

**Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice**

REFERENCE:  
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Mr. Allegra,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 33/30, 34/21, 25/32, 34/19 and 15/23.

In this connection, we would like to bring to the attention of your Government information we have received concerning the implementation of the **Executive Order on Border Security and Immigration Enforcement Improvements and the Executive Order on Enhancing Public Safety in the Interior of the United States**, raising particular concerns over increased and expedited deportations, including a disproportionate impact on women, in possible violations of the non-refoulement principle, infringing migrants' rights to a due process and lacking proper individual assessment, the increased use of immigration detention, the lack of access to services for migrants, regardless of their status and the stigmatisation of migrants as criminals.

Concerns regarding the Executive Order 13769 on "Protecting the Nation from Foreign Terrorist Entry into the United States" were sent in a communication addressed to your Government (US) on 31 January 2017. These preoccupations were expressed in a press release issued on 1 February 2017. We received a reply on 20 April 2017 from Your Government to our communication, stating that the Executive Order 13769 has been revoked and that the new Executive Order (13780) was subject to litigation in Court. Your Government offered to provide additional information in response to our inquiries after the resolution of the pending litigation. We take this opportunity to call Your Government to provide a reply on the contents of our communication dated 31 January 2017.

According to the information received:

*Background*

On 25 January 2017, President Donald J. Trump signed two Executive Orders on "Border Security and Immigration Enforcement Improvements", with number 13767, and "Enhancing Public Safety in the Interior of the United States", with number 13768.

The **Executive Order on Border Security and Immigration Enforcement Improvements** includes the following provisions;

Sec. 2 (b) to detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

Sec. 2 (c) to expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

Sec 2 (d) to remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed;

Sec. 5 (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico;

Sec. 11 (a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens;

**The Executive Order on Enhancing Public Safety in the Interior of the United States** includes the following provisions;

Sec. 2 (c and d) states that is the policy of the Executive Branch to ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law and to ensure that aliens ordered removed from the United States are promptly removed;

Sec. 5 (b, c, f, and g) redefines the criteria to prioritize the removal of certain aliens including those who have been charged with any criminal offense, where such charge has not been resolved, those who have committed acts that constitute a chargeable criminal offense, those subjected to a final order of removal, and those that in the judgment of an immigration officer, otherwise pose a risk to public safety or national security;

Sec. 7 to take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions;

Sec. 8 delegates authority to state and local police officers to perform functions of an immigration officer through the implementation of section 287(g) of the Immigration and Nationality Act.

On 20 February 2017 the Secretary of the Department of Homeland Security issued a Memorandum to implement the Executive Order entitled “Enhancing Public Safety in the Interior of the United States”.

We are seriously concerned that the Executive Order on Border Security and Immigration Enforcement Improvements and the Executive Order on Enhancing Public Safety in the Interior of the United States may fall short of international human

rights standards, particularly with regards to provisions concerning increased and expedited deportations, the increased use of immigration detention, the lack of access to services for migrants and the stigmatisation of migrants as criminals.

*1. Deportations and lack of procedural safeguards*

We are concerned that the Executive Order on border security's direction to departments and agencies to deploy all "lawful means to secure the Nation's southern border, to prevent further illegal migration, and to repatriate illegal aliens swiftly, consistently, and humanely" along with vastly expanding the categories of people eligible for removal beyond migrants who have criminal records, allows for the arbitrary or discriminatory enforcement of deportation laws by authorities. This may lead to an erosion of due process guarantees, including the right to be presumed innocent until proven guilty, by allowing for removal without being presented to an immigration judge or being provided legal counsel.

Consequently, in the absence of due procedural safeguards, including consideration of individual circumstances that may mitigate the grounds on which an individual is deported, such measures could amount to collective expulsion and violate the non-refoulement principle. These measures may further disrupt family unity, especially in the case of undocumented migrants with children born in the U.S., along with violating the principle of the best interest of the child in cases of deportation of migrant children.

Concerns relating to the use of private security forces in the first instance of identifying and detaining migrants have further been alleged, as providing a barrier to access proper judicial procedures and the asylum procedures, by migrants upon arrival. In addition, it is further alleged that under the provisions of the Executive Orders, migrants in the midst of legal proceedings have been deported to Mexico and Canada in breach of due process.

The order on Public Safety announces new interior enforcement priorities, making every irregular immigrant an enforcement priority. Irregular entry is considered by domestic US legislation a crime under many circumstances (Art. 8 U.S.C. §1325). The resulting increase in deportations that the Executive Orders would imply may severely harm hundreds of thousands of people, including lawful permanent residents, individuals who have not been convicted of a crime, or those for whom the most serious offense committed was an immigration violation.

We are concerned that, as a consequence of such provisions, migrants with a temporary resident status will no longer see their visas renewed. For instance, on 5 September 2017, Secretary of the Department of Homeland Security issued a memorandum, rescinding the Deferred Action for Childhood Arrivals (DACA) program and phasing it out. We are particularly concerned, that migrants enrolled in the DACA program are at risk of being deported with the expiration of their visas. According to the memorandum, the visas will only be valid until the expiration date, with no possibility of renewal. We are further concerned over the status of persons admitted under the Temporary Protected Status (TPS), as the protected status for several hundred thousands of immigrants is set to expire soon and their renewal not guaranteed. This raises concerns regarding arbitrary or discriminatory enforcement of

deportation laws by authorities, dismissing the need of an individualized assessment for migrants, and raises concerns regarding collective expulsion and refoulement.

## 2. *Increased use of immigration detention*

The reinstatement of the Secure Communities Program and the termination of the Priority Enforcement Program require local law enforcement offices to share information with the Department of Homeland Security (DHS) about individuals in custody, while authorizing DHS to issue detainers to local jails and to detain individuals longer than scheduled release, raising concerns about marginalisation and arbitrary detention.

Reportedly, provisions relating to the use of mandatory detention of migrants fail to introduce safeguards in cases relating to vulnerable groups such as women, children and asylum seekers and do not provide for individualized assessments of the situation of migrants. This has been raised in connection with information received concerning minors in irregular migratory situations being placed in detention centers.

Furthermore, it is alleged that former private prisons, shut down due to inadequate standards of detention, have been reopened through interpretations of the Executive Orders, to be used as detention centres for migrants, implying grave human rights impacts on these, including on their physical and mental health.

It has been alleged that since the signing of the above mentioned Executive Orders an increased number of pregnant migrant women have been detained, which has led to an increased risk of physical and psychological harm, potentially leading to miscarriages, due to creating barriers to healthcare access. In the 2016 report of the Working Group's visit to the United States, the experts expressed concern at the situation of migrant women in detention centres, in particular women with minor children who are in prolonged detention. According to the information received, some detention facilities are not complying with federal mandates and agency policies. The Working Group also received allegations of sexual abuse and assault of women detainees, as well as mistreatment by Customs and Border Protection officials. Migrant women are often victims of trafficking and violence, including sexual violence, during their journey to the United States. The experts received complaints that appropriate health-care services were not systematically provided to these women in a timely manner, despite the horrifying physical and emotional ordeals they endured and in violation of detention standards.

## 3. *Limited access to services*

The Executive Orders also calls for actions to be taken against sanctuary cities and jurisdictions that refuse to comply with the enforcement of these laws, when threatening to withhold federal grants to jurisdictions that fail to exchange information regarding citizenship and migration status among federal, state, and local government entities and officials under the term of "sanctuary jurisdictions." While the order does not define "sanctuary jurisdictions," it is understood that the term is used to refer to cities, counties and states that decline federal cooperation requests, including to collect and share information on individual's migration status. As these jurisdictions provide protection mechanisms to irregular migrants, who owing to their migration status are

often at heightened risk of exploitation and abuse, pressuring sanctuary jurisdictions to comply may erode existing protections of migrants in both regular and irregular situations alike.

Additionally, the order requests the Secretary of Homeland Security make public, on a weekly basis, a comprehensive list of criminal actions committed by migrants and any jurisdiction that failed to honour detainees with respect to such migrants. Selective presentation of data pertaining to criminal actions committed by migrants further stigmatizes migrants, increases racial profiling, and fuels xenophobia and discrimination for regular and irregular migrants alike.

It has been alleged that as a result of the Executive Orders, the reinforcement on immigration detention policies compiled with universalized enforcement priorities has led to a significant change in the behaviour among unauthorized immigrants. Immigrants have chosen to withdraw from or minimize their presence in public spaces, which directly impacts their access to health services, to courts and to other essential public services. Allegedly, in order to avoid deportation, unauthorized immigrants have also avoided enrolling in government benefit programs for which they would be eligible, which ultimately increases their vulnerability. We are concerned that the increased risk of deportation under the Executive Orders may impact the right to health more generally for fear of reprisals if adequate firewalls are not guaranteed.

#### *4. Discrimination, racism and xenophobia*

The Executive Order on enhancing public safety has been phrased in a way that may effectively stigmatize migrants as criminals by presenting them as posing a “significant threat” to national security, without considering that the great majority of migrants have been living peaceful and respectful in the United States while contributing to its economy and its culture. The stigmatization of undocumented migrants as criminals may further increase their marginalization within society along with fuelling xenophobia and discrimination, which could lead to an increase in hate crimes against migrants.

Further, the Executive Order on Public Safety delegates authority to state and local police officers to perform functions of an immigration officer through the implementation of section 287(g) of the Immigration and Nationality Act. Such measures may result in increased racial profiling, along with failing to respect adequate firewalls between institutional functions of police and immigration officers. In this regards, individuals may chose not to contact police officers over legitimate grievances as a result of the fear of being detained and deported, weakening local law enforcement effectiveness.

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.

As 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/or comment(s) you may have on the above mentioned allegations.
2. Please explain whether an *ex- ante* human rights impact assessment has been undertaken to analyse the impact of these proposed legislative changes on the human rights of migrants. 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 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, the principle of the presumption of innocence, the principle of the best interest of the child and international standards regarding the prohibition of arbitrary arrest and detention of people.
4. Please provide information of any measures taken to ensure the due process rights can be guaranteed in expedited deportations of migrants. How are collective expulsions without proper individual assessment in compliance with your government obligations?
5. Please explain what measures will be taken to ensure that the use of detention is in line with your government obligation to only use detention for migrants as a last resort, only when reasonable, necessary and proportionate, in light of the circumstances and subject to periodic reassessment as it extends in time.
6. Please explain what alternatives to detention exist and whether they are considered on a regular basis.
7. Please explain provisions in place to ensure that all migrants, including irregular migrants, can have access to justice and remedies, to health care and all other services.
8. Please explain when and whether your government will consider amending legislation defining irregular entry as an administrative offence rather than a criminal offence.
9. Please indicate what measures your government intends to take to foster diversity, to promote respect and acceptance for cultural and religious diversity between citizens and non-citizens.
10. What provisions are in place for migrants enrolled in the DACA program to renew their visas?
11. What provisions are in place for migrants under the TPS programme to renew their visas?
12. What regular pathways for citizenship do exist for migrants on a temporary resident status?

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(s) responsible for the alleged violations.

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 Government's to clarify the issue/s in question.

Your government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Allegra, the assurances of our highest consideration.

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Kamala Chandrakirana  
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**

With regard to the detention of migrants and asylum seekers, we would like to draw Your Government's attention to article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Your Government on 8 June 1992, which provides that everyone has the right to liberty and security of person and to be free from arbitrary detention. 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). The detention of migrants and asylum seekers should thus be a measure of last resort. The ICCPR further stipulates that all persons deprived of their liberty shall be ensured, without delay, the right to initiate proceedings before a court, for it to determine the lawfulness of the detention (art. 9 (4)). For a more detailed overview of the international human rights standards governing the detention of migrants, including the obligation of States to always resort to alternatives to detention first, I would like to draw your attention to the previous Special Rapporteur on the human rights of migrants' report to the Human Rights Council (A/HRC/20/24), as well as the Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37).

With regard to the conditions of detention, we would like to draw the attention of Your Government to the Standard Minimum Rules for the Treatment of Prisoners (adopted by the Economic and Social Council by resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). We would also like to draw Your Government's attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988 (adopted by General Assembly resolution 43/173 of 9 December 1988). The Committee against Torture and the Human Rights Committee have consistently found that conditions of detention can amount to inhuman and degrading treatment.

We would also like to draw Your Government's attention to article 10 of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Further, the Standard Minimum Rules for the Treatment of Prisoners, Rule 22(2), provide that "(s)ick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. Furthermore, Rule 25(1) provides that, "(t)he medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed". We would also wish to refer your Government to the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111, according to which "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation" (Principle 9). 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 in the absence of "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". Any decision on detention 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 ICCPR.

We also would like to refer to article 3 of the CAT, which 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. Furthermore 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 refer Your Government to article 13 of the ICCPR, which provides that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority". In addition, the Human Rights Committee has reaffirmed this principle in its General Comment XV (Paragraphs 9 and 10). In this connection we would also like to recall to Your Government that, within the framework of the International Labour Organization, the Tripartite Meeting of experts on Future ILO activities in the field of migration adopted already in 1997 a number of guidelines which stated, inter alia, that "prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems...".

Furthermore, we would like to bring to Your Government's attention article 26 of the ICCPR stating that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

In this connection, I would also like to refer Your Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the treatment of offenders, Havana, Cuba, 27 August to 7 September 1990, in particular:

- Principle 1: all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings;
- Principle 5: Governments shall ensure that all persons are immediately informed by the competent authority on their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;
- Principle 7: Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

Regarding concerns that the Executive Orders will lead to increased discrimination and stigmatization of specific migrant communities in the United States of America, we would also like to remind Your Government that, according to the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States of America ratified in 1994, “racial discrimination” is defined in article 1 (1) as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. In addition, article 2 of the Convention requires States to condemn racial discrimination and pursue policies to eliminate it. Further, article 5 of the Convention refers to “the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”.

Further, we would like to direct Your Government to General Recommendation 30 relating to Discrimination against non-citizens, in which the Committee on the Elimination of Racial Discrimination recommends that States “ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens”. Furthermore, the Committee states that Governments should “take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and [...] promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens”; and “take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the internet and other electronic communications networks and in society at large”.

Additionally, we would like to draw attention to the Human Rights Council Resolution 15/16 and General Assembly Resolution 68/179, which call upon States “to respect the human rights and the inherent dignity of migrants” and to “strongly condemn the manifestations and acts of racism, racial discrimination, xenophobia and related intolerance against migrants and the stereotypes often applied to them including on the basis of religion or belief, and urges States to apply and, where needed, reinforce the existing laws when hate crimes, xenophobic or intolerant acts, manifestations or expressions against migrants occur in order to eradicate impunity for those who commit those acts”.

Furthermore we would like to recall paragraph 30 of the Durban Programme of Action which urges States (a) “[t]o develop and implement policies and action plans and to [...] implement preventive measures in order to foster greater harmony and tolerance between migrants and host societies, with the aim of eliminating manifestations of racism, racial discrimination, xenophobia and related intolerance, including acts of violence, perpetrated [...] by individuals or groups”; (c) “[t]o implement specific measures involving the host community and migrants in order to encourage respect for cultural diversity, to promote the fair treatment of migrants and to develop programmes, where appropriate, that facilitate their integration into social, cultural, political and economic life”.

Finally, we would like to refer to the report of the Working Group on discrimination against women in law and in practice (A/HRC/32/44/Add.2) which stresses migrant women, inter alia, are in a situation of heightened vulnerability. The experts recommended the Government to expand access to health care for migrants, for instance, through the adoption of the Health Equity and Access under the Law (HEAL) for Immigrant Women and Families Act, in order to review the eligibility requirements for the public welfare system so that the basic human rights of migrants, including those that are undocumented, are guaranteed, in particular access to health care for women and children and to end detention of migrant women with children. In the report, the Working Group also urge your Government to establish accountability mechanisms and adequate gender-sensitive training for Immigration and Customs Enforcement officials.