

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:
UA TJK 3/2021

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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 **80 individuals from Afghanistan, including at least 32 children, who allegedly sought asylum in Tajikistan and are currently being held, on an isolated Island, in life-threatening conditions.**

According to the information received:

After the Taliban seized Kaldar district, in Balkh Province, Afghanistan, a group of approximately 80 individuals, from Afghanistan, including at least 32 children, fled the country towards Tajikistan to seek asylum and international protection from the Taliban persecution. On 22 August 2021, they arrived at a border crossing of Tajikistan and requested international protection to the border security forces.

The group of Afghan asylum seekers were immediately arrested by border guards, denied entry to Tajikistan, beaten and forcibly transferred to an island reportedly located in Amu Darya River between Afghanistan and Tajikistan, and known as "Island 266". They were left there without clean water, food, warm clothes, shelter, or living necessities. Under such conditions, the asylum seekers, including children who were heard crying desperately, were starving and have been eating wood from the ground, suffering from dehydration, and are at serious risk for their safety and lives. On 2 September 2021, the asylum seekers were provided with food for only two days since their deprivation of liberty and continued to be denied access to asylum procedures.

A few Tajikistani guards were left to secure the place and ensure that no one would cross the borders to Tajikistan. Reportedly, the Afghan asylum seekers have been severely beaten by guards and threatened to be handed over to the Taliban, who have reached the borders and have attempted to attack them.

It is reported that amongst the 32 children, there is a number of girls, above the age of 14, whose names were listed by Taliban forcing their families to flee Afghanistan as the Taliban were looking for them.

Without prejudging the accuracy of the information received, we are deeply alarmed by the alleged deprivation of liberty of Afghan asylum seekers, including children, under life-threatening conditions on an isolated island, and by the alleged ill-treatment by security guards. Those allegations, if confirmed, would amount to torture or other cruel, inhuman or degrading treatment or punishment. In this regard, 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 codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and article 7 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Tajikistan on 11 January 1995 and 4 January 1999, respectively. The freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right under international law that must be respected and protected under all circumstances. We would also like to remind your Excellency's Government that article 9 of the ICCPR provides the right not to be deprived arbitrarily of liberty.

We would like to stress that holding migrants without giving them the possibility to leave amounts to deprivation of liberty, regardless of the particular location and categorization in national law, including where voluntary departure would entail a real risk of serious human rights violations. Accordingly, all affected migrants are entitled to the full protection afforded to persons deprived of their liberty under international law. Conditions under which migrants are held must strictly comply with internationally recognised standards, most notably the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Any inadequate detention conditions or other ill-treatment may amount to torture if they are intentionally imposed, encouraged or tolerated by States for reasons based on discrimination of any kind, including based on immigration status, or for the purpose of deterring, intimidating or punishing migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, or agreeing to "voluntary" return.

We are also seriously concerned about the lack of access to asylum and other protection granted under international human rights, humanitarian, and refugee law, for this group of Afghani migrants. We would like to stress that any measures taken by Governments, including to manage irregular migration, should be in full compliance with the prohibition of arbitrary or collective expulsions and the principle of non-refoulement. Furthermore, we would like to draw the attention of your Excellency's Government to General Comment No. 31 of the Human Rights Committee, which specifies that State obligations under Article 2 of the International Covenant on Civil and Political Rights entail "an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm ... either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." The Special Rapporteur on the human rights of migrants underscored in his report on means to address the human rights impact of pushbacks of migrants on land and at sea that "effective access to territory is an essential precondition for exercising the right to seek asylum" (para 43, A/HRC/47/30).

We also wish to stress that migrants arriving at international borders, regardless of how they have travelled, should have access to their human rights, including an individualized, prompt examination of their circumstances necessary to uphold the prohibition of arbitrary or collective expulsions. In this regard, we would like to draw the attention of your Excellency's Government to the prohibition of collective expulsions as a principle of general international law, as elaborated in the General Comment No. 15 (1986) of the Human Rights Committee, on the implementation of article 13 of the ICCPR, "would not be satisfied with laws or decisions providing for collective or mass expulsions"(Para.10). The Committee on the Elimination of Racial Discrimination has also recommended States to "ensure that non-citizens are not subject to collective expulsion".

Furthermore, the principle of non-refoulement as enshrined in article 3 of the CAT, provides that, "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"; and that, "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". This absolute prohibition on refoulement is also more expansive than the protections afforded under refugee law insofar as it applies to any form of removal or transfer of persons, regardless of the status or grounds for seeking protection, and does not apply any exception, even if persons do not qualify for refugee or asylum status under Article 33 of the 1951 Refugee Convention or domestic law. Heightened consideration must also be given to children in the context of return, whereby actions of the State must be taken in accordance with the best interests of the child and States must also consider the particular needs and vulnerabilities of each child, in particular girls, which may give rise to irreparable harm in the country of return.

Furthermore, in any event, involuntary returns cannot be lawfully carried out without due process of law. In this connection, under international law, the decision to expel, remove or deport a non-national may only be taken after an examination of each individual's circumstances and in accordance with the law and when procedural guarantees have been respected. In this connection, individuals facing deportation/repatriation are to have access to a fair, individualized examination of their particular circumstances, and to an independent mechanism with the authority to appeal negative decisions. Moreover, a risk assessment in the event of extradition should also be carried out to determine whether there is a risk of violation in the receiving State. In this context, an analysis of the general human rights situation in that State must be taken into consideration.

We would like to further remind your Excellency's Government that the Convention relating to the Status of Refugees expressly prohibits the punishment of asylum seekers for having breached immigration rules in order to gain access to the protection of the territorial State. In addition, the Special Rapporteur on torture has concluded that "criminal or administrative detention based solely on migration status exceeds the legitimate interests of States in protecting their territory and regulating irregular migration, and should be regarded as arbitrary (A/HRC/39/45, annex, para. 10)." In any case, children should never be detained solely because of their irregular

migration status or because they cannot be expelled.

We draw the attention of your Excellency's Government to OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders calling on States to consider the individual circumstances of all migrants at international borders, with appropriate attention being given to migrants who may be at particular risk at international borders who shall be entitled to specific protection and individualized assistance which takes into account their rights and needs.

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

We are issuing this appeal in order to safeguard the rights of the 80 Afghan migrants from irreparable harm and without prejudicing any eventual legal determination.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned persons in compliance with international instruments.

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 precise location where the above-mentioned asylum seekers are held, as well as their treatment by Tajikistani security guards and their conditions of deprivation of liberty on the alleged Island.
3. Please explain the factual and legal grounds for the deprivation of liberty of the above-mentioned individuals, including children, and how this is compatible with the international human rights obligations of Tajikistan.
4. Please provide detailed information on any measures taken, or foreseen, to immediately provide living necessities to the group of Afghan asylum seekers, including food, clean water, warm clothes, shelter and medical care.
5. Please indicate what measures have been taken by your Excellency's Government to protect the human rights of migrants at international borders, including ensuring their access to legal representatives and relevant legal and procedural safeguards for persons in need of protection under international human rights and refugee laws.

6. Please provide detailed information on any investigation, which may have been undertaken concerning the allegations of torture and ill-treatment detailed above. If no investigations were undertaken, please explain how this is compatible with the international human rights obligations of Tajikistan.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and protect the physical and mental integrity of the Afghan asylum seekers, especially the most vulnerable.

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.

We would like to inform your Excellency's Government that after having transmitted an urgent appeal to the Government, the Working Group on Arbitrary Detention may transmit the cases through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such appeals in no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure.

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 Excellency's Government's to clarify the issue/s in question.

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

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

Miriam Estrada-Castillo
Vice-Chair of the Working Group on Arbitrary Detention

Felipe González Morales
Special Rapporteur on the human rights of migrants