



WORKING GROUP MIGRATION AND TORTURE IN AFRICA

Contribution to the Draft General comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention

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The SOS-Torture Migration and torture Working in group in Africa, is a group of 10 experts from the OMCT SOS-Torture network, which aims to analyze first-hand information in order to set out authoritative research and recommendations for the protection of migrants against torture and other punishments or cruel, inhuman or degrading treatment. The group is sponsored by the World Organization Against Torture (OMCT) and the Collectif des Associations Contre l'Impunité au Togo (CACIT).

Introduction

1. Although immigration detention is not a recent phenomenon, it has recently been fostered by the increasing criminalization of migration both in departure, transit and destination states. This criminalization has encouraged pernicious manipulations of criminal laws to meet political agendas notwithstanding international law in a way that fits with political strategies to respond to and manage migratory flows.
2. Many States are adopting increasingly restrictive deterrence-based immigration control practices and policies in response to the arrival of irregular migrants at their borders. These measures include *refoulement*; criminalisation; prolonged detention, often in appalling conditions; the separation of family members; inadequate reception conditions, including medical care; and “pushback” and “pullback” operations, including on the high seas and may amount to torture and or ill-treatment ¹. According to the UN Special Rapporteur on Torture: *“as a consequence, throughout their journey and even upon arrival at their country of destination, irregular migrants experience increasing uncertainty, danger, violence and abuse, including an escalating prevalence of torture and ill-treatment at the hands of both State officials and non-State actors”*.²
3. European Union³ (EU) and some of its Member States bilaterally (including Spain and Italy⁴) have adopted a range of measures in order to deter and prevent sub-Saharan migrants from crossing the two main physical obstacles on their way to Europe, namely the Mediterranean and the Sahara. As early as 2013, the Special Rapporteur on the rights of migrants had noted with concern that *“within the European Union policy context, irregular migration remains largely viewed as a security concern that must be stopped. This is fundamentally at odds with a human rights approach (...)”*⁵ One such measure is the so-called “externalisation” policy, whereby *“border control no longer takes places at the physical borders”*⁶ but is outsourced to third States and non-state actors, in countries of departure and transit, in exchange for financial support. The EU’s main partners in that

¹ See generally, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”; A/HRC/37/50, 26 February 2018; “Unlawful death of refugees and migrants”, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions; A/72/335, 15 August 2017; OHCHR, “Situation of migrants in transit”, A/HRC/31/35, 2016,

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”; A/HRC/37/50, 26 February 2018, para 9.

³ These include measures to build the capacity of the Libyan coast guard to conduct search and rescue operations in order to prevent irregular sea crossings and return intercepted boats to Libya; restrictions on the ability of NGOs to conduct their own search and rescue operations; and suspending the deployment of EU naval assets (see e.g. Amnesty International, “Libya’s dark web of collusion, Abuses against Europe-bound refugees and migrants”, 2017).

⁴ For an overview of measures adopted by the Spanish and Italian governments, see e.g. Amnesty International, “Fear and Fences- Europe’s approach to keeping refugees at bay”, 2015; “Europe’s sinking shame: the failure to save refugees and migrants at sea”, 2015.

⁵ Report of the Special Rapporteur on the rights of migrants, Francois Crepeau, “Regional study: management of the external borders of the European Union and its impact on the human rights of migrants”, para. 31 (A/HRC/23/46, 24 April 2013)

⁶ Idem

regard are Libya, Niger, Chad and Sudan⁷. Militarisation and securitization of border control are another feature of externalisation, including through the deployment of military equipment, drones and satellite surveillance to monitor migration routes⁸. These externalisation policies are often justified on the grounds that they ‘disrupt’ the business model of smuggling, however in practice they force many to have recourse to even more dangerous routes and practices⁹.

4. This contribution of the migration and torture working group aims to enshrine the reality of migrants facing new types of deprivation of liberty that are more and more used by states in order to avoid violating existing legislation. The threat of arbitrary arrest and detention is ubiquitous along migration routes. Migrants can be arrested or ambushed by smugglers, traffickers, local police, security agents and armed groups¹⁰. An increasing grey zone exists either on migration routes or destinations and need to be clarified.

I. Criminalization of migration in Africa

5. As previously noted, we are witnessing a “progressive criminalization of migration at the expenses of fundamental rights as well as the ill-treatment and arbitrary detention of refugees in third countries »¹¹. In this regard, the Special Rapporteur Felipe González Morales notes that the criminalization of all kinds of migration has forced migrants to lead a life hidden in total secrecy¹². According to him, under the pretext of fighting against the smuggling of migrants, the authorities confuse the offense of trafficking with the criminalization of migrants. For example, while the 2015 law in Niger on the fight against the smuggling of migrants proposes to protect migrants, its article 30 provides for cases of “arrest, imprisonment or preventive detention of a trafficked migrant”¹³, without specifying the reasons. Thus, the law, by providing for coercive measures against migrants, creates a climate of mistrust between them and the security forces who abuse them.

⁷ Clingendael, Netherlands Institute of International Relations, “Multilateral damage: The impact of EU migration policies on central Saharan routes”, CRU Report, September 2018

⁸ See generally: Report of the Special Rapporteur on the rights of migrants, Francois Crepeau, “Regional study: management of the external borders of the European Union and its impact on the human rights of migrants”, A/HRC/23/46, 24 April 2013); UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “Unlawful deaths of refugees and migrants”, A/72/335, 2017

⁹ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “Unlawful deaths of refugees and migrants”, A/72/335, 2017

¹⁰ MSF (2017) Libya: The arbitrary and inhumane detention of migrants, refugees and asylum seekers, available at: <http://www.msf.org/en/article/libya-arbitrary-detention-refugees-asylum-seekers-and-mi-grants-must-stop>

¹¹ Parlement européen, Résolution 2015/2342(INI) « Gérer les flux de réfugiés et de migrants: le rôle de l'action extérieure de l'Union » du 5 avril 2017, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0124_FR.html?redirect

¹² Déclaration de fin de mission du Rapporteur Spécial des Nations Unies sur les droits de l'homme des migrants, Felipe González Morales, lors de sa visite au Niger (1-8 octobre, 2018) <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=23698&LangID=F>

¹³ Law No. 2015-36 of 26 May 2015 relating to the smuggling of migrants

6. In addition, the legal errors of several countries, especially in West Africa, lead to a form of criminalization of individuals of the region who wish to migrate legitimately in a neighboring country on the basis of the ECOWAS protocol on free movement. Their aspirations run counter to the provisions of anti-migration laws which put them in conflict with defense and security forces.

II. Definition of deprivation of liberty

7. Given the various realities observed in the immigration controls, it is necessary to clarify the concept of deprivation of liberty as provided by international treaties and explore how the definition can be extended. The prohibition of arbitrary deprivation of liberty is recognized in all major international and regional instruments for the promotion and protection of human rights. The Article 9, paragraph 1, of the International Covenant on Civil and Political Right provides that *“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”*. The Human Rights Committee in its general comment No. 8 (1982) on the right to liberty and security of persons concluded that article 9, paragraph 1, of the International Covenant on Civil and Political Right is applicable to *“all deprivations of liberty”* including cases concerning immigration control¹⁴. The Committee further indicates that *“any confinement or retention of an individual accompanied by restriction on his or her freedom movement, even if of relatively short duration, may amount to de facto deprivation of liberty”*.
8. If Article 4 (2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment insist on any form of *“detention”* or *“imprisonment”* or *“the placement of a person in a public or private custodial setting”* there are several cases where these situation are rather *de facto* in different settings. In many contexts the restriction of movement is imposed by the indirect effects of a legal, judicial or administrative measure.
9. In many cases, the deprivation of liberty does not fall within the classical definition of placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance. It also has a *de facto* character where people’s freedom of movement is restricted by different means.¹⁵ The Working Group on arbitrary detention has confirmed this in its previous deliberations on house arrest, retention in non-recognized centres for migrants or asylum seekers, psychiatric facilities and so-called international or transit zones in ports or international airports, gathering centres or hospitals¹⁶. In these conditions the deprivation of liberty, although not being a classical process of detention or even retention appears to be a *de facto* restriction of movement similar to a house arrest.
10. These practices should also be qualified as arbitrary detention. The notion of *“arbitrary” stricto sensu* includes both the requirement that a particular form of deprivation of liberty

¹⁴ Human Rights Committee, Torres v. Finland, communication No. 291/1988, Views adopted on 2 April 1990; A. v. Australia, communication No. 560/1993, Views adopted on 3 April 1997

¹⁵ See report of the Working Group to the Economic and Social Council, E/CN.4/1998/44, para. 41; Working Group opinion No. 16/2011 (China).

¹⁶ See its deliberations Nos. 1, 4, 5 and 7.

is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary¹⁷. Even when the law has provided for particular form of deprivation of liberty, it can still be qualified as arbitrary because we should note that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”¹⁸.

III. Types and places of deprivation of liberty to which migrant workers and members of their families may be subjected

A. *De facto* deprivation of liberty following Close ports policies

11. European governments have been refusing permission for the ship’s Master to disembark the migrants and refugees who fled Libya and other countries, in contravention of international law. This practice has highly increased during the Covid19 global pandemic. The repeated occurrence of sea vessels with rescued migrants on board being refused permission to disembark at a safe port by authorities can be considered as *de facto deprivation of liberty*. As a consequence of refusing such permission, the vessels are prevented from docking at the nearest safe port from the point at which migrants are rescued in accordance with established principles of human rights and maritime law. This has resulted in the migrants enduring prolonged periods of time in the Mediterranean Sea on board a vessel without adequate resources or medical attention or the ability to seek protection under the Refugee Convention. These practices are demonstrative of the so called: ‘Closed Ports’ policy¹⁹.
12. This closed-ports policy is a consequence of the refusal to fulfil the non-refoulement obligations of States enshrined in both the UN Convention Against Torture and the UN Refugee Convention. It therefore has the immediate result of indefinite deprivation of liberty of persons on board of such vessels. Indefinite detention is the deprivation of liberty with no time limit or fixed release date. The uncertain and prolonged situation, from which deprivation of liberty arises, results in the mental and physical pain and suffering of persons detained on the vessels.²⁰

¹⁷ See e.g. Human Rights Committee, *A. v. Australia*; *Marques de Morais v. Angola*, communication No. 1128/2002, Views adopted on 29 March 2005, para. 6.1; Inter-American Court of Human Rights, *Gangaram Panday v. Suriname*, Judgement, Ser. C, No. 16, 1994, para. 47; Working Group, opinions No. 4/2011 (Switzerland); No. 3/2004 (Israel).

¹⁸ As noted by the Human Rights Committee in *Mukong v. Cameroon*, communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8

¹⁹ The use of the term ‘Closed Ports’ policy here is not an official term used by either governments, but a term commonly adopted by the media and commentators to refer to the repeated and systematic occurrence of sea vessels carrying refused migrants being refused permission to disembark. The term is adopted herein as shorthand to refer to this practice.

²⁰ ECtHR [GC], *A and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, para. 130: “The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of

13. The retention or blocus of potential asylum seekers, immigrants or refugees on board of these vessels results to prolonged administrative custody without the possibility of administrative or judicial review of remedy²¹. The committee on the Protection of the Rights of All Migrant Workers and Members of Their Families should recognize the refusal to disembark migrants from vessel and their indefinite blocus in boats as a strategy that leads to the detention and severe deprivation of physical liberty of migrants leading to ill-treatment and or torture.
14. *“The possibility for asylum seekers in those circumstances to leave the area of the country where they were seeking asylum appears purely theoretical to the extent that no other country offering a degree of protection comparable to that obtainable in the country where asylum has been requested is prepared or ready to receive the person. This was the view expressed by the European Court of Human Rights, which concluded that maintaining asylum seekers in a transit area, in view restrictions imposed, amounted in fact to deprivation liberty”*²²;

B. Places of detention

The Working group on Migration and torture in Africa would like to share with the committee to de facto places of deprivation of liberty following states practices: migrants’ vessels and ghettos. These places are note legally speaking places of detention.

a) Vessels, “boat refugees” or “boat migrants”: *Ad hoc or de facto detention centres*

15. The Working Group on Arbitrary Detention proposes to use the expression “places of custody” (“lieux de rétention”) to distinguish these from places of “detention”, which are run by prison authorities and are more specifically related to the penal imprisonment of offenders²³. This certainly means that vessels and boat hosting migrants that are indefinitely blocked at coast or in international or so-called “transit” areas falling in the jurisdiction of states of destination that refuse them to disembark, should be considered as “places of detention”.
16. In fact, these boats or vessels should be seen as any other retention, transit or detention center used to prevent and deter migrants to enter the territory of a receiving states to file an asylum request. They play exactly the transitory role played by immigration detention facilities before the return of migrants. Their role is to prevent migrants to enter

certain of the applicants. This is one of the factors which the Court must take into account when assessing whether the threshold of Article 3 was attained.”

²¹ Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, (Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012) <https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>

²² Ibid., § 41

²³ Commission on human rights fifty-fourth session question of the human rights of all persons subjected to any form of detention or imprisonment, Report of the Working Group on Arbitrary Detention E/CN.4/1998/44 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/145/54/PDF/G9714554.pdf?OpenElement>, 19 December 1997, §38

on the territory and jurisdiction of a state and obtain the possibility to meet a judge and access to potential remedies.

b) Ghettos and detention houses of migrants in the desert by non-state actors

17. In response to these measures to criminalize irregular migration, “new routes have been created to meet the growing migration demand and new actors have become involved in this profitable business. For example, Agadez in Niger is currently seeing an increased presence of Sudanese smugglers who organize transit to Libya through Chad and Darfur. These new roads, longer, more dangerous and less traveled, crossing areas in conflict, expose migrants to whole new risks. »²⁴.
18. Therefore, migrants fall under the control of non-state actors involved in smuggling who organize their trip and sometimes abandon them in the desert or sell them to armed militias. Smugglers take advantage of the criminalization of migration to drag migrants down even more dangerous migration routes where they are put in detention. In many cases they end up being deprived of their liberty and detained in ghettos in the deserts or in other unknowns’ areas.
19. Ghettos are a group of houses controlled by smugglers and rented by migrants, where several young people of different nationalities generally live in hiding. Ghetto managers prevent migrants from leaving fearing they will be spotted or arrested by security forces²⁵. In these ghettos, migrants are kept locked up by smugglers who exercise on them several forms of physical and moral violence for many days. In general, there is a lack of detailed information on the places of detention of people because of their status as migrants or asylum seekers. Our organisations have identified several violations of the human rights of migrants, such as the deprivation of food and water, restrictions or deprivation of liberty, in these ghettos²⁶.

²⁴ Daria Davitti & Anca-Elena Ursu, *Why securitizing the Sahel will not stop migration*, https://www.clingendael.org/sites/default/files/2018-01/PB_Why_securing_Sahel_won%27t_stop_migration.pdf, FMU Policy Brief No. 02/2018, 10 January 2018, p. 3,

²⁵ Institut néerlandais de relations internationales *Clingendael* 2018. *Caught in the middle, A human rights and peace-building approach to migration governance in the Sahel*, décembre, <https://www.clingendael.org/publication/human-rights-approach-migration-governance-sahel>

²⁶ OHCHR 2019. *Visite au Niger. Rapport du Rapporteur spécial sur les droits de l’Homme des migrants*, 16 mai, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/140/44/PDF/G1914044.pdf?OpenElement>