

Mandates of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on Arbitrary Detention and the Special Rapporteur on the human rights of migrants

REFERENCE:
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19 February 2021

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Working Group on Arbitrary Detention and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 43/20, 42/22 and 43/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **imminent return of at least 1,200 undocumented Myanmar nationals who are currently in immigration detention in Malaysia.**

According to the information received:

The Myanmar military, following the seizure of power on 1 February 2021, communicated to the authorities of Malaysia through diplomatic representation in Kuala Lumpur, that it will make arrangements for its citizens held in Malaysian immigration detention centers to return.

Reports indicate that the highest proportion of foreign migrants in Malaysia's immigration detention centers across the country are nationals of Myanmar, with 4,534 persons out of approximately 13,000. This, in comparison to the capacity of immigration centers which is 12,530 at any given time.

Over the past months, there has been systematic arrests and detention of migrants on grounds of their irregular migration status. This has led to overcrowded detention centres, where migrants are subjected to inhumane and degrading conditions including exposure to the COVID-19 virus. It remains unclear whether the migrants have received an individualized assessment, access to lawyers and to information about their rights and can meaningfully challenge their detention and deportation.

In accordance with Malaysian national legislation, irregular migrants can be detained for an indefinite period of time. Immigration authorities give detained asylum-seekers, migrants or refugees the choice between detention or "voluntary return" to Myanmar.

On 15 February 2021, the Malaysian Immigration Chief announced that the detainees will be deported on 23 February.

While we do not wish to prejudge the accuracy of these allegations, we are concerned that the Myanmar nationals soon to be deported may be at risk of serious human rights violations, including torture or ill-treatment upon return to Myanmar under the current military rule. The state of emergency measures currently enforced in Myanmar, and previous consistent patterns of extreme violence and serious violations under international law perpetrated by the Myanmar military raises serious concern for the safety of these 1,200 undocumented migrants, in particular with regard to their rights to personal security and physical and mental integrity.

We would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as an international norm of jus cogens, and as reflected inter alia, in Human Rights Council Resolution 25/13 and General Assembly Resolution 68/156.

In this context, a return to a place where individuals are at risk of torture and other ill-treatment is also prohibited under the fundamental principle of international law of non-refoulement. The Human Rights Committee, has clearly noted that States, "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 extradition, expulsion or refoulement" (General Comment 20, para 9). The UN General Assembly has stressed repeatedly the importance of effective legal and procedural safeguards in cases of refoulement and recognizes that diplomatic assurances, where given, do not release States from their obligations under international human rights, humanitarian and refugee law (A/RES/70/146). The Special Rapporteur on Torture, in his report A/60/316, has stated that "diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated".

Furthermore, the Committee Against Torture, has stressed the need to take legislative, administrative, judicial and other preventive measures against possible violations of the principle of non-refoulement (CAT/C/GC/4, para 18). Accordingly, migrants who are asked to consent to a voluntary return process must be fully and meaningfully informed of the choice they make, and that their consent must be given free of coercion such as the threat of indefinite detention in degrading and inadequate conditions.

In the absence of an individual determination of the circumstances of each person in the group there is a risk that the deportation will amount to a collective expulsion. We would like to recall that in the context of the COVID-19 pandemic, States have been urged to suspend deportations or forced returns during this time to protect the health of migrants and that of the communities they return to, and uphold the human rights of all migrants, regardless of status by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and

UN Special Rapporteur on the human rights of migrants.¹

We are further concerned that these migrants are currently detained and are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy and have not benefitted from an adequate identification of their human rights protection situation in Malaysia, including the risk of exposure to the COVID-19 virus. The Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants also called on States to establish protocols and create adequate conditions in shelters and other structures designed for the reception or stay of migrants, considering the health requirements for protection against the spread of COVID-19 and particular vulnerabilities of people affected by humanitarian crises, such as those displaced and/or living in camps, in readiness and response operations.

We also recall the the United Nations' Working Group on Arbitrary Detention Revised Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies which notes that (i) the threshold for exceptionality of detention in migration context is heightened during the pandemic (para 23); (ii) further heightened threshold for detention of women and children in the migration context during pandemic (para 24) and (iii) due process rights, including the right to challenge the legality of detention must be respected during pandemic (para 18).

Finally, we wish to recall that according to the paragraph 12 of the United Nations' Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants, any form of administrative detention or custody of adults in the context of migration must be used as an exceptional measure of last resort, for the shortest period of time and only if justified by a legitimate purpose. Alternatives to detention of adults in the context of migration are to be sought whenever possible and children should not be detained based on migratory grounds. We also wish to recall that persons detained in the course of migration proceedings enjoy as a minimum the same rights as those detained in the criminal justice or other administrative context, and migrant persons have the right to bring proceedings before a court to challenge the legality of their detention and to obtain appropriate remedies if their challenge is successful. We further recall the need for individualized assessment of the need to detain (paras 14 and 20) and the prohibition of automatic detention in the migration context (paragraph 19).

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the currently being taken or considered by your Excellency's Government to safeguard the rights of this group migrants in compliance with Malaysia's international human rights obligations.

¹ [Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants.](#)

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 any comment you may have on the above-mentioned allegations.
2. Please provide detailed information on the assessment/screening carried out by authorities in Malaysia to ascertain whether on an individual basis, individuals in this group of migrants are at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, upon return in Myanmar if deported. If no such assessment has been conducted, please indicate how this is compatible with the international norms mentioned above.
3. Please indicate which concrete measures are being taken by your Excellency's Government to fulfil its obligations under the the principle of non-refoulement prohibition of collective expulsion and
4. Please provide information regarding the legality, proportionality and necessity of the detention of the migrants described in this letter. Please provide information on whether an individualized assessment of the need to detain them has been carried out. Please explain what legal procedures are being followed in relation to the detention and intended deportation of those migrants, and what legal avenues are provided to migrants to challenge their detention and deportation.
5. Please provide information regarding all prevention measures taken in response to the COVID-19 pandemic in immigration detention facilities, in order to protect the physical and mental integrity of the detained migrants, the staff and the wider community.

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

We may consider publicly expressing our concerns in the near future as, in our view, the information at our disposal indicate a matter that merits urgent attention on the part of the Government of Malaysia. We also believe that should this collective deportation occur, the wider public should be alerted about its implications for the enjoyment, exercise and protection of human rights. Any public expression of concern in this case on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Given the urgency of the issue, we thank very much the Government of Malaysia in advance for a prompt response to this communication.

This communication and any response received from your Excellency's 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.

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

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

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

Felipe González Morales
Special Rapporteur on the human rights of migrants