

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on trafficking in persons, especially women and children

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the human rights of migrants; and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 33/30, 26/19, and 26/8.

We wish to address you as Malta currently holds the Presidency to the European Council. In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning allegations about draft policy proposals which raise serious concerns regarding the human rights of migrants, including children.

We have received information about a Recommendation from the European Commission to the European Union (EU) Member States relating to the implementation of return procedures and removal operations in applying the EU Return Directive, to be adopted on 1 March 2017.

Allegedly, the draft Recommendation contains proposals which would be contrary to certain human rights principles and obligations.

It has been alleged that the proposal would enable large-scale detention in return procedures, including by promoting reception conditions conducive to return.

Reportedly, the proposal would allow for the detention of families in first reception, and Member States would be encouraged to ensure provisions in their law allowing for the detention of children. Furthermore, we have received information that the best interests of the child would only be determined after return.

The Recommendation would allegedly also call for massive investment in large-scale institutions for children in countries of origin.

While we do not wish to prejudge the accuracy of this information, we wish to draw your attention to the following: any plans to increase the use of immigration detention – whether on arrival or pre-removal – go in direct contradiction to international human rights law and jurisprudence. According to international human rights standards, detention should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available, and needs to be decided, while taking into account the specific circumstances of each individual case. Furthermore, detaining children has a profound and negative – and well-documented – impact on

children's health and well-being. Even very limited periods of detention in so-called "child-friendly" environments can have severe and lifelong impacts on a child's psychological and physical well-being and compromise their cognitive development. International law and jurisprudence clearly establish that immigration detention of children and families with children can never be in the best interests of any child and is always a violation of children's rights: it must be expeditiously and completely ceased.

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 any comment you may have on the above mentioned information.
2. Please explain what measures you intend to take to ensure that any recommendation on the implementation of the Returns Directive is in accordance with international human rights law.
3. Please indicate what measures Malta, currently holding the Presidency of the European Council, will undertake to ensure that the primary consideration in all actions concerning children is in their best interests.
4. Please also explain what measures Malta, currently holding the Presidency of the European Council, will undertake to develop alternatives to immigration detention.

We would appreciate receiving a response within 60 days.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issue in question.

The response will be made available in a report to be presented to the Human Rights Council for its consideration.

We wish to inform you that a letter with similar content has been sent to the following Commissioners of the European Commission: Mr. Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, Mr. Frans Timmermans, First Vice-President, Better Regulation, Interinstitutional Relations, the Rule of Law and

the Charter of Fundamental Rights, and to Vera Jourova, Commissioner for Justice, Consumers and Gender Equality.

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

José Guevara
Vice-Chair-Rapporteur of the Working Group on Arbitrary Detention

François Crépeau
Special Rapporteur on the human rights of migrants

Maria Grazia Giammarinaro
Special Rapporteur on trafficking in persons, especially women and children

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), which provides that everyone has the right to liberty and security of person. The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but “must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10). 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.” 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”.

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). As stated in the Special Rapporteur on the human rights of migrants report to the Human Rights Council, detention for immigration purposes should never be mandatory or automatic.

The Convention on the Rights of the Child (CRC) prescribes the minimum standards which States must adhere to regarding the treatment of children on their territory. The CRC provides in article 2 that all rights contained in the Convention apply to all children within the jurisdiction of the State Parties without discrimination of any kind. Article 3 provides that the best interests of the child shall be a primary consideration in all actions concerning children. Article 6 sets out the right to life, survival and development of the child. Article 12 provides that children have the right to express their views, and the opportunity to be heard in judicial and administrative proceedings affecting them.

Concerning the deportation of children of migrants, it is essential to respect the best interests of the child in such procedure. Children should only be repatriated if it is proven – through a legally exhaustive process – to be in the best interests of the child in order to allow for family reunification. A best interest of the child procedure must be conducted prior to deportation, such as outlined in Committee on the Rights of the Child’s General Comment No. 6 (2005).