



**Non-Refoulement and the Obligations of States to Persons Arbitrarily  
Detained in North-East Syria**

**Position Paper of the United Nations Special Rapporteur on the Promotion  
and Protection of Human Rights and Fundamental Freedoms while  
Countering Terrorism\***

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It is estimated that over 70,000 persons, mostly made up of women and children, are detained in closed camps, rehabilitation centres, and prisons in the Northeast of the Syrian Arab Republic.<sup>1</sup> Those detained maintain over 60 different nationalities.<sup>2</sup> Their detention conditions and regimes, including mass incommunicado detention, have been found by the Special Rapporteur<sup>3</sup> to meet the threshold of torture, or cruel, inhuman or degrading treatment or punishment under customary and treaty based international law norms. None

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<sup>1</sup> 62,628 are estimated to be held in Al Hol camp, 3271 at Al Roj, approximately 10,000 men across multiple prisons and approximately 1,000 boys in prisons and rehabilitation centres.

<sup>2</sup> See A/78/520. See also, Médecins Sans Frontiers, *Between Two Fires: Danger and Desperation in Syria's Al Hol Camp* (2022) found here: [file:///Users/fionnualaniaolain/Downloads/between-two-fires\\_-danger-and-desperation-in-syria%E2%80%99s-al-hol-camp.pdf](file:///Users/fionnualaniaolain/Downloads/between-two-fires_-danger-and-desperation-in-syria%E2%80%99s-al-hol-camp.pdf).

<sup>3</sup> End of Mission Statement of the technical visit to the Northeast of the Syrian Arab Republic, 15-20 July 2023: <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/EoM-Visit-to-Syria-20230721.pdf>. See also A/78/520.

of the third country nationals detained in the detention facilities in Northeast Syria have undergone judicial proceedings or been given the opportunity to challenge the legality of their detention. Judicial proceedings convicting men of Syrian and/or Iraqi nationality primarily of terrorism offences do not appear to comply with the most basic principles or standards of fair trial or due process of law. Numerous serious and systematic violations of human rights and humanitarian law are conjoined with the detention, particularly of third country nationals, including sustained arbitrary violence from the detaining authority and between detainees, as well as sexual violence, enforced disappearances, limited access to appropriate and nutritious food, absence of sanitation, inadequate shelter, lack of access to essential medical services, and lack of access to adequate education for all children. Children who live in the camps are especially vulnerable to deprivation, violence,<sup>4</sup> sex-based harm, trafficking, and exploitation.<sup>5</sup> Almost all children in rehabilitation centres have been subjected to treatment which has induced extreme trauma and mental suffering, particularly due to their brutal separation from their families in the camps, and with no access to psychological support. In addition, due to their isolation from the outside world, with the known exception of interrogations by security agencies, and the unreported fatalities caused by widespread tuberculosis, the children detained in Gweiran Panorama (Sina'a) prison are at particularly high risk of enforced disappearance and torture. Similarly, men held in Gweiran Panorama (Sina'a) prison, are subjected to incommunicado detention and enforced disappearance, and their lives are at severe risk, given the prevalence of untreated tuberculosis combined with starvation. The Special Rapporteur has consistently maintained that the only international law-compliant response to the unendingly complex and precarious human rights, humanitarian and security situation faced by those detained in Northeast Syria is international law compliant repatriation to their countries of nationality.

In the context of repatriation, the Special Rapporteur is acutely aware that concerns related to the risk of refoulement may arise for some individuals and groups if returned to

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<sup>4</sup> Syria: UN Human Rights Chief condemns brutal killing of two girls, alarmed by sharp rise in violence in Al Hol Camp 18 November 2022, found here: <https://www.ohchr.org/en/press-releases/2022/11/syria-un-human-rights-chief-condemns-brutal-killing-two-girls-alarmed-sharp>

<sup>5</sup> See Report of the Special Rapporteur on trafficking in persons, especially women and Children, A/76/263; Independent International Commission of Inquiry on the Syrian Arab Republic <https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/detention-report>

their countries of nationality. As such, she sets out what the application of this principle and applicable international law to the situation of detention in Northeast Syria involves and identifies what corresponding obligations arise for Member States given the desperate, vulnerable, and unsustainable position of persons detained in the various detention facilities in Northeast Syria, to whom the principle of non-refoulement may apply.

### **Principle of non-refoulement in international law**

Conscious of the dehumanising nature of torture and other cruel, inhuman or degrading treatment or punishment, the preamble of the Universal Declaration of Human Rights (UDHR) recognises the inherent dignity of each human individual as the “foundation of freedom, justice, and peace in the world”. This global awareness of the necessity to protect human dignity, together with a profound preoccupation about the increased practice of torture worldwide, has paved the way for the progressive development of the well-established normative framework relating to the universal and absolute prohibition of torture and other cruel, inhuman and degrading treatment or punishment, and its extended applicability everywhere and in all circumstances, with no possible derogation, invoking situations of war, threat of war, public emergency, or security threat.<sup>6</sup> Furthermore, as a norm of international customary law,<sup>7</sup> considered to have the rare status of a peremptory norm of international law (*jus cogens*),<sup>8</sup> this prohibition is mandatory for all: States, regardless of whether they have ratified any relevant treaty, and non-state actors.<sup>9</sup>

The principle of *non-refoulement* has been recognised as an essential component of this absolute and non-derogable protection against torture and other forms of ill-treatment,<sup>10</sup> under international law and as a *jus cogens* norm. Within this legal framework, States are

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<sup>6</sup> Torture and other forms of ill-treatment are prohibited, inter alia, under Article 7 of the ICCPR; Article 1 and 16 of the UNCAT; Article 37 of the CRC.

<sup>7</sup> Article 5 of the UDHR which reads “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” is widely regarded as expressing customary international law.

<sup>8</sup> ILC draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (2022), Annex, [https://legal.un.org/ilc/guide/1\\_14.shtml](https://legal.un.org/ilc/guide/1_14.shtml).

<sup>9</sup> See Article 3 Common to the four Geneva Convention, See also ICRC Rule 90 of the International Humanitarian Law Database of Customary International Humanitarian Law.

<sup>10</sup> See UN Special Rapporteur on torture, A/HRC/13/39/Add.5, para. 238.

required to refrain, at all times, from contributing in any way to practices, which are likely to violate the prohibition against torture or other forms of ill-treatment.

***Refoulement is expressly prohibited under international human rights, refugee<sup>11</sup> and humanitarian law.***

Under international human rights law (IHRL), the obligation to protect individuals against refoulement explicitly prohibits States from transferring or removing individuals from their jurisdiction, or effective control or authority<sup>12</sup> when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment, enforced disappearance, or other serious human rights violations.<sup>13</sup> Under international human rights law, the principle of non-refoulement can be already inferred from Article 7 of the International Covenant on Civil and Political Rights (ICCPR) through its extraterritorial interpretation. This is the long-standing interpretative position of the Human Rights Committee.<sup>14</sup> Similar to the prohibition of torture, the principle of non-refoulement is absolute and applicable at all times and under all circumstances without exception or possible derogation;<sup>15</sup> it is also part of customary international law accepted by all States.<sup>16</sup>

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<sup>11</sup> Article 33 of the 1951 Geneva Convention relating to the Status of Refugees.

<sup>12</sup> The Committee Against Torture interpreted the term any territory under the State jurisdiction to include “[a]ny territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.” General Comment no.2 (2007), para.7.

<sup>13</sup> ICTY, Prosecutor v. Anto Furundzija, No. IT-95-17/1-T, Judgement, 10 December 1998, para. 148.: “It is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture”.

<sup>14</sup> General Comments No. 20 (1992) para. 9 and No. 31 (2004). See also CCPR/C/48/D/470/1991, para. 13.2.

<sup>15</sup> CAT Committee, Tapia Paez v. Sweden (CAT/C/18/D/39/1996), para. 14.5; Nuñez Chipana v. Venezuela (CAT/C/21/D/110/1998), para. 5.6; Agiza v. Sweden (CAT/C/34/D/233/2003), para. 13.8. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/59/324, para. 28.

<sup>16</sup> UNHCR, ‘The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’, 31 January 1994; UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’, 26 January 2007, paras 15 and 21. See also Lauterpacht/Bethlehem, pp. 87–177, and Hathaway, pp. 503–536.

The prohibition against *refoulement* is explicitly enshrined in multiple international treaties, including in article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), providing that, “[n]o State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” and that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”; as well as in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), article 16, stating that “(1) No State Party shall expel, return (“*refouler*”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance; (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.” The same obligations were underlined in articles 8, 9 and 10 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance. Human rights treaty bodies have opined at length on the obligations of States in respect of non-*refoulement*, including the Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child.<sup>17</sup>

In regional instruments, the principle of non-*refoulement* is explicitly found in the Inter-American Convention on the Prevention of Torture (art.13(4)) “Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State”), the American Convention on Human Rights (art.22(8)) “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country

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<sup>17</sup> CAT Communication No. 316/2007 (Australia); Communication No. 827/2017 (Morocco); and CCPR Communication No. 2008/2010 (Spain)

his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions"), and the Charter of Fundamental Rights of the European Union (art.19(2) "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Although not expressly referred to in the European Convention on Human Rights, the general prohibition of refoulement has been solidly embedded as an inherent aspect of the absolute protection against torture construed as extraterritorial in nature.<sup>18</sup> In the European context, the prohibition against refoulement applies if there are reasonable grounds to assume actual danger that the person concerned would be subjected to torture or inhuman or other degrading treatment or punishment in the receiving State.

Under **international humanitarian law** (IHL), the principle of non-refoulement has long been recognised in respect of detainee transfers in international armed conflicts through the Third and Fourth Geneva Conventions.<sup>19</sup> While international humanitarian law rules pertaining to non-international armed conflict do not contain an express prohibition against refoulement, the Special Rapporteur supports and affirms the legal interpretation of the International Committee of the Red Cross (ICRC) on this issue.<sup>20</sup> Namely, that because of the fundamental rights it protects, common Article 3 of the four Geneva Conventions should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer.<sup>21</sup> Accordingly, the principle of non-refoulement applies in a non-international armed conflict as a matter of IHL. The categorical prohibitions in common Article 3 also excludes any transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to

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<sup>18</sup> See ECtHR, *Soering v United Kingdom*, Application No. 14038/88; *Chahal v. United Kingdom*, Application No. 22414/93; *Jabari v. Turkey*, Application No. 40035/98.

<sup>19</sup> Article 12.2 of the Third Geneva Convention States that "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." Article 45(4) of the Fourth Geneva Convention states that "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs". Similar obligations are enshrined in art.45(3) GC IV for Aliens.

<sup>20</sup> [https://casebook.icrc.org/a\\_to\\_z/glossary/non-refoulement](https://casebook.icrc.org/a_to_z/glossary/non-refoulement)

<sup>21</sup> ICRC, 2016 commentary on the First Geneva Convention, para. 708

life and person, such as murder, torture and other forms of ill-treatment.<sup>22</sup> In the same way that the Geneva Conventions prohibit circumvention of the protection owed to protected persons in international armed conflict by transfer to a non-compliant High Contracting Party, humanitarian law applicable in non-international armed conflict should not be circumvented by transferring persons to another Party to the conflict, or to another State or international organization not party to the conflict. Arguably, this would be true for all of the fundamental guarantees in common Article 3 (CA3), including humane treatment, as well as the prohibition of hostage-taking and of the passing of sentences without affording all judicial guarantees. For the last case, however – and considering also the more restrictive interpretation in human rights jurisprudence – the prohibition of *non-refoulement* would probably be confined to trials which are manifestly unfair.<sup>23</sup> The Special Rapporteur finds further confirmation of non-refoulement’s applicability from the position that the absolute prohibition of torture, cruel treatment or outrages upon personal dignity enshrined in CA3 should be interpreted “in light of the parallel provisions in human rights law” where appropriate.<sup>24</sup> The rationale for the absolute prohibition of refoulement under IHRL is that if the authorities are prohibited from subjecting persons to such torture and other ill-treatment, it should not be acceptable to transfer them to places or authorities where they will be subjected to the same or more egregious treatment. The Special Rapporteur uphold the logic of this position as also applicable to the prohibition against torture found in IHL.<sup>25</sup> In terms of who is bound by the prohibition of refoulement, the logic of CA3 requires that not only States, but also non-State Parties to non-international armed conflicts abide by it. The trigger for the *non-refoulement* principle is the transfer of control of the non-State Party to the control of another (State or non-State) authority.<sup>26</sup>

The Special Rapporteur stresses some key aspects of the legal obligations that flow from the principle of non-refoulement.

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<sup>22</sup> ICRC, 2016 commentary on the First Geneva Convention, para. 710.

<sup>23</sup> ICRC, 2016 commentary on the First Geneva Convention, para. 710.

<sup>24</sup> ICRC, 2016 commentary on the First Geneva Convention, paras. 712. See also International Review of the Red Cross, Volume 90 Number 871 September 2008, C. Droege – Transfers of detainees: legal framework, non-refoulement and contemporary challenges, pp. 676; On complementary protection, also see Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press, 2007, pp. 285.

<sup>25</sup> ICRC, 2016 commentary on the First Geneva Convention, para. 712.

<sup>26</sup> ICRC, 2016 commentary on the First Geneva Convention, para. 713.

- **First**, the principle is characterised by its absolute nature without any exception, even on security or counter-terrorism grounds, highlighting its nature as a peremptory norm of international law (*jus cogens*).<sup>27</sup>
- **Second**, the principle applies to any form of removal or extradition<sup>28</sup> no matter what motivates the action,<sup>29</sup> if a risk of irreparable harm exists, and non-refoulement is without any doubt specifically applicable to national security and/or terrorism contexts.
- **Third**, non-refoulement is applicable to transfers from one jurisdiction, or authority, or control, to another, even if within the same territorial borders.<sup>30</sup> This includes cases in which detention is carried out by a State other than the territorial State (extraterritorial detention), interrogations by third country authorities, as well as cases in which parts of the territory are under the control of another actor (State or non-State).<sup>31</sup> As applied to the situation of detention in Northeast Syria, this means that non-refoulement must be assessed even where the individual being transferred does not cross an international border.

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<sup>27</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07-34-05-tENg, Decision on the Application for the Interim Release of Detained Witnesses of 1 October 2013, Trial Chamber II, International Criminal Court, at para. 30 (“peremptoriness [of the principle of non-refoulement] finds increasing recognition among States”). See also Jean Allain, (2001) “The Jus Cogens Nature of Non-Refoulement”, International Journal of Refugee Law 13(4) 533-558 Oxford University Press 2002.

<sup>28</sup> Human Rights Committee, General Comment No. 20: “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”

<sup>29</sup> European Court of Human Rights, *Chahal v. the United Kingdom* App. No. 22414/93, 15 November 1996 “the prohibition provided by article 3 [of the ECHR] against ill-treatment is absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration” para. 80. See also *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005, para. 13.8.

<sup>30</sup> Special Rapporteur on torture, A/70/303 para. 38.

<sup>31</sup> The CAT Committee has repeatedly stated that the CAT applies in any territory under a State party’s jurisdiction which is to be understood to include “all areas under the effective de facto control” of the State party, and “all persons under the effective control of its authorities, of whichever type, wherever located in the world (CAT/C/CR/33/3, para. 4 (b); CAT/C/USA/CO/2, para. 20). The HRC and the ECtHR have similarly held that States parties are responsible for violations beyond their territories in cases of effective control over a territory or a person (CCPR/C/79/Add. 93, para.10, *Issa and Others v. Turkey*, 16 November 2004, ECtHR, Application no. 31821/96, paras. 68 et seq. *Öcalan v. Turkey*, 12 May 2005, ECtHR, Application no. 46221/99, para. 91).



- **Fourth**, the principle applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status and must be applied in a non-discriminatory manner.
- **Fifth**, as a corollary to the principle being applicable to all persons, it applies to any person at risk regardless of their security status.<sup>32</sup> Even where a person is considered or formally defined as posing a security risk to the transferring entity or State, non-refoulement still applies to the transfer process.
- **Sixth**, there must be substantial grounds to believe that a person will be subject to persecution, torture, ill-treatment, or other serious human rights violation upon transfer, either as an individual or as a member of a group (ethnic, religious, political, etc.) that may be at risk of persecution, or due to a systematic practice of torture in the State of destination or by the receiving authorities.
- **Seventh**, to abide by the principle of non-refoulement an individual assessment should be undertaken, to ascertain the risk of irreparable harm incurred if the person is transferred or returned. This assessment should be gender-sensitive, respectful of vulnerabilities, and in the case of children in consideration of the best interests of the child. The Special Rapporteur again highlights that the vast majority of the detained population in Northeast Syria consists of women, among them victims of sexual violence, and children. In addition, minimum safeguards should be granted to ensure that the person is aware of this return or transfer and is able to challenge the process/decision. Safeguards provided for children should take into account their vulnerability and ensure they are involved in and understand the process they are subjected to.
- **Eight**, the principle has been generally understood to apply whether a state exercises jurisdiction or effective control, even when outside of that State's territory. Refoulement may implicate extraterritorial State conduct in multiple dimensions. For

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<sup>32</sup> ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008: "The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3" (para. 137). "It must therefore reaffirm the principle stated in *Chahal* (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State" (para. 138).

example, it may apply whenever States operate and hold individuals abroad, as in the context of armed conflict. It may also apply to a third state providing the means to transfer a person from one territory to another. Whenever States are operating extraterritorially and are engaged in transfer process including provision of identity documents, means of transportation, negotiation for resettlement, the prohibition against refoulement continues to apply.<sup>33</sup> Countries of transit, where detainees are being temporarily held in the process of transfer/removal, have the responsibility to ensure that non-refoulement procedures have been followed and safeguards granted.

- **Ninth** the person at risk should never be transferred to a State from which he/she may subsequently face transfer to a third State where there are substantial grounds for believing that the person would be in danger of being subjected to torture (indirect or ‘chain’ refoulement).<sup>34</sup>

### **Non-refoulement in the context of repatriation from the Northeast of Syria**

The Special Rapporteur recognises that certain countries have made significant efforts to return their nationals from Northeast Syria,<sup>35</sup> others are making sizeable positive efforts.<sup>36</sup> Despite that action, overall, the scale and depth of repatriation from Northeast Syria to countries of nationality has been paltry. Many states lag grievously behind and show little commitment to improve the humanitarian and human rights crisis faced by the majority of their detained citizens.<sup>37</sup> Countries can and should do better. For example, Council of Europe states must now, pursuant to the judicial decision rendered by the European Court of Human Rights in the case of *H.F and Others v. France*, establish a defined legal process to address

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<sup>33</sup> Special Rapporteur on torture, A/70/303 para. 38.

<sup>34</sup> Human Rights Committee, General Comment No. 31, para 12: the obligation “to respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any other country to which the person may subsequently be removed”. UN Special Rapporteur on Torture, A/HRC/13/39/Add.5, para. 238.

<sup>35</sup> Uzbekistan, Kazakhstan, Kosovo, Germany, Bosnia and Herzegovina, United States.

<sup>36</sup> Russian Federation, France, Belgium.

<sup>37</sup> Canada, Norway, Tunisia, Trinidad and Tobago, Maldives, United Kingdom, Australia.

repatriation.<sup>38</sup> Human rights compliant repatriation must be a priority for all States and be discharged with urgency.

In that context, the Special Rapporteur articulates a parallel concern that men, women, and children currently held in closed camps, rehabilitation centres, prisons, and other sites of detention in Northeast Syria may be returned to countries where they face a well-grounded fear of persecution, torture and ill-treatment, enforced disappearances, unfair trials, or other serious human rights violations. She recalls that elements to be taken into account in assessing the credibility of this risk include the situation prevailing in the country to which a person is to be removed or may subsequently be removed (situational/country elements), or to the specific vulnerability of the person concerned (age, sex, affiliation, health status, or others), putting them at risk of torture or ill-treatment, or other forms of irreparable harm (personal elements).<sup>39</sup> The danger may arise independently out of each category, or work in combination.<sup>40</sup> Situational/political circumstances include the existence of a consistent pattern of gross, flagrant, or mass violations of human rights, or systematic practices of torture in the country concerned. These may need to be considered together with other relevant considerations, in particular those relating to the vulnerability of the person concerned.<sup>41</sup> Personal elements include, *inter alia*, whether the person has already been tortured or maltreated by, or at the instigation of, or with the consent or acquiescence of a public official in the past,<sup>42</sup> whether s/he has been arbitrarily detained and denied fundamental safeguards in detention, and whether s/he has engaged in political or any other activity within or outside the State concerned that would make him/her particularly exposed to the risk of being in danger of torture if removed to the State in question.

The Special Rapporteur's concerns arise from two specific contexts. The first, is returning individuals to countries whose treatment of certain groups, minorities or

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<sup>38</sup> ECtHR, Grand Chamber, Case of H.F. and others v. France Applications nos. [24384/19](#) and [44234/20](#), 25 September 2022.

<sup>39</sup> Committee Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 45

<sup>40</sup> Special Rapporteur on Torture, A/59/324, para. 34

<sup>41</sup> *Ibid*, paras 35-36.

<sup>42</sup> General Comment No. 1 of the Committee against Torture on the implementation of article 3 of the Convention and Special Rapporteur on torture, A/59/324, paras 37-38; Committee Against Torture: Tony Chahin v. Sweden, para. 9.5-9.6; and Tursunov v. Kazakhstan, para. 9.5.

religious/ethnic/cultural identities has already been identified by United Nations human rights bodies, including Special Procedures' mandates, and continue to raise clear and evidenced concerns about systematic human rights violation including torture, inhuman and degrading treatment and would therefore trigger non-refoulement consideration. She notes that there are already specific and identifiable groups held within Al-Hol and Al-Roj camps, and other detention facilities, where non-refoulement concerns are actualized and substantiated. For example, the situation of detainees belonging to the Uyghur, and other predominantly Muslim ethnic minority communities from the Xinjiang Uyghur Autonomous Region of the People's Republic of China, is particularly troubling if they were to be returned to China, given the sustained concerns identified and documented by the United Nations High Commissioner for Human Rights,<sup>43</sup> and United Nations Special Procedure mechanisms,<sup>44</sup> regarding their discriminatory targeting on the basis of their ethnic and religious affiliation and the associated serious violations against their fundamental human rights .

The second concern, as a combination of situational and political elements that touches both upon the conditions prevailing in the country of return and the specific vulnerability of the individuals, is that persons currently detained in these camps are perceived to be associated with U.N. designated terrorist groups (namely: ISIL/Daesh). By virtue of such presumed or actual association, may be subjected to torture and ill- treatment, including coercive interrogations to extract information, or other serious human rights violations such as incommunicado detention, enforced disappearance, death penalty, trials lacking due process guarantees and other forms of persecution should they return to their countries of nationality.<sup>45</sup>

The Special Rapporteur is aware of individuals who have not sought to be repatriated or refused repatriation despite the extremity of the situation they find themselves in,

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<sup>43</sup> OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, August 2022.

<sup>44</sup> OL CHN 18/2019; and AL CHN 12/2022

<sup>45</sup>See Commission of Inquiry on the Syrian Arab Republic, A/HRC/51/45, para. 36; A/HRC/52/69, paras. 62-70; A/HRC/54/5, paras. 40-41.

precisely because of their fears of persecution, torture, ill- treatment, unfair trials, or other serious human rights violations if returned home.<sup>46</sup>

The Special Rapporteur also notes that some individuals seeking repatriation, have been stripped of their citizenship of the country where they grew up and have family, and left stateless or with the nationality of their country of origin, to which they cannot return due to armed conflict, or because torture is endemic. By depriving these persons from the citizenship of the country where they may have had a chance of undergoing a fair trial and be treated humanely, if returned, they lost their only opportunity for an international law compliant repatriation, pursuant to the obligation of non-refoulement.

### **Procedural Safeguards and non-refoulement**

The Special Rapporteur recalls that due respect of the principle of non-refoulement in the context of repatriations requires the implementation of a set of safeguards to ensure the fairness of the procedure and effectively prevent and protect individuals against serious violations of their human rights. These safeguards include a fair and individualised assessment of whether there are substantial grounds to believe that a foreseeable, personal, present, and real risk of torture or ill-treatment, arbitrary deprivation of life, enforced disappearance, or persecution exists should the transfer take place and, if this risk is substantiated, the transfer would be denied.

To be meaningful, the individual assessment by the transferring authority should take place prior to any transfer and the transfer must be suspended until a final decision is reached. For the decision of transfer to comply with minimal procedural safeguards, during the review procedure, the detainee should: 1) be informed of the request for transfer, in a language that s/he understands; 2) be given a meaningful opportunity to provide information substantiating any fears and risks that may be incurred if returned; and 3) be granted access to legal assistance. Given the significant challenges of providing independent legal assistance

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<sup>46</sup> The Special Rapporteur acknowledges that individuals may not want to return home based on a fear of prosecution for various offences including terrorism and international crimes. Such return does not trigger concerns of non-refoulement.

in Northeast Syria, remote (confidential) communication with adequate and independent legal assistance and safeguards from countries of return or resettlement may be sufficient to provide necessary guarantees for the transfer process.<sup>47</sup> Furthermore, to ensure the fairness of the process of assessment, it should be: 1) thorough and with meaningful participation of detainees; 2) conducted without discrimination; and 3) the decision that it takes should have the possibility of suitable appeal.<sup>48</sup> Collective transfers, without an objective examination of the individual cases with regard to personal risks, should be considered as a violation of the principle of non-refoulement.<sup>49</sup>

The Special Rapporteur acknowledges that under applicable international humanitarian law, if the detaining authority is a non-state armed group, the obligations arising out of respect for the principle of non-refoulement may be required of them. Pursuant to article 45 of the Fourth Geneva Convention, the transferring authority has a responsibility to ensure humane treatment of the persons transferred and to ensure they will not be subjected to discriminatory treatment or persecution by the receiving authority.<sup>50</sup> These obligations align with the obligations under IHRL to protect the rights of transferred persons against serious human rights violations. The Special Rapporteur also notes that such groups have, in the past, already taken a number of measures to protect detainees against unlawful transfers.<sup>51</sup>

Given the lack of consistent and transparent procedures for repatriation from Northeast Syria, the Special Rapporteur confirms the responsibility of the detaining authorities to establish a non-discriminatory and international humanitarian law compliant process entrusted to track/document non-refoulement concerns. She also concludes that in order to establish trust and legitimacy such a process may necessitate a parallel and complementary internationally supported engagement, led by an international independent

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<sup>47</sup> A/78/171 & A/HRC/53/31 (Special Rapporteur Independence of Judges and Lawyers).

<sup>48</sup> Generally applicable human rights law would provide such appeal before an impartial and independent body separate from the one that took the transfer decision.

<sup>49</sup> CAT, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4, para. 13.

<sup>50</sup> ICRC, Commentary on article 45, GC IV on civilians, (1958)

<sup>51</sup> ICRC, "Detention by Non-State Armed Groups: Obligations Under International Humanitarian Law and Examples of How to Implement Them", Geneva, 2023; Diakonia International Humanitarian Law Centre, "The legal status of ISIS-affiliated foreign nationals held in detention in North-east Syria", August 2019, pp 37-39.

human rights body/office, to ensure that persons are not returned to countries where they face well-grounded fears of serious and irreparable harm. Such an international dimension would support comprehensive, individual, and human-rights compliant assessment in line with the procedural safeguards identified above. This process could be initiated in the detention settings to proactively identify individuals and groups for whom non-refoulement concerns arise.

This recommendation dovetails with the Special Rapporteur's view that comprehensive, well-regulated and human rights compliant data must be collected on persons leaving the camps in Northeast Syria to ensure that, as protected persons in an armed conflict, their rights are duly protected.

The Special Rapporteur further highlights the role played by United Nations entities in the Global Program on Prosecution, Rehabilitation and Reintegration (PRR),<sup>52</sup> and the specific obligations of due diligence that fall to the international process that support, enable and facilitate repatriation to countries of nationality in particular through technical assistance processes.

### **Use of Diplomatic Assurances**

The Special Rapporteur notes that in some cases, States may resort to diplomatic assurances in response to fears of irreparable harm expressed by nationals, upon their return. The Special Rapporteur is of the view that such assurances are not an alternative to the impartial, independent and individualised assessment process to exclude the possibility of refoulement.

The Special Rapporteur is concerned about the reported reliance on diplomatic assurances to facilitate the transfer of detainees from the Northeast of Syria to their countries of origin where they may be exposed to irreparable harm. This practice is likely to significantly undermine the prohibition against refoulement. It is her understanding that such assurances

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<sup>52</sup> <https://www.un.org/counterterrorism/cct/prosecution-rehabilitation-reintegration>

have been obtained through a third State, acting as an intermediary between the detaining authorities and the States to which individuals are transferred (indirect or chain refoulement).

The Special Rapporteur recalls that diplomatic assurances cannot be “used as a loophole”<sup>53</sup> to undermine the absolute and non-derogable principle of non-refoulement in cases where there are substantial grounds for believing the individual returned would be in danger of being subjected to torture or other ill-treatment in the State of return.

The Special Rapporteur notes that, in her view, as diplomatic assurances are always sought in situations involving return to countries where there is a clear and recognised risk of torture or other forms of ill-treatment, they should, as a matter of principle, not be resorted to.<sup>54</sup> This is particularly the case where there is a pattern of gross, flagrant or mass violations of human rights, or systematic practices of torture in the country concerned, even where the patterns and practices concern a limited category of individuals to which the detainee whose repatriation is sought, belongs. This could include individuals who belong to a specific ethnic or religious group, or to the category of “terrorist” or “extremist” (whether accused or convicted).

Where diplomatic assurances are nonetheless used to mitigate the risk upon transfer, the Special Rapporteur stresses that one of the inherent risks is the impossibility to adequately verify their respect once the individual has been transferred. Therefore, a key issue to be considered is whether the transferring authority believes that beyond a clear and unequivocal prohibition of persecution, torture, ill-treatment or other serious human rights violations, a system which abides by minimum international law requirements can be put in

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<sup>53</sup> CAT/C/CG/4, para. 20.

<sup>54</sup> UK House of Lords, *Judgments - RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department OO (Jordan) (Original Respondent and Cross-appellant) v. Secretary of State for the Home Department (Original Appellant and Cross-respondent)*, ([2009] UKHL 10), para 115: “That said, there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic. This comes close to the ‘Catch 22’ proposition that if you need to ask for assurances you cannot rely on them. If a State is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?”.



place and respected upon transfer. If the answer is no, then diplomatic assurances should not be resorted to. For States providing diplomatic assurances a human rights complaint follow-up procedure must be put in place. This follow-up process should identify the steps to be taken in the case where the rights of the individual transferred have been violated, or where the receiving State has failed to respect fundamental guarantees including humane treatment of those transferred.

The Special Rapporteur affirms that diplomatic assurances could not be agreed or pursued without the express consent of the concerned detainee. The terms of these assurances should be written, agreed, and elaborated in participation of the detainee and appropriate legal representation. They cannot be used to forcibly repatriate detainees.

In closing, the Special Rapporteur takes the view that bespoke arrangement will need to be made to address the specific needs for resettlement and reintegration of large groups who cannot be returned home, and for whom lifetime arbitrary detention is unacceptable as a matter of international law.

### **Alternative arrangements in substantiated cases of refoulement**

The Special Rapporteur recognizes that an indefinite situation of arbitrary detention in inhumane conditions cannot be the accepted alternative for detainees at risk of refoulement. In this regard, she is of the view that other measures should be considered in compliance with international humanitarian and human rights law to address the immediate humanitarian and human rights needs of this detained population. In considering alternatives, the Special Rapporteur makes a distinction between several categories of detainees and identifies relevant alternative measures to be considered by States in order to protect these identified groups from the risk of refoulement incurred if they return to their countries of origin.

#### **1) Vulnerable detainees including children (girls and boys) below the age of 18 years old.**

The Special Rapporteur recalls that the vast majority of the detained population in the Northeast of Syria are children below the age of 18 years old, who have been coerced to travel to Syria, by their families, or have been born during the conflict. They should all be primarily considered as victims of terrorism and granted meaningful reparation and rehabilitation. These children should be granted access to the right to seek refuge/resettlement, in cases where repatriation to home countries is not possible, to enable their release and resettlement to a third safe country, where they could be resettled with a commitment to rehabilitation and reintegration. Resettlement procedures should follow from sustained engagement with the relevant the UN specialised agencies facilitating legal representation in consideration of the best interests of the child and the right to family reunification. In cases where a child does not have family members, a priority would be to identify who could care for him/her in a third safe country.

For children, the Special Rapporteur insists that rights of children to family life is key factor in their meaningful rehabilitation, requiring States to grant resettlement of siblings together with their mothers, to the same country, and refrain from practices that would lead to family separations.<sup>55</sup>

## **2) Vulnerable detainees including women victims of sexual violence and trafficking.**

The Special Rapporteur holds that resettlement should be granted to women who have been victims of sexual violence or trafficking to conflict zones,<sup>56</sup> coerced or groomed to travel to Syria, and where there is no evidence of their involvement in committing serious crimes. The Special Rapporteur urges particular attention to the plight of girls who travelled under the age of 18, and who may have “married” in circumstances where no meaningful consent could be given to religious or civil marriage, and in general as a matter of domestic law, would have been the victims of statutory rape in regard of sexual relationships and impregnation before their age of majority. She also highlights the need to consider the plight of mothers who hold a different nationality from their children, particularly if such women would face

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<sup>55</sup> The Special Rapporteur recognises that in some cases separation will be in the best interest of the child. She highlights the importance of ensuring that the best interest test be examined through fair procedures with competent authorities, notably in countries of origin. See [CHE 4/2021 and TUN 6/2021, TUN 6/2023](#).

<sup>56</sup> A/78/172 para 6,7, 9 & 17 (Special Rapporteur on Trafficking in Persons, Especially Women and Children)

non-refoulement concerns on return to their countries of origin. She recommends in consideration of the best interest of the child, that such families be resettled in the country of the child's nationality, if no refoulement concerns arise there.

### **3) Persons accused or suspected of having committed serious crimes, including torture and ill-treatment:**

The Special Rapporteur reminds States of their obligation to extradite or prosecute (*aut dedere aut judicare*), which is enshrined as a principle of international customary law for core crimes under international law.<sup>57</sup> Considered as endangering of the values of dignity and humanity, all States have an obligation to cooperate in order to bring to justice persons who committed such crimes.<sup>58</sup> In application of the principle of *aut dedere aut judicare*, and in honouring the right of victims of terrorism to justice, States that have collected information and evidence that could incriminate detainees held in the Northeast of Syria, and having legal provisions allowing prosecution using universal jurisdiction,<sup>59</sup> should request their extradition for the purpose of prosecution, in accordance with due process of law and guarantees of a fair trial. In such cases, legal safeguards should be provided in a language the person understands, allowing full participation in judicial proceedings.

The Special Rapporteur recognizes the capacity of certain States to prosecute persons who are not their nationals and who have not committed crimes in territories under their jurisdiction, in application of the universal jurisdiction, particularly regarding core crimes under international law.

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<sup>57</sup> The ILC Draft Code of Crime Against Peace and Security of Mankind 1996 recognizes the existence of an international duty to extradite or prosecute with respect to certain types of crimes which constitute threats to international peace and security, art. 9. See also UN SC 1373, which requires States to bring individuals who are suspected of having committed acts of terrorism to justice or, in the event that they are unable to do so, to extradite them (*aut dedere aut judicare*).

<sup>58</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgement 20 July 2012, para 68, "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity..."

<sup>59</sup> Position Paper of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the prosecution of individuals with alleged links to designated non-State armed groups for crimes committed in North-East Syria as a key aspect of the rights of victims of terrorism, September 2023.  
<https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/Position-Paper-on-prosecutions.pdf>

Furthermore, the Special Rapporteur supports and encourages States to accept the resettlement of children with their mothers, even if mothers are accused or suspected of committing crimes, in order to safeguard the right to family life, ensure reintegration of children and to provide remedy for victims of terrorism. Her mandate supports the prosecution of all persons for whom there is sufficient evidence to proceed including mothers, for core international crimes. She has been encouraged by the practice of certain States in facilitating return, prosecution and ongoing maintenance of family ties.<sup>60</sup>

### **The Special Rapporteur recommends:**

- (1) **A formal acknowledgement** by all States with nationals detained in Northeast Syria and other key interlocutors that non-refoulement must be addressed in the context of a holistic response to the necessity of repatriation.
- (2) **A formal recognition** by United Nations human rights and counter-terrorism entities that non-refoulement is a specific and live concern in Northeast Syria and must be addressed by such entities in the technical assistance, capacity building, and in their global programming.
- (3) **A comprehensive empirical assessment** of the scale of non-refoulement challenge be carried out in consultation with relevant UN entities regarding quantification of this vulnerability within the population held in camps and other detention facilities in Northeast Syria.
- (4) **The establishment of clear and transparent repatriation procedures in compliance with international law**, by the detaining authorities, facilitating detainees to safely report their fears pertaining to the risk of refoulment, with engagement by international independent humanitarian and human rights entities to assess **compliance** in practice.
- (5) **The commitment of States** involved in repatriation, as a country of transit or territorial State (notably Syria, Turkey and Iraq), to exercise due diligence to ensure that detainees arriving in or repatriated through their territories have been subject to an

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<sup>60</sup> End of Mission statement on Germany/North Macedonia, 13 July 2003, <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/20230713-eom-germany-macedonia-srct-en.pdf>

international law compliant process to ascertain potential substantiated risks of serious human rights violations upon their repatriation, in due respect of minimum procedural safeguards.

- (6) **Ongoing monitoring of the commitment of the government of Syria** to implementation of non-refoulement guarantees and addressing the protection to persons returning from the Northeast to other parts of the territory of the Syrian Arab Republic.
- (7) **Consideration be given to the establishment of a process** to address the situation of those men, women and children who may be subject to non-refoulement concerns. Such a process could address third country resettlement, long-term planning if they are to remain in the territory and/or the negotiation and oversight of transfers with diplomatic assurances.