

**Mandates of the Working Group on Arbitrary Detention; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on the issue of discrimination against women in law and in practice**

REFERENCE:  
AL USA 23/2018

20 November 2018

Dear Mr. Cassayre,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; the Independent Expert on human rights and international solidarity; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 33/30, 35/3, 33/9, 34/5, 34/21, 34/35, 34/19, 35/5 and 32/4.

In this connection, we would like to bring to the attention of your Government information we have received concerning recent **restrictions to proceedings regarding asylum as well as the racialized and xenophobic rhetoric by US authorities against migrants travelling in caravans towards the United States of America.**

According to the information received:

Since 13 October 2018, an estimated 8,000 to 10,000 migrants have passed through the Guatemalan and Mexican borders seeking to reach the United States of America.

Most persons in the different groups of the caravans are from Honduras, with increasing numbers of migrants from Guatemala, Nicaragua and El Salvador joining. A significant number of the migrants are families, women and children, including many single mothers with children under the age of five years old. The vast majority are indigenous peoples or belong to ethnic or racial groups that are categorized as non-white in the United States.

The migrants reported that they were fleeing violence, forced recruitment and threats to their life and personal integrity by gangs, as well as poverty, social exclusion and a deep lack of livelihood opportunities.

## **Xenophobic and discriminatory rhetoric towards members of the caravans travelling towards the United States**

In escalating rhetoric ahead of the midterm elections, the President of the United States called the migrant caravans “an invasion” (29 October 2018) and “an assault on our country” (18 October 2018), and claimed that there were “criminals and unknown Middle Easterners” (22 October 2018) as well as “Many Gang Members and some very bad people” (29 October 2018) among the migrants in the caravans in later Tweets.

On 23 October, the Department of Homeland Security stated that within the caravans are people who are “gang members or have significant criminal histories”. To date, no empirical evidence to sustain these assertions has been provided publicly by the above-mentioned authorities. On 2 November, President Trump vowed to prevent the “violent” migrant caravan from “invading” the country.

To date, the US Department of Defense has reportedly deployed 5,200 active-duty troops to the southwest border (1,800 to Texas, 1,700 to Arizona and 1,500 to California). This increases the 2,000 National Guard members already at the border and the 7,000 National Guard troops planned to be deployed at the end of 2018. Reportedly, the Department of Defense turned down a request made by the Department of Homeland Security to grant authority to active military troops to directly enforce US immigration laws, including detention of migrants and riot control.

On 1 November President Trump commented that military troops “should treat rocks thrown by migrants as firearms attacks”. Later, President Trump retreated from those comments, stating that, if soldiers were attacked with rocks thrown by migrants, they would be arrested.

The 2014 update of the Use of Force Policy, Guidelines and Procedures Handbook of the US Customs and Border Protection established that border patrol agents are not supposed to shoot at rock throwers, unless they have a ‘reasonable belief’ that there is an “imminent danger of serious physical injury or death”. Since 2010, there have been nine incidents in which border patrol agents shot and killed alleged rock throwers at the border.

On 1 November 2018, the President of the United States announced that migrants would be held in “massive cities of tents” built with the assistance of the military. This raises concerns about immigration detention, an issue repeatedly raised with your Excellency’s Government, for instance in letters 23/2017, 12/2018 and 18/2018.

## **Restrictions to initiating asylum processes in the United States**

On 8 November, the Secretary of Homeland Security and the acting Attorney General issued an interim final rule providing that persons subject to a presidential proclamation concerning the southern border would not be eligible to pursue asylum. On 9 November, the “Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States” was issued. This proclamation provides that those persons who enter the southern border outside of an official entry point will not be eligible to request asylum. This appears to contradict what is established by the Immigration and Nationality Act (INA) which states that, “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival) may apply for asylum.” Moreover, the proclamation states that Department of Homeland Security would have to screen asylum seekers to determine whether they have a reasonable fear of persecution, which is the standard set by the Refugee Convention and its protocol.

In addition, US authorities have engaged in a pattern of denying asylum seekers access to the asylum process on the U.S.-Mexico border through variety of normative and *de facto* tactics. These tactics include physically obstructing access to the port of entry buildings, imposing unreasonable delays before granting access to the asylum process and arguing lack of sufficient capacity. Unreasonable delays in processing asylum requests are also due to the existence of a waitlist system which is being coordinated with Mexican immigration authorities and other parties. Asylum seekers are instructed to wait on the bridge, in the preinspection area, or at a shelter until there is adequate space at the port of entry. On some occasions they are informed that they cannot be processed because the port of entry is at its full capacity. The waiting time to be processed could range from one to two months, placing asylum seekers in a critical humanitarian situation as they usually are in a precarious economic situation and also face considerable risks due to the presence of organized crime at the border area. Most of them are compelled to enter the United States outside the ports of entry risking their lives and increasing the possibility of being detained by the Border Patrol.

In addition, the President of the United States issued a series of Tweets in which he threatened to cut off aid to Honduras, Guatemala and El Salvador unless they stop the caravans. The Vice-President met with the President of Honduras and tweeted about having delivered this message. In what seems to be a threat towards the funding for the “Alliance for Prosperity in the Northern Triangle”, the President is aiming at the plan which his administration previously claimed would combat irregular immigration by creating conditions for shared security and economic growth across the hemisphere. In reaction to the threats, the Presidents of Honduras and Guatemala have issued statements saying that the organisers of the caravan shall be prosecuted with the full force of the law.

Without attempting to prejudge the accuracy of these allegations or formulate a conclusion on the facts, we express our grave concern about Your Government's reported reaction to the upcoming arrival of migrants at different points of the Southern border between Mexico and the United States of America.

We are seriously concerned about the racialized and xenophobic language allegedly used by US authorities, which stigmatizes migrants, equating them with crime and epidemics. We are deeply concerned that such rethoric may fuel a climate of hostility, intolerance, racial hatred and xenophobia against those perceived as non-white. It is of particular concern that such rethoric is used by high-level authorities, leading to the escalation and normalization of hate speech, incitement to hatred and discrimination in the political and public sphere.

We are also deeply concerned about the announced recourse to military personnel to secure the border of the United States. Experience shows that when armed forces are used to perform tasks that they are not trained to do, this usually leads to serious violations of human rights. In addition, we are also concerned about the excessive use of detention against migrant persons, under a system that seems to be, in many cases, unnecessary, punitive, unreasonably long and not based on an individualized assessment of the necessity and proportionality of the deprivation of liberty.

We also express our serious concern about possible returns in violation of the principle of non-refoulement and the lack of individual risk assessments. When individual assessments are delayed or not carried out, and migrants are not given the opportunity to present their asylum claims describing the risks they may face when returned to their countries of origin, a possible violation of the international principle of non-refoulement results. We also would like to remind your Excellency's Government that, under the universal, non-derogable and peremptory prohibition of torture, no person, regardless of their entitlement to refugee status, their background or any other consideration, can be lawfully returned to a country or territory where they may face a real risk of being exposed to torture.

We are additionally concerned about the threats to cut aid to the countries of origin of the migrants, as this may only lead to exacerbating the conditions from which these migrants are fleeing in the first place.

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

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide information and any comments you have on the above-mentioned allegations.

2. Please provide information on how your Government has respected and continues to respect the principle of non-refoulement, and particularly on the measures in place to guarantee that all asylum seekers have access to an asylum process in a timely manner.
3. Please provide information on how your Government plans to respect the principle to prohibit collective deportations and to ensure that each person receives an individual assessment of his or her asylum application and protection needs.
4. Please provide information on how your Government identifies especially vulnerable migrants, in particular women, children, victims or potential victims of trafficking in persons, the elderly and LGBTI persons.
5. Please provide information on the measures taken by your Government to ensure that deportations are only carried out on the basis of genuine, fully informed and valid consent, in a dignified manner that guarantees respect for human rights, in addition to the appropriate measures for the evaluation of their needs and their reintegration in their countries of origin.
6. Please provide information on actions taken to ensure that security forces at the border will act in accordance with the internationally recognized principles of necessity, proportionality and rationality, upon arrival of the caravans.
7. Please indicate what measures have been taken to ensure that all of those who defend the rights of migrants in the United States are able to carry out their legitimate work in an enabling environment without fear of intimidation of any kind.
8. Please provide detailed information on measures taken to address xenophobic attitudes and behavior towards those perceived as foreigners/outsideers on the basis of their race, colour, descent, and national or ethnic origin. In particular, please provide details on steps taken to condemn, prohibit, eliminate and sanction hate speech as well as incitement to hatred, violence or discrimination-including against migrants, refugees and asylum seekers.
9. Please provide information on the measures envisaged to ensure that aid to concerned countries of origin will not be cut.

This communication and any response received from your Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to end hate speech against migrants and prevent violations of international human rights and humanitarian law when the caravans may reach the border of the United States of America.

Letters to verify allegations that the migrants faced violations of their human rights while travelling with the caravans in direction to the United States of America have also been sent to the governments of Guatemala, Mexico and Honduras.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Government and the Governments of Guatemala, Mexico and Honduras to clarify the issues in question.

Accept, Mr. Cassayre, the assurances of our highest consideration.

Elina Steinerte  
Vice-Chair of the Working Group on Arbitrary Detention

Obiora C. Okafor  
Independent Expert on human rights and international solidarity

Dainius Pūras  
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Michel Forst  
Special Rapporteur on the situation of human rights defenders

Felipe González Morales  
Special Rapporteur on the human rights of migrants

E. Tendayi Achiume  
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Nils Melzer  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Maria Grazia Giammarinaro  
Special Rapporteur on trafficking in persons, especially women and children

Ivana Radačić  
Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

## **Annex**

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

Without implying in advance, a conclusion on the alleged facts, we would like to draw the attention of your Government to the international standards and regulations applicable to the matters set forth above.

We wish to refer your Government to the International Covenant on Civil and Political Rights (ICCPR) ratified by United States on 08 June 1992 and notably to Articles 2, 5, 7, 9, 10, 11, 12, 13, 14, 19, 22 and 26. We recall that the aforementioned provisions can only be restricted in cases strictly limited by law and in accordance with the principles of necessity and proportionality established by international law.

In particular, we would like to draw the attention of your Government to Article 9.1 of the ICCPR, which stipulates that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. "

"The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party "(CCPR/C/21/Rev.1/Add.13, paragraph 10). The detention of migrants should always be a measure of last resort. The ICCPR furthermore stipulates in article 9.4 that that all persons deprived of their liberty shall be ensured, without delay, the right to initiate proceedings before a court, for it to determine the lawfulness of the detention. For a more detailed overview of the international human rights standards governing the detention of migrants, including the obligation of States to always resort to alternatives to detention first, we would like to draw your attention to the Special Rapporteur on the human rights of migrants' report to the Human Rights Council (A/HRC/20/24), as well as the Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37). The Special Rapporteur notably noted that "according to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available. Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure."

We would like to highlight that Revised Deliberation No. 5, on deprivation of liberty of migrants, recently adopted by the Working Group on Arbitrary Detention, requires for the detention of migrants to be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose (p. 12). It also calls for it to be reasonable, necessary and proportionate in the light of the circumstances specific to the individual case (p. 14). Very importantly, the Revised Deliberation No. 5 states that detention of migrants in situations of vulnerability or at risk, such as pregnant women,

breastfeeding mothers, survivors of trafficking, torture and/or other serious violent crimes, must not take place (p. 41).

With regard to the racialized and xenophobic rhetoric targeting members of the caravans, we would further like to bring to the attention of your Government relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by the United States of America in 1994. Article 2(1) requires that States Parties prohibit and eliminate any act or practice of racial discrimination against persons and/or groups based on race, colour, descent, or national or ethnic origin. In addition, the prohibition of hate speech is firmly enshrined in international human rights law, mainly through article 4 of ICERD and Article 20(2) of ICCPR. Article 4 of ICERD obliges States to condemn, prohibit, eliminate and sanction all propaganda that is based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or that attempts to justify or promote racial hatred and discrimination in any form. To this end, States must prohibit public authorities and institutions on the national and local level to promote or incite racial discrimination. Similarly, article 20 (2) of ICCPR reiterates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

General Recommendation 35 of the Committee on the Elimination of all Forms of Racial Discrimination underlines that racist hate speech can take various forms and is not confined to explicitly racial remarks (para. 7). In this context, the Committee urges States parties to declare and effectively sanction as offences punishable by law, inter alia (a) all dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) threats or incitement to violence against persons or groups on such grounds; and (d) insults of persons or groups or justification of hatred, contempt or discrimination on such grounds, when it clearly amounts to incitement to hatred or discrimination (para.13). The Committee also draws attention to the role of politicians and other public opinion-formers in contributing to a negative climate towards certain groups and thus encourages such persons to adopt positive approaches directed to the promotion of intercultural understanding and harmony (para.15). The Durban Declaration and Programme of Action similarly emphasizes that “the stigmatization of people of different origins by acts or omissions of public authorities, institutions, the media, political parties or national or local organizations is not only an act of racial discrimination but can also incite the recurrence of such acts, thereby resulting in the creation of a vicious circle which reinforces racist attitudes and prejudices, and which must be condemned” (para. 94).

Furthermore, we would like to refer your Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State



has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

We would also like to draw the attention of your Government to Article 12.2 of the ICCPR, which stipulates that "everyone shall be free to leave any country, including his own" and Article 13.2 of the Universal Declaration of Human Rights which stipulates that "everyone has the right to leave any country, including his own, and to return to his country".

We would furthermore like to refer to the OHCHR's "Recommended Principles and Guidelines on Human Rights at International Borders".

With regard to systematic detention of migrants and asylum seekers, we would like to draw the attention of your Government to the General Comment 35 of the Human Rights Committee, which records in paragraph 18 that "detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category". For these reasons, the committee considered that mandatory detention is inherently arbitrary and therefore contrary to the ICCPR.

We would also like to refer to the report of the Working Group on discrimination against women in law and in practice on its visit to the United States (A/HRC/32/44/Add.2) recommending that the United States end detention of migrant women with children and establish accountability mechanisms and adequate gender-sensitive training of Customs and Border Protection officials.

Furthermore, we would like to refer the Government of your Government to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990 and welcomed by the UN General Assembly in A/RES/45/166. The Basic Principles mention in Article 4 as a general provision that "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms."

With regard to the threats made regarding aid to the Governments of El Salvador, Guatemala, and Honduras, we would like to recall to your Government that international cooperation has widely been recognized as essential to the achievement of human rights, including in the Vienna Declaration and the 2030 Agenda for Sustainable Development, and specifically enshrined in Sustainable Development Goal 17. The Independent Expert

on human rights and international solidarity has repeatedly emphasized the importance of taking a human rights-based approach to international cooperation and development aid.

We would like to recall the Resolution 9/5 of the Human Rights Council, which addresses the human rights of migrants and "requests States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party" (Art. 1b). The resolution also "reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants" (Art 1c).

Finally, we would like to call the attention of your Government to the report of the Special Rapporteur on the right to mental health of people on the move (A/73/216) where he elaborates on the effect of xenophobic actions and negative rhetoric and discourse by leaders and politicians on the mental health and well-being of, not only people on the move, but the mental health and well-being of the general public. These negative attitudes and discourse help to create hostile emotional and psychosocial environments, erode the quality of human relationships and bring mistrust, disrespect and intolerance into societal life.