an overarching term for all such measures, actions or policies effectively resulting in the removal of migrants, individually or in groups, without an individualized assessment in line with human rights obligations and due process guarantees.

36. As described above, pushbacks generally involve practices relating to the removal of non-nationals from the territory of a State, such as “arbitrary expulsion” or “collective expulsion”, which are established legal notions under international law. A demonstration of the arbitrariness of such practices is that pushbacks may also entail the summary removal of a non-national from a country to a third country other than a previous country of transit or

¹ See para. 1.

² A team from the University of Bristol cooperated in the preparation of the present report.

³ Submissions are available at www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Pushback-practices.aspx.

⁴ In the present report, the term “international borders” is used in line with the use in A/69/277, footnote 34. Thus, “international borders” is understood broadly as the politically defined boundaries separating territory or maritime zones between political entities and the areas where political entities exercise border governance measures in their territory or extraterritorially (such areas including land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called “no-man’s-land” between border posts, in addition to embassies and consulates).

the country of origin.⁵ Pushbacks deny migrants their fundamental rights by depriving them of access to protection defined in international and national law, as well as procedural safeguards. The definition provided in the present report encompasses measures taken summarily to deny migrants access to a State's territory or jurisdiction, to prevent disembarkation, to curb onward travel or to expel migrants to outside of its territory. As such, this definition includes practices that can take place before an individual has entered a State's territory, as well as within the State's territory.

37. Pushback practices are variously carried out by State actors (regular and border police, specialized units, and military and security agents), as well as in cooperation with non-State actors (unidentified paramilitaries, carriers, transport personnel and contractors, operators of commercial vessels, private security personnel and others) acting with the authorization, support or acquiescence of the State. Some States conduct pushback operations with the acquiescence, and sometimes the cooperation, of third States to which migrants are forcibly removed;⁶ elsewhere, pushbacks are carried out secretly, giving rise to disputes regarding responsibility, as well as to political conflict.

38. 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.⁷ 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, and elsewhere when States act extraterritorially.⁸

C. International legal framework

39. States have an obligation to respect, protect and fulfil the human rights of everyone on their territory or within their jurisdiction or effective control, irrespective of migration status and without discrimination of any kind. States' obligations under all the core international human rights treaties relating to their migration governance measures require that human rights be at the centre of their efforts to address migration in all its phases, including in their responses to large and mixed movements.⁹ States must ensure that border governance measures respect, inter alia, the prohibition of collective expulsions, 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. States are further bound to ensure access to justice for victims of human rights violations, and abide by their search and rescue obligations under international maritime law.

⁵ The submissions by the Danish Refugee Council and the Hungarian Helsinki Committee document instances of pushback where migrants were forcibly removed, from Croatia and Hungary to Bosnia and Herzegovina and Serbia respectively, despite not having previously transited through those countries.

⁶ Such cooperation may involve – among other actions – assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return migrants. See A/72/335, paras. 36–40.

⁷ A/70/303, paras. 11–13.

⁸ 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.

⁹ 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, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, pp. 21–22.

1. The prohibition of collective expulsions

40. Collective expulsions are prohibited as a principle of general international law.¹⁰ Article 22 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families prescribes that migrant workers and members of their families shall not be subject to measures of collective expulsion and that each case of expulsion shall be examined and decided individually. The Human Rights Committee has stressed that article 13 of the International Covenant on Civil and Political Rights “would not be satisfied with laws or decisions providing for collective or mass expulsions”.¹¹ The Committee on the Elimination of Racial Discrimination has recommended States to “ensure that non-citizens are not subject to collective expulsion”.¹² The prohibition of collective expulsion has also been recognized in regional conventions.¹³ The United Nations High Commissioner for Human Rights has provided specific guidance on the personal scope of the prohibition of collective expulsion, including on the obligation of States to conduct a reasonable and objective examination of each person’s individual case to assess all relevant circumstances that may militate against expulsion.¹⁴

2. The principle of non-refoulement

41. Non-refoulement is a fundamental principle of international human rights and refugee law prohibiting all forms of removal and transfer of any individual, regardless of their status, when there are substantial grounds for believing that the individual would be at risk of irreparable harm, such as death, torture or cruel, inhuman or degrading treatment or punishment, persecution, enforced disappearance or other serious human rights violations, in the place to which they are to be transferred or removed, or of further transfer to a third State where there would be a real risk of such violations (chain refoulement). The principle of non-refoulement under international human rights law is characterized by its absolute nature without any exception, applying to all persons, including all migrants, at all times, irrespective of their citizenship, nationality, statelessness, migration status, gender, sexual orientation and gender identity.¹⁵

42. 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, such as risks to the rights to life, integrity or freedom of the person, and of torture and ill-treatment.¹⁶ In certain circumstances, the individual assessment of risk of irreparable harm includes, among other elements, access to or the level of enjoyment of economic and social rights.

¹⁰ See the intervener brief filed by the United Nations High Commissioner for Human Rights to the European Court of Human Rights, in *N.D. and N.T. v. Spain* (applications Nos. 8675/15 and 8697/15), paras. 7–11.

¹¹ See the Committee’s general comment No. 15 (1986), para. 10.

¹² See the Committee’s general recommendation No. 30 (2004), para. 26.

¹³ The American Convention on Human Rights, art. 22 (9); the Arab Charter on Human Rights (2004), art. 26 (2); the Charter of Fundamental Rights of the European Union, art. 19 (1); and the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, art. 25 (4) provide for the prohibition of collective expulsions. The African Charter on Human and Peoples’ Rights, art. 12 (5), prohibits mass expulsions aimed at national, racial, ethnic or religious groups.

¹⁴ See the intervener brief filed by the High Commissioner for Human Rights to the European Court of Human Rights, in *N.D. and N.T. v. Spain* (applications Nos. 8675/15 and 8697/15), paras. 13–40.

¹⁵ Under international human rights law, the prohibition of refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 16). Art. 33 of the Convention relating to the Status of Refugees (the 1951 Convention) prohibits the return of refugees and asylum applicants to countries where they would risk persecution. For further discussion of non-refoulement, see A/HRC/37/50, paras. 36–42.

¹⁶ OHCHR, “The principle of non-refoulement under international human rights law”, available at www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciplenon-refoulementUnderInternationalHumanRightsLaw.pdf.

3. Safeguarding human rights at international borders

43. Migrants arriving at international borders, regardless of how they have travelled, and of whether they are part of larger and/or mixed movements, should have access to their human rights, including individualized, prompt examinations of their circumstances, and referral to competent authorities for a full evaluation of their human rights protection needs, including access to asylum, in an age-sensitive and gender-responsive manner. Under international human rights law, everyone has the right to seek and enjoy in other countries asylum from persecution.¹⁷ The Special Rapporteur underscores that effective access to territory is an essential precondition for exercising the right to seek asylum.¹⁸

44. States are required to take all reasonable precautionary steps to protect life and prevent excessive violence,¹⁹ and have committed to cooperate internationally to save lives and prevent migrant deaths and injuries, in accordance with international law.²⁰ The loss of life at international borders has been a tragic consequence of States increasingly relying on militarization, extraterritorial border control and deterrence to attempt to control migration.²¹ State neglect leading to deprivation of access to medical assistance, water, food and basic means of survival for migrants may amount to torture and becomes a threat to the right to life. Delays in searching for and rescuing migrants in distress on land and at sea, as well as in designating safe ports for disembarkation, may also amount to torture or ill-treatment and undermine the right to life.

45. States have a duty to prevent and redress unjustifiable use of force in law enforcement, and only to use force where it is absolutely necessary and strictly proportional to the legitimate aim pursued.²² Pushbacks, when carried out violently, or effectively resulting in dire conditions for migrants, may amount to torture or ill-treatment and violations of the right to life.

46. Pushbacks contribute to the perpetuation of dire living conditions, which have been documented as including physical abuse, sexual and gender-based violence and deprivation of the necessities of life. States cannot point to exceptional or disproportionate operational challenges (e.g. the size of migratory movements, or the existence of a public health emergency such as COVID-19) or to other circumstances to justify such actions.

47. States are obliged under the Convention on the Rights of the Child to protect the human rights of children in the context of international migration. This applies to each child within the jurisdiction of the State concerned, including the jurisdiction arising from a State exercising effective control outside its borders.

48. Migrant children, in particular those who are unaccompanied, are at a heightened risk of sexual and gender-based violence by smugglers, traffickers and other actors, and of being sold into labour or forced into survival sex to gain passage, shelter, sustenance or money for their journeys.²³ Restrictive migration or asylum policies render migrant and asylum-seeking children, including unaccompanied or separated children, particularly vulnerable to suffering violence and abuse during their migration journey and in countries of destination.²⁴ The criminalization of irregular border crossing leads to increased risk of children being separated from their parents.²⁵

49. Pushbacks often exacerbate situations of vulnerability, including those based on multiple and intersecting forms of discrimination, such as on the basis of gender, age, race, ethnicity, nationality, migration status, sexual orientation and gender identity, and other factors. States should protect migrants at all stages of the migratory process and guarantee

¹⁷ Universal Declaration of Human Rights, art. 14 (1).

¹⁸ Office of the United Nations High Commissioner for Refugees (UNHCR), Ten-Point Plan on Refugee Protection and Mixed Migration, chap. 3, available at www.unhcr.org/50a4c0a89.html.

¹⁹ A/HRC/32/39, para. 75.

²⁰ General Assembly resolution 73/195, para. 24.

²¹ A/72/335, paras. 8–13.

²² See the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

²³ A/74/235, para. 21.

²⁴ *Ibid.*, para. 20.

²⁵ *Ibid.*, para. 24.

access to justice to remedy any discriminatory treatment or human rights violations that they experience. The Special Rapporteur has provided guidance to States on providing effective access to justice for all migrants at every stage of the migration process.²⁶ Further, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child have provided child-sensitive guidance to States on ensuring due process guarantees and access to justice for migrant children.²⁷

4. Search and rescue obligations under international law

50. States have the duty to provide an adequate and effective search and rescue service at sea. The United Nations Convention on the Law of the Sea, of 1982, and the International Convention for the Safety of Life at Sea, of 1974, place obligations on the masters of ships to render assistance to persons found at sea in danger of being lost, and to rescue persons in distress if informed of their need of assistance. This obligation exists without regard to the nationality, status or circumstances in which such persons are found. The International Convention on Maritime Search and Rescue, of 1979, obliges States parties not only to ensure that assistance is provided to any person in distress at sea, but also to provide for their initial medical or other needs and to deliver them to a place of safety. The International Convention on Maritime Search and Rescue prescribes that any search and rescue unit receiving information about a distress incident is to take immediate action if in a position to assist.

51. States are also bound to respect obligations laid down under international human rights law, especially the right to life, and cannot leave passengers adrift in international waters without access to humanitarian assistance and medical support, nor can they lawfully take action to return passengers to situations where they would be at risk of human rights violations. Disembarkation may only take place at a port designated as safe.

52. Pushbacks greatly increase the chance of a maritime disaster resulting in loss of life. Migrant women, girls and boys are at a greater risk of drowning or hypothermia.²⁸ Collective “turnbacks” and “takebacks”,²⁹ “driftbacks” (abandoning migrants adrift in unseaworthy rafts)³⁰ and “pullbacks” by State actors and proxies are incompatible with search and rescue obligations and may also result in other human rights violations, including refoulement. “Closed port” policies which deny private vessels, including commercial vessels and NGO rescue boats, a safe port after rescue are unlawful under international law.³¹

D. Pushback policies and practices

53. States often respond to migration movements by creating and progressively increasing barriers.³² Pushbacks are often carried out as a measure of deterrence, punishment, or targeting migrants as part of wider strategies. Pushback policies and practices, together with the deployment of physical barriers and advanced surveillance and deterrence equipment at borders, carry life-threatening risks for migrants. Thousands of migrants tragically die every year while trying to cross international land and sea borders; the use of force by border authorities during interception and summary returns has a major impact on migrants’ health and safety in transit.

54. In recent years and during the public consultation for the present report, pushbacks have been reported along most migration routes from all regions of the world experiencing mixed movements of migrants. States’ legitimate interests in governing borders have in some

²⁶ A/HRC/35/25, paras. 63–65.

²⁷ See 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, paras. 14–19.

²⁸ A/72/215, para. 11.

²⁹ Submission by the Refugee Council of Australia.

³⁰ Global Legal Action Network, “Drift-backs and torture on the Aegean”, March 2021, available at www.glanlaw.org/aegean-push-backs.

³¹ A/73/314, paras. 59–61.

³² A/HRC/35/25, para. 29.

cases turned into mass apprehension and return of migrants without individual assessment of vulnerabilities and protection needs. The militarization of border patrols has mainstreamed a security-focused approach that increases the risk of human rights violations.³³

55. Numerous submissions have raised concerns regarding Greece's border governance at both its land and sea borders with Turkey.³⁴ Situated on the Eastern Mediterranean migration route, Greece deploys border and coastguard patrol teams as part of national and joint European Union border operations, in cooperation with the European Border and Coast Guard Agency (Frontex).³⁵ On top of an increased militarization of the Evros land border region since March 2020, which has effectively resulted in preventing entry and in the summary and collective expulsion of tens of thousands of migrants and asylum seekers,³⁶ the Special Rapporteur has received allegations that pushbacks over the land border are also reportedly carried out from urban areas, including reception and detention centres.³⁷ An increase in pushbacks in the Aegean Sea, from Greek territorial waters, as well as from the islands of Rhodes, Samos and Symi, has also been documented, with one stakeholder recording 321 incidents involving 9,798 migrants between March and December 2020.³⁸

56. Croatia has reportedly deployed a large number of police officers as well as technical devices for optical and radar monitoring of its borders with Bosnia and Herzegovina and Serbia, as a measure of deterrence.³⁹ Nevertheless, allegations of unlawful and violent pushbacks have been reported in connection with operations at borders and with removals from deep inside Croatian territory, and as part of chain pushbacks from Italy to Bosnia and Herzegovina.⁴⁰ Between May 2019 and November 2020, one stakeholder recorded 22,500 pushbacks to Bosnia and Herzegovina,⁴¹ along with numerous reports by migrants of theft, extortion or destruction of property, physical abuse or assault, abusive or degrading treatment, including of children,⁴² and arbitrary arrest or detention, during those operations. A civil society organization has recorded instances of violent pushbacks against migrant children.⁴³ Croatian authorities have repeatedly prevented public scrutiny of border operations.⁴⁴

³³ A security-focused approach treats migrants as objects of surveillance and can have a dehumanizing effect, leading to increased acceptance of collective measures against them on the basis of representing a "threat" to sovereignty and national security. This process is exacerbated by the shift towards automation and the use of drones. See A/HRC/45/9, paras. 42–45.

³⁴ See the submissions by Amnesty International, the Association for the Social Support of Youth (ARSIS), the Border Violence Monitoring Network, the Danish Refugee Council, the Greek Council for Refugees, Human Rights 360, Human Rights Watch, Mare Liberum, Statewatch and the United Nations Children's Fund (UNICEF), among others, and the joint submission by the Irish Centre for Human Rights, the National University of Ireland Galway and the Global Legal Action Network.

³⁵ See the submission by Greece. The Special Rapporteur was informed that the Hellenic Coast Guard had, between 2015 and 2020, rescued over 319,000 migrants, and had applied detection and prevention measures in line with European Union law. National authorities and European Border and Coast Guard Agency (Frontex) agents followed a code of conduct, and accusations of ill-treatment, including as part of returns, were investigated.

³⁶ See GRC 1/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25116>, and the response by Greece, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35244>.

³⁷ See the submissions by the Border Violence Monitoring Network and Human Rights Watch. Pushbacks to North Macedonia and Bulgaria have reportedly been carried out by Serbian police in a similar way; see the submission by KlikAktiv.

³⁸ Submission by Mare Liberum.

³⁹ Submission by Croatia.

⁴⁰ A/HRC/44/42/Add.2, paras. 64–68; and see the submission by the Border Violence Monitoring Network.

⁴¹ Submission by the Danish Refugee Council.

⁴² Submission by Save the Children.

⁴³ Ibid.

⁴⁴ See the statement made by the High Commissioner for Human Rights to the Human Rights Council at its forty-sixth session, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=26806.

57. The Special Rapporteur remains concerned at reports of large-scale pushbacks of migrants from Algeria to the Niger since 2014,⁴⁵ which amount to collective expulsions. These pushbacks are allegedly carried out both through “official” repatriation convoys of Nigerien migrants by Algerian law enforcement authorities, as well as through unannounced collective expulsions, close to the border with the Niger, of non-Nigerien migrants, the majority of whom are from the Economic Community of West African States region, leaving hundreds stranded in a desert environment.⁴⁶ Algeria has reportedly unlawfully expelled migrants of at least 20 nationalities to Niger, including many women and children, as well as asylum seekers from African and Middle Eastern countries; in some cases, security personnel have reportedly separated children from their families during mass arrests, and stripped migrants of their belongings.⁴⁷

58. In 2020, thousands of migrants were expelled collectively from Libya and most of them were sent to Chad, Egypt and the Sudan.⁴⁸ Pushbacks included persons apprehended near the border area, as well as those detained in urban areas throughout the country and held in detention centres prior to removal, which occurred with no access to asylum or individualized procedures, often involving dangerous transport through the desert in unsafe vehicles, and has included nationals of third countries in conditions that create risks of chain refoulement.⁴⁹

59. In Cyprus, pushbacks of migrants and refugees to Lebanon and Turkey were reported, including those of Lebanese, Palestinian and Syrian origin, without an individualized assessment of their protection needs or of the risks to them upon return.⁵⁰ Since March 2020, Cypriot coastguard forces are said to have summarily pushed back, abandoned, expelled or returned more than 200 people at sea arriving from Lebanon.⁵¹ Syrian refugees returned by the Turkish Cypriot administration to Turkey were particularly at risk of chain refoulement to the Syrian Arab Republic.⁵²

60. Mexico and Guatemala have reportedly apprehended and returned migrants departing mostly from Honduras and travelling in so-called “caravans”, without providing them with access to individualized procedures. In Guatemala, reports indicate that “caravans” faced discriminatory and stigmatizing attitudes. In September 2020 and January 2021, the Government of Guatemala declared a state of alarm (*estado de prevención*) across several departments, effectively authorizing the use of force to dissolve assemblies, linking migrants in “caravans” to the spread of COVID-19.⁵³

61. In Poland, the Border Guard has been found by the European Court of Human Rights to have implemented a “consistent practice of returning people to Belarus”, a policy which amounted to collective expulsion, in relation to Russian asylum applicants from Chechnya, including children, whose repeated applications at the border were not subject to proper review, and who were removed without proper assessment of substantial chain refoulement

⁴⁵ *Migration Trends from, to and within the Niger: 2016–2019*, sect. 3.3 (p. 12) and sect. 3.5 (p. 15), available at <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf>.

⁴⁶ See A/HRC/41/38/Add.1.

⁴⁷ *Ibid.*; and Human Rights Watch, “Algeria: migrants, asylum seekers forced out”, 9 October 2020, available at www.hrw.org/news/2020/10/09/algeria-migrants-asylum-seekers-forced-out.

⁴⁸ Amnesty International, “Between life and death, refugees and migrants trapped in Libya’s cycle of abuse”, pp. 33–34, available at www.amnesty.org/download/Documents/MDE1930842020ENGLISH.pdf; and OHCHR, press briefing note on Libya, 28 April 2020, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25834&LangID=E.

⁴⁹ Amnesty International, “Between life and death, refugees and migrants trapped in Libya’s cycle of abuse”, pp. 33–34.

⁵⁰ A/HRC/46/23, para. 40.

⁵¹ Submission by Human Rights Watch.

⁵² Submission by KISA and EuroMed Rights.

⁵³ Submission by Franciscans International.

risks.⁵⁴ The Polish Commissioner for Human Rights has documented similar cases since 2015.⁵⁵

1. Use of force in pushback operations

62. The Special Rapporteur reiterates his concerns that some pushbacks have also involved the use of force, in violation of international norms and standards, such as beatings, electric shocks, forced river crossings, the stripping off of clothes, in some cases in adverse weather conditions, forced stress positions, gender-insensitive body searches and spray-painting the heads of migrants with crosses – treatment that appeared to be designed to subject migrants to torture and other cruel, inhuman or degrading treatment.⁵⁶ In other cases, migrants arriving in larger groups have been targeted by indiscriminate use of chemical irritants, water cannons and kinetic impact projectiles by law enforcement authorities as a strategy for preventing entry and breaking up and dispersing groups.⁵⁷ Such incidents have deplorably resulted in serious injuries and even the loss of life. An incident in June 2020, during which Iranian authorities violently pushed back a group of Afghan migrants through a border river, resulted in the death of at least 10 individuals, including one child, and in the disappearance of 15 others.⁵⁸

2. Bilateral and multilateral agreements

63. The Special Rapporteur welcomes the fact that States are entering into bilateral and multilateral agreements to provide joint responses to migration-related challenges. These cannot, however, be used as a strategy to bypass human rights obligations or to rubber-stamp migrant removals without individual safeguards.

64. Decisions to return migrants to a “safe” country – not necessarily the migrant’s country of origin – on the basis of readmission agreements can risk violating the prohibition of collective expulsions or the principle of non-refoulement if such decisions do not contain an individualized assessment of each migrant’s situation.⁵⁹ Diplomatic assurances providing guarantees between sending and receiving States are inadequate to genuinely address individual refoulement risks.⁶⁰

65. Since 2004, an agreement between the Government of Canada and the Government of the United States of America – the Safe Third Country Agreement – has restricted access to territory and asylum. Except in cases where one of the few exceptions apply,⁶¹ individuals

⁵⁴ European Court of Human Rights, *M.K. and others v. Poland* (applications Nos. 40503/17, 42902/17 and 43643/17).

⁵⁵ The submission of the Commissioner for Human Rights of Poland also noted that non-governmental organizations were denied access to the premises where such procedures were conducted.

⁵⁶ See the joint statement by Special Rapporteurs, 19 June 2020, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25976. See also CRO 1/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25355>, and the response by Croatia, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35470>; and the submission by Croatia.

⁵⁷ See, for example, the Secretary-General’s press conference of 16 September 2015 (as pertains to Hungary), available at www.un.org/sg/en/content/sg/statement/2015-09-16/secretary-generals-press-conference-full-transcript; “UNHCR disappointed by scenes of violence at Idomeni”, 11 April 2016, available at www.unhcr.org/news/latest/2016/4/570bb49d6/unhcr-disappointed-scenes-violence-idomeni; and the statement by the Special Rapporteur on the human rights of migrants (on Greece), 23 March 2020, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25736&LangID=E.

⁵⁸ See IRN 15/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25360>.

⁵⁹ A/HRC/37/50, para. 44.

⁶⁰ *Ibid.*, paras. 45–48.

⁶¹ Submission by Canada. Exceptions include persons with a family member in Canada, unaccompanied minors, persons who hold a valid travel document issued by Canada, and persons who are from a visa-exempt country for Canada but require a visa to enter the United States of America, as well as

seeking asylum after entering Canada from the United States at land ports of entry are deemed ineligible to have their claims referred to the Immigration and Refugee Board, and are returned to the United States.⁶² Civil society organizations have repeatedly challenged the agreement at court due to arbitrary detention and refoulement concerns. In July 2020, the Federal Court of Canada released a non-final decision striking down the Safe Third Country Agreement for the second time.

66. Under a 1996 bilateral agreement on “informal readmissions” with Slovenia, Italian authorities have allegedly been engaging in pushing back migrants apprehended within 10 kilometres of the border. Such returns have presumably been carried out outside of formal obligations under European Union and international law, and have led to chain refoulement to Bosnia and Herzegovina via Slovenia and Croatia.⁶³ In a recent judgment, a court in Rome found that the Italian border police violated the rights of a migrant pushed back from the city of Trieste to Bosnia and Herzegovina in 2020, leading to him living in destitution. The court ruled that “informal readmissions” were in violation of the Italian Constitution and the obligations of Italy under regional and international human rights treaties.⁶⁴ Similar legal challenges have been brought in Slovenia to stop this practice, which has reportedly resulted in the informal return of thousands of migrants⁶⁵ in coordinated police actions.⁶⁶

3. Extraterritorial processing

67. States increasingly externalize border governance measures, including by physically keeping arriving migrants, including registered asylum seekers, away from State territory. Externalization may entail delegating migration-related border governance and “entry” procedures to cooperating States, resulting in “pullbacks”, which 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.⁶⁷ 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.

68. Under its “Operation Sovereign Borders”, Australia prohibits any irregular maritime arrival and processes asylum seekers arriving by sea in offshore detention facilities.⁶⁸ Since 2013, approximately 3,000 refugees and asylum seekers have been forcibly transferred by Australia to so-called “offshore processing” facilities in Papua New Guinea and Nauru, in circumstances and conditions that have had severe impacts on health, and particularly significantly the mental health, of asylum seekers.⁶⁹

69. In the United States, the so-called Migrant Protection Protocols, also known as the “Remain in Mexico” policy, introduced in 2018, require asylum seekers seeking entry to the

persons with cases “in the public interest”, for example death penalty cases. The principle of non-refoulement is codified in the Immigration and Refugee Protection Act. Canadian cooperation with the United States is based on a “principle” that individuals “must claim asylum in the first safe country that they enter”.

⁶² Submission by Amnesty International.

⁶³ See the submissions by the Danish Refugee Council and UNICEF.

⁶⁴ Submission by the Danish Refugee Council.

⁶⁵ Submission by Amnesty International.

⁶⁶ An agreement between Slovenia and Croatia on the “readmission of persons whose entry or residence is illegal” is the legal basis for such “onward returns” from Slovenia to Croatia. The legality of returns without a return decision is currently being challenged at court. See the submission by the Human Rights Ombudsman of Slovenia.

⁶⁷ A/HRC/37/50, paras. 54–57.

⁶⁸ A/HRC/35/25/Add.3, para. 10.

⁶⁹ See the joint statement by special procedures, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E; and “UNHCR appeals to Australia to act and save lives at immediate risk”, 23 October 2018, available at www.unhcr.org/news/press/2018/10/5bcda38b7/unhcr-appeals-australia-act-save-lives-immediate-risk.html.

United States to return to Mexico and stay there while their claims are evaluated.⁷⁰ The Special Rapporteur deplores the fact that migrants enrolled in the programme have faced kidnapping, rape, torture, murder and other violent attacks while forced to wait in Mexico.⁷¹

70. The United States authorities also employ the so-called “metering” policy, which limits the number of asylum seekers processed at official border ports of entry, resulting in tens of thousands being forced to wait, often for months, in dangerous regions at the border where they are at risk of violence and exploitation.⁷²

71. Since 2015, a special regime has applied in the Spanish enclaves of Ceuta and Melilla that allows officials to carry out “border rejections” of foreign nationals trying to enter Spain irregularly from Morocco.⁷³ Along perimeter fences around the enclaves, Spain has introduced the concepts of a “physical” border and an “operational” border: those who cross the former but not the latter are deemed not to have entered Spanish territory, and can thus be pushed back in so-called “hot returns” (*devoluciones en caliente*).⁷⁴ The Special Rapporteur expresses serious concerns about barriers placed by Spain to accessing asylum in practice, in light of the creation of zones of exception at the border, and about information alleging that migrants from sub-Saharan Africa may be subjected to discrimination and prevented from exiting Morocco on the grounds of their appearance, and that they effectively lack access to Spain.⁷⁵

4. Pushbacks at sea, including through delays in search and rescue and in disembarkation

72. Australia has reportedly removed over 800 migrants on 38 vessels since 2013 and has engaged in “turnbacks” of vessels in various ways. Migrants have reportedly been turned back on their original vessels that might have been repaired or refuelled by Australia; they have been transferred to lifeboats or wooden “fishing” boats purchased by Australia; occasionally, they have been detained aboard Customs or Navy vessels before being returned.⁷⁶

73. In January 2021, the Human Rights Committee found Italy responsible for failing to promptly respond to a distress call and dispatch a vessel to rescue over 200 migrants, including 60 children, at sea, who died as a result of the delay.⁷⁷ The continued cooperation of Italy with Libya and the Libyan Coast Guard⁷⁸ has effectively resulted in the circumvention of the prohibition of refoulement and collective expulsion. Since 2016, more than 60,000 migrants have been disembarked in Libya following interception at sea, sometimes by instructing private vessels to proceed to Libya,⁷⁹ despite the fact that Libya is not considered to be a safe port for disembarkation for migrants⁸⁰ due to well-documented risks of human

⁷⁰ See USA 4/2019, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24381>. N.B.: The United States Department of Homeland Security has announced the suspension of new enrolments in the Migrant Protection Protocols programme. See the Department of Homeland Security statement of 20 January 2021, available at www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

⁷¹ Human Rights First, “Publicly reported cases of violent attacks on individuals returned to Mexico under the ‘Migrant Protection Protocols’, as compiled by Human Rights First”, available at www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks12.15.2020FINAL.pdf.

⁷² Submission by Human Rights First.

⁷³ Submission by Amnesty International.

⁷⁴ Submission by Statewatch.

⁷⁵ Submission by Save the Children.

⁷⁶ Submission by the Refugee Council of Australia.

⁷⁷ CCPR/C/130/D/3042/2017.

⁷⁸ Under a Memorandum of Understanding of 2017, on cooperation in the development sector to combat illegal immigration, human trafficking and contraband and on reinforcing border security between Libya and Italy; see the submission by Sea-Watch.

⁷⁹ Submission by Amnesty International.

⁸⁰ S/2021/62, para. 107; and “UNHCR position on the designations of Libya as a safe third country and as a place of safety for the purpose of disembarkation following rescue at sea”, September 2020, available at www.refworld.org/publisher,UNHCR,,,5f1edee24,0.html.

rights violations, including arbitrary detention, torture, enforced disappearance, sexual and gender-based violence, exploitation and trafficking.⁸¹

74. The authorities of Malta have reportedly conducted pushback practices, including an incident leading to the collective expulsion at sea of 51 migrants, via private vessels, and to the death of 12 migrants, reportedly due to the delay of search and rescue operations in 2020.⁸² A recent set of measures has been reported, allegedly to avoid assisting migrants,⁸³ which includes arranging unlawful pushbacks to Libya, diverting boats towards Italy rather than rescuing people in distress, unlawfully detaining hundreds of people on ill-equipped ferries offshore, and signing a new agreement with Libya to prevent people from reaching Malta.⁸⁴

75. The absence of regional responsibility-sharing mechanisms in the Asia-Pacific region to address maritime movements in the Bay of Bengal and the Andaman Sea has led to delays in search and rescue, to the interception and pushback of boats carrying Rohingya refugees and asylum seekers, leaving them to confront risks of unseaworthy vessels, adverse weather conditions and shortages of food and water, and to physical and sexual abuse by smugglers. At least 200 lost their lives in 2020.⁸⁵ Appeals to Governments in the region to immediately search for, rescue and disembark Rohingya refugees and asylum seekers who were left in distress on the Andaman Sea were made in early 2021.⁸⁶ Malaysian authorities reportedly turned away more than 300 Rohingya refugees and asylum seekers arriving on the country's shores on the grounds of risk of COVID-19 transmission.⁸⁷

5. Frontex operations

76. During joint operations at the external borders of the European Union, serious claims of Frontex's implication in pushbacks have been made, alleging that Frontex-operated surveillance technology on board aerial assets⁸⁸ and vessels⁸⁹ may have been misused to facilitate pushbacks to Turkey and Libya. Allegations of Frontex's implication in pushbacks⁹⁰ have prompted members of the European Parliament to establish a working group to

⁸¹ See, for example, the detailed findings of the investigation by OHCHR on Libya (A/HRC/31/CRP.3), 15 February 2016, available from www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ListReports.aspx.

⁸² See MLT 2/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25753>, and the response by Malta, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35968>; and the submissions by Human Rights Watch and Sea-Watch.

⁸³ Commissioner for Human Rights of the Council of Europe, "Commissioner urges Malta to meet its obligations to save lives at sea, ensure prompt and safe disembarkation, and investigate allegations of delay or non-response to situations of distress", 11 May 2020, available at www.coe.int/en/web/commissioner/-/commissioner-urges-malta-to-meet-its-obligations-to-save-lives-at-sea-ensure-prompt-and-safe-disembarkation-and-investigate-allegations-of-delay-or-no.

⁸⁴ Malta signed a Memorandum of Understanding with Libya in 2020 "on combating illegal immigration". See the submission by Sea-Watch; see also MLT 1/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25394>, and the response by Malta, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35584>.

⁸⁵ UNHCR, "Update on UNHCR's operations in Asia and the Pacific" (seventy-first session, 25 September 2020), available at www.unhcr.org/uk/excom/announce/5f6dee594/asia-and-pacific.html?query=pushback.

⁸⁶ See www.unhcr.org/news/press/2021/2/603339354/unhcr-appeals-for-immediate-rescue-of-rohingya-refugees-in-distress-on.html.

⁸⁷ Submission by Human Rights Watch.

⁸⁸ Submission by Sea-Watch.

⁸⁹ Submission by the Platform for International Cooperation on Undocumented Migrants.

⁹⁰ A/75/590, para. 12.

investigate Frontex's compliance with and respect for human rights, and its adherence to its own transparency and accountability standards.⁹¹

77. Frontex's limited accountability mechanisms have come under criticism for failing to provide prompt, transparent and thorough investigations into allegations of human rights violations in the context of the agency's operations.⁹²

6. Denial of access to territory and/or access to asylum

78. In Greece, authorities suspended the admission of asylum seekers entering the country irregularly in the Evros land border region for 30 days in March 2020, on the grounds of addressing unprecedented migratory pressure, derogating from binding procedures in national law and from international obligations.⁹³ In this regard, the Special Rapporteur emphasized in a public statement that such suspension had no legal basis in international human rights law, stressing that the right to an individual assessment cannot be put on hold.⁹⁴

79. In France, numerous unaccompanied child migrants are reportedly subjected to entry refusal and removal at the land borders with Italy and Spain, without due respect for the child rights protections in national law or for international obligations to consider best interests.⁹⁵

80. In Hungary, pushbacks have been legalized under the 2016 amendments to the Act on State Borders.⁹⁶ They prescribe that migrants apprehended within a zone 8 km from the border fence at the border with Serbia or Croatia are to be removed to two transit zones established on the southern border with Serbia.⁹⁷ Since 2017, such pushbacks have been enabled from the entire territory of Hungary, following the declaration of a so-called "crisis situation caused by mass immigration", resulting in practice in the application of derogations in the guise of general rules.⁹⁸ Under those provisions, Hungary fails to ensure that return decisions are individual and to provide safeguards against refoulement. Since 2016, the Hungarian authorities have forcibly removed more than 71,000 people.⁹⁹

81. Chile, Ecuador and Peru have turned to militarization of border governance in response to large movements of Venezuelans outside of their country. Reports of those States expelling migrants without due evaluation of their vulnerability or protection needs are worrying.¹⁰⁰ Trinidad and Tobago returned hundreds of migrants to the Bolivarian Republic of Venezuela on several occasions in 2020, including children, without assessing the risks to them, including of refoulement. Boats carrying migrants have been intercepted and escorted back to Venezuelan waters.¹⁰¹

⁹¹ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Respect of fundamental rights by Frontex: European Parliament inquiry launched", 23 February 2021, available at www.europarl.europa.eu/news/en/press-room/20210223IPR98504/respect-of-fundamental-rights-by-frontex-european-parliament-inquiry-launched.

⁹² Submission by Human Rights Watch.

⁹³ Submission by Greece. See also GRC 1/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25116>, and the response by Greece, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35244>.

⁹⁴ The Special Rapporteur's statement is available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25736&LangID=E.

⁹⁵ See the submission by the National Consultative Commission on Human Rights, of France, and the submission by UNICEF.

⁹⁶ Submission by the Hungarian Helsinki Committee.

⁹⁷ The Court of Justice of the European Union has held that such escorts to a strip of land devoid of any infrastructure are equivalent to removal. See *European Commission v. Hungary*, case C-808/18, judgment of 17 December 2020.

⁹⁸ Ibid.

⁹⁹ UNHCR, "UNHCR concerned by Hungary's latest measures affecting access to asylum", 10 March 2021, available at www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html.

¹⁰⁰ See the statement by the High Commissioner for Human Rights to the Human Rights Council at its forty-sixth session, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=26806.

¹⁰¹ Submission by the Caribbean Centre for Human Rights.

E. Challenges and obstacles faced by State and non-State actors at international borders

82. The complex nature of border governance requires that personnel in contact with migrants at international borders be equipped with specific knowledge on human rights law and standards, procedural safeguards, and age-sensitive and gender-responsive screening and referral protocols, in order to protect the human rights of migrants.¹⁰²

83. Most Member States have faced specific challenges due to the COVID-19 pandemic, according to the information expressed in their submissions. These include increased efforts invested in maintaining high hygiene standards, in following the relevant health protocols aimed at containing the spread of the virus, and in protecting the residents and personnel working at reception facilities.¹⁰³ The pandemic also caused temporary interruptions in procedures, such as asylum interviews, leading to delays in the processing of asylum applications.¹⁰⁴

84. Search and rescue and disembarkation were delayed or compromised by quarantine requirements, in addition to routine health screenings.¹⁰⁵ Some States have introduced tests to detect the presence of the COVID-19 virus as part of the general health screening on arrival.¹⁰⁶ In some contexts, national search and rescue capacities were reportedly challenged by boats being turned back, or being forced by neighbouring States to drift in international or territorial waters.¹⁰⁷

Challenges faced by non-State actors

85. The Special Rapporteur notes with concern that threats, intimidation and harassment and restrictive policies and practices against human rights defenders, including women human rights defenders, working to protect the rights of migrants, have not subsided.

86. In the United States, humanitarian actors risk five years in prison for “harbouring” undocumented migrants. Defenders of migrant rights are harassed and treated as national security threats.¹⁰⁸ In a number of countries in Europe, the obstacles faced by civil society are having a significant impact on the conduct of their legitimate activities.¹⁰⁹

87. NGO ships and crew involved in search and rescue have faced over 50 criminal or administrative proceedings initiated by Germany, Greece, Italy, Malta, the Netherlands and Spain since 2016.¹¹⁰ The Special Rapporteur notes with concern that those actions have resulted, in practical terms, in a marked decrease of adequate search and rescue capacities in the Mediterranean.¹¹¹ In Greece, NGOs are investigated and prosecuted by authorities on grounds of “espionage”, “violation of State secrets”, “membership of a criminal organization” and “violations of the migration law”.¹¹²

88. In France, supporting migrants at the border does not benefit from humanitarian exemption in the same way as in-country support, where the inclusion of exemptions from “facilitating” irregular stay has been constitutionally reinforced on the grounds of the

¹⁰² Submission by Greece.

¹⁰³ Submission by Croatia.

¹⁰⁴ Submission by Finland.

¹⁰⁵ Submission by Malta.

¹⁰⁶ Submissions by Canada and Italy.

¹⁰⁷ Submission by Turkey.

¹⁰⁸ See USA 2/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25061>.

¹⁰⁹ See Parliamentary Assembly of the Council of Europe resolution 2356 (2020) on the rights and obligations of NGOs assisting refugees and migrants in Europe.

¹¹⁰ European Union Agency for Fundamental Rights, “December 2020 update: NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them”, 18 December 2020, available at <https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal>.

¹¹¹ Ibid.

¹¹² Submission by Mare Liberum.

principle of *fraternité*.¹¹³ In Switzerland, authorities have prosecuted individuals who help people in an irregular situation to access protection, shelter and means of livelihood, on “facilitation” charges.¹¹⁴

89. Independent border monitoring is a key activity that can increase human rights compliance during border governance operations. However, international borders have become “operational areas”, “militarized zones” and “restricted areas”, where observers, including civil society stakeholders, are rarely allowed access.

90. In this regard, the Special Rapporteur welcomes the proposal by the European Commission, in its New Pact on Migration and Asylum, to establish independent national mechanisms to monitor human rights at the borders of the European Union,¹¹⁵ and notes the particular relevance of building independent monitoring capacity in European Union member States in the context of simultaneous proposals envisaging the increased use of fast-tracked asylum procedures and return procedures for certain categories of asylum seekers.

F. Promising practices and measures

91. Many States have domestic legislation codifying the principle of non-refoulement; some have given it constitutional protection.¹¹⁶ The prohibition of indirect (chain) refoulement has been codified in some national laws.¹¹⁷ In many States, domestic legislation sets out standard operating procedures to be applied at borders to provide protection-sensitive entry screening, vulnerability assessments and determination of protection needs.¹¹⁸

92. Some other States guarantee access to refugee protection at the constitutional level, including protection from unlawful removal,¹¹⁹ or are in the process of drafting national asylum laws on the basis of the Convention relating to the Status of Refugees (the 1951 Convention), to enhance national capacities to manage the arrival of refugees and asylum seekers.¹²⁰

93. States have taken steps to evaluate their migration policies in light of the recent commitments made in the Global Compact for Safe, Orderly and Regular Migration. Djibouti, for example, has commissioned a full assessment of its policies, informing a new national strategy on migration. In 2019, it established a national coordination office for migration.¹²¹

94. Access to asylum at border checkpoints has been secured in some countries’ legislation.¹²² In Switzerland, for example, border police authorities are required to ensure access to the asylum procedure to anyone who, even from a distance, indicates that they are in need of international protection. Such measures can prevent entry refusal and guarantee individualized assessment.¹²³

95. Some States guarantee access to asylum procedures and take advantage of electronic registration and referral to process applications without delay.¹²⁴ Remote interviewing has enabled better management of delays and ensured personal health and safety during the COVID-19 pandemic.¹²⁵ States have also made efforts to reduce administrative procedures to the minimum, investing instead in promoting digital technologies and procedures.¹²⁶

¹¹³ Amnesty International, *Punishing Compassion: Solidarity on Trial in Fortress Europe* (2020), available at www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF.

¹¹⁴ Ibid.

¹¹⁵ Submission by the European Commission.

¹¹⁶ Submissions by Austria and Finland.

¹¹⁷ Submissions by Albania, Denmark and Switzerland.

¹¹⁸ Submission by Greece.

¹¹⁹ Submission by Algeria.

¹²⁰ Submission by Egypt.

¹²¹ Submission by Djibouti.

¹²² Submissions by the Russian Federation and Switzerland.

¹²³ Submission by Switzerland.

¹²⁴ Submission by Finland.

¹²⁵ Submissions by Finland and Malta.

¹²⁶ Submission by Azerbaijan.

96. In Bulgaria, the Border Police provides unlimited access to UNHCR and its NGO partner to persons detained in the border area to ensure access to the territory and protection. Monitors can also review documentation relating to the procedures implemented in each individual case.¹²⁷

97. Training of police and migration authorities has been recognized by Mexico as key to resolving deficiencies and to preventing the repetition of failures.¹²⁸ National strategies to mainstream human rights-based procedures at borders are being developed in El Salvador.¹²⁹

98. Albania has invested in communicating messages to counter the stigmatization of migrants as posing an increased health risk to the country in the context of the COVID-19 pandemic, and in promoting their equal access to health services.¹³⁰

99. Since 2018, in support of the European Union member States most affected by migration movements in the Mediterranean region, Ireland has committed to relocating persons disembarked from search and rescue missions from Italy and Malta.¹³¹

IV. Conclusions and recommendations

A. Conclusions

100. Based on an examination of current global practices, the Special Rapporteur concludes that the practice of pushbacks is widespread, and in many contexts it has become a routine element of border governance, with a serious negative impact on the human rights of migrants. The occurrence of pushbacks may be driven by a variety of causes: some are rooted in States' denial of their human rights obligations vis-à-vis migrants, and others result from discriminatory legislation and policies, or from bilateral or regional cooperation between States that fails to respect the human rights of migrants.

101. Pushbacks manifest an entrenched prejudice against migrants, resulting in discriminatory treatment and a denial of access to human rights-based, gender-responsive and child-sensitive reception, screening and individualized assessment of all the reasons that may militate against a person's expulsion. Pushbacks can reflect a genuine lack of preparedness to provide human rights-based entry and reception support, particularly for countries that face large movements. A lack of awareness of States' human rights obligations and their operationalization by border personnel has also led to pushback practices.

102. Pushbacks are also sometimes carried out as a form of punishment and supposed deterrence, denying migrants the protections due in law to retaliate for crossing irregularly, or for attempting to cross an international border. Such practices exacerbate the vulnerabilities of migrants and are deeply traumatizing. Crossing an international border in an unauthorized manner should not constitute a crime, and it does not deprive migrants of their human rights entitlements, including due process guarantees.

103. Impunity for pushbacks is prevalent. In many countries, access to justice for migrants is severely compromised by the lack or failure of internal oversight mechanisms to adequately address and prevent violations. Independent human rights monitoring at borders is sporadic and cannot in itself prevent violations or abuses without the cooperation of the State.

104. States' prerogative to govern migration within their jurisdiction needs to be conducted in accordance with international law, including international human rights

¹²⁷ Submission by Bulgaria.

¹²⁸ Submission by Mexico.

¹²⁹ Submission by El Salvador.

¹³⁰ Submission by Albania.

¹³¹ Submission by Ireland.

law and standards. The Special Rapporteur considers that, in the absence of an individualized assessment for each migrant concerned and other procedural safeguards, pushbacks are a violation of the prohibition of collective expulsion and heighten the risk of further human rights violations, and are incompatible with States' obligations under international human rights law, in particular the prohibition of refoulement.

105. Lack of domestic asylum laws does not absolve States of their obligations to prevent refoulement under international human rights law. Whenever States bring a person within their jurisdiction by exercising control or authority over an area, place, individual or transaction, they are bound by their fundamental obligation not to engage in or contribute to refoulement.

106. In the context of the current COVID-19 pandemic, the Special Rapporteur reiterates that while global public health crises may require travel restrictions, screening, testing, medical quarantine or isolation measures, these measures may not result in denying effective access to asylum and protection under international law. States must ensure that such measures are non-discriminatory, necessary, proportionate, subject to regular and independent review, and reasonable, in line with international law. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.

B. Recommendations

107. The Special Rapporteur urges Member States to put an end to pushback practices, respect fully the prohibition of collective expulsion and uphold the principle of non-refoulement. The Special Rapporteur calls upon States to develop a human rights-based, gender-responsive, age- and child-sensitive approach to migration and border governance, that ensures that the human rights of migrants, including those in an irregular situation, are always the first consideration. The Special Rapporteur strongly recommends States and all relevant stakeholders to make use of the Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights at International Borders. In particular, the Special Rapporteur urges States to:

(a) Implement and fully respect international and regional human rights obligations and uphold the rule of law in the implementation of migration policies;

(b) Ratify the core international human rights instruments¹³² and continue efforts to ensure a human rights-based, age- and child-sensitive and gender-responsive implementation of the Global Compact for Safe, Orderly and Regular Migration and the global compact on refugees;

(c) Harmonize domestic legislation with international human rights law to prohibit refoulement and collective expulsion, and decriminalize irregular entry;

(d) Ensure that border governance measures do not adversely affect the human rights of migrants;

(e) Ensure that private actors who carry out search and rescue operations to aid migrants in distress are not criminalized or penalized for doing so; and ensure that administrative or criminal measures are not applied to deter or immobilize search and rescue capacities and humanitarian assistance at borders;

(f) Protect and assist all migrants at international borders without discrimination; to this end, address bias in law enforcement and adopt and implement standard operating procedures that provide operational guidance on human rights-compliant border governance;

(g) Ensure that each individual's situation and reasons for entry are determined in a gender-responsive manner and that migrants who may be at risk of or

¹³² Information about the core international human rights instruments and their monitoring bodies is available at www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx.

in vulnerable situations at international borders are identified and appropriately referred;

(h) Ensure that the use of force and firearms by border authorities is strictly regulated in accordance with international standards, and that any allegation of misuse is promptly investigated and appropriately sanctioned;

(i) Acknowledge the role of civil society organizations and human rights defenders in addressing and monitoring instances of pushback and provide support to them, including to women's organizations and women human rights defenders working with migrants, and ensure they do not face legal and practical obstacles in carrying out their work;

(j) Ensure due process guarantees for all migrants under the State's jurisdiction or effective control regardless of their status, by ensuring access to an individual examination, and to effective remedy and appeal before a judicial authority; provide access to gender-responsive legal and interpretation services; and suspend removal while an appeal is pending;

(k) Put in place appropriate administrative and legislative mechanisms to ensure access to rights and services to all migrants, and legal status to those who are unable to return, including on grounds relating to the principle of non-refoulement;

(l) Refrain from implementing any measures that adversely affect the best interests of children, whether they travel unaccompanied or in the company of adults; children's best interests should take precedence over migration management objectives;

(m) Cooperate internationally to protect the lives and safety of migrants at land and at sea; ensure that migrants rescued at sea are promptly brought to a port recognized by the international community as safe, and are given access to individualized procedures and adequate care; and refrain from entering into international agreements that would result in human rights violations;

(n) Promptly and thoroughly investigate allegations of human rights violations and abuses at international borders; and establish effective independent monitoring mechanisms and ensure access to all migration-related facilities and procedures to monitor their compliance with international human rights laws and standards;

(o) Protect and fulfil the rights of migrants who have suffered human rights violations or abuses as a result of border governance measures; and take proactive steps to follow up on and investigate pushback allegations in a prompt, effective and transparent manner, to remove suspected perpetrators from duty and to prosecute them where appropriate;

(p) Provide effective access to mechanisms for migrants who have suffered human rights violations or abuses as a result of border governance measures to seek remedies and redress, including by establishing accessible and adequate complaint and reparation procedures, and refraining from raising territorial or other restrictions that effectively prevent applicants from accessing justice;

(q) Ensure that border governance measures taken in the context of the COVID-19 pandemic meet international human rights standards.
