

Mandate of the Special Rapporteur on the human rights of migrants

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolution 34/21.

In this capacity, I would like to bring to your attention my concerns regarding the “Remain in Mexico” policy, officially named the Migrant Protection Protocols (MPP), as published on 24 January 2019, that aim at responding to an alleged security crisis at the U.S.’ southern border. The MPP establishes that migrants entering or seeking admission to the United States from Mexico, including those seeking asylum or other forms of human rights protection, are handed a “Notice to Appear” and may be returned to Mexico while awaiting their immigration proceedings. Based on my observations and information received, I am concerned that the practical implications of this policy amount to collective expulsion, work to undermine due process guarantees, and may lead to refoulement, breaching both U.S. and international law. Although it is currently being applied at the San Ysidro and Eagle Pass ports of entry, it has been announced that the implementation of the MPP shall be expanded to other border crossings along the U.S.-Mexico border.

Concerns regarding refoulement

The principle of *non-refoulement* forms an essential and non-derogable protection under international human rights, refugee, humanitarian and customary law. Under international human rights law, the principle of non-refoulement is explicitly guaranteed in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). International human rights bodies, regional human rights courts, and national courts have also found this principle to be an implicit guarantee flowing from the obligation to respect, protect and fulfill human rights contained within other international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). The principle is reaffirmed, for example, by the Human Rights Committee in its General Comment No. 20 on Article 7 of the International Covenant on Civil and Political Rights.

In a memorandum of Secretary Nielsen, entitled Policy Guidance for Implementation of the Migrant Protection Protocols of 25 January 2019 the U.S. Department of Homeland Security (DHS) refers to the principle of *non-refoulement*, but the modalities for implementation of the MPP reveal that the expected threshold to be

protected from refoulement is much higher than the international standards. Having to show that a migrant, including those who claim a fear of return to Mexico, would “more likely than not” be persecuted or tortured in Mexico, as required by the MPP, is an extraordinarily high hurdle and effectively undermines the principle of non-refoulement. The Committee against Torture established explicitly that “the risk does not have to meet the test of being highly probable, [...] but it must be personal and present”. Furthermore, Article 26 of the Vienna Convention on the Law of Treaties requires that the obligations of treaties which are binding upon the State, be performed by them in good faith. Accordingly States should interpret and apply their treaty obligations in such a way as to achieve the object and purpose of the treaty, and not to restrict individual rights and freedoms.

In her memorandum of 25 January 2019, Secretary Nielsen refers to a letter from the Chargé d’Affaires John S. Creamer to the Mexican authorities, and a statement of the Mexican *Secretaría de Relaciones Exteriores*. In this exchange, Mexico agreed to authorize the temporary entrance of certain foreign individuals who have been interviewed by U.S. immigration authorities and have received a notice to appear before an immigration judge, and to allow them to request admission into Mexican territory for humanitarian reasons. While Mexico states that these migrants will have all the rights and freedoms recognized in the Mexican constitution, Mexico’s migration laws and its international commitments, it remains unclear what this means in practice and, in particular, whether there have been explicit guarantees against the deportation of returned migrants, as such deportations would be in violation of the prohibition of indirect refoulement. Passing the responsibility for the protection of these migrants to the Mexican authorities without proper guarantees as to their protection from return defies both the spirit and letter of international obligations. It is not enough to “expect that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018” and send migrants to their charge, including children, asylum seekers and other migrants in vulnerable situations. Furthermore, there have already been reported cases of refoulement by Mexico, so that indirect refoulement, prohibited under the CAT, cannot be excluded even in the presence of an explicit guarantee.

Furthermore, it is not clear that Mexico itself can be considered a safe or appropriate country for return of these migrants. The U.S. Department of State itself has classified the security of Mexico, for the purposes of U.S. citizen travel, a security level 2, or “Exercise Increased Caution”, due to the widespread nature of violent crime in the country. Meanwhile, all Mexican states along the border with the U.S. have been classified by the U.S. Department of State as level 2 or higher, including explicit caution to “Reconsider Travel”, or “Do Not Travel” to these areas. These classifications themselves point to a dangerous and discriminatory double-standard. At the same time that the U.S. government is warning its citizens to exercise caution or even not to travel to Mexican border states, the U.S. government’s “Remain in Mexico” policy is forcing migrants back across the border to remain in these same states throughout the duration of their request for protection. In a leaked memorandum of the Department of Homeland Security and the Department of Justice, the U.S. authorities state that negotiations with Mexico about a safe third country-agreement are not yet possible as Mexico first has to

improve its human rights situation. The deduction that migrants would be safe to wait in Mexico, is therefore entirely incomprehensible.

Collective expulsions

Considering that these migrants are being returned to Mexico without a proper individual examination, in the absence of sufficient due process safeguards, and that the decision to be transferred to Mexico cannot be legally challenged, I am concerned that the MPP results in *de facto* collective expulsions. Collective expulsion is clearly prohibited under international law, following from the procedural safeguards against arbitrary expulsions, and the entitlement to individual decisions on an expulsion. The Human Rights Committee in its General Comment 15 argues additionally that the right to submit reasons against expulsions would make collective expulsions incompatible with Art. 13 of the ICCPR. In addition, I would like to note the Amicus Brief of the UN High Commissioner for Human Rights to the European Court of Human Rights in which the High Commissioner states that “the prohibition of collective expulsions implies a right to individualized examination and draws upon fair trial and due process guarantees akin to conventional expulsion procedures.”

In the case of the MPP, collective expulsions may coincide with cases of refoulement of asylum seekers and other migrants. In this regard, it is important to highlight the Advisory Opinion of UNHCR which states that, as asylum seekers may be refugees, they should not be returned or expelled pending the final determination of their status. This does not only mean returning to their home country, but also to any other place, such as in this case, Mexico.

Although the policy states that the Protocols will not apply to unaccompanied children and “other individuals from vulnerable populations who may be excluded on a case-by-case basis,” there is no official guidance as to who will be considered “vulnerable populations” for the purposes of the policy. Some reports indicate that children and LGBTI persons have been amongst those who have been returned to Mexico as part of the implementation of the Protocols.

Lack of due process

In this context, let me raise my concerns regarding the lack of due process in these immigration/protection proceedings that have partially already been alluded to above. While the MPP do not prohibit seeking asylum and other forms of protection, I am concerned that the policy effectively undermines the protection procedures, such as asylum, and fundamental due process guarantees. For example, it is unclear whether migrants have access to information, in a language they understand, about the proceeding and the conditions under which they are sent back to Mexico.

Another worrying aspect is that migrants seem to be deliberately not asked about their fear of returning to Mexico, as outlined in the Memorandum of Secretary Nielsen and the Policy Memorandum by the U.S. Citizenship and Immigration Services (USCIS) (PM-602-0169) of 28 January 2019. In addition, there is also a lack of practical access to legal counsel while the migrants are forced to remain in Mexico, as the migrants can only enter the U.S. territory shortly before their asylum or other immigration proceedings take place. This does not allow for a proper preparation for the hearings with the assistance of a lawyer or legal counsel, and may amount to preventing these migrants from meaningfully exercising their right to seek asylum or other protection under international human rights law.

Moreover, under the MPP, in order to receive notifications for protection hearings, migrants have to register an address to which the notifications can be sent. However, most migrants are third-country nationals who do not have an address in Mexico. Since the provision of housing in Mexico is not coordinated, the migrants often do not know where they will be staying. It is thus unclear how the notifications to appear can reach the migrants forced to remain in Mexico. I thus share concerns I received about the likelihood that some asylum seekers and other migrants may miss their hearings, that their asylum or other protection requests may be rejected *in absentia* and they will thus be prevented from meaningfully exercising their right to seek international protection, including asylum.

Furthermore, based on the memorandum of Secretary Nielsen and the Policy Memorandum by the USCIS, there seems to be no legal avenues possible to challenge the application of the MPP to one's case, including the decision to be removed to wait in Mexico. It remains also unclear how the right to a fair procedure will be guaranteed, notably to challenge the denial of an asylum or other protection claim.

Other concerns

I am also concerned about the stated goal of the MPP to serve as a deterrent and to “discourage individuals from attempting illegal entry” to the United States of America, while the MPPs apply even to people who present themselves at official ports of entry. Migration has always been part of humanity and will not stop because of the MPP. However, the application of this policy will most probably encourage border crossings outside of official ports of entry, and increase the prevalence of human rights abuses related to human smuggling and the risk of human trafficking, as migrants will be forced to undertake clandestine and even more precarious migration in order to seek protection.

Another aspect that is very likely leading to more border crossings between official ports of entry, is the long waiting period due to the so-called “metering”. The increase of border crossings due to metering practices has even been stated by the Office of the Inspector General of the DHS. Migrants wanting to seek asylum at the San Ysidro port of entry are told to put their names on a list, and will only be allowed to approach the checkpoint when it is their turn, according to this list. However, this waiting period has in some cases increased to 5-6 weeks, putting migrants at heightened risk in Mexico.

Based on the information I received, I do not concur with your Excellency's Government's assessment that there is a migration or security crisis at the United States' southern border. I would like to remind your Excellency's Government that human rights apply to everyone, including all migrants notwithstanding their nationality, age, gender, migratory status, or other attribute. The human rights of migrants are protected under international law, by which the United States of America are bound. This does also not change under a state of emergency.

In view of the above mentioned concerns, I urge Your Excellency's Government and all state governments to halt the implementation of the Migration Protection Protocols and the return of asylum seekers and other migrants to Mexico without proper individual protection assessments and due process. I also encourage your Excellency's Government to review the U.S. asylum and anti-torture policies in order to ensure their compliance with U.S. laws and obligations under international human rights law. I highly recommend that Your Excellency's Government consults the OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders.

I am looking forward to receiving further information on the concerns mentioned above from Your Excellency's Government, and stand ready to cooperate for the promotion and protection of the human rights of all migrants in the United States. A copy of this letter will also be shared with the government of Mexico.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. 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 my highest consideration.

Felipe González Morales
Special Rapporteur on the human rights of migrants