

Mandates of the Special Rapporteur on the human rights of migrants; 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; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
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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 torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 34/21, 34/19, 35/5, 32/19 and 32/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the availability of asylum for survivors of domestic abuse and other forms of violence in the United States.

According to the information received:

On 26 August 2014, the Board of Immigration Appeals (BIA), in *Matter of A-R-C-G- et al.*, affirmed that asylum is available in the United States for certain individuals fleeing domestic violence, who can be considered as individuals who have suffered persecution on account of their membership in a particular social group.

In December 2017, the BIA decided the *Matter of A-B-*, ruling that, following the precedent established in *Matter of A-R-C-G- et al.*, asylum should be available to a woman from El Salvador who had suffered extensive physical and emotional abuse at the hands of her former partner.

On 7 March 2018 Attorney General Jefferson Sessions intervened in the *Matter of A-B-* case, "certifying" the case to himself for reconsideration of the BIA decision. In his certification decision, the Attorney General invited the parties and interested amici to submit briefs on relevant matters including "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."

The parties' briefs were submitted on 6 April 2018, and amicus briefs were submitted on 13 April 2018, with the decision now before the Attorney General.

According to the agency head review power available to the Attorney General, he may individually overrule a BIA decision. A decision by the Attorney General to eliminate the ability of domestic violence victims/survivors to seek asylum would be binding precedent in United States immigration courts and would receive substantial deference in the Article III courts.

We wish to express our grave concern that any decision by the Attorney General to overrule the precedent set by the BIA in *Matter of A-R-C-G- et al.* may result in violations of the human rights of thousands of survivors of domestic violence, including their potential return to situations of abuse, where they may experience torture or other forms of ill-treatment. Further, this ruling may imperil the rights of numerous other asylum-seekers, including victims/survivors of female genital mutilation, forced marriage, human trafficking, and gang violence.

In connection with the information and concerns mentioned above, please refer to the attached **Annex which cites international human rights instruments and standards** relevant to these issues.

We would also like to take this opportunity to once again urge Your Excellency's Government to affirm its commitment to women's human rights and to ending violence against women and girls by ratifying the Convention on the Elimination of All Forms of Discrimination against Women.

As it is our responsibility, under the mandate(s) 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 issues.
2. Please explain whether an *ex-ante* human rights impact assessment has been undertaken to analyze the impact of any change to the current interpretation of the asylum law on the human rights of asylum-seekers, particularly survivors of domestic violence. In relation to this, please provide information on measures taken to avoid a restrictive interpretation of the definition of 'particular social group' in asylum law that negatively impacts the human rights of victims or potential victims of trafficking in persons guaranteed in state, federal and international anti-trafficking laws. Please share the outcome of any such analysis or consultation.
3. Please provide specific details about the measures which will be undertaken to ensure that Your Excellency's government will respect its international obligations, in particular the principle of non-refoulement, the prohibition of torture and other cruel, inhuman or degrading treatment, the principle of non-discrimination, and the principle of the best interest of the child.

4. In particular, please provide details about the measures that Your Excellency's government will take to ensure that domestic violence survivors/victims are not returned to situations where gender-based violence enjoys impunity and are in no way re-victimized by the laws, policies or practices of the United States of America.
5. Please provide specific details regarding what measures Your Excellency's Government will take to ensure an in-depth individual risk assessment to determine the protection needs of migrants, to ensure inter alia that there are no reasonable grounds to believe that the persons will be subjected to torture and other inhuman or degrading treatment in the country where they are sent to.
6. Please provide information on what measures Your Excellency's Government will take to ensure access to justice, including by ensuring migrants are fully informed of their rights, have access to legal representation, to the assistance of interpreters or translators and to effective remedies.
7. Please provide information on any further measures Your Excellency's Government intends to take in order to ensure the safety of domestic violence survivors, provide them with justice and restitution, and address the root causes of domestic violence affecting all persons within its territory.

We would like to inform you that this communication will be made available to the public on the website page of the mandate of the Working Group and will be included in the periodic communications reports of the Special Procedures to the Human Rights Council. Any response of Your Excellency's Government will also be made public in the same manner.

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

Felipe González Morales
Special Rapporteur on the human rights of migrants

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

Dubravka Šimonovic
Special Rapporteur on violence against women, its causes and consequences

Alda Facio
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

In connection with above alleged facts and concerns, we would like to draw your attention to the following human rights standards.

We wish to recall to your Excellency's Government's attention articles 7, 9, 10 and 26 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992, which provide for the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and security of person, the right to be treated with humanity and respect when deprived of liberty, and the prohibition of discrimination. We would like to remind you that the rights contained in the ICCPR 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).

Further, article 3 of the Convention against Torture (CAT), ratified by the United States of America on 21 October 1994, provides that no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture, and paragraph 9 of the General Comment No. 20 of the Human Rights Committee states that State parties, in order to fulfill their obligations under article 7 of the ICCPR, "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." This absolute prohibition against refoulement is broader than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee status under article 33 of the 1951 Refugee Convention or domestic law. Accordingly, non-refoulement under the CAT must be assessed independently of refugee status determinations, 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.

We would also like to call Your Excellency's Government's attention to the Committee against Torture's General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, which elaborates in part VIII the duties of States parties to consider specific human rights situations in which the principle of "non-refoulement" applies, and which calls on States parties to consider in particular **"Whether, in the State of origin or in the State to which he/she is being deported, the person has been or would be victim of violence including gender based/sexual violence, in public or in private, or gender-based persecution, genital mutilation, amounting to torture without intervention of the competent authorities of the State concerned for the protection of the victim."** (Paragraph 29(c)). Further, the Committee calls on States parties to **"refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being**

subjected to torture or other ill-treatment at the hands of non-State entities, including groups which are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control or whose acts it is unable to prevent nor to counter their impunity.” Similarly, the UN Special Rapporteur on trafficking in persons, especially women and children, further reiterated these concerns during her country visit to the United States, recommending that Your Excellency’s Government have due regard to the need, should it arise, for international protection of victims of trafficking and application of the principle of non-refoulement (A/HRC/35/37Add.2).

Additionally, article 4 (f) of the United Nations Declaration on the Elimination of Violence against Women notes the responsibility of States to develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.

Further, in its General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, the Committee on the Elimination of Discrimination against Women explains that gender should be used as a factor in recognizing membership of a particular social group for the purposes of granting asylum (para. 13), and identifies forms of gender-related persecution that are recognized in law and practice as legitimate grounds for international protection, including gender-related violence, the threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called “honour crimes”, trafficking in women, acid attacks, rape and other forms of sexual assault (para. 15). As a signatory to the Convention on the Elimination of All Forms of Discrimination against Women, the United States is bound to ensure that nothing is done which would defeat the object and purpose of the treaty