

Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL HUN 1/2016

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 26/19, 25/32 and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received **concerning xenophobic and discriminatory public campaigns and discourses, excessive use of force against unarmed migrants and other categories of non-citizens, involving threats and serious harm to their physical and mental integrity, pushbacks and summary returns of migrants and other categories of non-citizens by law enforcement officers at the border to Serbia in violation of the non-refoulement principle, mass expulsions in violation of due process guarantees and poor conditions in reception centres and in transit zones.**

A similar situation was the subject of allegation letter HUN 1/2015 A/HRC/731/79 sent on 7 September 2015 by the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on torture and other cruel, inhuman and degrading treatment. The Government replied to these allegations by letter of 24 November 2015.

According to the information received:

On 18 July 2016, the Hungarian Prime Minister promulgated a message concerning the introduction of a new media and billboard campaign in the lead up to the 2 October referendum on the Government's participation in the European migration relocation scheme. The posters of the campaign explicitly underscore: "Did you know? The terror attacks in Paris were committed by immigrants. / Did you know? From the beginning of the migration crises the abuse against women in Europe has skyrocketed." In this matter, parallel to the anti-migrants campaign, similar recent public statements have been reported in July 2016 to depict migration as a "problem" or "poison" for Hungary.

A widely disseminated pamphlet recently published by the Government states that there are more than 900 "no-go areas" in Western Europe, including the city of London, where, as a result of migrants, "the norms of the host society barely

prevail”. Senior Hungarian public officials, including the Minister of Foreign Affairs, have reiterated claims that Europe has hundreds of “no-go areas”.

A series of measures undertaken in the period from June 2015 to present have eroded the possibility for dignified treatment of migrants and other categories of non-citizens in and arriving to Hungary. These measures include but are not limited to the July 2015 declaration by the Government that Serbia is a “safe third country”; a package of law and policy measures including criminalization of breaching the border fence erected in September 2015, in parallel with the construction of a massive razor wire border fence; legal provisions adopted in June enabling police to escort persons found within 8 kilometers of the border inside Hungarian territory back to the border; as well as other measures.

These moves have created and continue to create an environment enabling abuses and violations of the human rights of migrants and other categories of non-citizens in and arriving to Hungary, namely:

It has been reported that the Government diminished the number of asylum seekers accepted in each of the transit zones to 15 people per day. In the queue to enter transit zones, on Hungarian territory, migrants and other categories of non-citizens, including women and children, do not receive adequate shelter and there are insufficient and inadequate sanitary facilities. Single men are rarely given the possibility to access the transit zone. At present, the waiting time to enter Hungary for single men is more than two years.

Further, it is alleged that asylum seekers’ need of international protection is not individually assessed in the transit zones. Since May 2016, claims have been summarily dismissed and people returned to Serbia under so-called “safe third country” rules.

It is further alleged that Hungarian law enforcement officers conduct push-backs of migrants and other categories of non-citizens without conducting individual assessments of protection needs. Migrants and other categories of non-citizens are regularly forced back through small openings in the razor fence and pushed back into Serbia. Allegedly, law enforcement officers do not hesitate to use batons, fists and release police dogs on such persons, in many cases causing serious physical injuries. In some instances, migrants and other categories of non-citizens were reportedly beaten by law enforcement officials with wooden or metal batons until they lost consciousness. It has further been reported, that personal belongings of migrants and other categories of non-citizens were destroyed by law enforcement officials. Several cases taking place in the second half of August 2016 include very serious injuries to pushed-back persons, apparently after border officials loosened attack dogs on them. In addition, it is reported that 3000 Hungarian civilians have recently been recruited as so-called “border-hunters” in a highly public campaign. Similar to other border guards, they are to be armed with live ammunition.

It has also been reported that some persons crossing into Hungarian territory have been detained in the transit zone. Access to quality legal assistance as well as translation is restricted in detention. Contact with the outside world and family members is nearly impossible. There is reportedly no form of public communication available in the transit zone. In one recent case, it has been reported that the person in detention has been verbally harassed by Hungarian police on a daily basis and that police spit in the detainee's food.

As of 19 September 2016, 222 persons were reportedly in detention in Hungary after having submitted an asylum application. This figure does not include persons held for up to 28 days in facilities directly at the Hungarian-Serbian border who are held while their asylum request is reviewed, but who do not fall within formal categories of "vulnerability". This number is estimated to be around 30-40 persons at present.

Without prejudice to the veracity of the information received, grave concern is expressed regarding the stigmatizing and xenophobic rhetoric – based heavily on misleading information – that is being disseminated by the Government. Most recently through an anti-migration billboard campaign that is being accompanied by singular discriminatory or stigmatizing public statements alleging worrying patterns of racism, racial discrimination and xenophobia against foreigners, migrants and other categories of non-citizens. Concern is expressed that this campaign appears to include strong elements of misinformation about the purported threats posed by immigration, and as such risks spreading xenophobia throughout the country and incitement to discrimination, causing fear and promoting hostility towards foreigners, migrants and other categories of non-citizens. Migrants thus become more at risk of violence.

We further express grave concern at the collective expulsion of non-nationals, acts explicitly prohibited under international law. The lack of individual assessment and possibility for each migrant to state his or her claim outlying the risk he or she may face when returned to Serbia and thereby the potential violation of the international principle of non-refoulement. We further wish to stress that the principle of non-refoulement under the absolute prohibition of torture and other ill-treatment as codified in the Convention against Torture, is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under article 33 of the 1951 Refugee Convention or domestic law. Accordingly, non-refoulement under the CAT must be assessed independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. Further concern is expressed regarding the lack of special measures envisioned at protecting people who might be particularly at risk of human rights violations, including children, persons with disabilities, LGBT persons, older people, victims of torture or victims of gender-based violence or trafficking.

Grave concern is further expressed about restricting access to Hungarian territory and asylum procedures, in contravention of Hungary's obligations under international human rights and refugee law, particularly with regard to the principles of non-discrimination, non-penalization and non-refoulement. We believe *inter alia* that the treatment of single men, and the fact that they are admitted at a much lower rate than families and unaccompanied and separated children, represents a concrete instance of discrimination.

We also wish to express our concern about the systematic abuses noted above – including arbitrary and discriminatory limiting of access to protection procedures, as well as arbitrary detention measures and collective expulsion. In that regard, we are particularly concerned over the lack of access to an independent and impartial process or remedy for migrants and other categories of non-citizens. We further express concern at the excessive use of force displayed by law enforcement officers in the context of unarmed migrants and other categories of non-citizens seeking protection. These measures seriously put at risk their mental and physical integrity.

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.

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 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 penal, disciplinary and administrative sanctions foreseen for officials that have made use of violence against migrants and other categories of non-citizens at the Hungarian border.
3. Please provide information with regard to whether the police officers and army personnel being deployed at the border have received training on human rights protection at borders. Also provide information about the establishment of the so-called “border-hunters”, and the safeguards in place in this regard.
4. Please provide information regarding the measures to be taken to ensure the principle of *non-refoulement* as well as the right to life, physical, and mental integrity of migrants, in particular of vulnerable groups such as unaccompanied children.
5. Please provide information on the grounds upon which Serbia is considered a safe third country for migrants and other categories of non-citizens.

6. Please provide information concerning counseling, translation and informative services provided to migrants and other categories of non-citizens upon arrival in the transit zones and reception facilities, as well as recent and future measures taken to cover migrants and other categories of non-citizens fundamental needs upon their arrival and during their stay in the transit zones.
7. Please provide information on how Hungary ensures that migrants and other non-citizens are given the possibility to access an independent and impartial process and how they can seek and obtain a remedy for violations of their human rights?
8. Please provide information on measures to be taken to individual assessment of protection needs.
9. Please explain how the erection of two fences and the daily quota of migrants and other categories of non-citizens being able to access Hungarian territory are in line with Hungary's international obligations to protect individuals who are vulnerable to suffer human rights violations.
10. Please indicate what measures your Government intends to take to foster diversity, to promote respect and acceptance for cultural diversity between citizens and non-citizens.
11. Kindly provide information on measures and actions taken to counter the xenophobic campaign against migrants and other categories of non-citizens.

We would appreciate receiving a response within 60 days.

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(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.

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Special Rapporteur on the human rights of migrants

Mutuma Ruteere
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia
and related intolerance

Juan Ernesto Mendez
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punishment

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to remind your Excellency's Government of its obligations under the International Convention on the Elimination of All forms of Racial Discrimination (ICERD), ratified on 4 May 1967. In particular, articles 2, 4, 5 and 6 address applicable States' obligations. With regards to the discriminatory practice of public matters, we recall article 2, paragraph 1 (b) and (c) on effective State review and elimination of policies and legislations which create or perpetuate racial discrimination, on the non-sponsoring, defence, or support to racial discrimination by any persons or organizations. Article 4 outlines criminalizing the dissemination of ideas based on racial superiority and prohibiting public authorities from promoting racial discrimination. Article 5 enumerates States' obligations to protect persons' rights to security, protection against bodily harm, and protection of a number of civil rights including the right to nationality. Article 6 describes how States will assure every person within its jurisdiction effective protection against racial discrimination and access to remedies.

Furthermore, we would like to draw the attention of your Excellency's Government to General Recommendation No. 30 on Discrimination Against Non-Citizens issued by the Committee on the Elimination of Racial Discrimination (CERD). The Committee recommends addressing xenophobic attitudes and behaviour towards non-citizens; ensuring that legislative protections against racial discrimination apply to non-citizens regardless of their immigration status; and guaranteeing non-citizens equal protection of the law. On issues specific to this case, the Committee advises in its recommendation No. 25 to ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin; and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies. The Committee has also elaborated relevant States' obligations in General Recommendation No. 35 on combating racist hate speech. Paragraphs 6 and 13 address States' measures to combat manifestations of hate speech. Paragraph 22 specifies that States ought to combat public expressions of racism, especially those of high-ranking officials, with disciplinary actions such as removal from office. Paragraph 47 encourages States to legislate against hate speech.

Additionally, the European Court of Human Rights has affirmed that freedom of expression as guaranteed under article 10 of the European Convention on Human Rights "constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man." The European Court has also stated that "the exercise of this freedom carries with it certain duties and responsibilities and is subjected to certain restrictions as set out in article 10(2) of the European Convention, in particular those that concern the protection of the rights of others" and

that “it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations”. Thus, the European Court has emphasised in its case law concerning Article 10 of the European Convention on Human Rights that “that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”

We would also like to remind your Excellency’s Government that the enjoyment of the rights guaranteed in the International Covenant on Civil and Political Rights (ICCPR) to which Hungary ratified on 17 January 1974, are not limited to citizens of States parties but “must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, other categories of non-citizens, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (ICCPR/C/21/Rev.1/Add. 13 (2004), Para. 10). Thus, article 6, paragraph 1, of the ICCPR imposes an obligation for states to “assure to everyone within their jurisdiction effective protection and remedies...against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” Moreover, article 20, paragraph 2 further states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Additionally, article 26 entitles all persons to equality before the law, as well as equal protection. Furthermore, we would also like to refer to paragraph 9 of the General Comment No. 20 of the Human Rights Committee in which it states that State 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 extradition, expulsion or refoulement.”

Furthermore, we recall paragraph 30 of the Durban Programme of Action which “urges States to develop and implement policies and action plans and to [...] implement preventive measures in order to foster greater harmony and tolerance between migrants and host societies, with the aim of eliminating manifestations of racism, racial discrimination, xenophobia and related intolerance, including acts of violence, perpetrated [...] by individuals or groups [...]; (c) implement specific measures involving the host community and migrants in order to encourage respect for cultural diversity, to promote the fair treatment of migrants and to develop programmes, where appropriate, that facilitate their integration into social, cultural, political and economic life”.

Additionally, Human Rights Council Resolution 15/16 and General Assembly Resolution 68/179 call upon States “to respect the human rights and the inherent dignity of migrants” and to “strongly condemn the manifestations and acts of racism, racial discrimination, xenophobia and related intolerance against migrants and the stereotypes

often applied to them including on the basis of religion or belief, and urges States to apply and, where needed, reinforce the existing laws when hate crimes, xenophobic or intolerant acts, manifestations or expressions against migrants occur in order to eradicate impunity for those who commit those acts.”

Moreover, allow us Excellency to recall that Human Rights Council resolution 9/5, which addresses the issue of the human rights of migrants, "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". Resolution 9/5 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" and "urge States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations, including persons with disabilities, and take into account, in conformity with their international commitments, the principle of the best interest of the child and family reunification".

We would further like to refer Your Excellency's Government to article 13 of the International Covenant on Civil and Political Rights, which provides that "An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." In its General Comment XV, the Human Rights Committee reaffirms this principle (Paragraphs 9 and 10). In this connection, we would also like to bring to Your Excellency's Government's attention article 26 of the International Covenant on Civil and Political Rights, stating that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Further, we would like 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 Hungary ratified on 15 April 1987 and wish to draw the attention of your Excellency's Government to its article 3 which 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 against refoulement is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under article 33 of the 1951 Refugee Convention or domestic law. Accordingly, non-refoulement under the CAT must be assessed independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. Every State is obliged to give immigrants a fair opportunity to state a claim that an impending extradition, deportation or expulsion puts him or her at risk of torture.

We would also like to refer Your Excellency’s Government 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.

We would also like to draw the attention of your Excellency’s Government to paragraph 7 of the Resolution A/RES/70/146 of the UN General Assembly 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, stresses the importance of effective legal and procedural safeguards in this regard, and recognizes that diplomatic assurances, where given, 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 “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, [...]”.

With regards to the allegations of excessive use of force by law enforcement personnel, we would like to draw the attention of your Excellency’s Government to the Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Officials, which provide that Law enforcement officials may only use force when it is strictly necessary and only to the extent required, for the performance of their duties. The use of force and firearms must as far as possible be avoided, using non-violent means before resorting to violent means (principle 4). Force used must be proportionate to the legitimate objective to be achieved. Should lethal force be used, restraint must be exercised at all times and damage and/or injury mitigated, including giving a clear warning of the intent to use force and to provide sufficient time to heed that warning, and providing medical assistance as soon as possible when necessary. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life (principle 9). Furthermore, Principle 5 provides that, “[w]hen the use of force and firearms is unavoidable law enforcement officials shall,

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment and (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment” (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990). Principle 15 of the UN Basic Principles on the Use of Force and Firearms by Law Officials allows the use of force against persons in custody or detention only when strictly necessary to maintain security and order within the institution, or in self-defence. Furthermore, Principle 16 restricts the use of firearms against persons in custody or detention, to self-defence or the defence of others against immediate threat of death or serious injury, or when strictly necessary to prevent a person in custody or detention from escaping provided such person has perpetrated a particularly serious crime involving a grave threat to life.