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SPECIFIC GROUPS AND INDIVIDUALS

MIGRANT WORKERS

**Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted
pursuant to Commission on Human Rights resolution 2002/62**

Executive summary

The present report is submitted in accordance with Commission on Human Rights resolution 2002/62. During the period under review the Special Rapporteur continued to receive information on the human rights of migrants and to exchange communications with Governments. A summary of the communications sent and responses received is contained in addendum 1 to this report. The Special Rapporteur visited Mexico, the border between the United States of America and Mexico, and the Philippines. Reports on those visits are contained in addenda 2, 3 and 4 respectively.

A summary of all the meetings and events attended by the Special Rapporteur since the establishment of the mandate is contained in her report to the General Assembly (A/57/292). During the period not covered by that report, the Special Rapporteur participated in a number of other such activities.

On 1 August 2002, the Special Rapporteur sent a request for information on the issue of migrants deprived of their liberty through a questionnaire which was distributed to all permanent missions in Geneva, non-governmental organizations (NGOs), United Nations special procedures mandate holders, field presence of the Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations and other agencies and programmes, and international experts in this field. On the basis of the information received, the Special Rapporteur analysed how international human rights obligations translate into practice at the national level.

The Special Rapporteur found that migrants are particularly vulnerable to deprivation of liberty. On the one hand, there is a tendency to criminalize violations of immigration regulations and to severely punish them, in an attempt to discourage irregular migration. On the other hand, a great number of countries resort to administrative detention of irregular migrants pending deportation. The Special Rapporteur would like to stress that the phenomenon of irregular migration should be addressed through a new concept of migration management with human rights as an integral part. Migration management is in fact an extremely complex series of processes which go well beyond unilateral punitive measures and control. States of origin, transit and destination, international and regional organizations, financial institutions, NGOs, the private sector and the civil society at large have a shared responsibility in this regard.

Deprivation of liberty is undertaken without due regard for the individual history of migrants. Victims of trafficking and smuggling are criminalized, detained and deported for infractions or offences committed as inevitable consequences of the violations they have suffered. Often there is a lack of specific provisions regarding the detention of children and other vulnerable groups, allowing for their detention in conditions that often violate their basic human rights and are detrimental to their physical and mental health.

The Special Rapporteur is concerned that in a considerable number of countries, measures aimed at stopping irregular migration undermine migrants' basic rights, including the right to seek asylum and minimum guarantees against arbitrary deprivation of liberty.

In particular, there is a tendency to provide immigration officials with broad powers to detain groups of migrants in conditions and facilities that seriously curtail their right to judicial or administrative review of the lawfulness of detention and to have their asylum claims reviewed.

Migrants subjected to administrative proceedings have in general far fewer guarantees and rights than those who are the subject of judicial proceedings. Legal grounds for administrative detention of migrants are often too broad and discretionary and time limits are not always legally determined or respected. This is often coupled with the absence of automatic mechanisms for judicial or administrative review and with a lack of other procedural safeguards, such as access to interpreters and lawyers, and limitations on the right to be informed of the grounds for detention and appeal mechanisms and the right to have consular or embassy representatives informed. All these elements result in administrative detention being beyond any control, disproportionate powers being exercised by immigration authorities, and incidents of discrimination and abuse.

Legislation and practices allow administrative detention to become at times indefinite or very lengthy, despite the fact that the facilities built or used for this purpose are not equipped for long-term detention. They do not provide for access to education, recreational activities and adequate medical services. According to the information received, many migrant holding centres are overcrowded and conditions of detention do not respect international norms, standards and principles, and at times amount to inhumane or degrading treatment. Often, such facilities are not accessible to external mechanism of inspection and grievance, or complaint mechanisms do not exist or are not accessible. The general lack of external oversight and human rights training permits torture, abuses and ill-treatment to take place.

Undocumented migrants deprived of their liberty often do not receive adequate legal, medical, social and psychological assistance and protection, either by the institutions of the host countries or by their consular representatives. Consular posts often lack the necessary equipment, personnel and expertise. In several cases, owing to the lack of documents, migrants are not recognized as citizens by their consulates or embassies.

With particular regard to the information received and reflected in the report, the Special Rapporteur would recommend that infractions of immigration laws and regulations not be considered criminal offences under national legislation; Governments should consider the possibility of progressively abolishing all forms of administrative detention and, when this is not possible, take measures to ensure respect for the human rights of migrants deprived of liberty.

The Special Rapporteur would like to encourage Governments to ensure that consular and embassy personnel are adequately trained to provide assistance to nationals in distress abroad, including irregular migrants. Mechanisms of supervision of cases of negligence in providing such assistance should exist. The Special Rapporteur would also like to underline that such assistance should be provided through the presence of representatives of all relevant ministries and departments, as well as through specialized medical, social and psychological counselling, at least in those countries with a high incidence of migration.

The Special Rapporteur notices that national and international NGOs have started to devote increased attention to the situation of migrants deprived of their liberty, and would like to encourage them to continue in their efforts to document and study the violations and abuses that migrants often suffer in the context of detention.

The Special Rapporteur would like to encourage the organizations of the civil society to develop programmes to provide assistance to migrants deprived of their liberty, including legal counsel and translation services and social and psychological assistance, and to visit regularly holding centres and penitentiaries where irregular migrants are held.

The Special Rapporteur would finally like to encourage dialogue, through international and regional events and forums, with the participation of relevant international and regional organizations and representatives of the civil society, on international cooperation and arrangements for the establishment of migration management systems capable of addressing the phenomenon of irregular migration in a way that respects the human rights and dignity of migrants.

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 2	6
I. ACTIVITIES OF THE SPECIAL RAPPORTEUR	3 - 11	6
A. Communications	3 - 5	6
B. Visits	6 - 8	6
C. Other activities	9 - 11	7
II. THE HUMAN RIGHTS OF MIGRANTS DEPRIVED OF THEIR LIBERTY	12 - 64	8
A. Deprivation of liberty in the context of migration management	15 - 51	8
B. Conditions of detention	52 - 64	15
III. CONCLUSIONS AND RECOMMENDATIONS	65 - 79	18
A. Conclusions	65 - 71	18
B. Recommendations	72 - 79	19

Introduction

1. This report is submitted in accordance with Commission on Human Rights resolution 2002/62, in which the Commission extended the mandate of the Special Rapporteur for three years.
2. Section I of the present report describes the activities carried out by the Special Rapporteur since her last report to the Commission (E/CN.4/2002/94 and Add.1). Section II is devoted to an analysis of the situation of migrants deprived of their liberty. Section III contains the concluding observations and recommendations of the Special Rapporteur.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Communications

3. The Special Rapporteur has continued to receive information on the human rights of migrants and to exchange communications with Governments in this regard. The Special Rapporteur receives information from Governments, non-governmental organizations (NGOs), individuals, and other elements of civil society. The Special Rapporteur has continued to bring to the attention of Governments information regarding the human rights of migrants. A considerable number of communications have been sent jointly with other thematic special procedures of the Commission. A summary of the communications sent to Governments and the responses received during the period under review is contained in document E/CN.4/2003/85/Add.1.
4. The communications received by the Special Rapporteur can be divided into two main categories: information regarding individual cases of alleged violations of the human rights of migrants; and information regarding general situations concerning the human rights of migrants in a specific country. Both types of information have been the subject of communications with Governments.¹ Communications sent by the Special Rapporteur can involve requests for information, cooperation and/or urgent action with a view to clarifying the allegations brought to her attention, as well as to preventing or, as necessary, investigating alleged violations of the human rights of migrants.
5. The Special Rapporteur seeks to establish a cooperative dialogue with Governments, regional and international organizations and the civil society concerning legislation, practices and situations affecting the human rights of migrants. Information received and considered complete and reliable according to pre-established criteria is brought to the attention of Governments in a genuine spirit of cooperation. In this connection, the Special Rapporteur would like to thank all the Governments that have responded to her communications.

B. Visits

6. In its resolution 2002/62, the Commission requested the Special Rapporteur to continue her programme of visits, "which contribute to improving the protection afforded to the human rights of migrants and to the broad and full implementation of all the aspects of her mandate".

During the period under review, the Special Rapporteur visited Mexico, the border between the United States of America and Mexico, and the Philippines. The reports on those visits are contained in addenda 2, 3 and 4 respectively to this report.

7. The Special Rapporteur believes that country visits represent an opportunity to engage in an open and constructive dialogue with Governments and civil society, with a view to identifying obstacles to the protection of the human rights of migrants and ways and means to overcome them. Visits also serve to create momentum for a comprehensive debate on migration issues at the national level and facilitate dialogue between the Government and civil society for the identification of common priorities and related strategies.

8. With a view to maintaining a geographical balance in discharging her functions, the Special Rapporteur decided that her programme of visits for the year 2003 will give priority to European and African countries.

C. Other activities

9. A summary of all the meetings and events attended by the Special Rapporteur since the establishment of the mandate is contained in her report to the General Assembly (A/57/292).

10. In the period not covered by that report, the Special Rapporteur participated in the Regional Summit on Foreign Migrant Domestic Workers organized by CARAM Asia (Coordination of Action Research on AIDS and Mobility in Asia), which was held in Colombo from 26 to 28 August 2002. At the meeting the Special Rapporteur encouraged dialogue among civil society, Governments and international organizations in order to protect domestic workers from human rights violations and other forms of abuse. In October 2002 the Special Rapporteur participated in a seminar organized by the Inter-American Institute of Human Rights where she spoke about international mechanisms of protection of the human rights of migrants. She also participated in the International Migration Policy Programmes (IMP) Follow-up Seminar to the International Migration Policy Seminar for the Caribbean Region which took place in Santo Domingo from 28 to 31 October 2002. At this meeting, the Special Rapporteur spoke about the need for a migration management system able to ensure protection of the rights of migrants, refugees and asylum-seekers. She also addressed the issue of return and reintegration, including human rights, discrimination and health considerations.

11. From 4 to 8 November 2002, the Special Rapporteur travelled to New York to present her report to the Third Committee of the General Assembly and to engage in consultations with United Nations partners and NGOs. She participated in the Hemispheric Conference on Migration (Santiago, 20-22 November 2002), where she spoke about the vulnerability of migrants to trafficking and smuggling and recommended measures to combat these phenomena from a human rights perspective. From 2 to 4 December 2002, the Special Rapporteur participated as an observer in the eighty-fourth session of the Council of the International Organization for Migration (IOM) (Geneva, 2-4 December 2002) and in a parallel event organized by the Steering Committee for the Global Campaign for the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. She also held consultations with officials of OHCHR, representatives of international organizations and NGOs.

II. THE HUMAN RIGHTS OF MIGRANTS DEPRIVED OF THEIR LIBERTY

12. On 1 August 2002, the Special Rapporteur sent a request for information on the issue of migrants deprived of their liberty through a questionnaire which was distributed to all permanent missions in Geneva, NGOs, United Nations special procedures mandate holders, OHCHR field presences, United Nations and other agencies and programmes, and international experts in this field.

13. The questionnaire comprised 23 questions, grouped under three main areas: legislative framework; safeguards for the protection of migrants in detention;² and conditions of detention. The Special Rapporteur would like to thank all Governments, organizations, experts and individuals who provided written responses to the questionnaire.³

14. In the following paragraphs, fundamental international human rights obligations are reviewed in the context of national legislation and practices, with a view to identifying the most frequent violations and abuses suffered by migrants. The analysis is based on the information provided through answers to the questionnaire and on practices personally observed by the Special Rapporteur.

A. Deprivation of liberty in the context of migration management

15. Deprivation of liberty of migrants must comply not only with national law, but also with international legislation.⁴ It is a fundamental principle of international law that no one should be subjected to arbitrary detention. International human rights norms, principles and standards define the content of that principle. Such norms, principles and standards apply to all individuals, including migrants and asylum-seekers, and to both criminal and administrative proceedings.

16. The Special Rapporteur observed that irregular migrants are particularly vulnerable to deprivation of liberty both in the context of criminal and administrative proceedings and that, especially in case of administrative detention, the above-mentioned rights and guarantees are often not respected in practice.

17. Migrants are detained in connection with criminal offences like any other citizens of a State. The Special Rapporteur, however, is concerned by the fact that under the legislation of a considerable number of countries violations of the immigration law constitute a criminal offence. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, overstaying their or breaching conditions of stay. The Special Rapporteur notes with concern that criminalization of irregular migration is increasingly being used by Governments to discourage it.

18. The Special Rapporteur also received worrying reports that there have been cases of evidence of criminal offences, such as theft or robbery, being planted by immigration officials on irregular migrants. Such incidents are often inspired by racist attitudes and beliefs. The Special

Rapporteur further observed that the tendency to arbitrary resort to criminal proceedings for administrative infractions is more frequent where corruption of immigration officials is widespread.

19. Migrants are also liable to administrative detention in connection with violations of immigration laws and regulations, including staying after the permit has expired, non-possession of identification documents, using somebody else's travel documents, not leaving the country after the prescribed period of time has expired, etc. The objective of administrative detention is to guarantee that another measure, such as deportation or expulsion, can be implemented. Under the legislation of some countries, administrative detention is also admitted on grounds of public security and public order, among others. Unless otherwise specified, this analysis focuses on the administrative detention of migrants.

Procedural guarantees in the context of administrative detention of migrants

20. According to the information provided to the Special Rapporteur, under the legislation of many countries, those detained under judicial proceedings enjoy far more guarantees than those held in administrative detention. In some countries migrants who are the subject of judicial proceedings have the right to free legal counsel and interpretation, while the costs of these services (or of one of them) must be borne by the alien in administrative proceedings. The right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not always guaranteed in cases of administrative detention.

21. The Special Rapporteur was informed that grounds for detention of migrants vary greatly from country to country and within the same country according to the infraction or offence of which migrants are suspected. In several countries the legislative criteria for administrative detention allow for a high degree of discretion in ordering it: foreign nationals can be detained when immigration officers have "reasonable" grounds to believe that the person is inadmissible, is a danger to the public, that the individual is unlikely to appear for an examination or a hearing, or where the officer is not satisfied about identity of the person. This often leads to situation in which migrants themselves have to prove to the satisfaction of officials circumstances relating to their documentation, entry, or migratory status in order to avoid deprivation of liberty.

22. The high degree of discretion and the broad power to detain accorded to immigration and other law enforcement officials can give rise to abuses and to human rights violations. The failure to provide legal criteria can result in de facto discriminatory patterns of arrest and deportation of irregular migrants. The Special Rapporteur was informed that at times migration authorities stop migrants at the border and take them arbitrarily to the police station where they are asked for money or sexual favours in exchange for their release. Cases of prolonged detention because of refusal to pay were reported. Information received by the Special Rapporteur shows patterns of discrimination whereby migrants belonging to certain ethnic groups or of a specific nationality are more likely to be intercepted and detained than others. Furthermore, the Special Rapporteur personally observed that migration and other police authorities with vast power to detain are often not adequately trained. In some instances migrants have been requested to produce documents other than or in addition to those prescribed by law.

23. Article 9 of the Universal Declaration of Human Rights establishes that “no one shall be subjected to arbitrary arrest or detention”. This universally recognized principle is also enshrined in article 9 of the International Covenant on Civil and Political Rights (ICCPR), which also sets that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. In its General Comment No. 8, the Human Rights Committee states that these provisions are applicable to all deprivations of liberty by arrest or detention, including in cases of immigration control. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly 43/173 of 9 December 1988) reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of a judicial or other authority. In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness of his/her detention.

24. However, according to the information provided to the Special Rapporteur, national laws often do not provide for judicial review of administrative detention of migrants. In some countries, judicial review of administrative detention is automatic within a prescribed period of time, in other instances it is initiated only upon request of the migrant. Sometimes only an administrative review of the decision to detain is possible. Even when the law guarantees the right to judicial review, other circumstances may undermine it. When the migrant must take the initiative for such review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice. It was reported that even when the law requires that detained migrants be brought before an administrative or other court, this is often not done within the prescribed time limit.

25. In the context of anti-terrorism measures adopted after 11 September 2001, the legislation of some countries allows for long periods of detention of non-nationals, without basic guarantees.⁵ Information was received according to which migrants, including asylum-seekers, are sometimes detained at airport transit zones,⁶ under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies,⁷ before being returned to their countries.⁸ The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the detention and deportation decision and to apply for asylum, even in the presence of legitimate claims.

26. The 1963 Vienna Convention on Consular Relations (art. 36) provides that, if so requested, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State that its national has been deprived of his/her liberty. Any communication to the consular post by the person detained shall be forwarded by the competent authorities without delay.

27. It was reported that consular posts are not always informed in a timely manner of detentions, often because detainees are not aware of this right. In many instances, consulates are informed only when migrants are taken to prison after several days of detention in police

stations. The Special Rapporteur visited some facilities where the absence of public telephones and the fact that the migrants had to pay for calls discouraged or prevented contacts with consular representatives.

28. According to the Body of Principles, persons under any form of detention or imprisonment shall be informed at the time of arrest of the reason for the arrest, as well as of their rights and how to avail themselves of those rights in a language they understand. Also, detained persons should have the assistance, free of charge, of an interpreter in connection with legal proceedings subsequent to arrest. Further, a detained person is entitled to have the assistance of a legal counsel, to be informed of that right and to be provided with facilities for exercising it. Detained persons also should have the right to be visited by and correspond with members of their families.

29. In practice detainees are often not informed of their right to appeal and of the status of their situation. Often they are unaware of the grounds for their detention and of its duration. It was reported that in some cases it is difficult for migrants under administrative detention to have access to their files and often migrants are only informed at a very late stage of the date of hearings. All these circumstances, coupled at times with the absence of legal assistance, seriously curtail migrants' right to defence.

30. Under the legislation of a number of countries no free legal services are available for administrative proceedings. Furthermore, often migrants are not informed, in a language they understand, of their rights to instruct and retain counsel. The Special Rapporteur received information that some migrant holding facilities do not allow visits from or confidential conversations with lawyers. Incidents in which detainees have been denied access to lawyers have also been reported to the Special Rapporteur, as well as cases of lawyers who had difficulty in locating their clients after a transfer.

31. During her visits and through answers to the questionnaire the Special Rapporteur was informed that migrants who do not speak the language of the country where they are detained have no access to translation services. Pertinent information on rights and procedures is sometimes only provided in the national language, and sometimes a few other languages. Detainees with some knowledge of the local language are sometimes requested to act as interpreters for others or translation is provided by telephone. According to the information received, in many instances interpretation is available only during judicial or administrative proceedings.

32. As for visits of families and friends, time and conditions vary from facility to facility and from country to country. The Special Rapporteur received information about migrants in administrative detention who were allowed to meet with their relatives and friends only for a very short period, separated by glass and in the presence of immigration or other officials. Incidents in which families were not informed of the whereabouts of the detainees were reported to the Special Rapporteur.

33. When administrative custody centres are not monitored and inspected by external mechanisms, and in particular when migrants are held in facilities that are not easily accessible, abuse and violence are more frequent. In the absence of a lawyer and interpreters, migrants often

feel intimidated and obliged to sign papers without understanding their content. Incidents were reported in which migrants waived their right to appeal against a deportation decision without understanding that they were doing so.

34. Often a lack of resources represents an obstacle to respecting procedural safeguards. Resources might in fact not be available to allow countries of destination to provide free legal counsel and interpretation services to all migrants. Equally, countries of origin might not have consular representation owing to financial constraints. The Special Rapporteur believes that efforts should be made to find imaginative and cost-effective solutions to guarantee migrants' rights. These could include using the voluntary services of NGOs, individuals, universities, or other national, regional and international organizations; the creation of toll-free services run by volunteers to provide information and assistance to migrants; the conclusion of bilateral and multilateral agreements between countries to provide assistance to migrants in distress; and greater use of non-custodial measures.

Length of administrative detention

35. Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite. The Human Rights Committee found that "detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal"⁹. The Working Group on Arbitrary Detention¹⁰ further states that a maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

36. Only in some countries' legislation is a specific time limit set beyond which deprivation of liberty should cease when deportation is not possible for reasons not imputable to the migrant, and even where time limits are prescribed by law, they are often disregarded.

37. According to the information received or personally witnessed by the Special Rapporteur, migrants often remain in administrative detention for long periods of time. The deportation procedure can in fact be very lengthy: consulates have to process travel documents, travel arrangements made, asylum claims and appeals against deportation reviewed.¹¹ The procedure can be particularly time consuming in circumstances such as the absence of diplomatic representation of the country of citizenship of the alien; the lack of means of the country of destination to finance the deportation; the refusal of the State of origin or the receiving country to accept the migrant. The case of stateless detainees, i.e. those who crossed the border irregularly and whose Governments refuse to recognize them, is another circumstance that may lead to indefinite detention. At times migrants remain in detention because, owing to the situation in their countries of origin, they cannot be deported.¹² The Special Rapporteur is particularly concerned that recently enacted anti-terrorism legislation, allowing for the detention of migrants on the basis of vague, unspecified allegations of threats to national security, can lead to indefinite detention when migrants cannot be immediately deported because that would imply a threat to their security and human rights.¹³

38. According to the information received by the Special Rapporteur, only the legislation of a limited number of countries provides for an automatic review of detention at set intervals to determine whether it should continue.¹⁴ In the majority of cases the review is not undertaken automatically, but mechanisms exist that allow the migrant to request it. However, access to such mechanisms can be seriously undermined by the lack of procedural safeguards.

Application of non-custodial measures

39. The Working Group on Arbitrary Detention recommended that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention”.¹⁵ Similarly, in its resolution 2000/21, the Sub-Commission on the Promotion and Protection of Human Rights encouraged “States to adopt alternatives to detention such as those enumerated in the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers” (para. 6). The legislation of several countries provides for alternatives to administrative detention, such as release on bail, release on parole, home detention, semi-liberty, payment of a certain sum as guarantee, police supervision, ban on leaving the country, obligation to reside at a given address with periodic reporting to the authorities, withdrawal of passport.

40. Reportedly, there is an element of discretion in many countries as to when such measures can be granted, as often the law itself does not prescribe them in the presence of specific criteria. Often, in the absence of statistics it is not possible to assess how often alternative measures are granted. However, it was reported that even when the laws provides expressly for non-custodial measures, they are hardly accessible. Bail, when granted, is usually set at a sum not affordable by migrants. The request for sureties is a further obstacle given the absence of relatives or friends who can stand surety for migrants. Similarly, home detention or social work is hard to obtain due to the fact that migrants often do not have stable work and lodgings.

Detention of victims of trafficking and smuggling

41. Victims of trafficking and smuggling commit infractions or offences, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention.¹⁶ The law of some countries punishes as criminal offences or administrative infractions irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution. Victims of trafficking are thus often detained and deported without regard for their victimization and without consideration for the risks they may be exposed to if returned to their country of origin.

42. The victims’ needs for specific medical, psychological or legal assistance are often not taken into account.¹⁷ The Special Rapporteur received information and testimonies of women and children who had been held in slavery-like conditions and who had suffered physical and sexual abuse and who were arrested and detained as irregular migrants after managing to escape from their exploiters, suffering further traumas. Furthermore, the Special Rapporteur received information according to which, for fear of being deported or criminalized, often victims of trafficking do not denounce their traffickers and do not seek protection from local authorities against their abusers.

Detention of women, children and other vulnerable groups

43. The Special Rapporteur observed that very often national legislation does not contain special provision regarding administrative detention of vulnerable groups, such as children, pregnant women, the elderly and the physically and mentally ill. Administrative detention should never be punitive in nature and special arrangements should be sought to protect vulnerable groups. In these cases the harm inflicted seems to the Special Rapporteur to be wholly disproportionate to the policy aim of immigration control.

44. Undocumented migrants often do not denounce violations and abuses for fear of being detained and deported. In the experience of the Special Rapporteur, this is particularly the case for migrants working in the informal and private sectors, such as women domestic workers, who are particularly vulnerable to exploitation and abuse.

45. Article 37 of the Convention on the Rights of the Child requires States parties to ensure that minors are detained as a measure of last resort and for the shortest possible period of time. In accordance with article 3 of the Convention, the best interests of the child shall be the primary consideration in any action taken by States parties.

46. The detention of migrant children for administrative infractions is forbidden under the legislation of some countries, which provides for unaccompanied irregular migrant children to be entrusted to foster families or institutions for minors. However, in other countries, immigration laws and regulations are silent with respect to the detention of minors, including unaccompanied children. In these cases decisions are taken on individual cases, often with reference to other national provisions and regional and international obligations. Even when administrative detention of migrant children is prohibited, other legislative provisions of the same country may allow for minors to be detained for criminal offences where breaches of immigration law are considered as such.

47. According to the Special Rapporteur's information and personal observations, minors, including unaccompanied children, are at times detained for long or undetermined periods and deported under no clear authority and on discretionary grounds, with no possibility of challenging the legality of the measure before a court or other competent, independent and impartial authority. The legislation or regulations of several countries provide for "family detention", whereby children under a certain age are detained with their parents, either in special facilities or in separate rooms within centres for migrants or penitentiaries. However, accompanied and unaccompanied children are often detained in punitive and inadequate conditions, deprived of the care, protection and rights to which they are entitled under the Convention on the Rights of the Child and other international human rights norms, including the right to education, physical and mental health, privacy, information, and rest and leisure, among others. During her visits the Special Rapporteur personally met women with newborn babies who did not even have blankets to protect them from the cold.

48. When the age of migrants is disputed, they are often reportedly treated like adults until credible documentary or medical evidence is produced which demonstrates that they are minors. Cases of migrant child victims of trafficking or smuggling who were detained and subsequently deported without consideration for their status as victims were brought to the attention of the Special Rapporteur, who also personally interviewed some of them.

49. The Special Rapporteur notices with concern that while the legislation of the majority of countries provides that minors subjected to criminal proceedings should be detained only as a measure of last resort and protected by a set of judicial safeguards and guarantees to ensure that the children's rights are protected, at the same time it allows for administrative detention of foreign children without any such guarantees.

50. Often elderly people, persons with disabilities, pregnant women and ill people, including the mentally ill, are detained without any particular regard for their conditions and specific needs. It was reported that detention has a heavy impact on pregnant women and their children, as well as the elderly, disabled and mentally ill. Pregnant women, for example, need to have access to proper nutrition for the well-being of the baby and to medical and support service that are not available in detention facilities.

51. Furthermore, detention produces anxiety, depression and isolation, especially in women. Detained migrants have often suffered previous traumas and the absence of psychological support, coupled with the conditions of detention, the lack of safeguards and uncertainty about the future, can have serious consequences for their mental and physical health. Several instances of migrants committing or attempting to commit suicide in detention were reported to the Special Rapporteur. It was also reported that migrants who attempt suicide are not always provided with the necessary medical and psychological assistance. It has been reported that migrants who had attempted suicide were moved to special rooms where they remained isolated and under constant surveillance, instead of being provided with necessary care and support.

B. Conditions of detention

52. Detention facilities for migrants vary from country to country and according to the type of regime to which migrants are subjected.

53. Migrants sentenced to imprisonment for immigration offences are detained with common criminals and subjected to the same punitive regime; they are not always separated from the rest of the prison population and have difficulties in understanding and communicating. The fact that their families are often far away and are difficult to keep in touch with further increases their sense of isolation. There are often no arrangements to provide culturally appropriate foods and to allow them to practise their faiths. Racist attacks against migrants detained with common prisoners were also reported. Prison personnel in most of the cases do not receive specific training on how to deal with foreign detainees.

54. Administrative detention should never be of a punitive nature. Furthermore, as enshrined in article 10 of ICCPR, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,¹⁸ but also that

migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs. In this respect, the Special Rapporteur would like to refer to General Comment No. 15 of the Human Rights Committee, which states: “if lawfully deprived of their liberty, [aliens] shall be treated with humanity and with respect for the inherent dignity of their person”. Article 37 of the Convention on the Rights of the Child also establishes that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

55. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers also provide an extensive list of guarantees for the protection of the human dignity of persons, including migrants, deprived of their liberty. Despite their non-binding nature, they reflect internationally recognized principles.

56. According to the information received by the Special Rapporteur, conditions of administrative detention are well below international standards.¹⁹ In many instances migrants under administrative detention are detained in common prisons, either because no other specific facility exists, or because those that exist are full. The Special Rapporteur received reports according to which migrants awaiting deportation were kept in penitentiaries with common criminals and subjected to the same regime, with severe restrictions on their freedom of movement, rights to communicate with families and receive visits, and limited access to outdoor recreational activities. Reports of migrants held in solitary confinement and heavily shackled and tightly handcuffed during visits or court appearances were brought to the attention of the Special Rapporteur.

57. In some countries special facilities for administrative detention of migrants have been built. Elsewhere, places such as schools, warehouses, airport terminals, sports stadiums and similar facilities have been converted into centres for the administrative custody of migrants. Both types of facility are usually thought of as being for the short term, however, it often happens that migrants remain detained in these centres for months, and in some cases years. In most cases there is no provision for either education for children or for adequate recreational activities. Facilities converted into detention centres often lack basic infrastructures, such as ventilation systems, outdoor spaces, or rooms allowing for private conversations with lawyers or family members.

58. Special centres for the detention of migrants are often overcrowded,²⁰ leading to a serious deterioration in living conditions, including lack of bedding, poor hygienic conditions, inadequate access to medical treatment and other services, the impossibility of separating men from women and adults from minors and of keeping families together, and lack of privacy. For security reasons, freedom of movement is limited within the facility and migrants remain locked up for most of the day.

59. The Special Rapporteur observed during her visits that many of the facilities where migrants are held do not have public telephones. Sometimes detention facilities are not regularly cleaned and basic products for personal use, such as soap, are not available and have to be provided by families and friends or by NGOs and humanitarian organizations. The Special Rapporteur personally interviewed detained women who were obliged to cook for male detainees and to sell food in order to be able to purchase basic items for personal use.

60. A very few centres provide a medical check-up upon arrival. The Special Rapporteur met with migrants who had open wounds, some of them suffered during their apprehension or resulting from excessive use of force by immigration officials, and migrants with serious skin diseases, other illnesses and psychological traumas who had no access to medical care.

61. Some of the recently built facilities for migrants provide for a general doctor to visit detainees every day. In many instances, however, only urgent medical care is provided. Also, it was reported that in some countries all medical expenses apart from general check-ups or emergency interventions must be borne by the detainees. Often, no translation or interpretation services are available, making it difficult for migrants to request medical attention and to understand medical prescriptions and diagnoses. Other inmates are sometimes used as interpreters. This practice is a source of concern as it breaches confidentiality, and when consent is sought and obtained, there are questions as to whether that consent is sufficiently informed. Furthermore, in these circumstances a detainee may be prevented from disclosing vital information about trauma suffered. Access to medical assistance is curtailed when migrants are detained in police stations and holding facilities that are not easily accessible. The Special Rapporteur received information about incidents of denial of medical care to migrants in administrative custody.

62. Mechanisms of external oversight of migrant holding facilities are not always in place. Some countries allow regular visits by external actors, such as the Red Cross, representatives of human rights institutions, NGOs, humanitarian organizations, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), or regional mechanisms such as the European Committee for the Prevention of Torture. However, the Special Rapporteur received information according to which representatives of NGOs were denied access to detained migrants. In some countries inspections are only carried out by representatives of hierarchically superior bodies of the ministry or department to which the police or the immigration service running the centre belongs. This raises concerns as to the objectiveness and impartiality of the supervision.

63. The regulations of some migrants holding facilities provide for internal complaint or grievance mechanisms. It was reported that internal complaint mechanisms are not always easily accessible, due to linguistic barriers, and scarcely used due to the fear of being labelled troublemakers or of retaliation, given the lack of confidentiality of such procedures. Reportedly, often the internal complaint procedure is not transparent and answers are not provided in a timely manner. The decision of internal review mechanism is usually final and such mechanisms frequently allow only for internal disciplinary measures, while a separate procedure must be initiated to start criminal proceedings. As repeatedly stated, such procedures are very difficult to access, especially if there are no external mechanisms of oversight and support that can provide assistance.

64. Holding centres for migrants under administrative detention are often run by immigration or other police. Immigration authorities in some countries have the power to detain migrants in police stations while their identity or migratory status is verified. In some countries migrant holding centres are staffed with or run by private personnel who often do not receive adequate training and are not prepared to discharge their functions in a way that is respectful of the human rights of migrants. Incidents of abuse and discrimination, and even of ill-treatment and torture of migrants in detention facilities at the hands of prison guards, police and immigration officers and private staff were brought to the attention of the Special Rapporteur.²¹

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

65. Migrants are particularly vulnerable to deprivation of liberty. On the one hand there is a tendency to criminalize violations of immigration regulations and to punish them severely, in an attempt to discourage irregular migration. On the other hand, a great number of countries resort to administrative detention of irregular migrants pending their deportation. The Special Rapporteur would like to stress that the phenomenon of irregular migration should be addressed through a new concept of migration management with human rights as an integral part. Migration management is in fact an extremely complex series of processes which go well beyond unilateral punitive measures and control. States of origins, transit and destination, international and regional organizations, financial institutions, NGOs, the private sector and the civil society at large share responsibility in this regard.

66. Administrative measures to contain irregular migration, such as deprivation of liberty, are undertaken without due regard for the individual history of migrants. Victims of trafficking and smuggling are criminalized, detained and deported for infractions or offences committed as inevitable consequence of the violations they themselves have suffered. Often there are no specific provisions regarding the detention of children and other vulnerable groups, which allows for their detention in conditions that often violate their basic human rights and are detrimental to their physical and mental health.

67. The Special Rapporteur is concerned that in a considerable number of countries, measures aimed at stopping irregular migration are often taken without due regard for international norms, standards and principles and undermine migrants' basic rights, including the right to seek asylum and to enjoy minimum guarantees against arbitrary deprivation of liberty. In particular there is a tendency to provide immigration officials with broad powers to detain migrants, and to detain them in conditions and facilities that seriously curtail their right to judicial or administrative review and to have their asylum claims revised.

68. Migrants subjected to administrative proceedings in general have far fewer guarantees and rights than those subjected to judicial proceedings. The legal grounds for administrative detention of migrants are often too broad and discretionary and time limits are not always legally determined or respected. This is often coupled with a lack of automatic mechanisms for judicial or administrative review and other procedural safeguards, such as access to interpreters and lawyers, the right to be informed of the grounds for detention and appeal mechanisms, the right

to inform consular or embassy representatives. All these elements put administrative detention beyond any control, grant disproportionate powers to immigration authorities, and give rise to incidents of discrimination and abuses.

69. Sometimes legislation and practices allow administrative detention to become very lengthy or indefinite, although the facilities built or used for this purpose are not equipped for long-term detention. They often do not have facilities for education, recreational activities and adequate medical services. According to the information received, many migrant holding centres are overcrowded, and the conditions of detention do not respect international norms, standards and principles and at times amount to inhumane or degrading treatment. Such facilities are not always open to external mechanism of inspection and grievance or complaint mechanisms do not exist, are not confidential, or are not accessible. The lack of external oversight and, most of the time, of human rights training allow physical and psychological abuses to take place.

70. Undocumented migrants deprived of their liberty often do not receive adequate legal, medical, social and psychological assistance and protection, either from the institutions of the host countries or from their consular representatives. Owing to resources constraints, consular posts may lack the equipment, personnel and expertise necessary to provide such assistance. In some cases, undocumented migrants are not recognized as citizens by their consulates or embassies.

71. The Special Rapporteur notes with satisfaction that treaty bodies have devoted increased attention to the issue of migrants deprived of their liberty and that other thematic special procedures of the Commission on Human Rights have increasingly taken up cases concerning migrants deprived of their liberty; she would like to stress that she is eager to strengthen cooperation with these mechanisms with a view to promoting migration management arrangements, systems and programmes that are respectful of the human rights of migrants.

B. Recommendations

72. With particular regard to the information reflected in this report, the Special Rapporteur would like to make the following recommendations.

73. Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur would like to stress that irregular migrants are not criminals per se and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.

74. Governments should consider the possibility of progressively abolishing all forms of administrative detention.²²

75. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by:

(a) Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only

when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health. Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open-air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to. Should the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor;

(b) Ensuring that the legislation prevents trafficked and smuggled persons from being prosecuted, detained or punished for illegal entry or residence in the country or for the activities they are involved in as a consequence of their situation as trafficked persons. In this respect, the Special Rapporteur invites States to consider ratifying the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime;

(c) Ensuring that procedural safeguards and guarantees established by international human rights law and national law in case of criminal proceedings are applied to any form of detention. In particular, deprivation of liberty should be allowed only on the basis of criteria established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty, whether under administrative proceedings or in cases of preventive detention for reasons of public security, should be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings;

(d) Ensuring that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty, of the available appeal mechanisms and of the regulations of the facility. Detained migrants shall also be accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. A briefing on the facility and information on the immigration law should also be provided. Migrants and their lawyers should have full and complete access to the migrants' files;

(e) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of all consulates and organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed;

(f) Ensuring that non-custodial measures and alternatives to detention are made available to migrants, including through providing for such measures in law and ensuring that the

prescribed conditions are not discriminatory against non-nationals. Official statistics should be kept on the percentage of migrants deprived of their liberty out of the total number subject to administrative detention;

(g) Ensuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite. The Special Rapporteur recommends that States consider entering into bilateral and multilateral agreements to speed up documentation/deportation procedures and thereby reduce the length of detention. The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant;

(h) Avoiding the use of detention facilities and of legal mechanisms and methods of interception and/or deportation that curtail judicial control of the lawfulness of the detention and other rights, such as the right to seek asylum;

(i) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law. Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody;²³.

(j) Providing training to authorities with the power to detain on psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law;

(k) Ensuring that the Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment are applied to all migrants under administrative detention. The Principles include the provision of a proper medical examination as promptly as possible and of medical treatment and care whenever necessary and free of charge; the right to obtain, within the limits of available public resources, educational, cultural and informational material; the provision for regular visits of places of detention by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment, in order to supervise the strict observance of relevant laws and regulations;

(l) Ensuring the existence of mechanisms allowing detained migrants to make a request or complaint regarding their treatment, in particular in case of physical and psychological abuse, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to judicial authorities;

(m) Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. Migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance;

(n) Applying the Standard Minimum Rules for the Treatment of Prisoners to migrants under administrative detention, including providing for the separation of administrative detainees from criminal detainees; the separation of women from men; a separate bed with clean bedding for each detainee; at least one hour of outdoor exercise daily and the right to communicate with relatives and friends and to have access to newspapers, books and religious advisers.

76. The Special Rapporteur would like to encourage Governments to ensure that their consular and embassy personnel are adequately trained in providing assistance to nationals in distress, including irregular migrants, and that there is a mechanism to address cases of negligence in providing such assistance. The Special Rapporteur would also like to underline that such assistance should be provided by representatives of all relevant government ministries and departments, as well as specialized medical, social and psychological personnel, at least in those countries with a high migration rate.

77. The Special Rapporteur notes that national and international NGOs have started to devote increased attention to the situation of migrants deprived of their liberty and would like to encourage them to continue in their efforts to document and study the violations and abuses that migrants suffer in the context of detention.

78. The Special Rapporteur would like to encourage the organizations of civil society to develop programmes of assistance to migrants deprived of their liberty, including legal aid, translation services and social and psychological assistance, and to visit regularly migrant holding centres and penitentiaries where irregular migrants are held.

79. The Special Rapporteur would finally like to encourage international and regional dialogue, with the participation of relevant international and regional organizations and representatives of the civil society, on international cooperation and arrangements for the establishment of migration management systems able to address the phenomenon of irregular migration in a way that respects the human rights and dignity of migrants. In this connection, the Special Rapporteur would like to encourage IOM to pursue international consultations among its member States and other relevant actors, including United Nations agencies and the civil society.

Notes

- ¹ In order to facilitate the submission of information, the Special Rapporteur has developed a questionnaire which can be found on the OHCHR web site *www.unhchr.ch*.
- ² For the purposes of this report, the term “detention” is used to indicate both administrative deprivation of liberty, or remand custody, and incarceration or imprisonment resulting from criminal charges or sentencing. The Special Rapporteur considers detention as confinement within a narrowly bounded or restricted location which the detainee cannot leave. Other restrictive measures such as limitations on residency do not fall within the scope of the present study.
- ³ The following Governments responded to the questionnaire: Argentina, Azerbaijan, Belarus, Bulgaria, Canada, Costa Rica, Croatia, Cyprus, Czech Republic, El Salvador, Finland, Germany, Greece, Honduras, Italy, Jordan, Lebanon, Mexico, Nicaragua, Norway, Poland, Qatar, Slovenia, Russian Federation, Spain, Togo and Uruguay. Information provided by NGOs supplemented or complemented that provided by Governments. No information was received on the situation, legislation and practices of a considerable number of countries.
- ⁴ See Views of the Human Rights Committee, *A. v. Australia*, communication No. 560/1993 (CCPR/C/D/560/1993). The deliberation of the Working Group on Arbitrary Detention on the “Situation regarding immigrants and asylum-seekers” (E/CN.4/2000/4, annex II, Deliberation No. 5) and the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers set the conditions under which detention of migrants can be carried out. Other international forums, such as the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in South Africa in 2001, have highlighted that detention of migrants shall respect international human rights standards (see Durban Programme of Action (A/CONF.189/12, chap. I), paragraph 36). Guarantees against arbitrary detention are also enshrined in regional human rights instruments; in particular, see article 7 of the American Convention on Human Rights, article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 6 of the African Charter on Human and Peoples’ Rights.
- ⁵ See E/CN.4/2003/85/Add.1, communications sent by the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the independence of judges and lawyer to the Governments of the United Kingdom of Great Britain and Northern Ireland and of the United States.
- ⁶ See *ibid.*, communications sent to the Governments of Japan, South Africa and Spain.
- ⁷ Reportedly, in some countries fines are imposed on companies that allow into the country people not in possession of valid papers.
- ⁸ E/CN.4/2003/85/Add.1, letter dated 25 September sent by the Special Rapporteur to the Government of South Africa.
- ⁹ CCPR/C/D/560/1993, *op.cit.*, para. 9.4.

¹⁰ E/CN.4/2000/4, *op.cit.*, *supra* at note 4.

¹¹ See E/CN.4/2003/85/Add.1, communication sent on 7 November 2002 by the Special Rapporteur to the Government of Australia.

¹² See *ibid.*, letter dated 4 September 2002 sent by the Special Rapporteur, together with the Special Rapporteur on torture to the Government of Greece.

¹³ See also the report of the Special Rapporteur on torture to the General Assembly (A/57/173).

¹⁴ Among the factors considered in undertaking such reviews are the reasons for detention, elements to determine the length of time that detention is likely to continue, unexplained delays or lack of diligence on the part of the authority in charge or by the person concerned, the existence of alternatives to detention.

¹⁵ E/CN.4/1999/63/Add.3.

¹⁶ See provision against criminalization in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

¹⁷ The legislation of some countries provides for some forms of assistance and protection of victims of trafficking. In the Netherlands, victims of trafficking are temporarily regularized and given protection and support so that they may decide to cooperate with law enforcement authorities. In Belgium the Act on Human Trafficking provides that victims of trafficking should be granted residence permits and social assistance if they agree to testify against the perpetrators. In the United States, the Act on the Protection of Victims of Trafficking provides that victims of trafficking should not be detained unless individual circumstances or the law require otherwise. In any case, if in detention, they should be placed in facilities appropriate to their victim's status. In January 2002, the "T" visa programme for victims of trafficking was created. It is a procedure for attaining permanent residency status for certain trafficking victims who cooperate with law enforcement agencies to prosecute those responsible for their enslavement. After three years under this status they may apply for permanent residency status.

¹⁸ The freedom from torture or cruel, inhuman or degrading treatment or punishment is an underogable right guaranteed by both customary and conventional law. See, in particular, article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁹ See E/CN.4/2003/Add.1, letter sent on 4 September 2002 by the Special Rapporteur on the human rights of migrants to the Government of Spain.

²⁰ See *ibid.*, letter dated 11 November 2002, sent by the Special Rapporteur on the human rights of migrants together with the Special Rapporteur on torture to the Government of Thailand.

²¹ See E/CN.4/2003/85/Add.1, communication sent by the Special Rapporteur, together with the Special Rapporteur on torture, to the Government of Japan.

²² See also E/CN.4/2002/76/Add.1, Summary of cases transmitted to Governments and replies received.

²³ *Op.cit.*, *supra* at note 4.
