

Mandate of the Special Rapporteur on the human rights of migrants

REFERENCE:
AL USA 25/2018

21 December 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolution 34/21.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **death of a 7 year old Guatemalan girl in custody of the US Customs and Border Patrol, and related concerns about human rights abuses at the US' southern borders.**

According to the information received:

██████████, a 7 year old girl was travelling with her father Nery Gilberto Caal Cuz from their home in Guatemala to seek refugee protection in the United States. As part of a larger group of around 163 migrants, they crossed the Mexico-US border, turned themselves to US Customs and Border Patrol and were taken into custody in the state of New Mexico on 06 December 2018. A bus transfer was arranged hours later to bring them to the nearest Border Patrol station.

It was reported that during the transfer, ██████ began vomiting, lost consciousness, and stopped breathing. Upon arrival at the Border Patrol station, ██████ was taken by helicopter to the hospital of El Paso. She was later reported passing away in the hospital.

While being in custody of the US Customs and Border Patrol, the father of ██████ allegedly signed a form confirming the good health status of his daughter, the I-779 form. The form being in English, a language the father does not speak, it was reported that it had been read to him in Spanish. The mother tongue of the Caal family being Q'eqchi', it is unclear how well the father understood the content of the form in Spanish, and how accurate the translation was.

On 14 December 2018, the Department of Homeland Security Office of Inspector General announced that it will investigate the death of the "7-year-old migrant child who recently died after being taken into Border Patrol custody." The DHS OIG also declared that the final report of the investigation will be provided to the public, in addition to the DHS Secretary and the Congress. It was reported that an autopsy of ██████'s body was being conducted.

While I do not wish to prejudge the accuracy of the information above, I would like to refer your Excellency's Government to Articles 2 and 3 of the Universal

Declaration of Human Rights and Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), which respectively guarantee the right of every individual to life and security and provide that these rights shall be protected by law and that no one shall be arbitrarily deprived of his or her life – no matter their migratory status.

I would like to draw your attention to the letter sent to your Excellency's government on 20 November 2018 with reference AL USA 23/2018, concerning restrictions to asylum proceedings, notably about the principle of non-refoulement and individual risk assessments. I hope to receive a reply in due course about the concerns raised and the questions asked, as they clearly link to the case referred to in the present letter.

Furthermore, I would like to draw your attention to the need to end child migration detention, and to seek alternatives to detention. Detention is detrimental to the well-being of a child, produces long-term severe adverse impacts on children and cannot be considered in their best interests. Detention of migrant children cannot be used as a deterrent to migration under any circumstance. It is a worrying trend that immigration detention is extensively used as a border management and deterrence tool against migrants and too often as a means to prevent their access to justice. In line with international human rights law, freedom must be the default position and detention for adults the exception, used only as a measure of last resort.

I welcome the Department of Homeland Security Office of Inspector General's announcement to launch an investigation into the death of [REDACTED] as well as his willingness to provide the final report to the public. An in-depth, independent investigation is the basis for effective access to justice for the family of the deceased girl. This furthermore include as guarantees of due process the right to legal aid and legal representation, the right to information and to an interpreter, the right to consular assistance, and access to remedies and redress. For further recommendations in this regard, I would like to refer your Excellency's government to my recent report to the UN General Assembly (A/73/187/Rev.1) on effective access to justice for migrants.

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 my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. How is Your Excellency's Government ensuring adequate reception facilities for migrants? What steps is Your Excellency's Government taking with a view to ensuring the enjoyment of the right to the highest attainable standard of health of migrant children in custody in the United States?

2. What alternatives to detention for migrant children has Your Excellency's Government identified?
3. Based on the expected investigation's findings, what measures is Your Excellency's Government taking in order to prevent similar violations in the future?
4. What redress has been provided to [REDACTED]'s family?

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I 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.

I intend to publicly express my concerns publicly on Monday 24 December 2018 as, in my view, the information upon which the press release is based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in touch with your Government to clarify the issues in question.

As a last point, please allow me to reiterate my willingness to conduct an official visit to the US, for which I have requested an invitation without having received a response so far. Conducting an official visit would allow me to get first-hand, direct information about the situation notably of migrant children, especially on those who are being held in detention. It would also allow me to present my recommendations to the US government on how to fulfill its international commitments to respect and protect the human rights of all migrants.

I am looking forward to engaging in a constructive dialogue with your Excellency's government – based on this letter, previous communications, and even a country visit.

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

Felipe González Morales
Special Rapporteur on the human rights of migrants

Annex
Reference to international human rights law

Without implying in advance, a conclusion on the alleged facts, we would like to draw the attention of your Government to the international standards and regulations applicable to the matters set forth above.

I wish to refer your Government to the International Covenant on Civil and Political Rights (ICCPR) ratified by United States on 08 June 1992 and notably to Articles 2, 5, 7, 9, 10, 11, 12, 13, 14, 19, 22 and 26. I recall that the aforementioned provisions can only be restricted in cases strictly limited by law and in accordance with the principles of necessity and proportionality established by international law.

In particular, I would like to draw the attention of your Government to Article 9.1 of the ICCPR, which stipulates that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. "

"The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, including 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, paragraph 10). The detention of migrants should always be a measure of last resort. The ICCPR furthermore stipulates in article 9.4 that 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. 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, we would like to draw your attention to the 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). The Special Rapporteur notably noted that "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. Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure."

I would like to highlight that Revised Deliberation No. 5, on deprivation of liberty of migrants, recently adopted by the Working Group on Arbitrary Detention, requires for the detention of migrants to be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose (p. 12). It also calls for it to be reasonable, necessary and proportionate in the light of the circumstances specific to the individual case (p. 14).

With regards to the detention of children, I would like to refer your Excellency's Government to the Convention on the Rights of the Child, signed by your Excellency's Government on 16 February 1995. Article 37 foresees that detention should be always used as a measure of last resort and we strongly urge your Excellency's Government to consider alternatives to the restriction of movement of children and codify these provisions accordingly into national law.

I would furthermore like to refer to the OHCHR's "Recommended Principles and Guidelines on Human Rights at International Borders".

I would like to recall the Resolution 9/5 of the Human Rights Council, which addresses the human rights of migrants and "requests 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, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party" (Art. 1b). The resolution also "reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants" (Art 1c).

I would like to refer your Excellency's government to in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESC, which the United States signed on 05 October 1977). This article provides for the right of everyone to the enjoyment of the highest attainable standard of mental and physical health, and is linked to Article 25 of the Universal Declaration of Human Rights. This includes an obligation on the part of all States parties to ensure that health facilities, goods and services are accessible to everyone, especially the most vulnerable or marginalized sections of the population, without discrimination. In addition, in 2000, the Committee on Economic, Social and Cultural Rights advised that "States are under an obligation to respect the right to health by refraining from denying or limiting equal access to for all persons including...asylum-seekers and illegal immigrants, to preventive, curative and palliative health service".

In that connection, the Committee on Economic, Social and Cultural Rights in its General Comment No. 14 provides that the right to health contains both freedoms and entitlements and holds that States are required to respect, protect and fulfil the right to health. In particular, the obligation of the State to respect the right to health requires it to refrain from enforcing discriminatory practices, denying or limiting equal access for all persons, including minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services (para 33). The Committee further reiterates the Covenant's prohibition of any discrimination in the realization of the right to health on the grounds of national or social origin, sexual orientation, health status, and civil, political, social or other status (para.18). The principle of non-discrimination applies to all aspects of the right to health and constitutes an immediate obligation (para.30).

Furthermore, Article 24 of the Convention on the Rights of the Child stipulates that State parties recognize the right of the child to the 'enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. State parties shall 'strive to ensure that no child is deprived of his or her right of access to such health care services'. This is furthered by article 24(2) that affirms the States obligation to 'pursue full implementation of this right, and in particular, shall take appropriate measures' to 'ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care'.

With regards to the investigation of this case, I would like to draw the attention of your Excellency's Government to my latest report submitted to the UN General Assembly (A/73/187/Rev.1) on effective access to justice for migrants.