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**PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the human rights of migrants

REFERENCE: AL G/SO 214 (106-10)
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29 August 2011

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the human rights of migrants pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/12.

In this connection, I would like to bring to your Excellency's Government's attention information I have received concerning I have the honour to address you in my capacity as the new Special Rapporteur on the human rights of migrants pursuant to the Human Rights Council resolution 17/12. As you may be aware, I took up my functions on 1 August 2011 following my nomination by the President of the Human Rights Council at its 17th session in June 2011.

As you may recall, Resolution 17/12 requests the Special Rapporteur, in carrying out his mandate "to request, receive and exchange information on violations of the human rights of migrants from Governments, treaty bodies, specialized agencies, special rapporteurs for various human rights questions and from intergovernmental organizations, other competent organizations of the United Nations system and non-governmental organizations, including migrants' organizations, and to respond effectively to such information" (paragraph 3). It also "requests the Special Rapporteur, in carrying out his mandate, to take into account the bilateral, regional and international initiatives that address issues relating to the effective protection of human rights of migrants, including the return and reintegration of migrants who are undocumented or in an irregular situation" (paragraph 5).

In this connection I would like seek further information from your Excellency's Government in relation to the "Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement" signed in Kuala Lumpur on 25 July 2011 by representatives of these two Governments, attached for your ease of reference. I also intend to address a similar request to the Government of Malaysia.

I wish, in particular, to receive information on the measures that your Excellency's Government has taken or intends to take in order to ensure that adequate protection

safeguards in line with the relevant obligations of Australia under international human rights and refugee law and standards are put in place prior to the implementation of this agreement and are scrupulously observed in the course of its implementation.

In this respect, and while the High Court of Australia reviews this agreement, I would like to recall that the application of the principle of non-refoulement, a recognized tenet of international customary law, may not be superseded by the provisions of this bilateral agreement. According to this principle the Australian State has the obligation not to return any person to a country where she or he is at risk of being subjected to torture, or other cruel and inhuman treatment. I note in this respect that clause 1(3) of the Agreement stipulates that it is subject to the respective Participant's relevant international law obligations in accordance with the applicable international law instruments or treaties to which the Participant is a Party. In this regard, I further note that Australia is a State party to the International Covenant on Civil and Political Rights and the Convention against Torture which have codified the same principle.

Furthermore the principle of non-refoulement bars States not only from returning asylum seekers to countries where they may be at risk of persecution but also to countries where there is a risk of "chain deportation" to the country of feared persecution. In this regard, allow me to mention that the Working Group on Arbitrary Detention of the UN Human Rights Council, following its visit to Malaysia in June 2010, expressed serious concern about the administrative detention regime applied to asylum-seekers, refugees and migrants in an irregular situation (A/HRC/16/47/Add.2). The report of the Working Group further explained that any non-citizens of Malaysia entering the country without the necessary documents and permits are categorized as illegal migrants, dealt with according to the relevant laws and punished accordingly, including subjecting them to systematic detention. The Working Group also expressed concern at the caning of immigrants in an irregular situation. In addition, UNHCR expressed concern, on a number of occasions, in relation to forcible deportation of asylum seekers and migrants to countries in the region where they may fear persecution or to countries which may return them to the countries of feared persecution.

I would also like to be informed on the measures that your Government has taken or intends to take to ensure that this agreement will in practice provide adequate protection safeguards related to specific vulnerable groups, including children and those migrants who may have been trafficked. In this respect, I should like to recall that the Committee on the Rights of the Child, in its 2007 Concluding Observations on Malaysia (CRC/C/MYS/CO/1), noted with concern that non-citizen children can only access their right to education upon the condition of having adequate documents and if places are available. The current transfer and resettlement agreement reflects these limitations as clause 3.3 of the Operational Guidelines to Support Transfer and Resettlement, Annex A of this agreement, provides only that "transferees of school age will be permitted access to private education arrangements in the community, including those supported by UNHCR" and where these "are not available or affordable, to informal education arrangements organized by IOM".

Concerning actual or potential trafficked persons, it is worth quoting the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1) which stipulate that trafficked persons shall not be detained, charged, or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons (Principle 7). Principle 8 also calls on States to ensure that trafficked persons are protected from further exploitation and harm and Principle 9 provides that safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or the safety of their families.

I would also like to take this opportunity to request further information on the agreement that has reportedly been signed with the Government of Papua New Guinea to re-open the Manus Island Facility for detaining asylum seekers and migrants. Similarly to what I requested above, I would, in particular, appreciate it receiving information on the measures that your Excellency's Government has taken or intends to take to ensure that this agreement include adequate protection safeguards in line with Australia's obligation under international human rights and refugee law and standards as well as to ensure that these safeguards are actually respected throughout the implementation of this agreement. In this regard, let me recall that a number of UN human rights mechanisms have expressed concern about the use of detention facilities for irregular migrants in remote or off-shore locations where their access to legal aid and other support services may be curtailed. More specifically, I would like to remind your Excellency's Government that in 2008 the Committee against Torture welcomed, while noting that "excised" offshore locations were still used for detention of asylum-seekers, information from the State party indicating the recent end of the policy of transferring asylum-seekers to offshore processing centres. In this respect, the Committee recommended Australia to end the use of "excised" offshore locations for visa processing purposes in order allow all asylum-seekers an equal opportunity to apply for a visa (CAT/C/AUS/CO/3, paragraph 12).

Allow me also to recall that the General Assembly, in resolution 65/212, adopted on 21 December 2010, called upon States to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children. The same resolution called upon Member States to address international migration through "international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability".

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all issues brought to my attention, I would be grateful to receive the information requested above within 30 days so that your responses may be accurately reflected in the report I will submit to the Human Rights Council.

I remain at your disposal for any further clarification you may require and hope to be able to continue this constructive dialogue with you and your Government. Please note that I can be contacted through the through the Office of the High Commissioner for Human Rights (Ms. Katarina Mansson at kmansson@ohchr.org, and Ms. Federica Donati at fdonati@ohchr.org, tel: + 41 22 917 9127/+ 41 22 917 9496; or any of them at: migrant@ohchr.org).

Please accept, Excellency, the assurances of my highest consideration

François Crépeau
Special Rapporteur on the human rights of migrants