

**Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on violence against women, its causes and consequences.**

REFERENCE: OC  
USA 10/2014:

7 July 2014

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the human rights of migrants; Special Rapporteur on the sale of children, child prostitution and child pornography; Special Rapporteur on trafficking in persons, especially women and children; and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 26/19, 25/6, 26/8, and 23/25.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **detention of unaccompanied children and the widespread and systematic human rights violations that they experience when held in detention facilities.**

According to information received:

During the past three years, the number of unaccompanied children attempting to cross the border of the United States of America has dramatically increased. Since October 2013, immigration officials have apprehended over 52,000 unaccompanied children. Fleeing rising levels of poverty, insecurity and violence, such as extortions, risks of forcible recruitment into gangs, sexual abuse and exploitation, and domestic abuse in their home countries, most of the unaccompanied children come from Mexico, El Salvador, Honduras and Guatemala. Many of the children hope to reunite with family already in the United States of America. Although some children travel alone, it is alleged that a large number of children travel through the organized journeys of "coyotes" and related criminal networks that undertake smuggling activities which could place children at risk of abuse, violence and exploitation, and other forms of human rights violations during the journey. There is also a possibility that children may

become victims of trafficking in persons and of sexual and labour exploitation, during and after their journey. The unaccompanied child migrants frequently lack food and water, and suffer physical and psychological abuse during their journeys.

Allegedly, upon arrival at the U.S. border, the unaccompanied children are taken to detention facilities where some of them are subjected to harassment, physical and sexual abuse at the hands of immigration officials. Moreover, the border facilities are reportedly unsanitary and overcrowded. The facilities lack safe drinking water and the food is not fit for consumption, both of which affect the right to health of the children. Those who travel with family members are detained separately from their families. In converted warehouses and improvised holding areas, children sleep on concrete floors in deplorable conditions with the light permanently on. Prison-like systems restrict movement and limit access to the outdoors. Additionally, the children allegedly do not receive the specialized assistance (medical, legal, psychological) or age-appropriate care required.

Many of the unaccompanied children are also unable to access the refugee status determining procedures. Despite a sharp increase in the number of children claiming that they fear returning to their countries of origin, there have been reports of massive deportations.

Concerns are expressed about the mandatory detention of unaccompanied children and their treatment upon arrival at the US border by immigration officials at the border and detention centers. Concern is also raised about the conditions of the border detention centers. Unaccompanied children detained at these facilities are denied their basic rights and access to special protection measures and services. Additionally, concern is also expressed that U.S migration policies ignore the social background compelling these migrant children to flee, including dangerous social and security conditions, as well as a prevalence of rape and sexual abuse, particularly of girls. There is also a strong concern about what may happen to the children if they are returned to their home countries, as it is reported that their communities remain unsafe and they may be targeted or revictimized if returned. Deporting migrants back to potentially harmful environments constitutes a breach of international law. Furthermore, these migration policies do not focus on realizing children's right to reunite with their families based on Your Excellency's Government's international obligation to protect the family. The Human Rights Committee's General Comment no. 19 requires that State parties adopt legislative, administrative or other measures to protect the family.

In connection to the above alleged facts and concerns, please refer to the **Reference to international law Annex** 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 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 information about the measures being implemented by your Excellency's Government to protect the rights of these unaccompanied migrant children.

3. As the issue of unaccompanied migrant children affects countries of origin, transit and destination, please provide information with regard to any regional protection measures in place that provide protection to migrant children.

4. Please explain all measures that have been taken, or are intended to be taken, by U.S. Customs and Border Protection (CBP) and U.S. Border Patrol to ensure adequate protection safeguards for unaccompanied children upon arriving at the US South Texas border and during their transfer and detention, including their right to seek asylum.

5. As no child should be detained and because there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum, what alternatives rather than alternative forms of detention or alternatives to release – has your Excellency's Government considered for migrant unaccompanied children irregularly entering the country, bearing in mind that alternatives have been found to be significantly more cost-effective than traditional detention regimes.

6. Please inform us as to whether individual assessments are carried out in each case, and whether the child or a representative is allowed to submit the reasons why he or she should not be deported, and to have the case reviewed by the competent authorities.

7. Please inform us as to whether each child is quickly provided with a legal guardian who is competent and able to represent them in any ensuing legal proceedings, as well as a competent lawyer able to defend their rights in such proceedings.

8. Please provide us the details, and where available the results, of the procedures put in place for the rapid identification, provision of assistance and protection of potential child victims of trafficking and exploitation among these unaccompanied migrant children. If no such measures have been taken, please explain why?

We would appreciate 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 responsible of 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.

François Crépeau  
Special Rapporteur on the human rights of migrants

Maud De Boer-Buquicchio  
Special Rapporteur on the sale of children, child prostitution and child pornography

Joy Ezeilo  
Special Rapporteur on trafficking in persons, especially women and children

Rashida Manjoo  
Special Rapporteur on violence against women, its causes and consequences

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to reiterate what was stated in the report of the Special Rapporteur on the human rights of migrants as presented to the Human Rights Council in 2012, that detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available.<sup>1</sup> We wish to recall that as a matter of principle no migrant children should be subjected to detention.<sup>2</sup>

Furthermore the United Nations Human Rights Committee has found that detention in the course of proceedings for the control of immigration is not per se arbitrary but that the detention must be justified as “reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.”<sup>3</sup> Detaining migrants and asylum seekers who have entered unlawfully onto a State party’s territory for more than a “brief initial period” while their claims are being resolved is “arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.” The decision must “consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category”.<sup>4</sup> The Committee has for these reasons considered mandatory detention to be inherently arbitrary and therefore contrary to the International Covenant on Civil and Political Rights (ICCPR). In addition, United Nations Human Rights Committee’s General Comment no. 19 requires that State parties adopt legislative, administrative or other measures to protect the family.

Of particular relevance in this regard is General Assembly resolution 65/212 of 21 December 2010 which reaffirms “the duty of 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”. The resolution calls upon all States to “review detention policies in order to avoid excessive detention of irregular migrants and to adopt, where applicable, alternative measures to detention” (para. 4). 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”.

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<sup>1</sup> A/HRC/20/24

<sup>2</sup> Commissioner for Human Rights, Position on the rights of minor migrants in an irregular situation. Strasbourg, 25 June 2010. CommDH/PositionPaper(2010)6, p. 5. See also Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Geneva, Switzerland, 11-12 May 2011, para. 7.

<sup>3</sup> CCPR/C/107/R.3, para 18

<sup>4</sup> CCPR/C/107/R.3, para 18

Moreover, the Human Rights Council resolution 25/6 of 27 March 2014 on “the rights of the child: access to justice for children” calls upon States to address barriers to access to justice that may exist for children belonging to particularly vulnerable groups, such as refugee and migrant children, including unaccompanied and separated migrant children.<sup>5</sup>

Allow us to recall that research on various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are placed in alternative to detention programmes.<sup>6</sup> In addition, there is reportedly no empirical evidence that immigration detention deters irregular migration, or discourages people from seeking asylum. In fact, treating migrants and asylum-seekers with dignity and respect for their human rights throughout the asylum or immigration process contributes to constructive engagement in these processes.<sup>7</sup> We would like to stress that alternatives to detention should not be used as alternative forms of detention and neither should alternatives to detention become alternatives to release. Alternative measures may also impact on the enjoyment of human rights and should therefore be in line with the principles of necessity, proportionality, legitimacy and other key human rights principles.<sup>8</sup> Alternatives to detention include registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew.<sup>9</sup>

Additionally, the United States of America is a state party to the 1951 Refugee Convention and consequently must ensure that the treatment of all transferred asylum-seekers is fully compatible with its obligations under the 1951 Refugee Convention and other applicable international instruments which it has ratified.

We would like to recall the principle of non-refoulement in the Refugee Convention, by which the United States of America is bound, which bars States from returning asylum seekers to countries where they may be at risk of persecution.

According to international standards, an individual assessment mechanism is required in order to determine the necessity, proportionality and reasonableness of detention. A policy of mandatory detention leaves no or little consideration to the particular circumstances of each detainee’s case with full application of procedural safeguards applicable to persons deprived of their liberty.

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<sup>5</sup> A/HRC/RES/25/6, Op.5 a)

<sup>6</sup> <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf> . Please see: <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf>

<sup>7</sup> Summary Conclusions of the UNHCR-OHCHR Global Roundtable on alternatives to detention of refugees, asylum seekers, migrants and stateless persons, 11-12 May 2011 (hereinafter “Summary Conclusions 2011”).

<sup>8</sup> Summary Conclusions 2011, paras. 18, 19.

<sup>9</sup> Ibid., para. 20.

Since 2002, the United States is a State Party to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In the concluding observations adopted on the 1<sup>st</sup> of February 2013, on the second periodic review of the United States, the Committee on the Rights of the Child recommended that the country “ensure that foreign immigrant children victims of offences covered by the optional protocol are not returned or deported.” The Committee further recommended that the United States “provide immigrant child victims with all the necessary services aimed at their physical, psychological and emotional recovery.” It also recommended that the United States “call for the incorporation of a “bests interests determination” for unaccompanied children in all decisions throughout immigration-related procedures”, and ensure that every unaccompanied child is appointed an independent child advocate and is represented by a qualified attorney.<sup>10</sup>

Moreover, the United States is a State Party to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime which provides that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered “trafficking in persons”, regardless of the means used (Article 3). In providing for assistance and protection to victims of trafficking in person, State Party shall take into account, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. (Article 6(4))

We would like to draw your attention to Guideline 8, Paragraphs 2 to 5 of the Office of the United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Trafficking ( 2002), which set out that States should consider ensuring that procedures are in place for the rapid identification of child victims of trafficking and locating family members where children are not accompanied by relatives or guardians with a view to consider either 1) facilitating the reunion of trafficked children with their families where this is deemed to be in their best interest or 2) establishing adequate care arrangements that respect the rights and dignity of the trafficked child in situations where the safe return of the child to his or her family is not possible or where such return would not be in the child’s best interests.

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<sup>10</sup> CRC/C/OPSC/USA/CO/2, para.47.