

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the human rights of migrants; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 40/16, 42/22, 35/6, 34/5, 34/21 and 42/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the harassment and "flagging" of human rights defenders and journalists by the United States Government, reportedly in retaliation for their work with migrants and asylum seekers. According to the information received, human rights defenders and journalists have been stopped and detained by U.S. authorities or by other governments at the request of U.S. authorities, using a flagging system designed to stop organised crime and threats to national security. The incidents discussed below started in 2017 but appear to have escalated into what may constitute a pattern in response to human rights defenders' support of migrants travelling in so-called "migrant caravans".

According to the information received:

The leadership of Al Otro Lado, an organisation engaging in direct client services to migrants and asylum seekers in the United States of America and broader impact litigation, has been subject to retaliation based on alleged national security threats.

Beginning in early 2017, the staff and volunteer human rights defenders at Al Otro Lado began to be detained or delayed when crossing the U.S.-Mexico border. From February through April 2017, attorney Nicole Ramos, a U.S. citizen living in Tijuana and the legal director of Al Otro Lado, received reports from asylum seekers that Customs and Border Protection (CBP) had made slanderous statements against her at the San Ysidro port of entry, including that Ms. Ramos was a "fraud," a "fake attorney," and a "troublemaker." CBP officers also accused the asylum seekers of having "been coached" by Ms. Ramos to provide false

accounts of their persecution and that Ms. Ramos “had lied to [the asylum seekers]” about their rights in the asylum application process.

Shortly after Al Otro Lado filed a class action lawsuit against the Department of Homeland Security (DHS) on 12 July 2017, staff attorney Erika Pinheiro, a U.S. citizen, was questioned for several minutes by a CBP officer at the San Ysidro border crossing. The CBP officer told her “I better not be rude to you or you will sue me, too,” indicating that the CBP officer knew who she was and that her organisation had filed a lawsuit against the DHS.

On 22 July 2017, Ms. Ramos was informed by an executive of Border Angels, a binational humanitarian aid organisation working to aid migrants that the local delegate of the Mexican National Institute for Migration (Instituto Nacional de Migración) had received inquiries from the U.S. Government regarding Ramos’s immigration status and permission to remain in Mexico. This was considered an indication that the U.S. and Mexican governments were communicating about Ramos’ immigration status and ability to travel as a means to exert pressure on her advocacy efforts.

Harassment and “flagging” efforts appear to have increased after the July 2018 arrival of the so-called “migrant caravans.” The leadership of Al Otro Lado has been subject to retaliation on the alleged basis of national security threats. On 10 January 2019, Ms. Ramos was sent into secondary inspection and had her Secure Electronic Network for Travelers Rapid Inspection (SENTRI) card confiscated. The CBP supervisor told Ms. Ramos that she could make inquiries as to the reason for the suspension of her card at the SENTRI office, however, the SENTRI office had been closed due to the government shutdown.

On 29 January 2019, Al Otro Lado attorney Erika Pinheiro was detained by Mexican immigration authorities as she attempted to enter Mexico at the San Ysidro East Port of Entry. Mexican immigration officials advised Ms. Pinheiro that a foreign government had issued a migratory alert on her passport. Ms. Pinheiro was detained for two hours before ultimately being denied entry into Mexico. Ms. Pinheiro advised the Mexican immigration officials that her Mexican-born child and partner were waiting for her to return to Mexico, showing the officials a picture of her child’s Mexican birth certificate. Two attorneys who came to advocate on Ms. Pinheiro’s behalf were directed to leave the port of entry and were denied access to speak with her. One of the attorneys was subsequently denied entry in Mexico.

On 31 January 2019, attorney Nora Phillips, the legal director of Al Otro Lado in Los Angeles and a U.S. citizen, was detained by Mexican officials at the Guadalajara Airport based on a “migratory alert” connected to her U.S. passport. Ms. Phillips had travelled to Mexico for a short family vacation with her child, husband, and a family friend. She was detained for approximately ten hours, during which time neither she nor her child were given food or drinking water.

Ms. Phillips is a person with disabilities and requires medication to manage her multiple medical conditions. Despite having informed the Mexican officials of her condition and her need to take medication at the outset of the interrogation, Ms. Phillips was not provided reasonable accommodation and with drinking water for ten hours. Ms. Phillips was ultimately denied entry into Mexico, and she and her child were returned to the United States of America.

During this same period, it is alleged that U.S. attorneys and immigration advocates volunteering with Al Otro Lado were subjected to secondary inspections by U.S. immigration authorities as they re-entered the United States of America after working in Tijuana. Secondary inspection is typically used to question people that DHS suspects either do not have the legal right to be in the United States of America, or whom they suspect are threats to national security. Further to the information received, it appears to be systematically used as a mechanism to deter lawyering or human rights advocacy.

Other human rights defenders have been stopped and detained by border officials after having been “flagged” by the US government.

In July 2017, an attorney and specialist in immigration and human rights law, who had helped several people impacted by the travel ban imposed pursuant to the Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States of America, was detained in a third country. The attorney was involved in several lawsuits challenging the legality of different aspects of the Executive Orders, and had been interviewed by media outlets about them. The attorney was held in detention at the airport, for more than an hour, by the authorities of the third country while returning from holidays. The attorney was questioned about travel, profession and employment. All belongings were swabbed and x-rayed multiple times. Devices and other electronics were inspected. Authorities of the third country informed the attorney that the reason for detention was that the U.S. government had “flagged” the attorney, generating the letters “SSSS” on the boarding pass. The attorney was released an hour later. The attorney had previously held security clearance with three U.S. Federal Government agencies, had travelled through more than twenty countries for the U.N. and the Organization for Security and Cooperation in Europe (OSCE) without ever having been stopped. It is believed that the detention and flagging was a result of the immigration related challenges to the U.S. government.

Since late December 2018, Jeff Valenzuela, a US citizen and volunteer with Pueblo Sin Fronteras, a transborder organization that provides assistance to migrants and refugees in Mexico and the United States of America, residing in Tijuana, has been sent to secondary screening a half-dozen times when crossing the US-Mexico border. On Christmas Day, after spending two hours waiting to cross the border into the U.S., Mr. Valenzuela was escorted by two U.S. officers to an interview room, where he was questioned about the migrant caravans and the condition of shelters in Tijuana. During the questioning, Mr. Valenzuela was told

that the officers needed to search his phone as “standard procedure to make sure [he did not] have child pornography.” Mr. Valenzuela was informed that he could refuse the search but that doing so would result in his phone be seized and that he would be sent to a secondary location. Mr. Valenzuela consented to the search, allowing the officers to watch as he scrolled through his photos. After more than two hours, Mr. Valenzuela was released. Two days later, as Mr. Valenzuela attempted to cross the border into the U.S. to visit family, DHS officers approached his vehicle, ordered him to exit the vehicle, and to put his hands behind his back. The DHS officers handcuffed Mr. Valenzuela but told him that he was not being placed under arrest and that his treatment was standard procedure. Mr. Valenzuela was taken to a secondary location where his belongings were confiscated and he was handcuffed to a bench. Four hours later, he was taken into an interview room by two plainclothes officer, questioned, coerced into unlocking his phone after showing him a document indicating that his phone had been “detained for further examination, which may include copying,” implying that this would be the next step if he refused to consent. The officers took his phone and returned it approximately one hour later. Mr. Valenzuela believes that most apps on his phone were searched. In the weeks that followed, Mr. Valenzuela was pulled into secondary screening four more times. On one of those occasions, Mr. Valenzuela was handcuffed again.

Between December 2018 and February 2019, two other volunteers and human rights defenders working with Pueblo Sin Fronteras experienced similar treatment. One of them, a Mexican citizen had his U.S. multiple entry visitor visa revoked after working with Central American migrants heading to the United States of America and participating in interviews with several news outlets during the trip. The second volunteer was sent to secondary screening twice. The longest of these interviews occurred in early January 2019, at Los Angeles International Airport, after visiting friends and family in Mexico and Honduras.

Hugo Castro and James Cordero, two volunteers working at Border Angels, a non-profit organization that advocates for human rights, humane immigration reform and social justice, attempting to reduce the number of fatalities along the U.S.-Mexico border, were subjected to secondary screening between December 2018 and February 2019. Mr. Castro was detained for more than five hours on 20 December 2018. Mr. Cordero was sent to secondary screening on 24 December 2018, when he returned from delivering toys to children at a shelter in Tijuana, where many of the migrants who were travelling in the caravans were staying. Officers questioned Mr. Cordero about the environment in the shelter and who was in charge of its operations.

Alleged harassment and detention of journalists after they reported on human rights, immigration law and policy affecting migrants.

In December 2018, two journalists captured a video of Mexican and U.S. border patrol working together to prevent migrants from turning themselves into U.S.

Customs and Border Protection to apply for asylum. After shooting the footage, both individuals, as well as other journalists reported that the CBP employed intimidating behaviour against them, including DHS agents accusing the journalists of aiding and abetting people to enter the United States of America illegally. One of the journalists present during the aforementioned event with the DHS agents was pulled into secondary screening in El Chaparral port of entry, while leaving Mexico in January 2018.

Two other journalists that covered CBP's tear gas attack on migrants trying to cross the border into the United States of America on 1 January 2019, were approached by Mexican police and had their passports photographed. The Mexican officials indicated that this request came from "the Americans". A freelance journalist that was among the group of journalists at the border wall on 1 January 2019 was accused by CBP of helping to facilitate illegal migrant crossings, and was pulled into secondary screenings twice, between December 2018 and February 2019, when flying back to the U.S. On both occasions, CBP conducted searches on bags and camera files. In January 2019, during a second screening, a CBP officer told the journalist that the repeated detentions were likely due to the freelancer's line of work.

Between December 2018 and January 2019, a filmmaker who spent two months with the caravans was sent into secondary screening. During the second detention, the filmmaker was questioned about the tear gassing on 1 January 2019 and asked whether he was an "activist." It is reported that U.S. officials took the filmmaker's phone for approximately fifteen minutes, during which time it is believed the phone was cloned.

Four other journalists reported having been subject to similar treatment and intimidation, including secondary screenings, detention by Mexican officials upon their arrival to the country, denial of access to a lawyer and having their phones confiscated and their belongings searched.

Without prejudging the accuracy of the information received, we express our grave concern at the apparent pattern and practice of DHS agents and other U.S. Government officials of using secondary inspection to harass and question human rights defenders, journalists, humanitarian workers and lawyers. We are concerned that the facts as presented show a pattern and practice of U.S. authorities misusing international systems designed for combating organised crime and terrorism, by issuing flags and migratory alerts in retaliation against the lawful actions of human rights activists, journalists, and lawyers. The above allegations would appear to be in contravention of rights protected under articles 7, 9, 10, 17, 19, 21 - 23 of the International Covenant on Civil and Political Rights (ICCPR), and of articles 5(c) and 9(c) of 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.

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 all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the factual and legal basis for the flagging and detention of Nicole Ramos and other human rights activists, lawyers, or journalists related to their efforts of assisting asylum seekers, those affected by the travel ban imposed pursuant to the Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States of America, and the migrant caravans.
3. Please explain how the practice of flagging is compatible with your Excellency's Government obligations under international human rights law, in particular with articles 9, 10, 13, 17, 19, 21, 22, and 23 of the International Covenant on Civil and Political Rights.
4. Please provide information about the factual and legal basis for issuing migratory alerts on the travel of Erika Pinheiro, Nora Phillips, and any other human rights activists, lawyers, and journalists described in the facts above. Please further explain how these migratory alerts are compatible with the obligations of your Excellency's Government under international human rights law, in particular with articles 9, 10, 13, 17, 19, 21, 22, and 23 of the International Covenant on Civil and Political Rights.
5. Please provide the factual and legal basis for the use of secondary screenings. In particular, please provide information on measures taken to ensure secondary screenings do not violate any articles of the International Covenant on Civil and Political Rights and fell under the provisions outlined by the Convention against Transnational Organized Crime or other relevant treaty, resolution, or practice on transnational organized crime or terrorism.
6. Please provide information regarding the statements described above in relation to Nicole Ramos, Erika Pinheiro, and steps taken to ensure that article 17 (1) of the International Covenant on Civil and Political Rights protecting the rights of individuals to be free from unlawful attacks on their honour and/or reputation is not violated.

7. Please explain the apparent use of immigration status as a method of speech regulation as in the case of Nicole Ramos and steps that the United States of America Government has taken to avoid violations of articles 12 and 13 of the International Covenant on Civil and Political Rights.
8. Please provide information about the legal and factual basis for the revocation of SENTRI cards and multiple entry visitor visas of human rights defenders including Nicole Ramos.
9. Please detail steps that the United States of America Government has taken to ensure that families are not separated in violation of article 23 of the International Covenant on Civil and Political Rights. Please explain the temporary or prolonged separation of Erika Pinheiro, Jeff Valenzuela, and other human rights defenders and journalists from their families including the legal and factual basis supporting the separation of these individuals from their families.
10. Please describe steps taken to ensure detained individuals as described above have access to legal counsel, translators, and consular access.
11. Please describe the conditions of detention for individuals described above. In particular, please provide information on individual's access to reasonable accommodation in detention, drinking water and food, their ability to take medication, the duration of their detention, whether they were handcuffed, conditions of interrogation, access to lawyers, and any other relevant details. In particular, please describe measures taken to ensure that detention of individuals during secondary screenings did not violate articles 7, 9, and 10 of the International Covenant on Civil and Political Rights.
12. Please comment on the pattern of restrictions on movement, increased use of secondary screening, and harassment of human rights defenders and its apparent increase in relation to human rights work assisting asylum seekers, those affected by the travel ban imposed pursuant to the Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States of America, and migrants travelling in caravans.
13. Please provide information in details of how your Excellency's Government's counter-terrorism efforts as realized through border security management which effects journalists, lawyers and human rights activists comply with the United Nations Security Council Resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017), and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123, 72/180 and 73/174, in particular with

international human rights law, refugee law, and humanitarian law contained therein.

We would like to inform your Excellency's Government that having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit specific cases relating to the circumstances outlined in this communication through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure.

We would appreciate receiving a response within 60 days. Thereafter, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. 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 halt the alleged violations and prevent their recurrence 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.

We would also like to inform you that a similar communication will be sent to Mexico.

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

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

Catalina Devandas-Aguilar
Special Rapporteur on the rights of persons with disabilities

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Felipe González Morales
Special Rapporteur on the human rights of migrants

Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation

Annex

Reference to international human rights law

While we do not wish to prejudge the accuracy of the above allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

Without expressing an opinion on the facts of the case and on whether the flagging, migratory alerts, revocation of SENTRI cards and multiple entry visitor visas, secondary screenings, and detention of human rights defenders and others described above were lawful, we would like to appeal to you Excellency's Government to take all necessary measures to ensure that the rights of human rights defenders are not impinged upon under the guise of national security in retaliation for their lawyering, reporting, and other human rights activities. Since 2001, civil society space has been shrinking, and civil society actors face defamation, harassment, spurious charges, and the criminalisation of peaceful actions. Globally, human rights defenders who express views contrary to the official position of the State face charges as "threats to national security" or terrorists. (A/HRC/40/52). The Human Rights Council has stressed the need to ensure that invocation of national security is not used to unjustifiably or arbitrarily restrict the right to freedom of opinion and expression. (HRC resolution 7/36). Legitimate expression of opinions or thought must not be criminalized. Measures aimed to regulate the existence of or control of civil societies and human rights defenders must comply with the requirements of proportionality, necessity, and non-discrimination. In particular, we would like to bring the attention of the Government to paragraphs 75(a) to (i) of my 2018 report A/HRC/40/52 on the impact of terrorism measures on civic spaces and human rights defenders.

We would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights. (OP 10).

We would like to refer also to the Commentary to the Declaration on human rights defenders which states that "travel restrictions imposed on defenders in order to prevent them from participating in assemblies of different kinds outside their country of residence is contrary to the spirit of the Declaration and the recognition in its preamble that individuals, groups and associations have the right to "promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels". In this regard, we respectfully remind your Excellency's Government of Article 5 (c) of 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, which states that For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels to communicate with non-

governmental or intergovernmental organizations, as well as article 9 (c), which provides that everyone has the right to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

We would like to further refer you to the U.N. Convention against Transnational Organized Crime ratified by the United States of America on 3 November 2005. The Convention explicitly defines an organized criminal group as a structured group consisting of “three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” Serious crimes are defined as any offense punishable by at least four years’ imprisonment. While the threat posed by transnational organized crime to national security is understandably of interest to your Excellency’s Government, we encourage you to make explicit how the actions of individuals such as those in the facts of this communication fit the parameters of a transnational organized criminal group and how their actions constitute a serious crime. Individuals should also be informed of the basis for detention and secondary screenings. Furthermore, we recall the need to ensure that in regulation of cross-border travel and commerce, including the regulation of illegal cross-border activities, the protection of human rights and promotion of human contacts must be upheld.

With respect to the use of counter-terrorism justifications to restrict and delegitimize the exercise of freedom of expression, we would like to underline that any restriction on expression or information that a government seeks to justify on grounds of national security and counter-terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. (CCPR/C/GC/34). We would like to stress that counter-terrorism legislation should not be misused against individuals peacefully exercising their rights to freedom of expression, peaceful association, and assembly. These rights are protected under the International Covenant on Civil and Political Rights. The non-violent exercise of these rights is not a criminal offense.

We respectfully remind your Excellency’s Government of the relevant provisions of the United Nations Security Council Resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017), and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123, 72/180 and 73/174. These resolutions require States to ensure that any measure taken to combat terrorism, including measures applied at borders, comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law contained therein.

Regarding human rights law, we refer your Excellency’s Government to articles 19, 21, and 22 of the ICCPR on the freedom of expression, association, and assembly. Human Rights Committee General Comment 34 states that the “[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the

person.” The harassment, intimidation or stigmatization of a person including arrest, detention, trial, or imprisonment for reasons of opinion constitute a violation of article 19. *Any* form or effort to coerce the holding of any opinion is prohibited. The Committee further states that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights.

We also refer your Excellency’s Government to article 17 of the ICCPR which prohibits unlawful attacks on the honour and reputation of an individual. The Human Rights Committee has construed honour and reputation broadly. For example, the dissemination of personal information based on an unjustified inclusion of a person on the United Nations 1267 Committee’s Consolidated List constituted a violation of article 17 based on the negative association made between the names and the title of the sanctions list. *See* Human Rights Committee, Comm. No. 1472/2006, ¶¶ 10.12-10.13.

Regarding the protection of family units, article 23 of the ICCPR states that the family unit is the “natural and fundamental group unit of society and is entitled to protection by society and the State.” This is particularly important in the context of dual-nationality families. Furthermore, under article 13 of the ICCPR, aliens are entitled to certain rights. This includes not only respect for family life, but also the right to humane treatment. *See* Human Rights Committee, General Comment 15 (April 1986).

In the context of detentions, we refer your Excellency’s Government to articles 9 and 10 of the ICCPR protecting liberty and security of person as well as the humane treatment and respect for the inherent dignity of those deprived of their liberty. Human Rights Committee General Comment 35 states that liberty of person refers to “freedom from confinement of the body” and that security of person concerns “freedom from injury to the body and the mind, or bodily and mental integrity.” (para. 3). Furthermore, article 9 of the ICCPR states that no one shall be subjected to arbitrary arrest or detention. General Comment 35 states that “An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.” (para. 12). While not enumerating examples of lawful arrest or detention, the Committee does note that security detention (also known as administrative detention) not in contemplation of criminal charges presents a severe risk of arbitrary deprivation of liberty (para 15).