



Mandate of the United Nations Special Rapporteur on Trafficking in Persons, especially women and children

1. I, Siobhán Mullally, the United Nations Special Rapporteur on trafficking in persons, especially women and children, (the Special Rapporteur) established pursuant to Human Rights Council resolution 44/4, have the honour to submit my expert opinion in the case of Shamima BEGUM v SSHD.
2. I have been instructed by the lawyers representing Ms Shamima Begum to provide an opinion in my capacity as the UN Special Rapporteur on trafficking in persons, especially women and children.
3. I have been provided with a copy of the Grounds of Appeal, the evidence of the Secretary of State, and a copy of the Scott Schedule in this matter.
4. Special Rapporteurs are independent experts on thematic human rights or country issues within the Special Procedures of the UN Human Rights system. The Special Procedures are independent human rights experts, and in accordance with the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, all Special Procedures mandate holders carry out their functions independently and impartially.
5. Pursuant to Human Rights Council (HRC) Resolution 44/4, the mandate of the Special Rapporteur involves: (a) taking action on violations committed against trafficked persons and on situations in which there has been a failure to protect their human rights; (b) undertaking country visits in order to study the situation in situ and formulate recommendations to prevent and/or combat trafficking, and protect the human rights of victims of trafficking in specific countries and/or regions; and (c) submitting annual reports to the UN Human Rights Council and the General Assembly. HRC Resolution 44/4 specifically recognises the importance of the work of the Special Rapporteur on trafficking in persons, especially women and children, “*in the prevention of trafficking in persons and the promotion of the global fight against trafficking in persons and in promoting awareness of and upholding the human rights of victims of trafficking*”.

6. As Special Rapporteur, I report annually to the United Nations Human Rights Council and to the United Nations General Assembly. Having addressed the legal issues of identification, assistance and protection of victims of trafficking, and in particular the protection of victims of trafficking in conflict affected areas,¹ as well as the nature and scope of the non-punishment principle in international law and the nexus between trafficking and terrorism,² the legal questions at the core of this case, relate directly to the work and concerns of the mandate of Special Rapporteur.
7. I have recently appeared as an intervener, with the Court's permission, in: *Wong v. Basfar*, (UKSC 2020/0155), heard on 13 and 14 October 2021; *AAD & Ors, R. v [2022] EWCA Crim 106* (03 February 2022); *H.F. and M.F. v. France* (App. No. 24384/19) and *J.D. and A.D. v. France* (App. No. 44234/20) before the European Court of Human Rights (Grand Chamber); and *Prosecutor v Dominic Ongwen* No. ICC-02/04-01/15 A A2 (Appeals Chamber, the International Criminal Court).

Submission by the UN Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally

8. The submission of this opinion is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies
9. As the UN Special Rapporteur, I am particularly mindful of the critical need to understand that the factors linked to women's and girls' alleged association with terrorist groups is highly complex. The relevance of age and gender related factors, as well as those of race and ethnicity, and positions of vulnerability, must be

¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, on the gender dimension of trafficking in persons in conflict and post-conflict settings and the importance of integrating a human rights-based approach to trafficking in persons into the women and peace and security agenda of the Security Council (17 July 2018) A/73/171; Report of the Special Rapporteur on trafficking in persons, especially women and children, on trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children (5 August 2016) A/71/303; Report of the Special Rapporteur on trafficking in persons, especially women and children, on due diligence and trafficking in persons (3 August 2015) A/70/260; Report of the Special Rapporteur on trafficking in persons, especially women and children, on trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children (3 May 2016) A/HRC/32/41.

² Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle (2021) UN Doc. (17 May 2021) A/HRC/47/34; *On the Nexus between Trafficking and Terrorism* A/76/263 (3 August 2021)

acknowledged. Dependency, may be linked to the lack of family or community supports, the presence of children and caring needs, lack of knowledge of local languages, economic dependency, ill health, or fear of attacks or reprisals. I have engaged with other independent experts of the UN Special Procedures, in Communications to States, including the United Kingdom, concerning the situation of women and children in the camps in NE Syria, led by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. These Communications analysed their potential status as victims of trafficking, and the positive obligations of states to provide assistance and protection to victims of trafficking and persons at risk of trafficking.³ I was invited to provide oral evidence to parliament, on the Nationality and Borders Bill, and I led a Joint Communication (OL GBR 11/2021.) to the United Kingdom, providing legal analysis of the Nationality and Borders Bill, which was joined by other Special Rapporteurs of the Human Rights Council, including the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Letter, and the Government's response are published at: <https://spcommreports.ohchr.org/TmSearch/Results>

10. Human trafficking is a regular and widespread phenomenon in armed conflict. In such situations, women and children are frequently the targets of armed groups, and are recruited for the purposes of, *inter alia*, sexual exploitation, forced marriage, forced labour and exploitation in criminal activities. Recognising these forms of exploitation, and the processes through which individuals are recruited to leave for the territory of Syria, the United Nations Security Council (UNSC) has repeatedly called on states not to penalise or stigmatise victims of trafficking for their involvement in any unlawful activities.⁴

11. In Resolution 2331 (2016), the UN Security Council called upon Member States to implement:

[...] robust victim, and possible victim, identification mechanisms and provide access to protection and assistance for identified victims without delay, also in relation to trafficking in persons in armed conflict, including where such victims are refugees and internally displaced persons (IDPs), and to address comprehensively victims' needs, including the provision of or access to medical, psychosocial assistance and legal aid, as well as ensure that victims are treated as victims of crime and in line with domestic legislation not penalized

³ See also OHCHR, '[Switzerland: Two abducted girls held at grim Syria camp must be returned home – UN experts](#)' (21 April 2021); OHCHR, '[Syria: UN experts urge 57 States to repatriate women and children from squalid camps](#)' (8 February 2021).

⁴ UNSC, 'Statement by the President of the Security Council' (16 December 2015) S/PRST/2015/25; UNSC Res 2331 (2016); and UNSC Res 2388 (2017).

or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage.⁵

12. In addition, the Security Council affirmed that:

[...] victims of trafficking in persons in all its forms, and of sexual violence, committed by terrorist groups should be classified as victims of terrorism with the purpose of rendering them eligible for official support, recognition and redress available to victims of terrorism, have access to national relief and reparations programmes, contribute to lifting the sociocultural stigma attached to this category of crime and facilitate rehabilitation and reintegration efforts.⁶

13. In Resolution 2388 (2017), the Security Council urged Member States to:

[...] assess the individual situation of persons released from the captivity of armed and terrorist groups so as to enable prompt identification of victims of trafficking, their treatment as victims of crime and to consider, in line with domestic legislation, not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having being subjected to trafficking.⁷

LEGAL DEFINITION OF TRAFFICKING IN HUMAN BEINGS

14. According to the Council of Europe Convention on Action against Trafficking in Human Beings:

“Trafficking in human beings” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁸

⁵ UNSC Res 2331 (2016) para. 2(d).

⁶ *Ibid*, para. 10.

⁷ UNSC Res 2388 (2017) para. 17.

⁸ Council of Europe Convention on Action against Trafficking in Human Beings (n 5) Art. 4(a).

15. Notwithstanding the absence of an express reference to trafficking in the ECHR, in the landmark judgment of *Rantsev v. Cyprus and Russia*, the ECtHR considered that:

[...] trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. [...] There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.⁹

16. As noted in the Council of Europe Convention’s Explanatory Report, trafficking in human beings is a combination of three constituents – act, means, and purpose – rather than the constituents taken in isolation.¹⁰ The definition endeavours to encompass the whole sequence of actions that leads to exploitation of the trafficked person.

17. The act in trafficking in persons refers to the recruitment, transportation, transfer, harbouring or receipt of persons. The means are the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and giving or receiving payments or benefits to achieve the consent of a person having control over another person. ‘Abuse of a position of vulnerability’ is a particular means, which “stands apart from others such as ‘force’ or ‘fraud’ in its essentially open-ended quality.”¹¹ The Explanatory Report to the Council of Europe Convention defines it as:

[...] abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.¹²

⁹ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (ECtHR, 7 January 2010) paras. 281-282.

¹⁰ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 75.

¹¹ UNODC, Issue paper. *The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised* (2018) p. 7.

¹² Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 83.

18. The third constituent of the trafficking definition is the purpose element, which must be the exploitation of the individual. In addition to the forms of exploitation specified in the definition (sexual exploitation, labour exploitation and removal of organs), individuals may be trafficked for the purpose of exploitation of forced marriage or exploitation in criminal activities, domestic servitude or a combination of these purposes of exploitation.¹³
19. A distinctive element of human trafficking, as defined both in the Palermo Protocol and in the Council of Europe Convention, is the irrelevance of the trafficked person's consent to the intended exploitation where any of the means have been used.¹⁴ With regard to children, understood as persons under the age of eighteen, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking even if this does not involve any of the means.¹⁵ In other words, consent is irrelevant regardless of whether any means have been used.
20. The experiences of women and girls associated with terrorist groups are highly complex, and involve a wide range of factors, including age and backgrounds. In the context of marriages – both with respect to trafficking for the purpose of forced marriage, but also with respect to the role of marriage in trafficking experiences – the UNODC has highlighted that, in certain circumstances, “husbands employ various methods of control to limit the freedom of movement and choice of their spouses, using violence, threats and psychological pressure. Women and girls are abused and exploited ... and they are extremely dependent on their husbands in multiple ways.”¹⁶ States must be mindful of the potential for coercion, coercive control, position of vulnerability, deception and trafficking when examining these cases. Indeed, in respect of trafficking of women and girls to Syria, “while some women in the camps may bear various degrees of responsibility for crimes based on their roles in ISIL, some were also victims of abuse, trafficking or sexual exploitation after having been coerced or groomed into joining the group.”¹⁷

¹³ UNODC, *Countering Trafficking in Persons in Conflict Situations* (2018) p. 56; *Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle*.

¹⁴ Council of Europe Convention on Action against Trafficking in Human Beings (n 5) Art. 4(b). See also Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 25 December 2003) (‘Palermo Protocol’) Art. 3(b).

¹⁵ Council of Europe Convention on Action against Trafficking in Human Beings (n 5) Art. 4(c). See also Palermo Protocol (n 20) Art. 3(c).

¹⁶ UNODC, *Interlinkages between Trafficking in Persons and Marriage* (2020) p. 56.

¹⁷ 23rd Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (2021) A/HRC/46/55, para. 55.

21. The UNODC *Countering Trafficking in Persons in Conflict Situations: Thematic Paper*, (2018)¹⁸ highlights the prevalence of trafficking for all purposes of exploitation, including sexual exploitation and forced marriage, in conflict situations. The report of the Secretary-General on trafficking in persons in armed conflict pursuant to Security Council resolution 2388 outlines that trafficking in persons continues to be increasingly identified as a feature of armed conflict. (Security Council resolution 2388 (2017)).
22. States should be mindful of the potential for coercion, co-option, coercive control, grooming, trafficking, enslavement and sexual exploitation when examining the agency, or lack thereof, of victims of trafficking or potential victims. States should always undertake individualised assessments with respect to the specific situations of women and girls, and be conscious of the gender-specific trauma that can be experienced by women and girls. Article 17 of the Council of Europe Convention on Action against Trafficking in Human Beings draws attention to the gender dimension of trafficking in human beings.¹⁹ The Explanatory Report to the Convention stresses that, “measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims.”²⁰
23. The Special Rapporteur notes that rape and other forms of sexual violence against children can result when children are trafficked for the purpose of forced, temporary or child marriage, sexual slavery or other forms of sexual exploitation. Recruitment and use of children by armed forces and armed groups can constitute trafficking in persons, being an act (recruitment) carried out for the purpose of exploitation (use in armed conflict).
24. States have an international obligation to identify, assist, and protect victims of trafficking.²¹ A failure to identify a trafficked person will likely result in a further denial of that person’s human rights. The ECtHR has held that the identification of victims or potential victims of trafficking is a positive obligation resting on the State, flowing from Article 4 of the European Convention on Human Rights (ECHR).²²
25. As the Court found in *Rantsev v. Cyprus and Russia*, “Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or

¹⁸ https://www.unodc.org/documents/human-trafficking/2018/17-08776_ebook-Countering_Trafficking_in_Persons_in_Conflict_Situations.pdf

¹⁹ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) Art. 17.

²⁰ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (2005) para. 210.

²¹ Council of Europe Convention on Action against Trafficking in Human Beings (n 5) Arts. 10 and 12; OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002) Guideline 2.

²² *Rantsev*. See also, *inter alia*, *L.E. v. Greece*, App. No. 71545/12 (ECtHR, 21 January 2016); *Chowdury and Others v. Greece*, App. No. 21884/15 (ECtHR, 30 March 2017); *S.M. v. Croatia*, App. No. 60561/14 (ECtHR [GC], 25 June 2020); and *V.C.L. and A.N. v. United Kingdom*, Apps. No. 74603/12 and No. 77587/12 (ECtHR, 16 February 2021).

potential victims, of trafficking.”²³ In order for such obligations to arise, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited. In this context, States have a positive obligation to take operational measures to protect victims, or potential victims, of trafficking, which “include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.”²⁴

26. The Special Rapporteur highlights that significant bodies of evidence are now available on the recruitment and use of children, including in particular girl children and young women, by ISIL and Da’esh, for purposes of forced labour, sexual exploitation, forced criminality and forced marriage.²⁵ As has been noted in the UNODC Thematic Paper, *Countering Trafficking in Conflict situations*, (2018) high levels of trafficking in persons may be present in areas affected by conflict in which atrocity crimes are perpetrated. It is also noted that “Ethnic, religious and other minorities may be acutely vulnerable where they are targeted for specific, particularly egregious forms of exploitation” (at p.43). The intersections of gender, race and ethnicity must also be recognised in increasing vulnerability to trafficking. As is noted in the UNODC Thematic Paper, “Pre-existing vulnerability factors, such as discrimination based on sex or gender, may be exacerbated by conflict. This is the case for adolescent girls’ vulnerability to violence, sexual exploitation and forced marriage” (p.43).
27. The identification of victims of trafficking is a positive obligation on the State. Victims may not self-identify, due to a lack of recognition of the situation of exploitation, particularly where the ‘act’ of recruitment or transfer took place when they were a child (i.e. under the age of eighteen). Fear of reprisals may also hinder reporting of experiences of exploitation. In situations of conflict and displacement, the lack of protection available increases the risks of reprisals. Where there is a failure to identify a victim, the specialised assistance and protection needed is not provided: “Victims of trafficking may be approached as survivors of gender-based violence and sexual slavery or as any other people in need of support. In the former case there are opportunities to also identify them as victims of trafficking and to ensure their access to specialized assistance services.”²⁶ In addressing the linkages between trafficking of women and girls and marriage, it is recognised that factors that, “contribute to the vulnerability of women and girls include poverty, unemployment, violence and conflicts, circumstances

²³ *Rantsev* para. 286.

²⁴ *V.C.L. and A.N.* (n 25) para. 153. See also *Rantsev* para. 286; *Chowdury and Others*, para. 110; *L.E. v. Greece* paras. 56, 64.

²⁵ See e.g., UNSC Counter-Terrorism Committee Executive Directorate (CTED), *Identifying and Exploiting the Nexus Between Human Trafficking, Terrorism, and Terrorism Financing* (2019); CTED, Analytical Brief: The repatriation of ISIL-associated women (2019); UNGA, 23rd Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, para. 55;

²⁶ UNODC *Countering Trafficking in Conflict Situations* (2018) Thematic Paper. (p.50)

which create situations where marriage is seen as a social obligation or a means for a better life.”²⁷

28. Article 4 ECHR, “also entails a procedural obligation to investigate situations of potential trafficking”.²⁸ As the Court has noted in *Rantsev v. Cyprus and Russia* (Application No. 25965/04), as trafficking offences may take place in the country of origin, as well as in the country of destination, a failure to investigate the recruitment aspect of alleged trafficking, “would allow an important part of the trafficking chain to act with impunity.”²⁹ The Court has also held that the, “need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable.”³⁰
29. The consequences of the failure of the State to identify, assist, and protect victims of trafficking have also been highlighted in the recent judgment in *V.C.L. and A.N. v. the United Kingdom*,³¹ where the failure to identify the victims resulted in the failure to implement the non-punishment principle, resulting in a violation of both Articles 4 and 6 ECHR.
30. Lastly, as noted by the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, trafficking in persons may fit the legal definition of torture. As the Special Rapporteur’s 2016 report notes:

[...] whenever States fail to exercise due diligence to protect trafficking victims from the actions of private actors, punish perpetrators or provide remedies, they are acquiescent or complicit in torture or ill-treatment.³²
31. The Special Rapporteur further wishes to stress that States have an obligation to ensure a protective environment for children.³³ The particular rights applicable to children, protected under, *inter alia*, the UN Convention on the Rights of the Child (CRC) and its Optional Protocols,³⁴ state that children must always be treated primarily as victims and the best interest of the child must always be a primary consideration. Article 2 of the CRC further protects the right of children to be free from discrimination. In line with Security Council Res 2427 (2018), States should recognise that children who are

²⁷ UNODC *Interlinkages between Trafficking in Persons and Marriage* (UNODC: Vienna, 2020), p.viii

²⁸ *Rantsev* para. 288.

²⁹ *Ibid.*, para. 307.

³⁰ *Ibid.*

³¹ *V.C.L. and A.N.* paras. 163-183, 194-210.

³² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2016) A/HRC/31/57, para. 41.

³³ See e.g., Council of Europe Convention on Action against Trafficking in Human Beings, Art. 5(5); UNSC Res 1261 (1999), 1341 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011), and 2068 (2012).

³⁴ In particular, Art. 6, 7, 24(2) and 27 of CRC, respectively on the right to life, the right to birth registration, name and nationality, the right to health, and the right to an adequate standard of living.

detained for association with armed groups are first and foremost victims of grave abuses of human rights and international humanitarian law, and should facilitate their return.³⁵

32. On child victims of trafficking, the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 8, according to which: “The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.”
33. The CRC provides that States shall take all feasible measures to ensure the protection and care of children affected by armed conflict, and all appropriate measures to promote their physical and psychological recovery, as well as social reintegration. Articles 38 and 39 of the CRC are of particular relevance to children affected by armed conflict and to children who are victims of any form of exploitation, as is the Optional Protocol to the Convention on the involvement of children in armed conflict. In addition, the ECtHR has held that measures applied by the State to protect children against acts of violence falling within the scope of Articles 3 and 8 ECHR, should be effective and include reasonable steps to prevent ill-treatment of which the authorities were, or ought to have been, aware.³⁶
34. The duty to provide assistance to victims of trafficking is enshrined, *inter alia*, in Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings, according to which each State Party shall adopt such legislative or other measures to assist victims in their physical, psychological and social recovery. Such assistance shall include, *inter alia*, assistance to enable victims’ rights and interest to be presented and considered at appropriate stages of criminal proceedings.³⁷ Similarly, Article 6(3) of the Palermo Protocol encourages States to provide for the recovery of victims of trafficking in persons. In this respect, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime requires that a State Party whose citizen is a victim of human trafficking, “shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.” The Council of Europe Convention on Action against Trafficking in Human Beings states that: “the Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the

³⁵ UNSC Res 2427 (2018) paras. 20, 26.

³⁶ *Söderman v. Sweden* [GC] App. No. 5786/08 (ECtHR, 12 November 2013).

³⁷ Council of Europe Convention on Action against Trafficking in Human Beings Art. 12.

receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.”³⁸

35. The non-punishment principle is a general principle of law, is enshrined in numerous international and regional legal instruments, in domestic legislation, and in case law of regional and domestic courts. It is further set out in the Principles and Guidelines for Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR),³⁹ and in the Council of Europe Convention on Action against Trafficking in Human Beings.⁴⁰
36. A range of punishments applied to victims or potential victims of trafficking linked to United Nations designated terrorist groups, have been highlighted in recent communications to States by several UN Special Procedures.⁴¹ The range of forms of punishment covered by the non-punishment principle include non-repatriation, family separation or refusal of consular assistance. The imposition of such punishments engages States’ obligations under the non-punishment principle.
37. Failure to respect the principle of non-punishment leads to further serious human rights violations, including detention, family separation and unfair trial. It also increases risks of trafficking and re-trafficking. Deliberately exposing victims and potential victims, including children, to such risks is a failure of prevention and an egregious failure of protection.⁴²
38. Where restrictions on movement that amount to a deprivation of liberty are imposed on trafficked persons, the obligation of non-punishment is engaged. The President of the UN Security Council has underscored:

[...] the need for Member States and the UN System to proactively identify trafficking victims amongst vulnerable populations, ... and address comprehensively victims’ needs, including proactive victim identification ... as well as ensure that victims of trafficking in persons are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage.⁴³

39. In its decision in *V.C.L. and A.N. v. the United Kingdom*, the ECtHR recognized that the lack of application of the non-punishment principle may conflict with the State’s

³⁸ Council of Europe Convention on Action against Trafficking in Human Beings, Art. 16.

³⁹ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

⁴⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Art. 26.

⁴¹ See OHCHR.

⁴² Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle (n 2) (17 May 2021).

⁴³ UNSC, ‘Statement by the President of the Security Council’ (n 7) p. 2.

duty to take operational measures to protect a victim, or potential victim, of trafficking, “where [State authorities] are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.”⁴⁴ The Court further held that the failure to apply the principle would be injurious to a victim’s “physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future.”⁴⁵

EXTRA-TERRITORIAL OBLIGATIONS

40. The Special Rapporteur would like to highlight the duty to act with due diligence and take effective measures to protect vulnerable individuals, including victims and potential victims of trafficking located outside of the State’s territory, where they are at risk of serious human rights violations. This obligation applies extra-territorially, when the State’s responsibility is engaged.⁴⁶ The United Nations Human Rights Committee has held that a State’s responsibility to protect applies extraterritorially in circumstances where the State has the capacity to protect the right to life against an immediate or foreseeable threat to life.⁴⁷
41. The determination of whether a State has acted with due diligence is based on an assessment of how much the State knew or ought to have known of the risks; the risks or likelihood of foreseeable harm and the seriousness of the harm.⁴⁸ The duty to act with due diligence to ensure that the lives of their nationals are protected from irreparable harm to their life or to their physical integrity, applies where acts of violence and ill-treatment are committed by State actors or other non-State actors.⁴⁹
42. In a decision on admissibility in *L.H., L.H., D.A, C.D. and A.F. v France* (30 September 2020) the Committee on the Rights of the Child specifically addressed the issue of whether the State Party (France) (UN Doc. CRC/C/85/D/79/2019–

⁴⁴ *V.C.L. and A.N.* (n 25) para. 159.

⁴⁵ *Ibid.*

⁴⁶ See, *inter alia*, *Soering v. The United Kingdom*, App. No. 14038/88 (ECtHR, 7 July 1989); *Drozd and Janousek v. France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992).

⁴⁷ See UN HRC, General Comment No. 36: Article 6 (Right to Life) (2018) CCPR/C/GC/36, para. 63. In the European Court of Human Rights jurisprudence, see *Opuz v. Turkey*, App. No. 33401/02 (ECtHR, 9 September 2009); *Osman v. United Kingdom* [GC] App. No. 23452/94 (ECtHR, 28 October 1998); *Z and Others v. the United Kingdom* [GC] App. No. 29392/95 (ECtHR, 10 May 2001), and *Talpis v. Italy*, App. No. 41237/14 (ECtHR, 18 September 2017).

⁴⁸ UN HRC, General Comment No. 36 (n 58). See also *Opuz v. Turkey* (n 58); *Osman v. United Kingdom* (n 58); *Z and Others v. the United Kingdom* (n 58), and *Talpis v. Italy* (n 58).

⁴⁹ See Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State (2019) A/74/318.

CRC/C/85/D/109/2019) has competence *ratione personae* over the children detained in the camps in north-eastern Syrian Arab Republic. In its decision, upholding admissibility, the Committee recalled that, under the Convention, States have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State's jurisdiction to "territory". (para.9.6). Territorial jurisdiction was deliberately left out of article 2 (1) of the Convention.⁵⁰ The Committee concluded that a State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders. Specifically in the migration context, it was noted that the Committee has held that under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection. (para.9.6). In its decision, the Committee concluded that the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. The relevant circumstances cited by the Committee include, "the State party's rapport with the Kurdish authorities, the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syrian Kurdistan since March 2019" (para. 9.7).

CONCLUSION

43. The Special Rapporteur notes that trafficking in human beings is a serious human rights violation. Ensuring that the protection of human rights is practical and effective and not merely "theoretical and illusory", requires protective operational measures to be taken by the State. The Council of Europe Convention on Action against Trafficking in Human Beings, applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime. Article 3 of the Convention requires State Parties to ensure that "the enjoyment of measures to protect and promote the rights of victims, shall be secured *without discrimination*". As the Court has noted in *V.C.L. and A.N. v. the United Kingdom* (applications nos. 77587/12 and 74603/12), the protection measures required by Article 4 ECHR include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery. In my opinion, this is not an impossible or disproportionate burden for the State to fulfil.
44. I am aware of the duties of experts in civil proceedings as set out in Practice Direction 35 to the Civil Procedure Rules and in preparing this report I have complied with those duties.

⁵⁰ See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Volume 1*, (New York, United Nations, 2007), pp. 332–333.

Signed:

A handwritten signature in black ink, appearing to read "Siobhán Mullally". The signature is written in a cursive style with a large, sweeping initial 'S'.

Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons, especially women and children

Dated: 30 June 2022

Curriculum Vitae of Professor Siobhán Mullally

Professor Siobhán Mullally assumed her mandate as the UN Special Rapporteur on 1 August 2020. Prior to her appointment as Special Rapporteur, Professor Mullally was the former President of the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (**GRETA**) (2016-18), and previously as First Vice-President of GRETA (2014-16), the 15 member treaty monitoring body of the Council of Europe Convention on Action Against Trafficking in Human Beings (**ECAT**). She served as a member of GRETA for six years, from 2012-2018. Professor Mullally is the Established Professor of Human Rights Law at the Irish Centre for Human Rights, School of Law, National University of Ireland Galway. She is a member of the Permanent Court of Arbitration, The Hague, and an elected member of the Royal Irish Academy.

From 2014-2019, Professor Mullally was a Commissioner of the Irish Human Rights and Equality Commission, and member of the Good Friday Agreement treaty body, the Joint Committee on Human Rights of the Northern Irish and Irish Human Rights Commissions. She is currently a member of the Permanent Court of Arbitration, The Hague, and Joint Editor in Chief of the Irish Yearbook of International Law.

Professor Mullally has held visiting positions in several Universities including Columbia University, School of Law (Fulbright Scholar and Senior Fellow in Residence) (2010), Cornell Law School (Clark Scholar) (2003), Harvard Law School, (Human Rights Fellow) (1999), National Law School of India University, Bangalore (1994), Peshawar University (1992-94).

Professor Mullally's research has been published in leading journals including Human Rights Quarterly, International and Comparative Law Quarterly, Modern Law Review, Oxford Journal of Legal Studies, American Journal of Comparative Law, European Human Rights Law Review, Social and Legal Studies, Asian Yearbook of International Law. Her books include: Gender Migration and Care: Law and Practice (ed.) (Routledge: 2015); and Gender Culture and Human Rights: Reclaiming Universalism (Hart: 2006). Published reports include A Child Rights Response to Child Migration and Migrant Children at Risk (International Bar Association: 2019) and Report into the Independence of the Judiciary in Pakistan (International Bar Association: 2007).

Professor Mullally has worked with international NGOs and UN agencies in many parts of the world including in Pakistan, Timor-Leste, Kosovo, Kazakhstan, Ethiopia, working with UNIFEM, UNDP, OHCHR, International Crisis Group, Irish Aid, Human Rights Commission of Pakistan. She is the recipient of numerous research awards for work relating to gender equality, migration and refugee protection, human trafficking and migrant workers, including from the Irish Research Council, European Commission, Irish Aid, International Bar Association, Nuffield Foundation.

Prior to her appointment at NUI Galway, Professor Mullally held a Full Professorship in Law at University College Cork, where she was also Director of the Centre for Criminal Justice and Human Rights. From 2006-8, Ms Mullally served as Chairperson of the Irish Refugee Council. She was a founding member of the Board of Directors of NASC, the Refugee and Migrant Rights Centre and is a member of the Irish Council for Civil Liberties. Ms Mullally is a graduate of the European University Institute, Florence (PhD), the London School of Economics (LL.M) and University College Cork (BCL).