

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; 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; the Special Rapporteur on violence against women, its causes and consequences; and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
OL USA 8/2018

16 May 2018

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; 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; Special Rapporteur on violence against women, its causes and consequences; and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 33/30, 35/15, 33/9, 34/21, 34/35, 34/19, 32/19 and 32/4.

In this connection, we would like to bring to the attention of your Government information we have received concerning **Immigration and Customs Enforcement (ICE) Directive 11032.3, eliminating a presumption against immigration detention of pregnant women**. We also highlight concerns regarding the implementation of this directive and the risks it implies to the life, safety, health, wellbeing, and other human rights of pregnant migrant women, as well as the disproportionate, racialized impact this Directive has, including on vulnerable women in precarious socio-economic situations, predominantly migrating from Latin-American countries.

Concerns regarding previous Executive Orders on immigration policy, 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, were sent in communications addressed to your Government (US) on 31 January 2017 and on 19 October 2017. We regret that to date the replies received from Your Government regarding these communications have referred only to the inability to comment due to pending litigation.

According to the information received:

On 29 March 2018, ICE announced that it was commencing implementation of Directive 11032.3: Identification and Monitoring of Pregnant Detainees, which was signed on 14 December 2017.

Directive 11032.3 supersedes a previous Directive, numbered 11032.2, signed on 15 August 2016, which included the presumption that “absent extraordinary circumstances or the requirement of mandatory detention, pregnant migrant women will generally not be detained by ICE.” In practice, the new policy revokes guidance limiting the detention of women. It removes various reporting requirements regarding the treatment of pregnant women, and eliminates the presumption that ICE should not detain pregnant women except in extraordinary circumstances.

The language regarding this presumption in favour of the right to liberty is absent from the new Directive 11032.3, and the deputy executive associate director for ICE’s enforcement and removal operations confirmed that there will no longer be any presumption against holding pregnant women in ICE detention facilities.

According to ICE, this policy change was enacted in order to better align with Executive Order 13768 (referenced in the 19 October 2017 communication to Your Excellency’s Government), which makes deportation of every irregular immigrant an enforcement priority.

At least 506 pregnant migrant women have reportedly been detained by ICE since the new directive was signed on 14 December 2017, and ICE reported holding 35 pregnant migrant women in detention as of 20 March 2018. These include women in irregular migratory situations but also a number of asylum-seekers.

Directive 11032.3 mandates that pregnant women shall receive “appropriate medical care” while in ICE custody. However, reports from pregnant detainees and others who have had access to ICE facilities allege that medical services provided are minimal, that women often receive inadequate information regarding their medical condition, that they are often not provided with information and healthcare in a language that they understand, and that pregnant detainees are often held in harsh conditions where they receive inadequate healthcare and rest. These conditions undermines the enjoyment of their rights to health, including sexual and reproductive health rights, and to be free from torture and other cruel, inhuman and degrading treatment, and in some circumstances put their life at risk. A number of detainees have experienced miscarriages while in ICE custody and some attribute these experiences to detention conditions including stress, being refused access to comprehensive healthcare, lack of heating and proper nutrition, and insufficient or untimely responses to symptoms of pregnancy complications.

Many of these allegations are documented in an administrative complaint, filed by a number of non-governmental organizations on behalf of a number of pregnant women who were detained by ICE, with the Department of Homeland Security’s

Office for Civil Rights and Civil Liberties (CRCL) and the Office of the Inspector General (OIG) on 26 September 2017.

Many of the women detained by ICE have survived trafficking and violence, including sexual violence, in their countries of origin and during their journey to the United States, and a significant portion of pregnant detainees have become pregnant as a result of rape experienced during their journey. Some detainees have reported accepting deportation and return to conditions of domestic violence and other risk to themselves and their children over the conditions experienced in ICE detention.

We wish to express our grave concern at the risks to the life, health, liberty, safety, wellbeing and other human rights of pregnant migrant women, associated with their detention in ICE custody, and our further concern at the disproportionate impact that this directive has on these women living in vulnerable conditions, including in precarious socio-economic situations, on the basis of their race, ethnicity and national origin.

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 this directive on the human rights of migrant women. Please share the outcome of any such analysis or consultation.
3. Please explain whether comprehensive individual risk assessments are conducted to determine the specific situation of vulnerability and protection needs of pregnant migrant women before any decision on deportation is taken, and prevent serious violations of their human rights and the principle of *non-refoulement*.
4. Please provide detailed explanation of any measures being taken to ensure that pregnant migrant women detained by ICE are provided with appropriate medical care including ante-natal care and assistance during childbirth, that conditions of detention do not jeopardize the health and lives of pregnant women, that medical information and counselling is provided in a language that detainees can understand, and that adequate

emergency health care is available for high risk pregnancies or where pregnancy complications develop.

5. Please provide detailed disaggregated statistical information regarding the outcomes of detention of pregnant migrant women, including medical complications suffered by pregnant women and pregnancy related injuries experienced during childbirth, as well as accounting of births, miscarriages, still births and any deaths in childbirth or deaths as a result of complications with pregnancy that have occurred while women were held in ICE custody.
6. Please provide specific details about the measures which will be undertaken to ensure that your Government will respect its international obligations, in particular the prohibition of torture and other cruel, inhuman or degrading treatment and the obligation to provide access to justice, redress, including compensation and rehabilitation to the victims, respect their rights to equality and non-discrimination, the guarantee of the presumption of innocence, and international standards regarding the prohibition of arbitrary arrest and detention.
7. Please explain what human rights compliant alternatives to detention exist, in particular for pregnant migrant women, and whether they are adopted on a regular basis.
8. Please provide details regarding efforts to address allegations of inadequate healthcare for pregnant women held in detention facilities, especially in light of the increase in the number of pregnant migrant women who are being detained under the new policy, including but not limited to any measures adopted in response/as a follow-up to the complaint filed with CRCL and OIG in September 2017.
9. Please explain what mechanisms are in place to ensure that any person who denies appropriate healthcare to pregnant women in violation of your Government's legal obligations is held accountable, and that such women have access to justice and effective remedies, and are made aware of their rights.

While awaiting a reply, we urge that all necessary interim measures be taken to ensure that the rights of pregnant migrant women are respected 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 you that this communication will be made available to the public on the website page of the mandate of the Working Group on the issue of discrimination against women in law and in practice and will be included in the periodic

communications reports of the Special Procedures to the Human Rights Council. Any response of Your Excellency's Government will also be made public in the same manner.

Please accept the assurances of our highest consideration.

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

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

Felipe González Morales
Special Rapporteur on the human rights of migrants

E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia
and related intolerance

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Dubravka Šimonovic
Special Rapporteur on violence against women, its causes and consequences

Alda Facio
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

We would like to draw Your Government's attention to article 6(1) and 9 (1) of the International Convention on Civil and Political Rights (ICCPR), ratified by Your Government on 8 June 1992, which provide that every individual has the right to life and that no person shall be arbitrarily deprived of his or her life and that everyone has the right to liberty and security of person and to be free from arbitrary detention, respectively. 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 ICCPR 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, we 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).

We 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). Very importantly, such Revised Deliberation No. 5 states that detention of migrants in situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, survivors of trafficking, torture and/or other serious violent crimes, must not take place (p. 41).

Regarding the right to life, the Human Rights Committee, in its General Comments no. 6 and 31, confirmed that this right is not to be narrowly interpreted and that its protection requires that the State adopt positive measures (General Comment no. 6, para. 5 and CCPR/C/21/Rev.1/Add.13 para. 8). These positive obligations are only discharged if individuals are protected by the State against violations of its own agents, and private persons and entities alike. Permitting or failing to take appropriate action to exercise due diligence to prevent the death of any individual on its territory or under its jurisdiction will result in a violation by the State party of the ICCPR and give rise to State responsibility. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual's rights. The Human Rights Committee has further noted "State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about

the state of health of the detainees as far as may be reasonably expected.” (CCPR/C/74/D/763/1997).

We would further like to refer to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23) which notes “states have an obligation to protect the right to life of women when they exercise custody or control over women... Respect for the right to life and prevention of arbitrary deprivation of life while in custody go beyond managing the power imbalance in the relationship between prisoners and police officers. It extends to managing a prisoner’s gender-based vulnerability and associated risks vis-à-vis other prisoners and their conditions of incarceration more generally.”

With regard to the conditions of detention, we would 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. 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. 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 the attention of Your Government to the Standard Minimum Rules for the Treatment of Prisoners (initially adopted in 1957 and reviewed and unanimously adopted by the UN General Assembly in Resolution A/RES/70/175 on 17 December 2015). Rule 22(2) provides 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). Finally, we would 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).

With specific regard to the detention of pregnant women, we would like to draw Your Excellency's Government's attention to General Assembly Resolution 65/229, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, which emphasize in Rule 64 a preference for non-custodial treatment for pregnant women, and which also require adequate hygienic conditions and physical and psychological health services for pregnant women. Further, the United Nations High Commission for Refugees Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention specify in paragraph 58 that "as a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained."

With regard to the detention of pregnant women who are the survivors of violence and may have become pregnant as a result of rape, we wish to recall article 4(f) of the United Nations Declaration on the Elimination of Violence against Women, which notes the responsibility of States to develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.

As a signatory to the Convention on the Elimination of All Forms of Discrimination against Women, Your Excellency's Government is obligated to ensure that nothing is done which would defeat the object and purpose of the treaty, which stipulates that States Parties shall take all appropriate measures to ensure women's access to appropriate services in connection with pregnancy, confinement and the post-natal period and adequate nutrition during pregnancy and lactation (art.12), as well as to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications (art.14). In its General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, the Committee on the Elimination of Discrimination against Women reiterates the presumption against detention of pregnant women, and emphasizes the need for facilities and materials that meet the specific hygiene needs of women (para. 34).

Additionally we would like to refer to the report of the Working Group on the issue of discrimination against women in law and in practice on its country visit to the United States (A/HRC/32/44/Add.2) which stresses that migrant women, inter alia, are in a situation of heightened vulnerability. The experts recommended that the Government 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 urges your Government to establish accountability mechanisms and adequate gender-sensitive training for Immigration and Customs Enforcement officials.

Regarding concerns that the ICE Directive will disproportionately impact 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”.