

**Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the rights of indigenous peoples; 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 the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE:  
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Excellency,

We have the honour to address you in our capacity as Working Group on Arbitrary Detention; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 33/30, 35/6, 33/12, 34/21, 34/35, 34/16 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the implementation of the **memorandum for federal prosecutors along the Southwestern border on *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* issued by the Attorney General**, raising particular concerns over: the increased criminalization of migration; the increased use of immigration detention; the automatic separation of children from their families in violation of the best interests of the child and their rights to liberty and family life; increased and expedited deportations, in possible violation of the non-refoulement principle, infringing migrants' rights to a due process and lacking proper individual assessment; the stigmatization of migrants as criminals; and the racialized impact of this memorandum on migrants from Latin American countries.

Concerns regarding the Executive Order 13767 on *Border Security and Immigration Enforcement Improvements* and the Executive Order 13768 on *Enhancing Public Safety in the Interior of the United States* were sent in a communication addressed to your Government on 19 October 2017. We received a response from your Government on 7 March 2018, stating that they were unable to comment further on the above-mentioned Executive Orders due to the Government's involvement in ongoing litigation regarding the implementation of the Executive Orders. We take this opportunity to call Your Government to provide an updated reply on the content of our communication dated 19 October 2017.

According to the new information received:

On 6 April 2018, the Attorney General of the United States issued a Memorandum for Federal Prosecutors along the Southwest Border on *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*. Accordingly, the Attorney General directs each US Attorney's Office along the Southwest Border, in consultation with the Department of Homeland Security, to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a), a federal statute. This section refers to the "Improper entry by alien" through improper time or place, avoiding examination or inspection, or through misrepresentation or concealment of facts. In practice, this zero-tolerance policy means that the US federal government will attempt to criminally prosecute every migrant person who crosses into the country without authorization. Further, the Attorney General reminds federal prosecutors along the Southwest border that "our goal is not simply more cases. It is to end illegality in our immigration system."

This memorandum was preceded by another memorandum entitled *Renewed Commitment to Criminal Immigration Enforcement*, dated 11 April 2017, in which the Attorney General directed the prioritization of the prosecution of certain criminal immigration offenses and to develop guidelines for prosecuting offenses under 8 U.S.C. § 1325(a) (i.e. misdemeanor entry violations or "first-time crossers"), with the aim of deterring first time entrants.

As a result of the adoption of this zero-tolerance policy, thousands of parents traveling with their children, including asylum-seeking families, are being automatically separated and subjected to criminal prosecution as a punitive deterrent from migrating to the United States. In some locations such as McAllen, Hidalgo County, on the Texas-Mexico border, this zero-tolerance policy has been implemented *en masse*.

The majority of migrants who are detained by the US Border Patrol near the South Texas border are being referred to federal prosecutors and charged with misdemeanor "illegal entry" under 8 U.S.C. §1325. Most of the migrants detained are asylum seekers from Guatemala, El Salvador and Honduras, who have fled their countries because of insecurity, violence and violations of their human rights. In general, these groups are comprised of indigenous migrants and non-white migrants. Parents subjected to criminal proceedings are separated from their children before being brought to court, and their children are transferred from the border facility to the custody of the Department of Health and Human Service Office of Refugee Settlement (e.g. a federal agency tasked with caring and placing unaccompanied migrant children) for indefinite periods of time. The

parents cannot communicate with their children and vice versa, and have no information about the whereabouts of their children, which causes them great distress. Forcibly separated children include children with disabilities in need of specialized assistance.

After the conclusion of the criminal process, the parents are generally transferred to administrative immigration detention. Most parents go unrepresented in the immigration case and have no legal assistance as they seek reunification with their children. Once in immigration detention, if the parent is an asylum seeker and fails to pass the credible fear interview (e.g. a threshold asylum screening interview) or an abbreviated appeal to an immigration judge, he or she will likely be deported. Similarly, if the parent is not an asylum seeker, he or she may be deported. During immigration proceedings, the parents remain separated from their children, without information about their whereabouts, and without guarantees that they will be reunited with their children in the US, during the immigration proceedings or before being deported. There are reports of parents that have been deported to their countries of origin while their children remained in the US and vice versa.

While we do not wish to prejudge the accuracy of these allegations, we are gravely concerned that this zero-tolerance policy leads to significant and multiple violations of international human rights law. Families of asylum seekers and other migrants in vulnerable situations are systematically detained and forcibly separated from their children against the best interests of the child and in serious violation of the rights to liberty and family of children. In addition, the separations are conducted without notice, information, or the opportunity to challenge the separation. Furthermore, parents and children affected by this policy do not have access to information about each other's whereabouts, are not able to communicate with each other, and do not have access to a process that allows for reunification.

We would further like to express our concern regarding the use of immigration detention and family separation as a punitive deterrent of irregular entry, contrary to international human rights norms and standards. The best interests of the child should be the paramount consideration, including in the context of migration management, and children should never be detained for reasons related to their own or their parents' migration status, as detention of children in the context of migration constitutes a human rights violation. We would also like to express our serious concern at the lack of due process guarantees for asylum seekers and other vulnerable migrants who seek protection in the US, in possible violation of the non-refoulement principle, lacking proper individual assessment, and at deportations that are resulting in further family separation. We are also concerned about the care, protection and well-being of the forcibly separated children, who are particularly vulnerable to abuse, including sexual abuse, violence and exploitation. Last but not least, we are concerned at the increased criminalization of

migration, in particular through the criminalization of irregular entry or stay in the US, which at most should be an administrative offence.

Furthermore, we are also concerned because if true, the alleged violations above may also violate the prohibition on discrimination on the basis of race, ethnicity or national origin under international human rights law, which includes a prohibition on discriminatory effects even of facially neutral policies.

In connection with the above-mentioned facts and concerns, we would like to refer your Government to articles 2, 17, 23 and 24 of the International Covenant on Civil and Political Rights, ratified by the United States in 1992. We wish to refer particularly to article 23, which provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and to article 24, which states that: “Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” We would also like to draw your Government’s attention to para. 10 of the General Assembly Resolution 62/156 which “urges States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations and take into account, in conformity with their international obligations and commitments, the principle of the best interest of the child and family reunification.”

We are gravely concerned that the zero-tolerance policy risks significant and systemic violations of the customary non-refoulement principle, which is also codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by the United States in 1994, and 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 or she would be in danger of being subjected to torture (article 3). Furthermore, the General Comment No. 20 of the Human Rights Committee affirms 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” (para.9). 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 determination, 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.

With respect to our concerns regarding the racialized impact and discriminatory nature of the zero-tolerance policy, we wish to recall that the United States is a State party to the International Convention on the Elimination of All forms of Racial

Discrimination (ICERD), and has been since 1994. Article 1 prohibits racial discrimination, article 2 requires States to condemn racial discrimination and pursue policies to eliminate it, and article 5 affirms “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”. In addition, General Recommendation No. 30 on Discrimination against Non-Citizens of the Committee on the Elimination of Racial Discrimination brings authoritative interpretive clarity to ICERD. It makes clear that States must: “7. Ensure that legislative guarantees against racial discrimination apply to noncitizens regardless of their immigration status and that the implementation of legislation does not have a discriminatory effect on non-citizens”; “18. Ensure that non-citizens enjoy equal protection and recognition before the law”; “25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies”; and “26. Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account.”

We furthermore wish to refer to the United Nations Declaration on the Rights of Indigenous Peoples, for which the United States of America has declared its support. The Declaration sets forth in article 7 that indigenous peoples should not be subject to acts of violence, including by forcibly removing children of the group to another group. Article 22 affirms that States shall take measures to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

The Executive Order also risks violation of the right not to be deprived arbitrarily of liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the ICCPR. Moreover, we wish to recall several key legal principles, as outlined by the Working Group on arbitrary Detention in its Revised Deliberation No. 5 on deprivation of liberty of migrants. These principles include the right to personal liberty and the right of migrants not to be detained arbitrarily, the principle of exceptionality of detention in the course of migration proceedings, and the right to challenge such detention, and the prohibition of non-refoulement, among others.

The full texts of the human rights instruments and standards recalled above are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of the person(s)

affected by the zero-tolerance policy, in particular forcibly separated and detained families, in compliance with international instruments.

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 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 specific details about how your Government intends to observe the above-mentioned provisions of the relevant international human rights instruments and apply them in a non-discriminatory manner to parents and children systematically separated and detained as a result of the implementation of the zero-tolerance policy;
3. Please provide information on any measures taken to stop the detention of children forcibly separated from their parents, and adopt non-custodial alternatives that allow children to remain with their families and fulfil the best interests of the child;
4. Please provide information on the number of children separated from their families crossing the Southern border of the United States without authorization since 6 April 2018, and measures adopted to guarantee their safety, care and well-being, including their protection from abuse, violence and exploitation;
5. Please provide information on measures taken to ensure access to information and communication of parents with their separated children and vice versa, as well as measures adopted to guarantee that separated children will be promptly and safely reunited with their parents;
6. Please provide information on measures adopted to cease the systematic practice of prosecuting parents and to ensure the rights to protection and due process guarantees of asylum seekers and other migrants in vulnerable situations, cease their automatic detention and separation from their children, allow for their expedited release from detention for reunification with their children, and prevent their deportation without effective individual assessments, and to the extent that such deportation would result in further family separation;
7. Please provide information on steps taken to ensure that comprehensive and effective individual assessments of protection needs, including risks

faced upon deportation, are conducted for each individual migrant person, in order to comply with the international principle of non-refoulement;

8. Please explain how the zero-tolerance policy is an effective deterrent measure of irregular entry and stay in the US in accordance with the US obligations under international human rights law, particularly with regard to the rights of migrants, asylum seekers and children, as well as international principles of non-discrimination, the best interests of the child, the prohibition of torture and other cruel, inhuman or degrading treatment, and international standards regarding arrest and detention of persons;
9. Please explain whether any analysis has been undertaken to assess the impact of the zero-tolerance policy on the human rights of vulnerable migrants and asylum seekers. Please share the outcome of any such analysis;
10. Please indicate what measures your Government intends to take in line with Sustainable Development Goal 10 target 7 of the 2030 Development Agenda, by which States commit to facilitate orderly, safe, and responsible migration and mobility of people; in particular, what orderly, safe and responsible channels are available for family reunification, including for migrants with family members living in the US with a temporary residence permit. Please also indicate what orderly, safe and responsible channels are available for particularly vulnerable migrants fleeing poverty, discrimination, violence, conflict, political upheaval and poor governance in their countries of origin, to enter the US.

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.

We are intending to publicly express our concerns in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

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

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