

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human rights of migrants

REFERENCE:
AL USA 7/2019

2 April 2019

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 33/30, 33/12 and 34/21.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **death of an eight-year-old Guatemalan boy in custody of the US Customs and Border Patrol.**

According to the information received:

██████████, an eight-year-old boy from the indigenous Chuj community of Yalambojoch, Guatemala, was apprehended by U.S. Customs and Border Patrol agents when attempting to cross the US-Mexico border with his father, Agustin Gómez Pérez, on 18 December 2018.

The indigenous Chuj community of Yalambojoch which ██████████ and his family belong to is believed to be located in one of the most isolated and poorest areas in Guatemala. ██████████ father decided to migrate due to extreme poverty, absence of social service and very limited job opportunities. Indigenous peoples in Guatemala continue to face entrenched racism, further preventing access to education, employment, health care, political participation and justice. He brought ██████████ with him following the advice of a smuggler that bringing a child would ease his entry into the country.

After their apprehension on 18 December 2018, ██████████ and his father were held at Paso Del Norte processing centre.

Between 20 and 23 December 2018, ██████████ and his father were transferred twice, firstly to El Paso Border Patrol Station, then to the Alamogordo Border Patrol Station in New Mexico. They arrived at the Alamogordo Station on 23 December 2018.

On 24 December 2018, ██████████ demonstrated signs of illness which included coughing. It was reported that personnel at the processing centre noticed that his eyes were glassy and they believed that he had the flu. Accompanied by his father, at approximately 9.30 a.m., ██████████ was transferred to Gerald Champion Regional Medical Centre in Alamogordo. He was diagnosed with the common cold and

given Tylenol. He had a fever of 103°F and was initially held for further evaluation but then released at about 2.50 p.m. with a prescription for antibiotics (amoxicillin) and ibuprofen. █████ and his father were then transferred to a temporary holding at the Highway 70 checkpoint. Concerns have been raised that the conditions of this checkpoint are not appropriate to hold children. At approximately 5.00 p.m., █████ received the prescribed medications from CBP agents. Reportedly, medical staff and agents conducted several welfare checks on him. However, █████ situation continued to worsen. He vomited that evening (approximately around 7.00 p.m.) and was returned back to Gerald Champion Medical Centre around 10.00 p.m. when he “appeared lethargic and nauseous again.” █████ threw up and lost consciousness in transit. He arrived at the hospital at approximately 11.00p.m.

Before midnight on the same day, the hospital medical staff were unable to revive █████ and pronounced him dead. An autopsy performed by the New Mexico Office of the Medical Investigator revealed that █████ had the flu. However, they could not provide the official cause of death, as they would need to run more tests. The body of █████ was repatriated to Guatemala and was laid to rest on 28 January 2019.

Without prejudging the accuracy of these allegations, we would like to express our grave concern about the fact that the death of █████ in custody of the US Customs and Border Patrol (CBP) is the second of its kind in a very short period of time. In fact, it occurred only two weeks after the death of █████, a seven-year-old Guatemalan girl who passed away in US CBP custody on 8 December 2018. █████ was the subject of a letter sent to your Excellency’s Government on 21 December 2018 with reference AL USA 25/2018, in which the Special Rapporteur on the human rights of migrants raised concerns about her death and related human rights abuses at the US’ southern border.

In addition, we would like to reiterate our concerns expressed in the letter dated 20 November 2018 with reference AL USA 23/2018, regarding restrictions to asylum proceedings, notably about the principle of non-refoulement and individual risk assessments.

We would also like to refer to your Excellency’ Government to the letter from the Special Rapporteur on the human rights of migrants dated 7 March 2019 with reference OL USA 4/2019, regarding the “Remain in Mexico” policy. In this letter, the Special Rapporteur raises his concerns that the practical implications of this policy amount to collective expulsion, work to undermine due process guarantees and may lead to refoulement.

While we are aware that the CBP is currently implementing a new directive to increase medical support for migrants, especially juvenile, who are in CBP custody, as well as the planned expansion of medical support, we remain concerned about the practice of detention of children in the context of international immigration. In view of the deaths of █████ and █████ and the various concerns raised about relevant immigration and asylum proceedings, we call on your Excellency’s Government to

review relevant policies and practices and their human rights impact on all migrants, particularly children.

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 information on any independent and thorough investigation into the death of [REDACTED].
2. Please indicate what redress has been provided to the family of [REDACTED].
3. Please provide information on any measures taken to ensure the provision of adequate health care for all migrants including children in US custody.
4. Please provide information on the latest reports on the above-mentioned processing centres issued by any independent monitoring body.
5. Please indicate what steps have been taken by the U.S. to end the practice of child detention in the context of international migration.
6. Please provide information on any measures taken by the U.S. to prioritize non-custodial alternatives to detention in the context of international migration.
7. Please provide information on any measures taken to prevent the re-occurrence of similar events and violations.
8. Regarding the detention of [REDACTED] and his father, was there any individualized assessment of the need to detain carried out in relation to the father? Was [REDACTED] detained because his father?

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, 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 would like to inform your Excellency's Government that, after having transmitted this letter of allegations to the Government, the Working Group on Arbitrary Detention may transmit these cases through its regular procedure, in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such allegations in no way prejudice any opinion the Working Group may render. If that were to be the case, the Government is required to respond separately to the letter of allegation and the regular procedure.

We may 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's to clarify the issue/s in question.

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

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Felipe González Morales
Special Rapporteur on the human rights of migrants

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to Article 3 of the Universal Declaration of Human Rights which states that "Everyone has the right to life, liberty and security of person."

We would also like to draw attention to the International Covenant on Civil and Political Rights (ICCPR), which your Government ratified on 8 June 1992. Article 6 (1) of the ICCPR, states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." In its General comment No. 36 (2018) on this article, the Human Rights Committee elaborates that "States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their life[...]", and "loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation which establishes the State's compliance with its obligations under article 6. [...]"

Furthermore, Article 9 (1) of the ICCPR 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."

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 Government on 16 February 1995. Article 3 (1) of the Convention on the Rights of the Child, which stipulates that the best interest of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private institutions. 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.

We also wish to refer to the Revised Deliberation No. 5, on deprivation of liberty of migrants, adopted by the Working Group on Arbitrary Detention, in which the Working Group states that "the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited." It further requests that "any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose". The Working Group also called for the detention in the course of migration proceedings to be "justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case." Further, "detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child".

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."

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

We 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).

We would like to refer your Excellency's government to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESC), which your Government signed on 5 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 include 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).

We furthermore wish to refer to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007, which elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. In particular, we would like to recall article 7 of the UNDRIP which provides that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. We also wish to refer to the report of the Special Rapporteur on the rights of indigenous peoples on her country visit to Guatemala in 2018 (A/HRC/39/17/Add.3), which describes the structural racism that indigenous peoples face in the country and how it leads to difficulties in obtaining access to education, formal employment, health care, political participation and justice.

