

**Mandates of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE: AL  
AUS 5/2015:

1 June 2015

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 26/19 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged violation of the principle of non-refoulement by Australian authorities in returning a group of 46 Vietnamese asylum seekers to Vietnam without allowing for adequate procedures to determine their claim to refugee status, thus allowing for a risk of possible torture or ill-treatment upon return to Vietnam.**

According to information received:

In March 2015, 46 Vietnamese nationals left Vietnam in a boat with the intention to claim protection in Australia. On 20 March, the boat was intercepted at sea, north of Australia, by Australian customs and navy vessels, and the 46 Vietnamese nationals were moved to the Australian navy ship HMAS Choules.

On 17 April, the 46 Vietnamese asylum seekers were allegedly transferred back to Vietnam and handed over to Vietnamese officials in Vung Thau. The adults among them were subsequently detained for at least a week in a detention centre in Phan Thiet.

On 21 April, the Office of Australian Immigration Minister, Peter Dutton, issued a statement declaring that Australia had not breached its obligations under the United Nations Refugee Convention, by returning the asylum seekers back to Vietnam.

On 25 May, the Commander of Operation Sovereign Borders declared in a Senate hearing that the asylum seekers were interviewed individually at sea. Each interview lasted between 40 minutes and two hours. Furthermore, he stated that Vietnamese authorities had assured the Australian Government that there would be no reprisals; however, he noted that the Australian Government does not track asylum seekers once they have been returned.

Since commencing its 'Operation Sovereign Borders' policy on 18 September 2013, the Australian Government has, according to its own information of January 2015, intercepted and returned 15 boats, carrying a total of 429 asylum seekers. Despite official information by the Parliament of Australia, updated on 2 March 2015, that between 70 and 100 per cent of asylum seekers arriving by boat at different times in the past have been found to be refugees, all claims for protection have been refused.

In 2012, the Australian Government introduced an 'enhanced screening procedure' to assess whether unauthorized maritime arrivals raise claims that engage Australia's non-refoulement obligations. Under the 'enhanced screening process' individuals are allegedly not informed of their right to asylum; screening interviews are generally brief and not sufficiently detailed to ensure that all relevant protection claims are raised; legal advice is only provided upon specific request, and persons who are 'screened out' are not given a written record of the reasons for the decision, nor do they have access to independent review of such a decisions.

We express serious concern at the allegations that Australian authorities have acted in violation of the principle of non-refoulement by returning 46 Vietnamese asylum seekers without assuring a fair refugee status determination procedure, thereby putting them at risk of being subjected to torture or ill-treatment upon return to their country of origin. We further express concern at the possible incompatibility of the 'enhanced screening procedure' with international law, and in particular the principle of non-refoulement.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations concerning the return of the 46 Vietnamese asylum seekers:

1. Please provide any additional information and any comment or observation you may have on the above mentioned allegations.

2. Please provide information on the 46 Vietnamese asylum seekers and on the respective reasons for their travel.

3. Please provide detailed information on the screening procedures carried out at sea, including the grounds on which the respective requests for refugee status determination were denied.

4. Please explain how such screening procedures are compatible with international standards, including those referred to in the annex.

5. Please provide information on whether access to legal representatives has been facilitated by the authorities. If not, please explain why;

6. Please provide information on steps, if any, taken to monitor the situation of the 46 asylum seekers in Vietnam and ensure that they are not subject to ill-treatment and/or reprisals.

7. Please explain the measures taken by the Australian Government, in relation to assessments carried out at sea, to ascertain that extraditions in violation of article 3 of the CAT do not take place in the future, including the investigation, prosecution and punishment of those responsible for the allegedly illegal extradition of the 46 asylum seekers in question.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary measures be taken to prevent the re-occurrence of the alleged violations and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

François Crépeau  
Special Rapporteur on the human rights of migrants

Juan E. Méndez  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

## **Annex**

### **Reference to international human rights law**

While we do not wish to prejudge the accuracy of these allegations or to express an opinion yet, the above allegations appear to be in contravention of the non-refoulement obligation under Article 33(1) of the Refugee Convention, to which Australia acceded on 22 January 1954.

With regards to the potential risk, faced by the 46 asylum seekers, of persecution upon return, we wish to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Australia ratified on 8 August 1989. In particular, we would like to draw the attention of your Excellency's government to Article 3 of the CAT, which urges States not to return a person to another State where she or he risks being tortured, and requests that States' determination procedures take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned.

With particular regard to the interviews carried out on the high seas, which may be focused on determining the eligibility for asylum or refugee status, and not necessarily on the risk of torture, we wish to remind your Excellency's Government that the non-refoulement provision of the CAT differs from that of the Refugee Convention, on the important point that its prohibition of return applies regardless of whether or not the person qualifies for asylum or refugee status.

We would like to draw the attention of your Excellency's Government to paragraph 16 of the UN General Assembly Resolution, A/RES/65/205, of the which urges States "not to expel, return ("refouler"), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, and recognizes that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement".

Furthermore, paragraph 7d of Human Rights Council Resolution 16/23 urges States "(n)ot to expel, return (refouler), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture, [...]."

We would also like to refer to paragraph 9 of the General Comment No. 20 of the Human Rights Committee which states that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

Finally, we would like to draw the attention of your Excellency's Government to the thematic report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/25/60), which states that the non-refoulement obligation is a specific manifestation of the more general obligation of States to ensure that their actions do not lead to a risk of torture anywhere in the world.